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NO. 50391-3-II

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

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MICHELLE R. DALEN,

Plaintiff/Appellant,

v.

ST. JOHN MEDICAL CENTER, PEACEHEALTH,  
MARC KRANZ, CASCADE EMERGENCY  
ASSOCIATES, RAMONA SHERMAN, N.P., SISTERS  
OF ST. JOSEPH OF PEACE,

Defendants/Respondents.

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**RESPONDENTS' BRIEF**

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## INTRODUCTION

The trial court's entry of summary judgment was proper because all of Plaintiff's claims arise out of her involuntary mental health detention. The statutory scheme provides immunity to health care professionals for good faith acts taken pursuant to the mental health statutory scheme, so long as the acts are done in good faith and are not grossly negligent. In this case there is no evidence Defendants' acts were negligent let alone grossly negligent.

Plaintiff was properly evaluated by the medical personnel, was evaluated by a statutorily designated mental health professional, was found to be gravely disabled, and was properly detained for further evaluation and treatment, all pursuant to the statutory scheme. The mental health professional initiated a proper involuntary detention proceeding in Cowlitz County Superior Court.<sup>1</sup> Hospitals are permitted to detain, evaluate and treat mental health patients while they wait for the statutorily authorized mental health evaluation. In this case, Plaintiff was evaluated and detention proceedings were initiated well within six hours of her arrival at the hospital. Because the statutory procedures were followed and there is no evidence of bad faith or gross negligence, Defendants are immune from civil

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<sup>1</sup> The mental health professional that evaluated Plaintiff and initiated the involuntary detention proceeding was not employed by these Defendants and is not a party to this appeal.

liability arising out of the care and treatment provided pursuant to Plaintiff's involuntary detention.

In addition, summary judgment was appropriate because Plaintiff was not able to support her claims with qualified expert testimony. Also, summary judgment as to defendants Marc Kranz, M.D. and Cascade Emergency Associates was proper because they were not timely served. Finally, Plaintiff did not plead or argue at the trial court level that her Intentional Infliction of Emotional Distress (IIED) claims were based on post-treatment actions (as she now appears to be claiming). Such an argument made for the first time on appeal is improper and, in any event, Plaintiff did not present sufficient evidence to support the claim.

### **OBJECTIONS**

Plaintiff repeatedly cites to and quotes from the Washington Health Law Manual. *Br. Ap.* at 14, 16, 17. That document is a trade association document. It is not a legal document, not an official governmental document and is not binding on this court in any way. Defendants object to its citation and use as presumptive authority on any issue.

Plaintiff discusses journal articles that were submitted with the Amended Declaration of Janet Hart Mott, Ph.D. *Br. Ap.* at 10. Those articles are not admissible. Ms. Mot is not a physician and is not qualified

to discuss the medical standard of care. And Ms. Mott did not even mention the articles in her declaration and clearly did not testify that she relied on them in any way. ER 803(a)(18); ER 702.; *Supra* Part B.

### **COUNTER STATEMENT OF THE CASE**

Defendants disagree with and object to Plaintiff's Statement of the Case. Plaintiff's Statement of the Case ignores key factual issues, misrepresents some facts and improperly asserts facts based only on unsworn testimony offered during court hearings. Respondents present this counter statement of facts.

- A. Plaintiff was brought to St. John Medical Center for assessment of abnormal behaviors and was properly detained pursuant to the statutory procedures for her own safety.**

On February 28, 2011, Plaintiff was transported to the Emergency Department (ED) of St. John Medical Center by her father, step-mother and two siblings after displaying rapid deterioration with psychotic features. CP 280. The ED records state that Plaintiff arrived, accompanied by her family at approximately 1:53 pm. CP 64. Plaintiff was confused and admitted to having hallucinations. CP 64. She was noted to be on various medications including Adderall, Celexa, Vicodin and Lorazepam. CP 64.

On exam she was noted to appear anxious and confused. CP 64. She was noted to have abnormal behavior, including paranoid behavior and

auditory hallucinations. CP 64. A progress note at 2:05 pm quotes Plaintiff as yelling “stop screaming in my head.” CP 64.

Plaintiff refused to stay in the exam room and was secluded for her own safety at about 2:19 pm. CP 64. She was noted to be speaking in “word salad.” CP 64. At about 2:31 pm, Plaintiff’s care providers attempted to take Plaintiff to the bathroom to get a urine sample, but Plaintiff refused to cooperate. CP 65. A mental health professional was called to assess Plaintiff.

The mental health professional, Lisa Lovingfoss, MSW, noted abnormal behavior and a history of drug use. CP 65. The chart note reads:

“EDSW observed pt to have word salad. Cannot maintain attention to answer questions and is not redirectable. Pt's sister reports pt spoke with her parents yesterday and her parents were concerned and contacted her to go to pt's home and check on her. Pt's sister reports pt had very odd behavior and continuously spoke, but did not make any sense. Pt's sister reported she seemed more clear headed after she woke after a nap yesterday but has been decreasing from baseline behavior since. Pt's sister reports pt has had drug use history, but does not know if she has taken any kind of drug, and knows she is on medications but does not know if she took too many.” CP 65

The ED providers again asked Plaintiff to urinate into a cup so that they could perform a drug test, but Plaintiff refused. CP 65. At 2:51 pm, a straight catheterization procedure was ordered in order to obtain the urine sample for a drug screen. CP 65, 68.

At about 3:20 pm a nursing note indicates that Plaintiff was pacing about the room and staring into the hall with a “wild, paranoid gaze.” CP 65.

The chart note reads:

“Pt up pacing about room, then standing and starring into hall at EDT with wild, paranoid gaze. Pt has rapid, pressured speech that is audible then she quiets to a whisper. Pt has flight of ideas and is not reality oriented. Pt states, ‘I know you from a dream, you are a doctor’s wife. You have a big belly. You look like a Disney ride.’ Pt then pressed face into window and kissed glass.” CP 65.

Shortly thereafter, Bobbi Woodford, the County Designated Mental Health Professional (CDMHP)<sup>2</sup> arrived to assess Plaintiff. CP 65, 280. Ms. Woodford was employed by former defendant Lower Columbia Mental Health.<sup>3</sup> CP 272. Plaintiff signed a form titled “Notice and Statement of Rights” at 3:50 pm. CP 285. Ms. Woodford began her evaluation at approximately 4:04 pm. CP 65.

Ms. Woodford found Plaintiff to be confused, guarded and disoriented with impaired memory, insight and judgment. CP 281. Her thought process was assessed as “erratic with loose associations’ and she was noted as having paranoia and delusional thoughts. CP 281. Plaintiff’s family told Ms. Woodford that they assumed her behaviors were the result of

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<sup>2</sup> A County Designated Mental Health Professional is authorized by statute to file a petition for initial detention. RCW 71.05.150(1) (2007).

<sup>3</sup> Former defendant Lower Columbia Mental Health was not a party to the summary judgment motion being appealed and is not a party to this appeal. CP 178.

intoxication. CP 281.

Plaintiff reported being scared and is quoted as stating “my dreams . . . splitting the sands of time . . . traveling first class in fire.” CP 282. Plaintiff also reported seeing relatives dancing in the room that could not be seen by the care providers. CP 282. Ms. Woodford noted a “severe deterioration in routine functioning, loss of cognitive or volitional control” CP 283. Ms. Woodford noted both visual and auditory hallucinations and found that Plaintiff was unable to differentiate dreams from reality. CP 282. Ms. Woodford found that Plaintiff’s actions constituted a likelihood of serious harm to herself, others or to the property of others. CP 280. She concluded that it was “evident” that Plaintiff suffered from a mental disorder that rendered her gravely disabled and requested that Plaintiff be detained pursuant to RCW 71.05 for evaluation and treatment for no more than 72-hours. CP 282. Ms. Woodford also found that there were “no less restrictive alternatives to involuntary treatment that will protect the best interests of [Plaintiff] at this time.” CP 286. The petition was filed in Cowlitz County Superior Court, Case No. 116000295. CP 280. Pursuant to the petition, Plaintiff was held for evaluation and treatment and was discharged less than 72 hours later, on March 2, 2011.

**B. Plaintiff filed a complaint in 2014, Lower Columbia Mental Health moved for dismissal and plaintiff prosecuted the case against the remaining defendants in 2016.**

Plaintiff filed a complaint in Cowlitz County Superior Court on February 26, 2014. CP 3. The complaint asserted ten claims<sup>4</sup> against each of the defendants. CP 3. On May 27, 2014, an attorney for defendant Lower Columbia Mental Health appeared and on August 15, 2014 Lower Columbia Mental Health filed a motion to dismiss all claims against it based on the Petition for Initial Detention filed by Ms. Woodford. CP 272. The Clerks Papers in this appeal do not contain the trial court's order on that motion, however Lower Columbia Mental Health did not make any further appearances in the case and was not included in the case caption of subsequent pleadings. This current appeal does not include Lower Columbia Mental Health. CP 178.

The remaining Defendants became aware of the litigation in 2016. These remaining Defendants filed a motion for summary judgment on September 9, 2016, noting a hearing date of October 12, 2016. CP 21, 189. Plaintiff requested a two week continuance, which was freely granted by the

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<sup>4</sup> Those claims were: Assault and Battery; False Imprisonment; Negligent Infliction of Emotional Distress; Intentional Infliction of Emotional Distress; Outrage; Violation of Civil Rights; Violation of Statute; HIPAA Law Violation; Medical Malpractice; Failure To Obtain Informed Consent. CP 3-12. In response to Defendants' motion for summary judgement, Plaintiff presented no evidence in support of and agreed to the dismissal of the claims for Assault and Battery, False Imprisonment, Violation of Civil Rights and HIPAA Law Violations. CP 53. The remainder were dismissed when the Trial Court Granted Defendants' Motion for Summary Judgment.

remaining Defendants and the hearing was reset to October 26, 2016. CP 190. At the October 26, 2016 hearing, Plaintiff sought another continuance, which was granted by the court, and another hearing was rescheduled for November 30, 2016. CP 190. On November 29, 2016, Plaintiff requested another continuance. CP 191. At the November 30, 2016 hearing, Judge Nelson recused himself from the case and the hearing was rescheduled. CP 191. Plaintiff's motion for a third continuance was denied on December 7, 2016. CP 192. Oral argument on Defendants' Motion for Summary Judgment was heard on December 14, 2016. CP 192. The motion was granted and this appeal followed.

## ARGUMENT

### **A. Summary Judgment As To All Claims Was Proper Because Defendants' Are Immune From Liability Pursuant to RCW 71.05.**

The trial court properly granted Defendants' Motion for Summary Judgment because Defendants were immune from civil liability for their care of Plaintiff during her involuntary detention pursuant to RCW 71.05.120. RCW 71.05.120 provides civil and criminal immunity to evaluation and treatment facilities<sup>5</sup> with regard to their decisions relating to admission, discharge, administering antipsychotic medications, and detention for evaluation and treatment, so long as those decisions are made in good faith

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<sup>5</sup> St John Medical Center is an "evaluation and treatment facility." See RCW 71.05.020(21).

and without gross negligence. RCW 71.05.120 (2000).

Plaintiff argues that immunity did not apply because Defendants did not follow the statutory procedures of RCW 71.05 and that failing to follow the statutory procedures constituted bad faith and gross negligence. *Br. Ap.* at 20-21. Plaintiff's argument is incorrect because the procedures of RCW 71.05 were followed and there is no evidence of bad faith or gross negligence.

- 1. Washington's mental illness statute provides immunity from civil liability for actions taken to treat mentally ill patients so long as those actions are not grossly negligent or done in bad faith.**

Washington's mental illness statute, RCW 71.05 *et seq.*, is intended to prevent inappropriate and indefinite commitment of mentally ill persons while allowing medical providers to evaluate and treat such persons who refuse voluntary treatment, in order to prevent the persons from harming themselves or others. RCW 71.05.010(1), (2).

Although civil commitment statutes should be strictly construed because they involve a significant deprivation of liberty, the spirit and intent of the laws should prevail over the letter of the laws so as to avoid strained or absurd consequences. *Matter of Det. of A.S.*, 91 Wn. App. 146, 158, 955 P.2d 836, 843 (1998).

RCW 71.05.050 provides that professional staff of a hospital emergency room can detain a patient who refuses admission if they regard the patient as potentially having a dangerous mental illness, in order to have the patient evaluated by the County Designated Mental Health Professional (CDMHP). The statute provides, in part:

“if a person is brought to the emergency room of a public or private agency or hospital for observation or treatment, the person refuses voluntary admission, and the professional staff of the public or private agency or hospital regard such person as presenting as a result of a mental disorder an imminent likelihood of serious harm, or as presenting an imminent danger because of grave disability, they may detain such person for sufficient time to notify the county designated mental health professional of such person's condition to enable the county designated mental health professional to authorize such person being further held in custody or transported to an evaluation treatment center pursuant to the conditions in this chapter but which time shall be no more than six hours from the time the professional staff determine that an evaluation by the county designated mental health professional is necessary.” RCW 71.05.050 (2000) (*emphasis added*).

When involuntarily detained, care providers must provide any required medical care or treatment. RCW 71.05.210(2) provides that patients involuntarily detained “shall receive such treatment and care as his or her condition requires. . .” RCW 71.05.210(2) (2009) (*emphasis added*).

RCW 71.05.120 provides immunity from civil liability for acts taken pursuant to the statutory scheme, so long as the acts are performed

in good faith and without gross negligence. This applies to each of Plaintiff's claims, including the medical malpractice, informed consent and emotional distress claims. The statute provides:

“(1) No officer of a public or private agency, nor the superintendent, professional person in charge, his or her professional designee, or attending staff of any such agency, nor any public official performing functions necessary to the administration of this chapter, nor peace officer responsible for detaining a person pursuant to this chapter, nor any county designated mental health professional, nor the state, a unit of local government, or an evaluation and treatment facility shall be civilly or criminally liable for performing duties pursuant to this chapter with regard to the decision of whether to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment: PROVIDED, That such duties were performed in good faith and without gross negligence.” RCW 71.05.120 (1) (2000) (*emphasis added*).

In this case, Plaintiff was brought to the PeaceHealth St. John Medical Center Emergency Department because she was exhibiting very abnormal behavior. CP 64. As noted above there were also questions raised regarding drug use and/or intoxication. CP 65. Plaintiff refused care and was detained for treatment and evaluation. CP 64. The County Designated Mental Health Professional evaluated Plaintiff, determined that she posed a risk to herself and others, determined that she was gravely disabled and initiated a Petition for Initial Detention in Cowlitz County Superior Court, Case No. 116000295. CP 280. Plaintiff was kept safe, treated, and properly

released within 72 hours. The statutory procedures were complied with and there is no evidence that Defendants acted with gross negligence or bad faith. Pursuant to RCW 71.05.120, Defendants are immune from each of Plaintiff's claims of civil liability.

**2. Plaintiff was determined to be in imminent danger due to a mental disorder by former defendant Lower Columbia Mental Health.**

Plaintiff argues, at length, that Defendants did not follow the statutory procedure because, according to Plaintiff, there was insufficient evidence of gross disability or risk of harm to detain Plaintiff pursuant to Washington's mental illness statute. *Br. Ap.* at 19-25. Plaintiff ignores the facts in the medical records. More importantly, Plaintiff ignores the fact that the statutory detention determination was made by *former* defendant Lower Columbia Mental Health and not by any of the defendants whose summary judgment is at issue in this appeal. CP 35.

The record clearly shows that the detention determination was made by Bobbi Woodford, a County Designated Mental Health Professional (CDMHP) employed by Lower Columbia Mental Health. CP 280. Plaintiff's family witnessed the evaluation and Plaintiff waived her right to voluntary hospitalization. CP 286. Ms. Woodford evaluated Plaintiff, determined that she posed a likelihood of serious harm to herself or others, and found that she suffered from a mental disorder that rendered

her in imminent danger as a result of being gravely disabled by severe deterioration in her cognitive functioning. CP 280. Ms. Woodford signed the Petition for Detention on February 28, 2011, at 5:30 pm, well within six hours of both Plaintiff's arrival in the Emergency Department and the determination by ED staff to have Plaintiff evaluated by Ms. Woodford. CP 283.

Any argument that Ms. Woodford's determination violated the mental illness statute is improper and incorrect because the County Designated Mental Health Professional and Lower Columbia Mental Health are not parties to this appeal and Plaintiff has presented no evidence that the Circuit Court overseeing Plaintiff's involuntary detention proceeding found the detention to be unlawful or improper in any way.

**3. The ED provider's decision to request assessment by the CDMHP was justified and proper.**

It can hardly be disputed that the Emergency Department medical personnel were justified in seeking evaluation of Plaintiff by the County Designated Mental Health Professional. Plaintiff was brought to the Emergency Department by her family due to concerns about her abnormal behavior. CP 64. She was noted to be exhibiting paranoid and delusional behavior, as well as having auditory hallucinations and incomprehensible speech patterns. CP 64. The medical records indicate that Plaintiff's

behaviors were very abnormal. She was quoted as yelling “stop screaming in my head.” CP 64. She refused to participate in her own care and refused to cooperate with the providers that were trying to help her. CP 64. She was unable to communicate coherently. CP 64. At 2:31 pm, approximately 30 minutes after arrival, she was evaluated by an Emergency Department Social Worker who noted that Plaintiff was speaking in “word salad,” could not maintain attention or answer questions, and was generally exhibiting “very odd behavior.” CP 65. Plaintiff’s family reported a history of drug use. CP 65. The County Designated Mental Health Provider was called and Plaintiff was evaluated by the County Designated Mental Health Provider at around 3:50 pm. CP 285. The County Designated Mental Health Provider found Plaintiff to be gravely disabled and initiated involuntary detention proceedings. CP 283.

The Emergency Department providers were clearly justified in detaining and evaluating Plaintiff and in requesting an evaluation of the CDMHP based on Plaintiff’s abnormal behavior. The appropriateness of their acts is evidenced by the undisputed and unchallenged determination by the CDMHP that Plaintiff was in fact suffering from a mental disorder that rendered her “gravely disabled” and that her condition posed a likelihood of serious harm to herself or others. CP 280. There is no evidence that any of the acts by the Emergency Room personnel were

grossly negligent or were made in bad faith. In fact, as noted below, there is no evidence that defendants acted negligently in any way, let alone in a grossly negligently manner. Plaintiff was given an opportunity to come forward with admissible expert testimony indicating that defendants care fell below the standard of care. Plaintiff was unable to come forward with such testimony.

**4. Detention, evaluation and treatment of Plaintiff while waiting for the CDMHP evaluation is permitted by the statute and was proper.**

Chapter 71.05 is intended to address care issues associated with the treatment of persons with mental disorders and substance use disorders. As discussed above, both of these issues applied to Plaintiff's hospital presentation. Part of the legislative intent associated with RCW 71.05 is to "provide prompt evaluation and timely and appropriate treatment of persons with serious mental disorders and substance use disorders." *See* RCW 71.05.010(c).

RCW 71.05.210 addresses situations in which an individual is involuntarily detained and admitted to a treatment facility. Pursuant to this statute, the individual "shall" be examined and evaluated by a physician, physician assistant or advanced registered nurse practitioner and one mental health professional. RCW 71.05.210(2) (2009). As noted by Washington courts, part of the process associated with such a patient is

“time necessary to screen and stabilize a patient, the time that it takes to conduct a thorough evaluation of a patient for possible referral to the CDMHP; the relative difficulty of evaluating the patient for possible referral to the CDMHP; whether the patient requires immediate medical care.” *See In re Det. of C.W.*, 147 Wn.2d 259, 278, 53 P.3d 979, 988 (2002). In this same decision the Washington Supreme Court specifically acknowledged the “concern that ED staff not be limited by courts in performing their duties to evaluate and treat patients.” *Id.* at 279.

Plaintiff incorrectly argues that the remaining defendants violated the statute because it was allegedly improper to detain and evaluate Plaintiff *before* the CDMHP assessment. Plaintiff argues:

“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.” *Br. Ap.* at 24.

Plaintiff also cites to the case of *In re Det. of C.W.* as supporting this assertion. However, Plaintiff’s interpretation of the case is incorrect. The case does not support Plaintiff’s assertion, but rather confirms that emergency room providers can lawfully detain, evaluate and treat mentally ill patients before they have been assessed by the CDMHP.

*In re Det. of C.W.*, involved the consolidated cases of six individuals who had been taken to local hospitals, evaluated by a CDMHP and

involuntarily detained for evaluation and treatment for a 72 hour period. *Id.* at 262. In each case, the trial court had denied the State's request for an additional involuntary detention period because it ruled that the State had violated RCW 71.05.050 by initially detaining the persons for more than six hours. *Id.* at 263. At the time, RCW 71.05.050 provided that hospital care providers could detain mentally ill patients they deemed as presenting an imminent likelihood of harm for a sufficient time to notify the CDMHP and allow the CDMHP to conduct a mental health exam. The statute stated that the patient could not be held more than six hours from the determination that an exam by the CDMHP was necessary. *Id.* at 271.

At issue in the *In re Det. of C.W.* case was whether the six hour time period began to run from the time the patient was initially detained by the hospital staff or from the time that the hospital staff made the determination that an exam by the CDMHP was necessary. *Id.* The court of appeals held that the six hour time period begins to run from the time that the hospital staff makes the determination that it is necessary to contact the CDMHP for evaluation. *Id.*

The court also clearly held that RCW 71.05.050 permits hospital staff to detain, evaluate and treat mentally ill patients *before* the patient is evaluated by the CDMHP and before the hospital staff makes the official determination that exam by a CDMHP is necessary. The court explained

that “patients who initially present with psychiatric symptoms are often restrained to their beds or placed in a locked section of the hospital before being fully evaluated.” *Id* at 273. Pre-detention restraint is a necessary part of the process as it would be illogical to suggest that the statute only allows detention of mentally ill patients who voluntarily consent to treatment and assessment by hospital staff. If pre-detention restraint was not allowed, patients who refused to consent to any evaluation and treatment could never be detained, regardless of the threat they might pose to themselves or others, because hospital staff could never examine them to determine that an exam by a CDMHP was necessary. The statute does not prohibit pre-detention restraint. Rather, the statute permits hospitals to restrain, evaluate and treat uncooperative patients while hospital staff assesses the patient’s medical and mental health needs. *Id.* The *In re Det. of C.W.* court explained that the statute does not provide any specific time limit for that initial restraint:

“RCW 71.05.050 does not provide a limit on the amount of time between a person's arrival at the hospital or agency and the professional staff's determination that referral to the CDMHP is appropriate.” *Id.* at 277.

However, because the statute does not provide a time limit within which the determination must be made, the court imposed a constitutional “safeguard” requiring the State to prove *in the detention proceeding* that any delay between the person’s arrival and the evaluation by the CDMHP was

justified. *Id.* at 278. As also discussed above, the court noted several considerations in assessing the reasonableness of the delay, including “the time that it takes to conduct a thorough evaluation of a patient for possible referral to the CDMHP,” “the relative difficulty of evaluating the patient for possible referral to the CDMHP,” and “whether the patient requires immediate medical care.” *Id.* at 278. The court found that the safeguards addressed the State’s concern “that ED staff not be limited by courts in performing their duties to evaluate and treat patients.” *Id.* at 279 (*emphasis added*).

*In re Det. of C.W.* did not hold that hospitals have no ability to hold, evaluate and treat uncooperative mental health patients before referral to a CDMHP is made. In fact, the case clearly interprets such action as authorized by RCW 71.05.050. A patient who believes the pre-assessment restraint is unjustified can challenge the constitutionality of the restraint *in the detention action*.

In this case, there is no evidence that Plaintiff challenged her pre-assessment restraint in her detention proceeding and no evidence that any court has ever found Plaintiff’s pre-assessment restraint to have been unconstitutional or in violation of any statute. Presumably the issue has already been determined by the court overseeing the detention proceeding and cannot be collaterally attacked in this civil proceeding.

There is no evidence of any unconstitutional delay in assessing the need for a CDMHP evaluation. Plaintiff arrived at the hospital at approximately 1:53 pm. CP 64. Plaintiff was assessed by mental health professional Lisa Lovingfoss, MSW<sup>6</sup> at 2:31 pm. CP 65. Plaintiff's catheterization and drug screen occurred at about 2:51 pm. The CDMPH arrived sometime before 3:50 pm as demonstrated by the fact that the CDMHP signed the "Notice and Statement of Rights" at 3:50 pm. CP 285. The CDMHP, Ms. Woodford, is noted as being "in to evaluate patient" at 4:02 pm. CP 65. The CDMHP signed the Petition for Initial Detention in Cowlitz County Case No. 116000295 at 5:30 pm. CP 280.

Thus, the time period between admission to the hospital and the evaluation by the CDMHP was less than two hours. The record does not state exactly when the determination was made that Plaintiff needed to be evaluated by the CDMHP. But the determination had to have been made sometime within that two hour window, most likely around 2:30 pm, when mental health professional Lisa Lovingfoss, MSW examined Plaintiff. CP 65.

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<sup>6</sup> Ms. Lovingfoss is a social worker. RCW 71.05.020(38) defines the term mental health professional as: "a psychiatrist, psychologist, physician assistant working with a supervising psychiatrist, psychiatric advanced registered nurse practitioner, psychiatric nurse, or social worker, and such other mental health professionals as may be defined by rules adopted by the secretary pursuant to the provisions of this chapter."

Regardless of when the determination was made, the time period between the determination and the actual evaluation by the CDMHP had to have been less than six hours because Plaintiff was examined by the CDMHP less than six hours from her arrival at the hospital.

Plaintiff did not present evidence that the remaining Defendants “utterly disregarded the statutorily required procedures” as argued in Appellant’s Brief. *Br. Ap.* at 24. In fact, the undisputed evidence clearly establishes that the statutory procedures were properly followed and that Plaintiff was properly evaluated, cared for and kept safe during this episode. There is no evidence that any of the medical providers involved in plaintiff’s care acted with gross negligence or in bad faith. Nor is there any evidence that Plaintiff’s pre-evaluation restraint and evaluation was unconstitutional. As such, Defendants are immune from liability arising out of their evaluation and treatment of Plaintiff after her detention by *former* defendant Lower Columbia Mental Health. RCW 71.05.120(1) (2000). This immunity applies to all claims arising out of the health care in question including the medical malpractice claim, informed consent claim and emotional distress claims.

**B. Plaintiff Did Not Present Qualified Expert Testimony Supporting The Medical Malpractice Claim.**

Plaintiff argues that the declarations of Lisa Taylor and Janet Mott were sufficient to allow a reasonable jury to find that Dr. Kranz and the nursing staff were negligent for failing to “rule out” head trauma as a cause of Plaintiff’s mental disorder. *Br. Ap.* at 25-27. Plaintiff’s argument is incorrect.

In a medical malpractice case, the plaintiff must prove “[t]he health care provider 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 or she belongs, in the state of Washington, acting in the same or similar circumstances.” RCW 7.70.040(1). The applicable standard of care in medical malpractice actions must generally be established through expert testimony. *Miller v. Jacoby*, 145 Wn.2d 65, 71-72, 33 P.3d 68 (2001). Thus, in response to a summary judgment motion, a medical malpractice plaintiff must submit testimony of medical experts that would be sufficient to sustain a verdict in plaintiff’s favor on the claim. *Reyes v. Yakima Health Dist.*, \_\_\_ Wn. \_\_\_, 419 P3d 819, 823 (Wn. 2018).

If the plaintiff does not submit sufficient medial expert testimony to sustain a verdict in the plaintiff’s favor, the defendant is entitled to

summary judgment as a matter of law. *Id.*; *McKee v. American Home Prods. Corp.*, 113 Wn.2d 701, 706-07, 782 P.2d 1045 (1989).

Except in rare cases, the standard of care applicable to physicians can only be established by the expert testimony of another qualified physician. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 228, 770 P.2d 182, 189 (1989). A plaintiff's expert evidence must arise to the level of a "reasonable medical certainty." *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App., 155, 163, 194 P.3d 274 (2008). The expert testimony may not be based on speculation or conjecture. *Id.* Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689, 693 (1993). Testimony reflecting only the personal opinion or experience of an expert is insufficient to establish the generally community standard of care. *Adams v. Richland Clinic*, 37 Wn. App. 650, 655, 681 P.2d 1305 (1984).

In this case, Plaintiff presented the declarations of two persons; Lisa Taylor and Janet Mott. *Br. Ap.* at 25-26. In Defendant's original Reply in Support of their Motion for Summary Judgment (before Plaintiff's first continuance was granted) Defendants objected to and moved to strike portions of Plaintiff's declaration and the declaration of Plaintiff's "expert" Lisa E. Taylor. CP 73-77. Before granting Plaintiff's

motion for a continuance, the court granted most of Defendant's motion to strike portions of Plaintiff's declaration and also granted Defendants' motion to strike Ms. Taylor's declaration. RP, Oct. 26, 2016 at 4.

As Defendant argued at the trial court level, Ms. Taylor's declaration was deficient for several reasons. First, Ms. Taylor declared that she was a registered nurse. However, she then went on to comment on the acts of the "physicians." A registered nurse is not qualified to offer a standard of care opinion regarding a physician. In *Young*, the court explained:

"This court has never accepted, however, a rule that would allow a non-physician to testify as an expert regarding the proper standard of care for a physician practicing a medical specialty. Such a rule would severely degrade administration of justice in medical malpractice actions." *Young v. Key Phram, Inc.*, 112 Wn 2d 216, 227, 77 P.2d 182 (1989).

Also, as noted by defendant at the trial court level CR 56(e) provides that affidavits made in support of, or in opposition to, a motion for summary judgment must be based on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters therein. Expert testimony must be based on facts of the case and not on speculation or conjecture. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 493, 183 P.3d 283 (2008), citing to *Seybold v. Neu*, 105 Wn. App. 666, 19 P.3d 1068 (2001). As the *Davies*

court also noted:

“Such testimony must also be based upon a reasonable degree of medical certainty. *McLaughlin v. Cooke*, 112 Wash. 2d 829, 836, 774 P.2d 1171 (1989). Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment.’ *Guille*, 70 Wash. App. at 25, 851 P.2d 689.”  
*Id.* (emphasis added)

Ms. Taylor’s declaration does not set forth admissible evidentiary facts and does not provide any basis for her alleged knowledge. CP 57. For example, did Ms. Taylor reviewed a single medical record associated with this case? Her declaration does not state that she has. CP 57-58. Medical expert testimony must “link” the expert’s conclusions to a factual basis. *Reyes*, 419 P.3d at 283. Ms. Taylor’s testimony appears to be based on unsupported speculation and conjecture that is not linked to any factual basis. Ms. Taylor’s declaration is not based on a reasonable degree of medical certainty. Her declaration appears to be entirely based on conclusory statements without any reference to factual support. Such a declaration is insufficient to defeat a motion for summary judgment. It is also important to note that Ms. Taylor’s declaration states the basis for her opinions as “in my experience.” CP 57. The standard of care is not defined by an individual healthcare provider’s experience or an individual healthcare provider’s personal opinion. *Versteeg v. Mowery*, 72 Wn.2d 754, 759, 435 P.2d 540 (1967); *Skodje v. Hardy*, 47 Wn.2d 557, 560, 288

P.2d 471 (1955). Rather, the appropriate standard is the standard recognized by the medical community. *Id.*

Ms. Taylor's declaration did not establish that she is qualified to offer expert standard of care or causation opinions in this case, did not set forth admissible evidentiary facts, offered the opinion of a nurse regarding a physician's care, and was based on speculation and conjecture. For all of these reasons, Ms. Taylor's declaration was not admissible evidence and was not sufficient to support Plaintiff's Summary Judgment Response.

After receiving several continuances, Plaintiff also submitted the declaration of a second "expert", Janet Mott. In Defendant's Supplemental Reply in Support of Defendants' Motion for Summary Judgment defendants listed all of the reasons why Janet Mott, PhD's declaration was also deficient. CP 161-163.

First, as noted by Ms. Mott in her declaration, she is a "rehabilitation counselor and case manager." CP 121. However, she then goes on to comment on the standard of care for the medical treatment provided to Ms. Dalen at the St. Johns Medical Center Emergency Room. There is no evidence in the record that Ms. Mott has any experience or qualification to comment on the standard of care applicable to emergency room medical personnel.

Much like Ms. Taylor's declaration, Dr. Mott's declaration and amended declaration do not set forth admissible evidentiary facts and do not provide any basis for her alleged knowledge. Again, there is no evidence that Dr. Mott ever reviewed a single medical record associated with this case. There is no evidence that Dr. Mott's declaration is based on anything other than speculation and conjecture.

Dr. Mott does not have a medical degree and nothing in her declaration suggests that she has any actual training, education or experience in the area of diagnosing or treating mental illness or brain injuries. CP 121-123. It is also notable that Dr. Mott's declaration is not based on a reasonable degree of medical certainty. Her declarations also appear to be entirely based on conclusory statements without any reference to factual support. As noted above, such declarations are insufficient to defeat a motion for summary judgment. Again, it is also important to note that Dr. Mott's opinions are also based in terms of "in my opinion." CP 123. As discussed above, the standard of care is not defined by an individual healthcare provider's personal opinion. Rather, the appropriate standard is the standard recognized by the medical community. *Id.*

It is also important to note that both Ms. Taylor's and Dr. Mott's declarations were devoid of causation opinions. CP 57-58, 106-107, 121-123.

Having considered all of these arguments the trial court correctly ruled that plaintiff's experts did not support plaintiff's medical malpractice, failure to obtain informed consent or statutory violation claims. RP, Dec. 7, 2016 at 38-89.

**C. All Claims Against Dr. Kranz And Cascade Emergency Associates Were Properly Dismissed Because They Were Not Properly Served And The Trial Court Did Not Abuse Its Discretion When It Denied Plaintiff Another Continuance At The December 14, 2016 Hearing.**

Defendants presented undisputed evidence that defendants Marc Kranz, M.D. and Cascade Emergency Associates were not properly served. CP 197, 203, 209, 214, 219. The trial court dismissed all claims against them for lack of proper service. CP 169; RP, Dec. 14, 2016 at 38. Plaintiff apparently concedes that service was deficient, but argues that the trial court erred by not granting Plaintiff another continuance to depose two PeaceHealth employees that Plaintiff argues may have testified that PeaceHealth was authorized to accept service on behalf of all Defendants. *Br. Ap.* at 27-28. Plaintiff's argument lacks merit.

By the time of the Summary Judgment hearing, the medical care in question had occurred five years prior and Plaintiff's lawsuit had been pending for nearly three years. Prior to the summary judgment hearing Plaintiff had been given at least two prior continuances, had never requested the depositions at issue and, in any event, the depositions would not have raised a genuine issue of fact because PeaceHealth risk manager Daniel Huhta's declaration specifically confirms that PeaceHealth was not authorized to accept service for Cascade Emergency Associates or its employees, including Dr. Marc Kranz. CP 219.

Denial of a motion for continuance is reviewed for abuse of discretion. *Bldg. Indus. Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 743, 218 P.3d 196, 207 (2009). The trial court has discretion to deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence; (2) the requesting party does not indicate what evidence would be established by further discovery; or (3) the new evidence would not raise a genuine issue of fact. *Id.*

Plaintiff's complaint was filed on February 26, 2014. CP 3. Defendants Dr. Kranz and Cascade Emergency Associates were not served with the summons or complaint and were not aware of the lawsuit until January 2016. CP 197, 203, 209, 214, 219. Dr. Kranz and Cascade Emergency Associates filed an answer asserting "Insufficiency of Service of

Process” as an affirmative defense on January 20, 2016. CP 15. Defendants filed their motion for summary judgment arguing that the claims against Dr. Kranz and Cascade Emergency Associates should be dismissed for lack of service on September 9, 2016. CP 21. The hearing for the motion was scheduled for October 12, 2016. CP 189. Plaintiff requested additional time to respond to the motion and defendants’ freely agreed. RP, Oct. 26, 2016 at 6. The hearing was rescheduled for October 26, 2016. CP 190. Plaintiff did not request any depositions prior to the hearing. At the hearing, Plaintiff sought a continuance because she wanted to depose one of her treating doctors. She did not argue that she needed to depose any other PeaceHealth employees. She argued:

“I’m motioning the court for a continuance. I’m not prepared. I need to depose Dr. Aaron.” RP, Oct. 26, 2016 at 5.

The court granted a five week continuance and the hearing was rescheduled for November 30, 2016. CP 191. Dr. Aaron was deposed on November 17, 2016. On November 29, 2016, Plaintiff request another continuance. CP 191. At the November 29, 2016 hearing, Judge Nelson recused himself from the case and the hearing was rescheduled. CP 191. Plaintiff’s motion for another continuance was heard on December 7, 2016. CP 191-192. Plaintiff argued that she needed more time because the deposition of her treating doctor had consumed her time. RP, Dec. 7, 2016

at 5-6. Plaintiff did not argue that she needed to take additional depositions of other PeaceHealth employees or that she needed more time to gather information to respond to Defendants' lack of service argument. The motion was denied and the summary judgment hearing was scheduled for December 14, 2016. RP, Dec. 7, 2016 at 11. At the December 14, 2016 hearing Plaintiff stated, for the first time, that she "would like" to depose two PeaceHealth employees to find out whether they had provided the summons and complaint to Dr. Kranz. RP, Dec. 14, 2016 at 27.

By the time of the December 14 hearing it had been nearly two years since the complaint was filed, nearly twelve months since defendants' answer was filed and more than three months since defendants' motion for summary judgment was filed. Plaintiff had been given at least two continuances and offered no explanation as to why she had not sought to depose the PeaceHealth employees earlier. Because Plaintiff was given plenty of time to seek the depositions at issue and offered no good reason for failing to do so, the trial court did not abuse its discretion by failing to give Plaintiff another continuance.

In addition, other than Plaintiff's oral statement that she would like to depose the two witnesses, there is no evidence that Plaintiff actually requested another continuance. *See McCarthy*, 152 Wn. App. at 743 ("Where a continuance is not clearly requested, the trial court does not err in

deciding a summary judgment motion based on the evidence before it”); *MRC Receivables Corp. v. Zion*, 152 Wn. App. 625, 629, 218 P.3d 621, 622 (2009) (finding that merely discussing additional discovery that a party would like to conduct is not the same as requesting a continuance).

Finally, it should be noted that the additional discovery Plaintiff claims to have wanted would not raise an issue of fact because PeaceHealth is not and was not authorized to accept service for Dr. Kranz or Cascade Emergency Associates and neither Dr. Kranz nor Cascade Emergency Associates received notice of the lawsuit until January 2016. CP 197, 203, 209, 214, 219. For all of these reasons, all claims against Dr. Kranz and Cascade Emergency Associates were properly dismissed and the trial court did not abuse its discretion when it denied Plaintiff’s motion seeking another continuance of the summary judgment hearing to depose witnesses regarding PeaceHealth’s acceptance of service.

**D. Plaintiff Did Not Allege Or Argue That The IIED Claim Was Based On Post Treatment Conduct And The Claim Was Subject To Summary Judgment For Lack Of Evidence.**

Plaintiff argues that the trial court erred by subsuming her claims for negligent and intentional infliction of emotional distress and outrage into her medical malpractice claims pursuant to RCW 7.70.030 because, according to Plaintiff, the claims were based on events that occurred after her medical

treatment. *Br. Ap.* at 28-29. The argument should be rejected because it was not made in the trial court and because Plaintiff did not present evidence supporting the claims.

On appeal, this court is permitted to consider only “evidence and issues called to the attention of the trial court.” RAP 9.12. The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). As a general rule, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal.

*Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *review denied*, 165 Wn.2d 1017, 199 P.3d 411 (2009).

Plaintiff’s complaint does not mention any claim for emotional distress caused by any act of Defendants occurring *after* Plaintiff’s medical treatment. CP 3-12. The complaint alleges only “traumas and indignations” that occurred “at St. John Medical Center” as the cause of Plaintiff’s alleged emotional distress. CP 5. The only fact pled in the complaint relating to any post-treatment act of any defendant was pled at paragraph 3.11 and related to an alleged failure to follow “grievance procedures.” CP 6. In Plaintiff’s response to Defendants’ motion, Plaintiff argued that her emotional distress damages were caused by her medical treatment while at St. John Medical Center. CR 53. Plaintiff’s declaration stated:

“3. Emotional Distress Claims.

While at St. John Medical Center, I was forcibly disrobed, catheterized, subjected to a blood draw, isolated in a room for several hours and, eventually, admitted to the behavioral health unit for two days against my will.” CP 53.

The trial court did not err in granting summary judgment as to Plaintiff’s outrage and emotional distress claims because Plaintiff had pled that the claims were based on her medical treatment and argued that in response to Defendants’ motion. Plaintiff never argued that the emotional distress claims were premised on some latter occurring, non-medical conduct. A party who does not plead a theory of recovery cannot finesse the issue by later inserting the theory into briefs and contending it was in the case all along. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 472, 98 P.3d 827, 837 (2004); *See also Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir.1996) (“a plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.”).

In addition, Plaintiff did not present sufficient evidence to support the claims. The newspaper article detailing Plaintiff’s account of the incident is pure hearsay, is not factual evidence and is not sufficient to support independent claims for intentional or negligent emotional distress not “occurring as a result of health care.” RCW 7.70.010.

The article and alleged comments are inadmissible unauthenticated hearsay and references to them were affirmatively stricken by the trial court. In Defendants Reply in Support of their Motion for Summary Judgment, they objected to and moved to strike various statements contained in Plaintiff's declaration, including the statement relating to the alleged newspaper article comments. CP 75-77. At oral argument, the trial affirmatively granted all but a few of Defendant's objections, including Defendants objections to Plaintiff's statements relating to the newspaper article comments. RP, Oct. 26, 2016 at 4.

Plaintiff presented no evidence of extreme and outrageous conduct, objective symptomology or a causal connection between the alleged conduct and Plaintiff's emotional distress and/or objective symptomology. *See Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630, 632 (2003) (discussing the elements of intentional and negligent emotional distress claims). As such, Plaintiff did not submit sufficient evidence to support an IIED claim and the trial court properly granted summary judgment on the claim.

## CONCLUSION

For all of the above argued reasons, Defendants respectfully submit that the trial court properly granted Defendants' motion for summary judgments and the trial court's ruling should be upheld.

DATED this 16th day of July, 2018.

HODGKINSON STREET MEPHAM, LLC



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1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 16th day of July, 2018, I served the foregoing  
3 RESPONDENTS' BRIEF on the following:

4 Mr. Kevin Hochhalter  
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6 4570 Avery Ln SE #C-217  
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9 *Of Attorney for Plaintiff*

10 by the following indicated method(s):

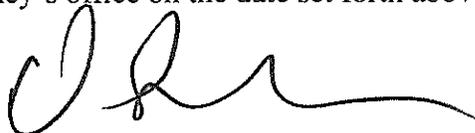
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16  by causing a full, true and correct copy thereof to be **hand delivered** to counsel at the last  
17 known address listed above on the date set forth above.

18  by sending a full, true and correct copy thereof via **overnight mail** in a sealed, prepaid  
19 envelope, addressed to the attorney as shown above on the date set forth above.

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21 which is the last-known fax number for the attorney's office on the date set forth above.

22 

23 \_\_\_\_\_  
24 David S. Mepham

**HODGKINSON STREET MEPHAM, LLC**

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