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

VALERIYA TIKHOMIROV, as Personal
Representative of the Estate of Lyudmila
Tikhomirova; NATALYA TIKHOMIROVA;
SVETLANA KALACHEVA; TIMOFEY
TIKHOMIROV; IRINA YUKHIMETS;
ANDREY TIKHOMIROV; and ALEKSANDR
TIKHOMIROV,
Appellants,
vs.

MACY'S WEST STORES, INC., an Ohio
Corporation; and JOHN DOES I-V,
Respondents.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Plaintiffs submit this Reply Brief in support of their appeal from a trial court decision granting summary judgment in favor of Defendant Macy's. Because the trial court incorrectly granted summary judgment in favor of Defendant Macy's by ruling, as a matter of law, (1) Macy's duty to exercise reasonable care in inspecting for dangerous conditions does not extend to inspecting the bathroom of the store prior to closing for the night, and (2) Macy's failure to render aid did not proximately cause Lyudmila Tikhomirova's death, and because the trial court incorrectly struck the expert report submitted by Stephen Melia by ruling that he is not qualified to render an expert opinion on retail industry standards for inspecting premises for dangerous conditions and that Mr. Melia's report did not comply with GR 13 and RCW 9A.72.085, the Court should vacate the trial court's grant of summary judgment, reverse the trial court's decision to strike Mr. Melia's report, and remand with instructions to allow the case to proceed to trial.

II. ARGUMENT IN REPLY

- a. Whether Macy's Breached Its Duty to Exercise Reasonable Care in Inspecting the Bathroom Prior to Closing the Store is a Genuine Issue of Material Fact.

In its response brief, Macy's cites to the concurring/dissenting opinion of Chief Justice Madsen in *Gregoire v. City of Oak Harbor*, 170

Wn.2d 628, 648, 244 P.3d 924 (2010), for the proposition that Macy's duty to render aid does not make Macy's a guarantor of the safety of their invitees. (Resp. Br. at 8). This argument misses the point that Plaintiffs do not seek a ruling which holds Macy's responsible as a guarantor of the health and safety of Ms. Tikhomirova; rather, Plaintiffs seek a ruling that genuine issues of material fact exist as to whether Macy's breached its duties to exercise reasonable care in inspecting the premises and to render aid, and whether Macy's breach proximately caused Lyudmila Tikhomirova's death.

It is undisputed that under common law, "[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger." RESTATEMENT (SECOND) OF TORTS § 343 (AM. LAW INST. 1965).

The requirement that a landowner exercise "reasonable care" imposes on the landowner the duty "to inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances.'" *Tincani*

v. Inland Empire Zoological Soc’y, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (quoting RESTATEMENT (SECOND) OF TORTS § 343 cmt. b). Macy’s would have this Court limit a land possessor’s duty to use reasonable care to inspect the property to extend only to those instances when such inspection would reveal a remediable defect of the land. (Resp. Br. at 6-7). However, such a limitation on a land possessor’s duty would run counter to common law and to public policy because the duty of a land possessor to inspect is separate and distinct from the land possessor’s duties to remedy a hazard or to render aid. *Nivens v. 7-11 Hoagy’s Corner*, 83 Wn. App. 33, 44, 920 P.2d 241 (Div. 2 1996) (“The duty to inspect may exist whenever an invitee is to come onto the land, but the duty to remedy does not arise until a reasonable person in the same circumstances as the defendant would perceive an unreasonably hazardous condition on the land, and thus an unreasonable risk of harm to the invitees”); *cf. Christian v. Lee*, 113 W.2d 479, 497, 780 P.2d 1307 (1989) (a tavern has a duty to “properly supervise its premises”); *Kelly v. Navy Yard Route*, 77 Wash. 148, 150, 137 P. 444 (1913) (common carriers owe their passengers a duty of vigilance.)

In the retail setting, as was the case in this instance, the land possessor’s duty to inspect requires the land possessor to conduct periodic inspection of the premises. *O’Donnell v. Zupan Enter. Inc.*, 107 Wn. App. 854, 860, 28 P.3d 799 (Div. 2 2001). The interval by which the inspections

should take place so as to satisfy the requirement of reasonable care is a fact-dependent inquiry. *Id.* In the present case, Defendant Macy's did not even knock on the door of the bathroom in preparation for closing the store on March 9, 2014. (CP 20-21). Plaintiff has submitted expert testimony that failing to check the bathrooms before closing was inconsistent with industry standards. (CP 71). While evidence of a breach of an industry standard is not dispositive, it is informative in determining reasonableness of actions or omissions. *Miller v. Staton*, 58 Wn.2d 879, 885, 365 P.2d 333 (1961) ("where negligence is in issue, the usual conduct or general custom of others under similar circumstances is relevant and admissible.") *See also*, e.g., *Meyers v. Meyers*, 81 Wn.2d 533, 538, 503 P.2d 59, 63 (1972) (standard practices of notaries); *Swartley v. Seattle School Dist. No. 1*, 70 Wn.2d 17, 21, 421 P.2d 1009 (1966) (the customary method of storing plywood); *Peterson v. Pac. First Fed. Sav. & Loan Ass'n*, 23 Wn. App. 688, 693 n.3, 598 P.2d 407 (Div. 2 1979) (savings and loan industry customs).

Because breach is generally an issue for the trier of fact, *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999), and viewing the facts of this case in the light most favorable to Ms. Tikhomirova, the question of whether Macy's exercised reasonable care in inspecting the store prior to closing in March 9, 2014, even though Macy's failed to follow standard industry procedures, is a genuine issue of material

fact. The existence of a genuine issue of material fact precludes summary judgment. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014).

- b. The Competing Medical Testimony in this Case Raises a Genuine Issue of Material Fact Whether Macy's Inexcusable Failure to Exercise Reasonable Care in Inspecting the Store Prior to Closing Caused Lyudmila Tikhomirova's Death.

Dr. Jared Strote, an emergency room doctor at Harborview Medical Center and University of Washington Medicine who is board-certified in emergency medicine, testified by declaration that "Ms. Tikhomirova was more likely than not to have suffered from a process in which she survived the initial collapse from the toilet but was unable to get up or call for help." (CP 64). Furthermore, "Ms. Tikhomirova was still alive when the store closed at 1900 on 3/9/14." *Id.* Dr. Jared Strote has concluded that receiving medical attention after collapsing from the toilet, "to a reasonable degree of medical probability, would have prevented Ms. Tikhomirova's deteriorating condition and saved her life." (CP 65).

Based on Dr. Strote's testimony, there is sufficient medical evidence upon which a reasonable juror could conclude that, but for Macy's failure to inspect the bathroom and to thereafter render aid, Lyudmila Tikhomirova would have survived. Therefore, summary judgment in this matter is wholly inappropriate. *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864

(Div. 2 1980) (“The trial court must deny a motion for summary judgment if the record shows any reasonable hypothesis which entitles the nonmoving party to relief.”)

In its response brief, Macy’s dismisses Dr. Strote’s sworn testimony as insufficient to establish a timeline whereby Macy’s could have discovered Ms. Tikhomiorva alive and in peril and cites to the Clark County Medical Examiner’s findings as evidence to the contrary: that Ms. Tikhomirova died immediately from a heart attack. Resp. Br. at 11-12. However, such differing opinions as to the cause, time, and manner of death demonstrates that reasonable medical minds have reached more than one conclusion of the circumstances surrounding Ms. Tikhomirova’s death which, again, makes summary judgment inappropriate. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985) (“As a determination of what actually occurred, cause in fact is generally left to the jury [...] such questions of fact are not appropriately determined on summary judgment unless but one reasonable conclusion is possible”); *cf.*, *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 694–95, 106 P.3d 258 (Div. 3 2005) (summary judgment was inappropriate where a buyer's experts opined that defects in a new home made it unfit for its intended purpose, while the builder's experts opined the defects were mere blemishes.)

c. Steven Melia's Expert Report Was Improperly Stricken.

i. *Expert Testimony on Industry Standards is not a Prohibited Legal Opinion.*

In its response brief, Macy's asks this Court to ignore the industry standards testified to in Steven Melia's report, terming his opinions inadmissible legal opinions. Resp. Br. at 13-14. Macy's argument entirely misreads the very basis of expert testimony. *State v. Kunze*, 97 Wn. App. 832, 850, 988 P.2d 977 (Div. 2 1999) (The "knowledge" required for admission of an opinion may be personal, or it may be scientific, technical, or specialized); ER 702.¹ Washington Courts routinely admit opinions of experts with specialized knowledge of industry standards to enlighten the trier of fact as to the accepted practice for that industry. *E.g., Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 97, 249 P.3d 607 (2011) (private consulting transportation engineer testified that the stop bar at a railroad crossing was located dangerously close to the railroad tracks in violation of industry standards); *Brotherton v. Kralman Steel Structures, Inc.*, 165 Wn. App. 727, 736, 269 P.3d 307 (Div. 3 2011) (building contractor testified a proposal to replace a driveway satisfied local industry

¹ "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702.

standards); *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 768, 115 P.3d 349 (Div. 1 2005) (expert testimony established that the only acceptable cures for a poured concrete slab were either a water cure or a chemical cure, and that curing on its own does not meet industry standards); *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 208, 969 P.2d 486 (Div. 1 1998), *as amended on denial of reconsideration* (Dec. 14, 1998) (paint expert maintained that the number of primer coats applied was inadequate to meet industry standards); *Pearce v. Motel 6, Inc.*, 28 Wn. App. 474, 477, 624 P.2d 215 (Div. 2 1981) (the Court noted a failure by plaintiff to present testimony of industry standards from which a trier of fact could conclude whether a motel knew or should have known a shower was unreasonably dangerous).

In this case, Stephen Melia has “over 30 years of experience in retail safety and security management,” and possesses “specific working knowledge concerning operations and procedures that are considered standard in the industry as it relates to security, safety, investigations, premise liability, crowd management, accident/injury prevention as well as security event planning.” (CP 68). Based on Mr. Melia’s vast practical experience, he is more than qualified to form an opinion as to the retail industry’s standards of practice for closing procedures for retail establishments. Such an opinion cannot not reasonably be mischaracterized

as an opinion of the law, but rather of the common practice reasonable retailers undertake in the operation of stores open to the public.

ii. Steven Melia's Report is Admissible.

As explained in Appellant's Opening Brief, CR 56(e) requires that evidence in support of, and opposition to, a motion for summary judgment be in the form of affidavits "made on personal knowledge" and which "set forth such facts as would be admissible in evidence." RCW 9A.72.085 provides, in pertinent part:

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

- (a) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (b) Is subscribed by the person;
- (c) States the date and place of its execution; and
- (d) States that it is so certified or declared under the laws of the state of Washington.

RCW 9A.72.085(1).

Macy's cites to dicta found in the footnote of *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 455 n.1, 166 P.3d 807 (Div. 3 2007), for the proposition that an unsworn declaration must strictly comply with RCW 9A.72.085. "Dicta is not binding authority." *Protect the Peninsula's Future*

v. City of Port Angeles, 175 Wn. App. 201, 215, 304 P.3d 914 (Div. 2 2013) (citing *Hildahl v. Bringolf*, 101 Wn.App. 634, 650–51, 5 P.3d 38 (Div. 2 2000)) Furthermore, Macy’s contention is in direct opposition to the long-standing black letter law that substantial compliance with the provisions of 9A.72.085 is all that is required for an unsworn statement to be treated as an affidavit, declaration, or other sworn statement. *E.g.*, *Johnson v. King Cty. (Metro Transit)*, 148 Wn. App. 220, 229, 198 P.3d 546 (Div. 1 2009) (“[F]ailure to state the place of [signing] under RCW 9A.72.085 is not fatal to complying with” statutory requirements); *Garcia v. Crico of James St. Crossing L.P.*, 125 Wn. App. 807, 812-13, 106 P.3d 765 (Div. 1 2004) (the various components of a certificate of service substantially comply statutory requirements if they “constitute some evidence of the time, place, and manner of delivery”); *Manius v. Boyd*, 111 Wn. App. 764, 770, 47 P.3d 145 (Div. 2 2002) (It was reasonably implied that a legal assistant signed a certificate of service and mailed the documents from her law firm’s address despite failure to strictly comply with RCW 9A.72.085). *But e.g.*, *Brackman v. City of Lake Forest Park*, 163 Wn. App. 889, 898, 262 P.3d 116 (Div. 1 2011) (A certificate of mailing that does not contain language that it was made under oath or under penalty of perjury did not comply with RCW 9A.72.085).

As explained in Appellant’s Opening Brief, Appellants concede that Mr. Melia’s expert report is not in strict compliance with the provisions of RCW 9A.72.085, but the report does *substantially* comply with the statutory requirements. It would therefore be in error to exclude the report for failure to strictly conform to the provisions of RCW 9A.72.085. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 879, 431 P.2d 216 (1967) (“[I]t is almost the universal practice—because of the drastic potentials of the motion—to scrutinize with care and particularity the affidavits of the moving party while indulging in some leniency with respect to the affidavits presented by the opposing party.”)

III. CONCLUSION

For the reasons set for above, and in Appellant’s Opening Brief, Appellants respectfully request that the Court vacate the trial court’s grant of summary judgment, reverse the trial court’s decision to strike Mr. Melia’s report, and allow the case to proceed to trial.

RESPECTFULLY SUBMITTED this 22nd day of March, 2018.



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CERTIFICATE OF SERVICE

“I certify under penalty of perjury under the laws of the State of Washington that on the 22nd day of March, 2018, I caused a true and correct copy of Appellants’ Opening Brief to be filed with the Court of Appeals, Division II, via electronic filing, and caused same to be served via email and First-Class Mail on the following:

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