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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' OPENING BRIEF

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I. INTRODUCTION

Lyudmila Tikhomirova, a 61-year-old homemaker, died while trapped overnight in a bathroom in the Macy's department store at the Vancouver Mall. Washington Courts uniformly agree that possessors of land who hold the land open to the public must exercise reasonable care in inspecting the land for dangers which pose unreasonable risk of physical harm to business invitees, and to render aid to an invitee when the possessor knows or has reason to know that the invitee is ill or injured. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 202, 943 P.2d 286 (1997), *as amended* (Oct. 1, 1997).

The trial court granted summary judgment for Macy's holding, as a matter of law, Macy's duty to use reasonable care in inspecting for dangerous conditions does not extend to inspecting the bathroom of the store prior to closing and locking up for the night. The trial court further held, as a matter of law, Macy's failure to render aid did not proximately cause Lyudmila Tikhomirova's death despite medical testimony to the contrary.

The trial court also struck the expert report of Stephen Melia, holding that Mr. Melia, the former Western Division Senior Director for Asset Protection, Safety, and Compliance for Sam's Club, was unqualified to render an expert opinion as to industry standards for basic closing

procedures in the retail industry. The trial court further held that Mr. Melia's report was inadmissible as an unsworn statement.

Appellants respectfully request this Court reverse the trial court for three reasons: first, a genuine issue of material fact exists for the jury to determine whether Macy's undisputed actions and omissions fulfilled its affirmative duty to exercise reasonable care in inspecting for dangerous conditions and to render aid to an ill invitee; second, a genuine issue of material fact exists whether Macy's failure to render aid to Ms. Tikhomirova proximately caused her death; and third, Stephen Melia is a qualified expert whose specialized knowledge would be helpful to the jury and his report substantially complied with GR 13 and RCW 9A.72.085.

For the above reasons, Appellants respectfully request that this Court vacate the trial court's order granting summary judgment, reverse the trial court's decision to strike the report of Stephen Melia, and allow the case to proceed to trial.

II. ASSIGNMENTS OF ERROR

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.

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.

III. STATEMENT OF ISSUES

1. Whether a genuine issue of material fact exists as to Macy's breach of its duty to exercise reasonable care in inspecting for dangerous conditions.
2. Whether a genuine issue of material fact exists as to Macy's breach of its duty to come to Lyudmila Tikhomirova's aid.
3. Whether a genuine issue of material fact exists as to whether Macy's breach was a proximate cause of Lyudmila Tikhomirova's death.
4. Whether Stephen Melia possesses specialized knowledge which will assist the trier of fact to understand the evidence or to determine a fact in issue.
5. Whether Stephen Melia's expert report substantially complies with GR 13 and RCW 9A.72.085.

IV. STATEMENT OF THE CASE

This is a wrongful death and premises liability case. (CP 5-6). Respondent Macy's West Stores, Inc. ("Macy's") owns and operates the Macy's store located at the Vancouver Mall, 8208 NE Vancouver Mall Drive, Vancouver, Clark County, Washington 98662. (CP 12). On or about the evening of March 9, 2014, shortly before 6:00 p.m., Lyudmila Tikhomirova entered the Vancouver Mall Macy's store. (CP 5). Ms. Tikhomirova was a frequent shopper at this Macy's store. (CP 76). Security camera footage from that evening shows Ms. Tikhomirova entered the Macy's bathroom approximately 4-5 minutes after she entered the store. (CP 63). Macy's closed at 7:00 p.m. that night. (CP 20-21). After Ms. Tikhomirova entered the bathroom, none of Macy's employees inspected the bathroom before closing the store for the night. *Id.* Ms. Tikhomirova never exited the bathroom. (CP 33). The next morning, at approximately 6:22 a.m., Ms. Tikhomirova was found dead, face-down on the bathroom floor, covered in feces with her pants and undergarments down to her knees. (CP 42).

According to the medical testimony contained in the Declaration of Dr. Jared Strote, Ms. Tikhomirova was still alive when the store closed. (CP 64-65). Dr. Strote also testified "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,” and “[o]nce on the floor and unable to get up, Ms. Tikhomirova spent the night without oxygen, which she required, and, more likely than not, died slowly, over many hours, from respiratory failure.” (CP 64). Dr. Jared Strote further testified that medical attention after collapsing from the toilet, “would have prevented Ms. Tikhomirova’s deteriorating condition and saved her life.” (CP 65).

Plaintiffs brought the present action on December 18, 2014. (CP 1). Defendant Macy’s served their Answer and affirmative defenses on February 25, 2015. (CP 16). On June 23, 2017 a hearing was held in Clark County Superior Court on Defendant Macy’s Motion for Summary Judgment. (CP 230; RP 1). After hearing argument from Macy’s and from Plaintiffs/Appellants, the trial court ruled that Ms. Tikhomirova was a business invitee at the time of her death and as such Macy’s owed a duty to exercise reasonable care to discover dangerous conditions and to take reasonable steps to protect Ms. Tikhomirova from those dangers. (RP 38:9-19). However, the trial court also held that there were no conditions present that created a risk to Ms. Tikhomirova, Macy’s had no obligation to check the bathroom before closing, and Macy’s failure to render aid did not proximately cause Ms. Tikhomirova’s death. (RP 39 6-9; 40:4-8, 19-21). The trial court also struck the expert witness report of Stephen Melia holding that Mr. Melia was not qualified to render an opinion on the

practices of retail stores and that Mr. Melia’s report did not comply with GR 13. (RP 35:7-12, 14-18). The trial court granted summary judgment in favor of Defendant Macy’s. (CP 231-32). Appellants timely appealed. (CP 233).

V. LEGAL ARGUMENT

a. The Trial Court Erred in Granting Summary Judgment in Favor of Macy’s Because Genuine Issues of Material Fact Remain at Issue.

i. *Standard of Review*

Appellate courts review a summary judgment de novo and engage in the same inquiry as the trial court. *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 297, 381 P.3d 95 (Div. 2 2016) (citing *Mangat v. Snohomish County*, 176 Wn. App. 324, 328, 308 P.3d 786 (Div. 1 2013)). The appellate court considers the evidence in the light most favorable to the nonmoving party below. *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015) (citing *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989)).

“Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014) (citing CR 56(c)). “A ‘material fact’ is a fact upon which the litigation depends, in whole or in part.” *Young*, 112 Wn.2d at 234 (citing

Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 643, 618 P.2d 96 (1980). “Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion.” *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003) (citing *Ruff v. County of King*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995)). “The trial court must deny a motion for summary judgment if the record shows any reasonable hypothesis which entitles the nonmoving party to relief.” *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (Div. 2 1980) (citing *Adamski v. Tacoma General Hospital*, 20 Wn. App. 98, 103, 579 P.2d 970 (Div. 2 1978)).

ii. *Macy’s Owed Lyudmila Tikhomirova a Duty to Use Reasonable Care in Inspecting for Dangerous Conditions.*

1. Lyudmila Tikhomirova was a business invitee.

“The legal duty owed by a landowner to a person entering the premises depends on whether the entrant falls under the common law category of a trespasser, licensee, or invitee.” *Fredrickson v. Bertolino’s Tacoma, Inc.*, 131 Wn. App. 183, 188–89, 127 P.3d 5 (Div. 2 2005) (citing *Younce v. Ferguson*, 106 Wn.2d 658, 662, 724 P.2d 991 (1986)). Macy’s acknowledges that Ms. Tikhomirova was an invitee upon entering the store on March 9, 2014. (RP 12:20-22).

2. Macy's had a duty to exercise reasonable care in inspecting for dangerous conditions.

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) (emphasis added). Washington has explicitly adopted the common law duties contained in sections 343 and 343A¹ of the Restatement as the “appropriate standards for determining landowner liability to invitees.” *Iwai v. State*, 129 Wn.2d 84, 95, 915 P.2d 1089 (1996). In applying these standards, the Washington Supreme Court has interpreted the requirement that a landowner exercise “reasonable care” as imposing 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*

¹ “A possessor of land is not liable to his [or her] invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.” RESTATEMENT (SECOND) OF TORTS § 343A(1).

Zoological Soc’y, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (quoting RESTATEMENT (SECOND) OF TORTS § 343 cmt. b).

Here, because it is undisputed that Lyudmila Tikhomirova entered the Vancouver Mall Macy’s store as an invitee, Macy’s owed to Lyudmila Tikhomirova the affirmative duty to exercise reasonable care in inspecting for dangerous conditions which Ms. Tikhomirova may not discover, or may fail to protect herself against.

3. Macy’s breach of its duty is a genuine issue of material fact.

Breach is generally a fact question 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).

Here, the facts show Defendant Macy’s did not conduct even a cursory inspection of the bathroom in preparation for closing the store on March 9, 2014. (CP 20-21). Employees did check the exterior doors and fitting rooms before making announcements over the loudspeaker that the store was closing, but no one checked the bathroom. *Id.* Consequently, Lyudmila Tikhomirova’s peril went undiscovered until the following morning. (CP 42).

According to expert Stephen M. Melia, the former Senior Director of Asset Protection, Safety, and Compliance for the Sam’s Club retail stores in the Western United States, “[i]t is considered standard in the retail

industry for staff, manager and/or security to check all offices, restrooms, fitting rooms that are generally accessible to the public during operating hours.” (CP 71).

Viewing the facts and reasonable inferences therefrom in the light most favorable to Ms. Tikhomirova, there remains a genuine issue of material fact as to whether Macy’s departure from industry standards in its store closing procedures was a breach of its duty to use reasonable care in inspecting for dangerous conditions. *Preston v. Duncan*, 55 Wn.2d 678, 681–82, 349 P.2d 605 (1960) (“It seems obvious that in situations where, though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent, knowledge, good faith, negligence, et cetera, a summary judgment would not be warranted.”)

iii. Macy’s Owed Lyudmila Tikhomirova a Duty to Render Aid Until She Could be Cared for by Others.

1. Had Macy’s fulfilled its obligation to Lyudmila Tikhomirova, Macy’s would have discovered her in distress.

According to medical evidence in this case provided by Dr. Strote, after entering the bathroom, “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). Alive, but trapped in the bathroom of Macy’s without the ability to call for help and

unable to protect herself, Lyudmila Tikhomirova laid dying on the floor all night.

Considering all facts and reasonable inferences in the light most favorable to Ms. Tikhomirova, had Macy's exercised reasonable care in inspecting the bathroom before locking up the store for the evening, it is reasonable to conclude that Lyudmila Tikhomirova would have been discovered—imperiled, but alive.

2. Macy's has a duty to render aid to Lyudmila Tikhomirova pursuant to the special relationship between business and customer.

“Under traditional tort law, absent affirmative conduct or a special relationship, no legal duty to come to the aid of a stranger exists.” *Folsom v. Burger King*, 135 Wn.2d 658, 674, 958 P.2d 301 (1998) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on the Law of Torts* § 56 (5th ed. 1984)). Special relationships giving rise to a duty to come to the aid of another may be formed by factual circumstances. *See, e.g. Benjamin v. City of Seattle*, 74 Wn.2d 832, 833, 447 P.2d 172 (1968) (common carriers to passengers); *Bartlett v. Hantover*, 9 Wn. App. 614, 621, 513 P.2d 844 (Div. 1 1973), *rev'd on other grounds*, 84 Wn.2d 426, 526 P.2d 1217 (1974) (employer to employee); *Byerly v. Madsen*, 41 Wn. App. 495, 503, 704 P.2d 1236 (Div. 3 1985) (hospital to patient); *Miller v. Staton*, 58 Wn.2d 879, 883, 365 P.2d 333 (1961) (innkeeper to guest);

McLeod v. Grant County Sch. Dist. No. 128, 42 Wn.2d 316, 319-22, 255 P.2d 360 (1953) (school to student). This series of cases follows the common law principle that a “possessor of land who holds it open to the public” is under a duty to “members of the public who enter in response to his invitation” to take reasonable action “(a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after [the possessor] knows or has reason to know that they are ill or injured,² and to care for them until they can be cared for by others.” RESTATEMENT (SECOND) OF TORTS § 314A. In *Lauritzen v. Lauritzen*, this Court emphasized the obligation recognized at common law is created by the “entrustment aspect” between the parties. 74 Wn. App. 432, 440-41, 874 P.2d 861 (Div. 2 1994), *review denied*, 125 Wn.2d 1006, 886 P.2d 1134 (1994).

In *Nivens v. 7-11 Hoagy's Corner, supra*, the Washington Supreme Court explicitly applied to the business and customer relationship the legal duty of a business owner to come to the aid of a customer who entrusts themselves “to the control of the business owner over the premises,” reasoning “a special relationship exists between a business and an invitee

² The landowner’s duty “to one who is ill or injured *extends to cases where the illness is due to natural causes*, to pure accidents, to the acts of third persons, or to the negligence of the plaintiff himself.” RESTATEMENT (SECOND) OF TORTS § 314A cmt. b. (emphasis added).

because the invitee enters the business premises for the economic benefit of the business.” 133 Wn.2d at 202.

Additionally, Courts in several other jurisdictions have also determined that “the relationship between an invitee on premises open to the public and the possessor of the premises justifies the creation of such a duty” to render aid to an ill or injured invitee. *Lindsey v. Miami Dev. Corp.*, 689 S.W.2d 856 (Tenn. 1985). *See generally Pers. Representative of Starling's Estate v. Fisherman's Pier, Inc.*, 401 So. 2d 1136 (Fla. Dist. Ct. App. 1981) (commercial fishing pier to customer); *Hovermale v. Berkeley Springs Moose Lodge No. 1483*, 271 S.E.2d 335 (W.Va.1980) (bar to patron); *Lloyd v. S. S. Kresge Co.*, 85 Wis. 2d 296, 270 N.W.2d 423 (Wis. Ct. App. 1978) (storeowner to customer); *Depue v. Flateau*, 100 Minn. 299, 111 N.W. 1 (1907) (farm to cattle buyer).

Had Macy’s conducted an inspection of the bathroom prior to closing for the evening, it is reasonable to infer that Lyudmila Tikhomirova would have been found in the condition she was in at 6:22 a.m. the following morning: face-down on the bathroom floor in a desperate and compromised position. (CP 42). Macy’s would have then had reason to know that Ms. Tikhomirova was ill or injured and required aid.

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3. Macy's breach of its duty is a genuine issue of material fact.

Breach is generally a fact question for the trier of fact. *Hertog*, 138 Wn.2d at 275.

Here, the facts show Defendant Macy's was unaware of Ms. Tikhomirova's peril due to its failure to conduct even a cursory inspection of the bathroom. (CP 20-21). The facts also show that no aid was rendered to Ms. Tikhomirova until the following morning when she was found dead. (CP 42).

Therefore, viewing the facts and reasonable inferences therefrom in the light most favorable to Ms. Tikhomirova, there remains a genuine issue of material fact as to whether Macy's breached its duty to render aid to an ill invitee. *Hudesman v. Foley*, 73 Wn.2d 880, 889, 441 P.2d 532 (1968) (quoting 92 C.J.S. Vendor & Purchaser § 374 (1955)) (“[Q]uestions of fact as to which there is a conflict in the evidence, or the evidence is such that different inferences might reasonably be drawn therefrom, are ordinarily for the jury under proper instructions.”)

- iv. *Whether Macy's Proximately Caused Lyudmila Tikhomirova's Death is a Genuine Issue of Material Fact.*

Proximate cause, like breach, is a fact question for the trier of fact. *Hertog*, 138 Wn.2d at 275. “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.” *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985).

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 64-65). Based on this evidence, a reasonable juror could conclude that had Macy’s rendered even the most minimal of aid in calling 9-1-1 to summon emergency services, Ms. Tikhomirova would have, more likely than not, survived her ordeal.

Therefore, there is sufficient medical evidence upon which a reasonable juror could conclude that, but for Macy’s failure to render aid, Lyudmila Tikhomirova would have survived. Such a reasonable hypothesis which would entitle Appellants to relief *is*—at its core—a genuine issue of material fact that precludes summary judgment. *Mostrom*, 25 Wn. App. at 162.

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b. The Trial Court Erred in Striking the Expert Witness Report of Stephen M. Melia.

i. *Standard of Review*

“Trial court rulings in conjunction with a motion for summary judgment are reviewed de novo.” *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 416, 150 P.3d 545 (2007) (citing *Folsom*, 135 Wn.2d at 663).

ii. *Stephen Melia Possesses Specialized Knowledge Formed by Relevant Practical Experience that will Assist the Jury to Determine Whether Macy’s Breached its Duty to Use Reasonable Care in Inspecting for Dangerous Conditions.*

“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. “To admit expert testimony under ER 702, the trial court must determine that the witness qualifies as an expert and that the testimony will assist the trier of fact.” *In re Det. of McGary*, 175 Wn. App. 328, 338–39, 306 P.3d 1005 (Div. 2 2013) (citing *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013)). “It is the proper function of the trial court to scrutinize the expert's underlying information and determine whether it is sufficient to form an opinion on the relevant issue.” *Johnston-*

Forbes v. Matsunaga, 181 Wn.2d 346, 357, 333 P.3d 388 (2014). “Practical experience is sufficient to qualify a witness as an expert.” *State v. Weaville*, 162 Wn. App. 801, 824, 256 P.3d 426 (Div. 1 2011) (quoting *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992)).

Here, 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). Among his professional positions, he spent five years as the Senior Director for Asset Protection, Safety, and Compliance for all Sam’s Club retail stores in the Western Division of the United States. (CP 73). Prior to that, he was a Sam’s Club Regional Director for Asset Protection, Safety, and Compliance in addition to several other positions with Walmart Stores, Inc. *Id.* Additionally, he is a member of the American Society of Industrial Security, the Loss Prevention Foundation, and the Loss Prevention Research Council where he served on the Board of Advisors from 2007 – 2009. (CP 74).

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 basic security closing procedures for retail establishments. This

specialized knowledge will assist the jury in evaluating the evidence and determining whether Macy's breached its duty to exercise reasonable care in inspecting the Vancouver Mall Macy's store for dangerous conditions prior to closing on March 9, 2014.

iii. *The Expert Report Submitted by Stephen Melia Substantially Complies with RCW 9A.72.085.*

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." "Underlying CR 56(e) is the requirement that documents the parties submit must be authenticated to be admissible." *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 745, 87 P.3d 774 (Div. 1 2004). Consistent with the requirement that evidence submitted in relation to a summary judgment hearing be authenticated, RCW 9A.72.085 and GR 13³ allow for the use of certain unsworn statements to be treated as if they were affidavits. *State v. McComas*, 186 Wn. App. 307, 318 n.3, 345 P.3d 36 (Div. 2 2015), *review denied*, 184 Wn.2d 1008, 357 P.3d 666 (2015).

³ "[W]henver a matter is required or permitted to be supported or proved by affidavit, the matter may be supported or proved by an unsworn written statement, declaration, verification, or certificate executed in accordance with RCW 9A.72.085." GR 13(a).

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). 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); *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). However, even if an unsworn statement does not substantially comply with the requirements of GR 13 and RCW 9A.72.085, “the drastic potentials of a summary judgment motion compel the courts to indulge in leniency with respect to affidavits presented by the nonmoving party.” *Pub. Util. Dist. No. 1 of Lewis Cty. v. Wa. Pub. Power Supply Sys.*, 104 Wn.2d 353, 361, 705 P.2d 1195, 713 P.2d 1109 (1985) (citing *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 879, 431 P.2d 216 (1967)).

In the present case, Appellants concede that Mr. Melia’s expert report is not in strict compliance with the provisions of GR 13 and RCW 9A.72.085, but the report does *substantially* comply with those statutory requirements.

Turning first to the time and place of execution, while Mr. Melia’s report does identify with particularity that it was created on July 29, 2016, the document never explicitly states that it was prepared and executed from his office in Southlake, Texas. (CP 67-68). However, as with *Manius v. Boyd, supra*, it is reasonable to infer that a report of this type, which he was asked to write based on his professional knowledge and experience, would have been prepared at his office.

Next, with respect to the statutory requirement that an unsworn statement recite that such statement is made under the laws of the State of

Washington and under the penalty of perjury, the report specifically identifies that it was made for use in the litigation of *Tikhomirova vs. Macy's West Stores, Inc.* (CP 67). While the report never explicitly refers to perjury or the laws of the State of Washington, the acknowledgment that the report was intended for use as notice of Mr. Melia's sworn expert testimony in a case tried in the Superior Court of the State of Washington is entitled to a reasonable inference that Mr. Melia expressed his expert opinion in accordance with the laws of the State of Washington and under the penalty of perjury. In this, Mr. Melia's report is more akin to the Certificate of Service at issue in *Manius, supra*, than to the Certificate of Mailing at issue in *Brackman v. City of Lake Forest Park, supra*.

Lastly, turning to the requirement that an unsworn statement be subscribed by the person making such statement, even though Mr. Melia's report does not include a handwritten signature, the report, which was tendered in electronic version to Macy's on September 19, 2016, (RP 31:13-15), contains on the last page of the report the following signature line:

Respectfully submitted,

Stephen M. Melia, LPC
S. Melia Consulting, LLC

(CP 71). RCW 9A.72.085(3)(b) provides that:

[A] person subscribes to an unsworn written statement, declaration, verification, or certificate by...[a]ttaching or

logically associating his or her digital signature or electronic signature as defined in RCW 19.34.020 to the document.

RCW 19.34.020(14) defines “electronic signature” as “a signature in electronic form attached to or logically associated with an electronic record, including but not limited to a digital signature.” Mr. Melia’s typewritten name in the signature line above the name of his consulting company meets the standard of an electronic form of a signature that is attached to or logically associated with his report. Thus, his signature line complies with the provisions of RCW 9A.72.085(3)(b).

Because Mr. Melia’s report substantially complied with the provisions of RCW 9A.72.085 and GR 13, it was an error for the trial court to strike the report as an inadmissible unsworn statement.

VI. CONCLUSION

The issues (1) whether Macy’s breached its duty to exercise reasonable care in inspecting for dangerous conditions, (2) whether Macy’s breached its duty to render aid to an ill or injured invitee, and (3) whether Macy’s breach was a proximate cause of Lyudmila Tikhomirova’s death, cannot be decided by the trial court on summary judgment in favor of Macy’s. Since these questions raise genuine issues of material fact, Macy’s summary judgment motion should have been denied.

Additionally, the trial court erred in striking Stephen Melia's expert report on the grounds that he is unqualified to offer an expert opinion and his report was an inadmissible unsworn statement. Since Stephen Melia possesses specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue and his expert report substantially complies with GR 13 and RCW 9A.72.085 the trial court should not have stricken his report.

For those reasons, 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 30th day of November, 2017.

A handwritten signature in black ink, appearing to read "JD Gehrke". The signature is written in a cursive, flowing style.

Joseph D. Gehrke, WSBA #47474
Attorney for the Appellants

CERTIFICATE OF SERVICE

“I certify under penalty of perjury under the laws of the State of Washington that on the 30th day of November, 2017, 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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DATED this 30th day of November, 2017, at Seattle, Washington



Amirah Nour
Legal Assistant

CROSS BORDER LAW

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