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Court of Appeals  
Division II  
State of Washington  
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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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**VALERIYA TIKHOMIROV, as Personal Representative of the Estate of Lydumila  
Tikhomirova; NATALYA TIKHOMIROVA; SVETLANA KALACHEVA;  
TIMOFEY TIKHOMIROV; IRINA YUKHIMETS, ANDREY TIKHOMIROV;  
and ALEKSANDR TIKHOMIROV,**

**Appellants,**

**vs.**

**MACY'S WEST STORES, INC. an Ohio Corporation;**

**Respondent,**

**and**

**JOHN DOES I-V,**

**Defendants.**

---

**APPEAL FROM CLARK COUNTY SUPERIOR COURT  
Honorable Derek J. Vanderwood, Judge**

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**BRIEF OF RESPONDENT**

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## **I. NATURE OF THE CASE**

Lyudmilla Tikhomirova died of natural causes in the restroom of a Macy's store. Despite the fact that no condition of the premises caused the death, her personal representative seeks to hold Macy's responsible. The trial court properly granted summary judgment to Macy's.

## **II. ISSUES PRESENTED**

1. Does a premises owner's duty require it to seek out invitees suffering medical emergencies unknown to the owner and not caused by a condition of the premises?
2. May proximate causation be established by speculative testimony?
3. Was the unsworn, unsigned report of Steven Melia offering opinions on Macy's legal duty properly excluded on summary judgment?

## **III. STATEMENT OF THE CASE**

### **A. STATEMENT OF RELEVANT FACTS.**

At approximately 5:48 p.m. on March 9, 2014, Lydumila Tikhomirova (hereinafter, "Ms. Tikhomirova") entered the Vancouver Macy's retail location. She entered a single occupancy restroom at approximately 5:52 p.m. Her body was discovered the next morning at

approximately 6:22 a.m. by independently contracted cleaning personnel. The Clark County Medical Examiner's report identifies congestive heart failure as the immediate cause of death and the death certificate states that she would have died within minutes of onset. CP 32-34, 42, 49)

On the evening of March 9, 2014, Macy's followed its closing procedures for a 7:00 p.m. close: the closing manager checked all exterior doors and checked all fitting rooms. The closing manager then made three announcements over a loudspeaker that the store was closing beginning approximately 15 minutes prior to the store's 7:00 p.m. closing. After the store closed, the closing manager then made two to four additional loudspeaker announcements that the store was closed over the course of about 30 minutes before shutting the lights off. The loudspeaker announcements are heard in the bathroom at issue. The closing manager then armed the alarm, exited the store, and locked the doors. (CP 20-21)

**B. STATEMENT OF PROCEDURE.**

On December 18, 2014, plaintiffs filed this lawsuit stemming from the natural death of Ms. Tikhomirova. Plaintiffs asserted the following causes of action: wrongful death; negligent infliction of emotional distress; and outrage. (CP 3-8)

Macy's answered the complaint on February 27, 2015. (CP 11-16)

Macy's filed a motion for summary judgment on all of plaintiff's claims, and a reply in support thereof. (CP 20-21, 22-49, 50-58, 222-29) Plaintiffs filed a response, but did not oppose summary dismissal of the claims for intentional or negligent infliction of emotional distress. (59-74, 75-210, 211-21) The trial court excluded the report of Stephen M. Melia, granted Macy's motion and dismissed plaintiffs' claims with prejudice. (CP 231-32)

Plaintiffs filed a Notice of Appeal. (CP 233) Plaintiffs do not appeal the trial court's dismissal of the claims for intentional and negligent infliction of emotional distress. Therefore, those claims will not be addressed here.

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW.**

The standard of review on an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment should be granted where the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005). "The nonmoving party may not rely

on speculation or argumentative assertions.” *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 824, 976 P.2d 126 (1999).

**B. A POSSESSOR OF LAND’S DUTY DOES NOT EXTEND SO FAR AS TO IDENTIFY AND PREVENT AN INVITEE’S UNFORESEEABLE MEDICAL EMERGENCY.**

In a negligence claim, the plaintiff “must establish the existence of (1) a duty, owed by the defendant to the plaintiff, to conform to a certain standard of conduct; (2) a breach of that duty; (3) a resulting injury; and (4) proximate cause between the breach and the injury”. *Cameron v. Murray*, 151 Wn. App. 646, 651, 214 P.3d 150 (2009), *rev. denied*, 168 Wn.2d 1018 (2010).

In this case, plaintiffs cannot identify a duty owed in the circumstances of this case, where Ms. Tikhomirova’s died as the result of natural causes; a breach of any duty; or proximate cause. Plaintiffs’ claim for wrongful death was properly dismissed as a matter of law.

**1. Duty Owed Is Governed by the Entrant’s Common Law Status as an Invitee, Licensee, or Trespasser.**

Duty is a question of law for the court. *Nivens v. 7-11 Hoagy’s Corner*, 83 Wn. App. 33, 41, 920 P.2d 241 (1996), *aff’d*, 133 Wn.2d 192, 943 P.2d 286 (1997); *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). It must be answered generally, without reference to the facts or parties in a particular case. *Id.* at 20; *see also Schooley v. Pinch’s Deli Market, Inc.*, 80 Wn. App. 862, 866, 912 P.2d 1044 (1996),

*aff'd*, 134 Wn.2d 468, 951 P.2d 749 (1998).

In Washington State premises liability actions, a possessor's duty of care is governed by the entrant's common law status as a trespasser, licensee, or invitee. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). Liability cannot attach under a general duty of reasonable care, irrespective of the entrant's status. *Id.* at 129-30; *see also Younce v. Ferguson*, 106 Wn.2d 658, 724 P.2d 991 (1986) (rejecting adoption of reasonable care under all of the circumstances standard for premises liability actions).

The overarching rationale for premises liability is that the possessor's knowledge of the condition and risk is superior to that of the invitee or licensee. *Singleton v. Jackson*, 85 Wn. App. 835, 843, 935 P.2d 644 (1997). However, it is well settled that a possessor is not the insurer of an entrant's safety. *McDermott v. Kaczmarek*, 2 Wn. App. 643, 655, 469 P.2d 191 (1970).

An invitee is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. RESTATEMENT (SECOND) OF TORTS § 332 (1965). An invitee is entitled to expect that the possessor will exercise reasonable care to discover conditions of the land that pose unreasonable risks of harm, and will exercise reasonable care to protect the invitee against the danger posed.

*Tincani*, 124 Wn.2d at 138-39; *see also* RESTATEMENT (SECOND) OF TORTS § 343 (1965).

Here, the trial court determined that Ms. Tikhomirova was an invitee at all times relevant to this cause of action. (CP 230; RP 36-38) Defendant does not dispute that finding on appeal.

No authority extends a possessor's duty so far as to identify or intervene in an unforeseeable medical emergency, absent notice. There is no evidence that any condition on the subject Macy's premises posed an unreasonable risk of harm to Ms. Tikhomirova.

As a matter of law, plaintiffs cannot establish a breach of any duty owed by Macy's. For this reason alone, summary judgment was appropriate.

## **2. No Condition of the Land Caused Injury.**

In the present case, there was no "condition of the land" that posed an "unreasonable risk of harm" to Ms. Tikhomirova. RESTATEMENT (SECOND) OF TORTS § 343 (1965). The only "danger" involved in this scenario was Ms. Tikhomirova's own health condition. Even to an invitee there is no duty to warn of dangers known to him/her or which are so apparent that s/he may reasonably be expected to discover them. *McDermott v. Kaczmarek*, 2 Wn. App. 643, 655, 469 P.2d 191 (1970). Here, Ms. Tikhomirova was in the best position to know her medical condition

and would be expected to exercise reasonable care to protect against that condition.

Plaintiff's attempt to argue that Macy's had a duty to inspect the restroom as a "dangerous condition" conflates the duties set out by RESTATEMENT (SECOND) OF TORTS § 343 *supra* and RESTATEMENT (SECOND) OF TORTS § 314A, (duty to render aid) discussed *infra*. In so doing, plaintiff attempts to create an illusion of a dangerous condition where there was none. The plain fact is that there was no dangerous condition of the premises for Macy's to correct or warn against. This was an ordinary one-person restroom. Nothing about it caused Ms. Tikhomirova's death. Macy's complied with its duty to its invitee.

As a matter of law, Macy's cannot be held liable under these facts. The trial court properly granted summary judgment.

**3. The Special Relationship Between a Possessor of Land and an Invitee Does Not Impose a Duty to Render Aid Absent Notice.**

Washington courts hold that a special relationship exists between a business and an invitee. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 203-04, 943 P.2d 286 (1997). Washington has adopted RESTATEMENT (SECOND) OF TORTS § 314A which provides:

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid **after it knows or has reason to know that they are ill or injured**, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

(Emphasis added.) *Shea v. City of Spokane*, 17 Wn. App. 236, 241-42, 562 P.2d 264 (1977), *aff'd* 90 Wn.2d 43, 578 P.2d 42 (1978) (holding that a city has a nondelegable duty to provide medical care to a prisoner in custody). This special relationship is an exception to the common law rule providing no duty to render aid. *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998). However, “the mere existence of a special relationship does not make the defendant a guarantor of the plaintiff’s safety.” *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 648, 244 P.3d 924 (2010).

The duty is limited to exercising reasonable care under the circumstances. RESTATEMENT 314A, cmt. e (1965). The duty is only triggered when a defendant has notice of the invitee’s medical peril. Comment f to this section provides:

The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained. He is not required to give any aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance.

No Washington case law extends a landowner's duty to render aid so far as to impose a duty to actively inspect the premises to identify invitees with medical emergencies. Plaintiff contends defendant should have inspected the restroom to rescue Ms. Tikhomirova from her medical emergency; but that contention misunderstands the thrust of RESTATEMENT (SECOND) OF TORTS § 314A. It inherently distorts the legal framework. Instead, the issue is whether Macy's had reasonable cause to be aware of Ms. Tikhomirova's medical emergency in the first place so that it could render aid. The undisputed facts are that it did not.

The Court should not expand the duty of a premises owner to require it to actively inspect its premises for potential or actual medical emergencies. There is no evidence that Macy's had any notice by which it could reasonably know of or anticipate Ms. Tikhomirova's medical emergency. Summary judgment was appropriate.

**C. PROXIMATE CAUSATION CANNOT BE PROVEN BY SPECULATION.**

Even if plaintiffs could establish a duty owed, and a breach of that duty, there is no evidence to support the requisite element of proximate causation. Plaintiffs must submit evidence allowing a reasonable person to conclude, without resorting to speculation, that Ms. Tikhomirova's death, more probably than not, would not have occurred but for a breach of a legal duty owed by Macy's. *Gardner v. Seymour*, 27 Wn.2d 802, 808-09, 180 P.2d 564 (1947); *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944, *rev. denied*, 158 Wn.2d 1017 (2006).

The law demands verdicts rest upon testimony and not upon conjecture and speculation. *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940); *Sortland v. Sandwick*, 63 Wn.2d 207, 211, 386 P.2d 130 (1963). “[I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.” *Gardner*, 27 Wn.2d at 809. Stated differently: proof which does nothing but show an injury could have occurred in an alleged way does not warrant the conclusion that it did so occur, where from the same proof, the injury can be equally attributed to some other cause. *Prentice*, 5 Wn.2d at 163.

Plaintiffs contend that if Macy's had checked the bathroom before closing, Ms. Tikhomirova would not have died. (CP 5) There is no evidence to support this conclusory assertion. There is no evidence that Ms. Tikhomirova was in a condition that her life would have been saved had Macy's found her at some time after closing. Similarly, there is no evidence that administration of first aid at a specific time, or at any time, would, in fact, have saved Ms. Tikhomirova's life. The jury would have to guess on the element of causation, and that will not support a verdict.

Even assuming a breach of duty, no one will ever know the time of Ms. Tikhomirova's passing. Plaintiff argues that if Macy's had checked the bathroom door, Ms. Tikhomirova would be alive. There is no admissible evidence to establish the time of Ms. Tikhomirova's death; no evidence as to when effective (i.e., life-saving) medical care could have been rendered; no admissible evidence to support the contention that Ms. Tikhomirova did not die prior to the store's close; and no evidence that the administration of medical care at a specific time, or at any time, would, in fact, have saved Ms. Tikhomirova's life.

If this case went to trial, a jury would have to assume that Ms. Tikhomirova (a) did not have a heart attack leading to immediate death prior to the store's close; (b) would have been alive had the bathroom door been opened sometime after 7:00 p.m.; (c) that she would have been discovered

in a medical state such that the reversal of a life-threatening condition could be administered by first responders; and (d) that first responders would successfully administer life-saving care.

The Washington State Certificate of Death, by Dr. Patricia Wooden, certifies that Ms. Tikhomirova died immediately from a myocardial infarction (i.e. heart attack). (CP 49)

The declaration of plaintiff's expert, Dr. Strote, fails to establish the element of proximate cause because correlation is not causation. Dr. Strote declares: "Collapse leading to death immediately or within an hour can occur and is most commonly associated with acute myocardial infarction. Much more commonly, however, collapse is caused by a transient decrease in blood flow to the brain and/or global weakness." (CP 63, ll 20-24). And, that "prompt medical attention, when it occurs usually facilitates a reversal of the life-threatening condition." (CP 63, ll 25-26) These opinions are not supported by any factual evidence in this case.

Here the evidence does nothing more than show the injury could have occurred as plaintiffs contend. Based on all admissible evidence, it is just as likely Ms. Tikhomirova passed immediately from a heart attack prior to the store's close; or, even if she had been discovered after the store's close, that she would have been in a state that no medical care could have prevented her death (i.e., that immediate and life-saving medical attention

could not have been administered).

Plaintiffs failed to satisfy their burden of proof on the element of proximate causation. Summary judgment was appropriate.

**D. THE REPORT OF STEVEN MELIA OPINING ON MACY'S LEGAL DUTY IS NOT ADMISSIBLE EVIDENCE, AND WAS PROPERLY EXCLUDED BY THE TRIAL COURT.**

“[A] court may not consider inadmissible evidence when ruling on a motion for summary judgment.” *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 570, 157 P.3d 406 (2007), *rev. denied*, 162 Wn.2d 1022 (2008) (quoting *Int'l Ultimate Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774, *rev. denied*, 153 Wn.2d 1016 (2004)). Conclusory or speculative expert opinions lacking an adequate foundation will not be admitted. *Safeco Ins. Co. of Am. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991), *rev. denied*, 118 Wn.2d 1010 (1992).

Qualifications of expert witnesses are to be determined by the trial court within its sound discretion and rulings on such matters will not be disturbed except for a manifest abuse of discretion. *Orion Corp. v. State*, 103 Wn.2d 441, 462, 693 P.2d 1369 (1985). Evidence offered in an attempt to prove the law is improper, since the determination of the applicable law is within the province of the trial judge and not that of an expert witness. *State v. O'Connell*, 83 Wn.2d 797, 816, 523 P.2d 872, *opinion supplemented*, 84 Wash.2d 602, 528 P.2d 988 (1974).



GR 13(a).

An unsworn declaration must meet the explicit requirements of RCW 9A.72.085. *Davis v. West One Automotive Group*, 140 Wn. App. 449, 455 n1, 166 P.3d 807 (2007), *rev. denied*, 163 Wn.2d 1040 (2008). RCW 9A.72.085 requires (a) recitation that the statement is certified or declared by the person to be true under penalty of perjury; (b) be signed by the person; (c) to state the date and place of execution; and (d) to state that it is so certified or declared under the laws of the state of Washington.

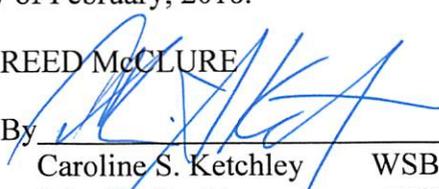
The report of Mr. Melia does not meet these requirements. The unsigned report of Texas-based Stephen Melia is hearsay, does not satisfy CR 56(e) or GR 13, and is not admissible. The report was properly stricken by the trial court.

#### V. CONCLUSION

As a matter of law, summary judgment was appropriate. The trial court's order should be affirmed.

DATED this 22<sup>nd</sup> day of February, 2018.

REED McCLURE

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**REED MCCLURE**

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