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

Michelle Dalen,

Appellant,

v.

St. Johns Medical Center, et al,

Respondents.

Reply Brief of Appellant

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1. Introduction

Michelle Dalen went to the emergency room for treatment of a head injury. Despite being told multiple times that Dalen had fallen and hit her head, Defendants forcibly carried Dalen into a treatment room against her will, where they restrained her and subjected her to numerous indignities and unconsented treatments, without any legal justification.

There is no excuse for Defendants' violation of Dalen's constitutional rights. Defendants cannot legally detain a person for mental illness treatment without first finding that the person poses a serious risk of imminent harm to self or others. There is no factual basis for a finding that Dalen posed any danger to anyone.

The trial court erred in dismissing Dalen's claims. Defendants failed to prove their defense of immunity, and Dalen presented genuine issues of material fact, which should have precluded summary judgment. This Court should reverse.

2. Reply Argument

Dalen's opening brief argued that the trial court erred on summary judgment because there were genuine issues of material fact on her claims and on the immunity defenses or, alternatively, because the Defendants failed to demonstrate that they were entitled to judgment in their favor as a matter of law.

First, Dalen argued that there were material issues of fact or that Defendants had failed to prove their affirmative defense of immunity arising from implied consent in a medical emergency. Br. of App. at 14-19. Second, Dalen argued that there were material issues of fact or that Defendants had failed to prove their affirmative defense of immunity under the involuntary commitment statute. Br. of App. at 19-25. Third, Dalen argued that her expert witness declarations presented admissible evidence of the standard of care, breach, and proximate cause, creating material issues of fact for trial. Br. of App. at 25-27. Fourth, Dalen argued that there were material issues of fact on service of process on Defendants Marc Kranz and Cascade Emergency Associates. Br. of App. at 27-28. Fifth, Dalen argued that the trial court erred in dismissing her emotional distress claims under RCW 7.70.030 when those claims did not arise from health care. Br. of App. at 28-29.

This Reply Brief will address each of those issues in turn, addressing the arguments made in the Brief of Respondents.

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

Dalen’s opening brief argued that under her lack of consent claim, Defendants had an obligation not to violate her

right to control her own medical care. Br. of App. at 14 (citing Washington State Hospital Association, *Washington Health Law Manual*, ch. 2A.2 (4th ed. 2016)¹). Defendants were not entitled to immunity arising from emergency health care because they failed to demonstrate 1) that Dalen was incapable of consent; 2) that Defendants obtained consent from an authorized surrogate; and 3) that Dalen did not refuse consent. Br. of App. at 15-16 (citing RCW 18.71.220; *Grannum v. Berard*, 70 Wn.2d 304, 306, 422 P.2d 812 (1967)).

Dalen refused her consent to any mental health treatment. Br. of App. at 17; RP, Dec. 14, 2016, at 31-32; *see* CP 46, 65, 114 (Dalen forcibly carried by guards to treatment room, screaming the whole way). Her family members were never asked to provide surrogate consent. Br. of App. at 18; CP 114-20. Because the Defendants failed to meet their burden of proof on this affirmative defense and Dalen presented evidence negating the defense, the trial court erred in dismissing Dalen's lack of consent claim.

¹ Defendants take issue with Dalen's citations to the *Health Law Manual*, arguing incorrectly that it is not authority on any issue. Br. of Resp. at 2. Like any other legal treatise, the *Health Law Manual* is persuasive authority. Its text is backed by citations to primary legal authorities that are binding in Washington. The *Health Law Manual* is available online at <http://www.wsha.org/our-members/resources-for-hospitals/washington-health-law-manual-third-edition/> (last visited Sept. 3, 2018).

Defendants' response brief concedes this issue by not responding to it. *See, generally*, Br. of Resp. (particularly at 8, where such a responsive argument would be expected to be found). The trial court erred in dismissing Dalen's lack of consent claim on summary judgment. This Court should reverse and remand for trial.

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

Dalen argued that the Defendants failed to prove any entitlement to immunity under Chapter 71.05 RCW or that there were genuine issues of material fact. Br. of App. at 19-25. Defendants utterly disregarded the statutory standards for involuntary commitment and unconstitutionally confined her even though she was "capable of surviving safely in freedom by [her]self or with the help of willing and responsible family members or friends." Br. of App. at 20 (quoting *In re LaBelle*, 107 Wn.2d 196, 201, 728 P.2d 138 (1986)).

Defendants failed to demonstrate any entitlement to immunity, and Dalen presented evidence negating immunity. Br. of App. at 23-24. The trial court erred in dismissing Dalen's claims on the basis of immunity.

2.2.1 Defendants' actions were bad faith and grossly negligent because they involuntarily detained Dalen without any evidence that she met the standards for involuntary commitment.

Dalen argued that Defendants' actions were bad faith and grossly negligent—and therefore not entitled to immunity—because Defendants ignored the statutory requirements by detaining her without any evidence that rose to the level of imminent danger required by the statute. Br. of App. at 21-23. Defendants appear to agree with the premise that disregarding the statutory requirements would be bad faith or grossly negligent, but they argue that they fully complied with the statute. However, defendants fail to demonstrate compliance.

Detention under the involuntary commitment statute is only justified when professional staff and the Designated Mental Health Professional determine that the detainee presents, “as a result of a mental disorder an imminent likelihood of serious harm, or ... an imminent danger because of grave disability.” RCW 71.05.050. These terms are defined in terms of the evidence required to reach a finding. Br. of App. at 21-23.

Defendants point to the DMHP's finding that Dalen was gravely disabled, as manifested by severe deterioration in routine functioning. The statutory definition of this alternative requires evidence of “severe deterioration in routine functioning”

evidenced by “repeated and escalating” loss of control **and** evidence that the person is not receiving care to provide for essential human needs of health or safety. RCW 71.05.020(17) (2011).

This finding is a passive condition, whereby the person is so unable to function that they cannot exist safely outside an institutional framework due to an inability to respond to the essential demands of daily life. *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 376 (Alaska 2007) (citing *In re LaBelle*, 107 Wn.2d 196, 728 P.2d 138 (1986)). The Washington Supreme Court has held,

It is particularly important that the evidence provide a factual basis for concluding that an individual “manifests severe [mental] deterioration in routine functioning”. Such evidence must include recent proof of significant loss of cognitive or volitional control. In addition, the evidence must reveal a factual basis for concluding that the individual is not receiving or would not receive, if released, such care as is essential for his or her health or safety. **It is not enough to show that care and treatment of an individual’s mental illness would be preferred or beneficial or even in his best interests.** To justify commitment, such care must be shown to be essential to an individual’s health or safety and the evidence should indicate the harmful consequences likely to follow if involuntary treatment is not ordered.

LaBelle, 107 Wn.2d at 208 (emphasis added).

Defendants point to Dalen’s “very odd behavior” in the emergency room in an attempt to satisfy the statutory standard, but the attempt falls far short. Dalen’s abnormal behavior may show that treatment was desirable or even in her best interests, but that is not enough to meet the statutory requirements for commitment. Defendants have not shown that they had any factual basis for a determination that Dalen would have been unable to provide for her own health and safety with the help of her family.

The statute requires that the person’s grave disability must be “a result of a mental disorder.” RCW 71.05.050. Dalen went to the hospital for treatment of head trauma, not mental illness. Dalen and her sister told multiple staff members that they were there for a head injury. CP 46, 120. The fact that Defendants ignored Dalen’s complaint of head trauma, to the point of not even including it in their notes and likely not telling the DMHP about it,² is evidence of bad faith or gross negligence

² In determining whether there are genuine issues of material fact, the court must draw all reasonable inferences in favor of the nonmoving party—in this case, Dalen. Based on the fact that the medical records do not mention any complaint of head trauma, *see* CP 64-67, it can be reasonably inferred that neither Lisa Lovingfoss, the social worker who requested evaluation by the DMHP, nor Bobbi Woodford, the DMHP who evaluated Dalen, were informed that Dalen had come with complaints of head trauma.

in the involuntary commitment process. This creates a genuine issue of material fact on Defendants' claim of immunity.

Summary judgment was improper. This Court should reverse.

Defendants' argument that the DMHP made a proper determination misses the point. Even assuming for the sake of argument that the DMHP's determination was proper,³ it would not excuse the remaining Defendants from their own disregard of the statutory requirements. Defendants were required to make a threshold determination prior to detention for evaluation by the DMHP. Defendants have failed to show that they had any factual basis for their threshold determination.

In order to meet their burden of proof on immunity, Defendants had to show that they had a good faith, factual basis for their determination that Dalen was gravely disabled by reason of mental illness. They have failed to do so. Dalen has presented evidence of bad faith and gross negligence. Summary judgment on the immunity issue was improper. This Court should reverse dismissal of Dalen's claims.

³ Dalen contends that it was not. Contrary to Defendants' arguments, the propriety of the DMHP's determination is still open to challenge because the DMHP eventually released Dalen prior to any court hearing on the matter. *See* Br. of Resp. at 6 (Dalen was discharged less than 72 hours later, on March 2, 2011); CP 50 (involuntarily committed for 72 hours); CP 67 (discharge date March 2, 2011). Dalen did not have an opportunity to challenge the DMHP's determination because the DMHP cancelled the hearing.

2.2.2 Defendants' actions were bad faith and grossly negligent because they forcibly admitted and restrained Dalen against her will when she posed no danger to herself or others.

Under the mental health statute, a hospital may detain a person for evaluation by the DMHP **only after** “the professional staff of the ... hospital” make a threshold determination that the person presents, “as a result of a mental disorder an imminent likelihood of serious harm, or ... an imminent danger because of grave disability.” RCW 71.05.050. Under the plain language of the statute, the ability to detain a person does not arise until this threshold determination is made. Once the threshold determination is made, the hospital may detain the person, notify the DMHP, and arrange for an evaluation by the DMHP within six hours.

Dalen’s opening brief cited to *In re C. W.*, 147 Wn.2d 259, 272-73, 53 P.3d 979 (2002). In that part of the opinion, the court described the statutory procedure:

We agree with the State that by its terms RCW 71.05.050 requires several events to occur Before the hospital staff may refer a person to the CDMHP. First, a person must be brought to the hospital or agency for “observation or treatment.” Second, the person must refuse voluntary admission. Third, the professional staff must “regard” the 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.” RCW 71.05.050.

Under the plain language of the statute, once these conditions are met, the professional staff “may detain such person.”

In re C.W., 147 Wn.2d at 272. This is consistent with Dalen’s interpretation.

The *C.W.* court also approved of “predetention restraint” of a patient, “because 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.” *C.W.*, 147 Wn.2d at 273-74. But the court’s constitutional analysis, *Id.* at 276-79, failed to address the most pressing issue: what was the legal justification for any “predetention restraint?”

As the dissent in *C.W.* articulated, “The issue here is under what circumstances, and for what length of time, an individual may be lawfully imprisoned, albeit shackled, in a hospital emergency room under color of law.” *C.W.*, 147 Wn.2d at 285 (Sanders, J., dissenting).⁴ “A State [or a hospital acting under color of law] cannot constitutionally confine, without more, a nondangerous individual who is capable of surviving safely in freedom by [her]self or with the help of willing and

⁴ Justice Chambers joined in dissent.

responsible family members or friends.” *O’Connor v. Donaldson*, 422 U.S. 563, 576, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).

The *C.W.* dissent continued, “The statute at issue in this case affirmatively furnishes the necessary lawful authority to hold, detain, restrain, or imprison one in a hospital emergency room under the statutory criteria.” *Id.* at 286 (Sanders, J., dissenting). “If someone is imprisoned upon his arrival at the emergency room for some hours before the staff regards him as potentially committable, what is the lawful authority for that initial period of predetention restraint? The majority doesn’t tell us and I am aware of none.” *Id.* at 287 (Sanders, J., dissenting).

“Rather, it would appear that this unspecified period of time when the person is neither detained nor free to leave is imprisonment without lawful authority and—therefore—unlawful imprisonment. Certainly this initial period is no less a massive curtailment of liberty than any subsequent period and is thus subject to the same constitutional concerns and safeguards. Without benefit of statute it is accomplished by brute force alone, affording the victim neither prior judicial hearing, counsel, nor the rudiments of humane respect and decency.” *C.W.*, 147 Wn.2d at 287 (Sanders, J., dissenting).

Even if there was some lawful justification for the “predetention restraint” in the *C.W.* cases, it did not come from the involuntary commitment statute. The statute only

authorizes detention or restraint *after* professional staff make a threshold determination of imminent harm. Without such a determination, restraint due to mental illness is constitutionally impermissible. *O'Connor*, 422 U.S. at 576. In the *C.W.* cases, the real justification appears to have been related to concern for the safety of the professional staff while making the threshold determination.

The patients in *C.W.* exhibited violent or suicidal behaviors prior to being restrained. C.W. was “flailing and thrashing his arms around and yelling” at police officers. *C.W.*, 147 Wn.2d at 263. B.B. punched and threatened to kill a nurse. *Id.* at 264. T.B. was physically abusing her daughter. *Id.* at 265. D.M. attempted to kill himself. *Id.* at 266. E.S. threatened his sister, assaulted a housekeeper, and placed a burning cigarette completely in his own mouth. *Id.* at 268. All of them were put in “predetention restraint” only after professional staff were aware of the threat of violence and imminent danger to patient or staff. Tellingly, R.F. was not violent and was not involuntarily restrained prior to referral to the DMHP. *Id.* at 268-69.

Dalen, like R.F., was not violent. Defendants restrained Dalen without cause. Prior to being forcefully seized and carried against her will from triage to the treatment room, Dalen had shown no signs or threats of violence toward anyone. There was

no factual basis for any safety concern that might justify “predetention restraint.”

Dalen peacefully refused her consent to mental health treatment. A patient who refuses treatment “shall be released immediately upon his or her request.” RCW 71.05.050. Instead, Defendants decided in bad faith that treatment was for Dalen’s own good. This is constitutionally insufficient. *LaBelle*, 107 Wn.2d at 208. Defendants utterly disregarded the statutory requirement of a threshold determination of imminent danger, forcibly seized, admitted, and restrained Dalen against her will and without justification, and subjected her to treatment without consent or statutory authority. This was bad faith and gross negligence.

Defendants were not entitled to immunity. At the very least, there are genuine issues of material fact on this issue. Summary judgment dismissal of Dalen’s claims was improper. This Court should reverse.

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

Dalen argued that the trial court erred in dismissing her medical malpractice claims on the basis of lack of expert testimony. Br. of App. at 25-27. Dalen argued that her experts were sufficiently qualified under ER 702 to provide admissible

expert testimony on the standard of care of nurses and other hospital staff involved in the unconsented mental health care and involuntary detention. Br. of App. at 25-26 (citing *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 234, 393 P.3d 776 (2017)).

Dalen also argued that the substance of her experts' testimony, although not using the "magic words" that courts and attorneys are accustomed to, sufficiently addressed standard of care, breach, and causation. Br. of App. at 26-27 (citing *Leaverton v. Cascade Surgical Partners, P.L.L.C.*, 160 Wn. App. 512, 520, 248 P.3d 136 (2011)). The trial court erred in concluding that Dalen's experts did not raise genuine issues of material fact on the elements of Dalen's claims.

Most of Defendants' arguments against Dalen's experts go to the form of their declarations, not the substance. As Dalen has argued, "To require experts to testify in a particular format would elevate form over substance." *White v. Kent Medical Center, Inc.*, P.S., 61 Wn. App. 163, 172, 810 P.2d 4 (1991). Courts do not require expert witnesses to utter any particular, talismanic words, such as "more likely than not" or "to a reasonable medical certainty." Rather, the court must examine the substance of what the expert brings to the discussion.

Dalen's experts testified to the standard of care. Ms. Taylor testified, "In my experience, the physicians would never forcibly hold down a mental health patient to catheterize to

obtain a urine sample.”⁵ CP 57. “Other causes such as head trauma would and should be ruled out first.” CP 58. “Because the medical staff was aware that Ms. Dalen had sustain[ed] head trauma within the past 48 hours, it should have focused on organic causes of the confusion, such as brain swelling, a hematoma or a concussion. There is no need for a urine sample to treat a head trauma patient, at least not during the emergency room treatment.” CP 58.

Dr. Mott testified, “Frequently the signs and symptoms of brain injury are overlooked in many healthcare settings. Not only are they overlooked, they frequently result in misdiagnosis and incorrect treatment. These signs and symptoms are many times confused with mental health diagnoses.” CP 122. These statements relate to the subject matter of the learned treatises attached to Dr. Mott’s declaration—proper handling of mild traumatic brain injuries in the emergency room. *See* CP 124-53.⁶

⁵ Defendants find fault in Ms. Taylor’s use of the word “physicians,” complaining that a nurse cannot testify to the standard of care of a physician. However, it was other professional and non-professional staff—not physicians—who forcibly restrained Dalen and catheterized her against her will. So, in reality, Ms. Taylor is testifying to the standard of care of the nurses and other staff.

⁶ Defendants’ objection to the articles attached to the Amended Declaration of Janet Hart Mott, Ph.D., is not well taken. *See* Br. of Resp. at 2-3 (citing ER 803(a)(18); ER 702), 23-24. The articles qualify as “learned treatises” relied upon by the expert in forming her opinion and therefore qualify for the hearsay exception under ER 803(a)(18).

She further testified, “The standard of care for diagnosis and treatment of traumatic brain injury was absent during Ms. Dalen’s initial admission to the hospital. Rather than treat and examine for a traumatic brain injury, the hospital physicians and staff assumed that she was suffering from a mental illness.” CP 123.

“In order to be admissible, it is only necessary that the expert’s standard of care testimony be more than a personal opinion. This requirement is met so long as it can be concluded from the testimony that the expert was discussing general, rather than personal, professional standards and expectations.” *White*, 61 Wn. App. at 172. This standard is met by the expert testimony here.

Dalen’s experts testified to breach and causation. Ms. Taylor testified, in addition to her comments above, “The forced urinary catheterization of Ms. Dalen was not necessary and likely further traumatized a patient that was already fragile when she presented with confusion due to head trauma.” CP 58.

Dr. Mott testified, “Michelle Dalen experienced a traumatic brain injury due to a fall prior to admission to the hospital in 2011. Prior to her admission to the hospital she sought care in the emergency department. In that setting she presented with the signs and symptoms of brain injury. Efforts to accurately diagnose these signs and symptoms of brain injury

were lacking. This resulted in misdiagnosis and inappropriate treatment. ... She continues to experience the signs and symptoms of traumatic brain injury which has been further compounded by the absence of timely diagnosis and treatment.” CP 122-23. Additionally, “Rather than treat and examine for a traumatic brain injury, the hospital physicians and staff assumed that she was suffering from a mental illness. This led to the wrong treatment regimen, including an unnecessary and humiliating forced catheterization.” CP 123. As already noted, Ms. Taylor testified that the catheterization caused additional trauma to Dalen. CP 58.

The experts testified to their qualifications. Ms. Taylor testified, “I am a registered nurse, receiving a BSN in 1992. From 1993 to 2005 I worked with in-patient mental health care at the Portland Veterans Administration Hospital.” CP 57. Dr. Mott testified, “I am the Clinical Case Manager for the Brain Injury Alliance of Washington. I have a Ph.D. in Rehabilitation. ... My professional experience and education have provided me with the opportunity to work with many individuals who sustained brain injuries during my 52 year career as a rehabilitation counselor and case manager. During that time it has come to my attention that frequently the signs and symptoms of brain injury are overlooked in many healthcare settings.” CP 122-23.

Defendants complain that Dr. Mott is not a physician. They argue that there is no rule that allows a non-physician to testify regarding standard of care for a physician. However, there is also no rule that prohibits it. Rather, the applicable rule, as declared recently by the Washington Supreme Court, is ER 702, which allows a witness to testify as an expert if they possess knowledge, skill, experience, training, or education that will assist the trier of fact. The scope of the expert's knowledge, not their professional title, governs the threshold question of admissibility of expert medical testimony. *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 234, 393 P.3d 776 (2017). Dr. Mott has studied traumatic brain injury for decades, including the signs and symptoms and how those should be evaluated and diagnosed in the emergency room setting. She is qualified to offer expert testimony on the standard of care.

Considering the substance of the declarations, both experts demonstrate that they were testifying to general professional standards, not personal opinions; that they have a factual basis for their opinions grounded in the facts of the case; that they are based on a reasonable degree of medical certainty; and that the experts were qualified to offer expert testimony. Although they do not use the magic words to which courts and lawyers are accustomed, from the words they did use there is no reason to suspect that their testimony is speculative or

otherwise improper. Both offered relevant and admissible opinions on the standard of care, breach, and causation.

This Court should consider the substance of the testimony and find that it presented genuine issues of material fact on the issues of standard of care, breach, and causation. As such, summary judgment dismissal of Dalen's claims was improper. This Court should reverse and remand for trial.

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

Dalen argued that there was a material issue of fact as to whether Dr. Kranz and Cascade Emergency Associates had been properly served with the summons and complaint. Br. of App. at 27-28. Dalen had explained to the trial court that PeaceHealth's risk management department had accepted service on behalf of all defendants. Br. of App. at 27; CP 52 (Dalen served all Defendants by way of PeaceHealth); RP, Dec. 14, 2016, at 25-26 (PeaceHealth's Kelly Dombroski accepted service on behalf of Defendants). In refusing to order Dalen's requested depositions of PeaceHealth employees, the trial court unreasonably permitted Defendants to benefit from their own refusal to allow legitimate discovery related to their affirmative defense. Br. of App. at 27-28.

Dalen's argument is two-fold. First, the trial court was aware of a genuine issue of material fact because Dalen informed the court that PeaceHealth had accepted service. The trial court should not have granted summary judgment. Second, the only reasonable response for the trial court was to allow Dalen's proposed depositions to take place.

Dalen does not concede deficiency of original service on Defendants. As Dalen explained to the trial court, Kelly Dombroski at PeaceHealth's risk management department accepted service on behalf of all Defendants. Dalen had no reason to doubt that Dombroski was authorized to do so. If Dombroski was authorized to accept service on behalf of Defendants, that service was proper.

This is where the disputed fact becomes material: Whether service was proper depends entirely on whether Dombroski was authorized to accept service. On one hand, Defendants have presented declarations stating PeaceHealth was not authorized to accept on behalf of Marc Kranz or Cascade Emergency Associates. On the other hand, Dalen referred the trial court to an earlier filed Affidavit of Service by her process server, stating that Dombroski affirmed that she was authorized to accept service for all defendants. Dalen told the trial court, "I have that in the form of an affidavit by a process server," RP,

Dec. 14, 2016, at 26, thereby calling the court's attention to the earlier filed document.

Dalen also called the trial court's attention to the return of service from the sheriff, which was part of Dalen's Amended Response, Part 1, at CP 98-103. It can reasonably be inferred from these documents that when the sheriff attempted to serve Defendants with Dalen's motion for default in January 2016, Sheldon Conrad at PeaceHealth accepted service for all Defendants, including Marc Kranz (CP 102) and Cascade Emergency Associates (CP 101), in direct contradiction to Defendants' assertion that PeaceHealth was not authorized.

By referring to these documents in the trial court record, Dalen made the trial court aware of a material dispute of fact on the issue of service. Due to this genuine issue of material fact, Marc Kranz and Cascade Emergency Associates could not be dismissed as parties at summary judgment.

Given the possibility that Dalen's side of this story was true, it was unreasonable for the trial court to dismiss without allowing Dalen to shore up her evidence with the deposition of Kelly Dombroski—a deposition that Dalen had requested but Defendants utterly refused to allow. It was unreasonable for the trial court to allow Defendants to benefit from their refusal to engage in proper discovery on their affirmative defense.

This Court should reverse dismissal of Marc Kranz and Cascade Emergency Associates as parties.⁷

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

Dalen argued that the trial court erred in dismissing her emotional distress claims under the health care claims statute, RCW 7.70.030. Br. of App. at 28-29. She argued that she had valid emotional distress claims arising from the Defendants’ conduct after the incident, including Dr. Kranz posting hateful comments in an online forum. Br. of App. at 28-29.

Defendants are incorrect when they argue that the complaint did not include any conduct after Dalen’s release from the hospital. In addition to Defendants’ conduct at the hospital on the days of the incident itself, the Complaint described a newspaper article about Dalen published in the Longview Daily News. CP 10. “Following the publication of the article, several private facts about the Plaintiff and Plaintiff’s condition were disclosed in the public forum attached to the on-line publication of the article. ... The disclosure of the private information without the Plaintiff’s authorization constitutes a violation of

⁷ It should be noted that even if this Court affirms dismissal of these two parties, that does not dispose of the case. Dalen would continue to have claims against the hospital and staff for their own conduct.

the HIPAA Laws, all to Plaintiff's damage, as herein alleged."
CP 10.

Dalen's damages, "as herein alleged," included her emotional distress claims, in which Dalen alleged, "Defendants' conduct, described herein, was contrary to all forms of human decency, and constitutes outrage, resulting in damages to the Plaintiff as set forth herein." CP 8 (quoting the outrage claim as an example; the other claims track with similar language). Defendants' conduct "described herein" includes Marc Kranz's response to the online newspaper article.

Dalen supported her emotional distress claims in her response to the summary judgment motion. Her initial responsive declaration recounted this conduct. CP 52. She again recounted the conduct and provided supporting documents as part of her supplemental response. CP 89-90 (Dalen's declaration), 91 (evidence that Marc Kranz is "darwinfighter"), 92 (the online comment by "darwinfighter"), 95-96 (the newspaper article).

Defendants are incorrect when they argue that Dalen did not raise these non-health-care-related claims in her complaint or in response to the summary judgment motion. Dalen raised the claims, defended them, and presented genuine issues of material fact. Kranz's response to the online article was itself admissible evidence of infliction of emotional distress. As a

statement of a party-opponent, it was not hearsay. ER 801(d)(2). The newspaper article also was not hearsay, because it was not offered to prove the truth of the matter asserted. ER 801(c). The article was offered merely to show what Kranz was responding to. Dalen's evidence was admissible and should not have been stricken. The trial court erred in dismissing Dalen's emotional distress claims under RCW 7.70.010, to the extent that those claims did not arise from health care. This Court should reverse and remand for trial.

3. Conclusion

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

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

dismissal of Dr. Kranz and Cascade Emergency Associates as parties.

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

Respectfully submitted this 5th day of September, 2018.

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4. Appendix

Wetherhorn v. Alaska Psychiatric Inst., 156 P.3d 371
(Alaska 2007)..... 1

Certificate of Service

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

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