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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

LESA SAMUELS,

Plaintiff/Appellant,

v.

MULTICARE HEALTH SYSTEM, GLORIA LEM, CITY OF TACOMA

Respondents.

APPELLANT'S REPLY BRIEF

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ARGUMENT

A. Introduction

Throughout this reply brief Appellant Lesa Samuels shall refer to the five member team from the Tacoma Fire Department as the "responders" and to Defendant City of Tacoma as the "Tacoma Fire Department" or "TFD." It is agreed by all parties that the responders visited Ms. Samuels' home on December 24, 2015 after Ms. Samuels reported that she believed she was having a stroke.

B. The City of Tacoma Fire Department's ("TFD's") response is rife with uncited allegations or intentionally false citations to the record which need to be reviewed by the Court for proper consideration of the issues.

The TFD's response brief misleadingly alleges, at page 9, that CP 58 states that "on January 5, 2016, nearly two weeks after her encounter with the first responders, Ms. Samuels went to Tacoma General Hospital where an emergency department physician found, for the first time, that she exhibited symptoms consistent with a positive F.A.S.T. exam." This is a blatant lie. CPs 58 and 59 do not state this anywhere. See CP 58-59.

Instead, the record, at CP 143-45 and 167, states that, on January 5, 2016, Tacoma General Hospital confirmed, via an MRI, that Samuels had previously suffered a stroke in the left medulla region. CP 143:6-8, CP

144:18 - 145:2 and CP 167:4-6. Elsewhere, the record also states that Samuels had "clear symptoms of a stroke on December, 24, 2015, CP 141:11 - 144:3, esp. 143:21-22, and, if a proper history had been taken then, it "would have implicated the factors in the FAST exam," CP 144:7-13.

Finally, the TFD's Response Brief, at page 8, implies that only now, in Samuels' appeal briefing, is she alleging the responders told her she was not having a stroke. This is incorrect. Samuels testified to that fact in her March 10, 2017 deposition. CP 732-34. Also, without any support in the record, the TFD's response brief states that the ten-minute visit of the responders, (actually less than ten minutes as explained, via proper citation, in Ms. Samuels' opening brief), is "a typical amount of time for a call of this nature." TFD Response Brief, page 8. This is an improper allegation because it does not cite any portion of the record.

C. It is simply illogical for the Tacoma Fire Department, ("TFD"), to argue that Samuels' appeal ignores RCW 18.71.210 because RCW 18.71.210's enabling statutes and code provisions require responders to follow county Protocols and the WACs before qualified immunity is bestowed.

Any argument that Samuels' appeal ignores RCW 18.71.210 is illogical because, while RCW 18.71.210 provides qualified immunity to emergency responders for certain acts "done or omitted in good faith … under the responsible supervision and control of a licensed physician or an

approved medical program director …,"[1] it removes that immunity for "an act which is not within the field of medical expertise of the … responder."[2]

It is also incorrect, and absurd, for the City of Tacoma (hereinafter referred to as the "Tacoma Fire Department" or "TFD") to assert that it is always entitled to immunity so long as its acts or omissions simply do not constitute willful and wanton misconduct or gross negligence. In so arguing, the TFD would somehow need to convince the Court of Appeals that the parts of the statute stating that qualified immunity only extends to acts or omissions done "… under the responsible supervision and control of a licensed physician or an approved medical program director …"[3] and "within the field of medical expertise of the … responder"[4] are surplus.

Thc Court cannot do this, however, because the Legislature is presumed to have intended that words within a statute mean what they say. Therefore, notwithstanding *Marthaller* at 94 Wn.App 916, (which does not list the full text of the current version of RCW 18.71.210), the Court is compelled to presume that the words in RCW 18.71.210 concerning supervision, control, and expertise have meaning.

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[1] RCW 18.71.210(1).
[2] RCW 18.71.210(2). It also removes that immunity for "any act[s] or omission[s] which constitute either gross negligence or willful or wanton misconduct."RCW 18.71.210(5).
[3] RCW 18.71.210(1).
[4] RCW 18.71.210(2).

Likewise, a plain reading of RCW 18.71.210 shows that the misconduct and gross negligence fault standards simply present another chance for a plaintiff to recover if the defendant has already passed the RCW 18.71.210(1) and (2) tests for qualified immunity because no part of RCW 18.71.310 says that willful and wanton misconduct and gross negligence fault standards also apply when the responder does not otherwise fulfill the prerequisites of RCW 18.71.210(1) and (2).

RCW 18.71.210(5) steepens the grade of fault which a plaintiff must prove if the prerequisites of RCW18.71.210(1) and (2) have already been met, but it does not speak to the level of fault required when they have not. As a result, the statute's silence on this issue means that the Legislature did not seek to impose a liability standard different from the generally applied negligence standard if RCW 18.71.210(1) and (2)'s prerequisites are unfulfilled.

In addition, the TFD has already conceded that ordinary negligence applies if RCW 18.71.210(1) and (2) have not been met. At the summary judgment hearing, the TFD's counsel stated that: "[Samuels'] motion [for declaratory judgment] basically [says Samuels] want[s] the court to declare [that] if there is no qualified immunity found by the trier of fact, that the ordinary care standard applies … and we agree with that. If there were no

qualified immunity, then the ordinary care standard applies." (VRP, p 12, lines 9-25).

As to the additional requirement that a responder be operating within his / her field of expertise, the TFD seems to have forgotten that the fields of expertise of the responders are narrowly legally defined. The responders' "field of expertise" is defined by the Secretary of the Department of Health directly through the administrative code, see RCW 18.73.081(1), and through approved guidelines and curricula that the county Medical Program Director, ("MPD"), establishes, i.e., the county protocols, so long as such county protocols do not exceed the scope of responder authority provided elsewhere in the WACs. See WAC 246-976-182(1)(C) and WAC 246-976-920(3)(a)(b)[5] and WAC 246-976-182(3).[6] In addition, the responders' violations of regulations, described in more detail below, constitute

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[5] The Secretary of the Department of Health has the power to certify persons who can render emergency medical care, RCW 18.73.030(12) and (15), and to certify county medical program directors, RCW 18.73.081(5). The Secretary also has the power to prescribe minimum requirements for ambulance and aid services, RCW 18.73.081(1), and responder training. RCW 18.73.081(3). The county MPD, on the other hand, is responsible for developing and adopting written prehospital patient care protocols for EMS personnel so long as the scope of care in the protocols does not exceed the scope of an EMS responder's certification under WAC 246-976-182. WAC 246-976-920(3)(b).

[6] Responders must "follow state-approved triage procedures, regional patient care procedures, and county MPD patient care protocols." WAC 246-976-182(3)

evidence of a duty and a breach in a medical setting. *Morinaga v Vue*, 85 WnApp 822, 832-33, 935 P2d 637 (Div. 3 1997). Therefore, this case should have been allowed to proceed to trial because there is no dispute as to what actions the responders were legally required to take or avoid. Those actions are listed in the WACs and the Protocols in plain English. The only disputes are whether the responders took them or failed to take them.

D. The standard of care is established through the Protocols, the WACs, and the responders' admissions and plaintiff Samuels does not need a third-party in-state responder expert to prove her case.

The first dispute is whether the responders completed the FAST exam steps required within the Protocols and the second dispute is whether the responders went beyond their field of expertise by offering a medical opinion. The third dispute is whether the responders actually recommended that Samuels either take a private ambulance to the hospital or have Arnold Williams drive her to the hospital. The fourth issue, and one upon which there are no disputed facts, is whether the responders violated the Secretary's WAC directives when they elected not to contact a base-station physician to determine treatment for unresolved, but potentially life-threatening, symptoms.

The first dispute is a dispute of fact because each party concedes that a complete FAST assessment is the professional standard and agrees that the Protocols properly describe the steps of a complete FAST assessment. The only dispute is whether the complete FAST assessment was performed. As such, there is no need for Samuels to produce a Washington-certifed responder to testify about the care, skill, and learning expected of a reasonably prudent responder acting in the same or similar circumstances because expert testimony to establish a medical professional's standard of care is not necessary when the facts at issue are observable to a lay person and describable without medical training. *Ripley v Lanzer*, 152 WnApp 296, 306-323, esp 306-7, 215 P3d 1020 (Div. 1, 2009), *Miller v Jacoby*, 145 Wn2d 65, 72-73, 33 P3d 68 (2001), *Shellenberger v Brigman*, 101 WnApp 339, 347, 3 P3d 211 (Div. 2, 2000), *Morinaga v Vue*, 85 WnApp 822, 832, 935 P2d 637 (Div. 3, 1997), and *Hill v Sacred Heart Medical Center*, 143 WnApp 438, 446, 177 P3d 1152 (Div. 3, 2008), citing *Douglas v Freeman*, 117 Wn2d 242, 252, 115 P3d 1023 (2005).

In essence, the *Morinaga* facts and standards, which may be the most applicable of the above-cited cases, state that regulations exist for a reason and if there is evidence that an injury resulted from a failure to follow a regulation, then there is no need for expert testimony on standard of care so long as causation evidence is entered. *Morinaga* at 832-36. That

causation evidence was entered at CP 140-47 via the testimony of Samuels' expert neurologist. The standard of care evidence is the Protocols, the WACs, and the responders' own admissions because the WACs and the Protocols are observable and describable by any layperson who can read. Whether the steps were performed is, therefore, a factual debate.

The Protocols state:

1. the "F" or "face" portion of the FAST exam is where responders must "ask the patient to show his or her teeth or smile ..." (Appendices D-1 and D-2 to the Protocols), CP 542-43, esp CP 543,

2. the initial step in completing a FAST exam is to get a "[r]eport from patient or bystander of one or more sudden: numbness or weakness of the face, arm, or leg, especially on one side of the body, confusion, trouble speaking or understanding, trouble seeing in one or both eyes, trouble walking, dizziness, loss of balance or coordination, [or] severe headache with no known cause." (Appendix D-1 to the Protocols), CP 542, 654, 677, and 701, and

3. the "T" in FAST refers to inquiring about the "[t]ime last normal (determine time patient last known normal)." (Appendix D-1 to the Protocols), CP 542, and

4. the "T" in FAST stands for "time" and indicates that the person performing the FAST exam must "[a]sk the patient, family or bystanders the last time the patient was seen normal." (Appendix D-2 to the Protocols), CP 543, 626, 654, 677, and 701-02.

The TFD's witnesses and Samuels' witnesses contradict each other concerning whether the responders performed the above-mentioned FAST steps. Therefore, this is not a dispute where expert testimony needs to

determine what the standard of care is. All parties agree about what the standard of care is. The dispute is whether the plainly written standard of care steps in the Protocols were performed and this is a factual dispute.

The second dispute is also a dispute of fact, not of law or professional standards, because the TFD's witnesses and Samuels' witnesses contradict each other's testimony about whether a medical opinion was offered by the responders. The TFD's witnesses say it wasn't and Samuels' witnesses say it was, but the responders themselves testified they are required to follow, and not exceed, the Protocols and are not allowed by the Protocols, or trained, to rule in or rule out diagnoses for a patient, so it is clear that they did not comply with their professional standards if they stated Samuels was not having a stroke. Therefore, since the dispute is whether an opinion was issued, not whether a responder can issue an opinion, this case should have proceeded to trial because all parties agree that offering medical opinions is beyond the training of the responders. As a result, if the testimony of Samuels' (the non-moving party's) witnesses is taken at face value, this is the exact type of situation where a credibility determination at trial needs to be made. See *Kim v. Lakeside Adult Family Home*, 185 Wn. 2d 532, 547, 374 P. 3d 171 (2016).

The third dispute, i.e., whether the responders "recommended" that Ms. Samuels take a private ambulance to the hospital or have Arnold

Williams take her to the hospital, is also a dispute of fact because phrasing the offer as a responder 'recommendation," (as the TFD Response Brief does at pp 8-9), grossly distorts the evidence. See CP 734 and CP 53-54 below.

Ms. Samuels' deposition testimony was as follows:

Q Did they make clear to you that they were not physicians and that's why they were recommending that you go get checked out at the ER?

...

A Nobody said anything like that.

Q Okay. Did they – did they tell you that they didn't know what was causing your symptoms and that you needed to go be checked out by a physiciam?

A No.

Q What did they say in this regard?

A Just that my face looks a little off, but I wasn't having a stroke.

Q But did they have an explanation for what was causing your symptoms?

A No.[7]

...

Q Did they say to you, basically, "You know, Ms. Samuels, the symptoms that you are having don't qualify, if you will, for

[7] CP 734, i.e., Samuels Dep at 118:9 – 119:13.

us to transpoprt you to the – to the ER. You can either go in in a private vehicle or we can call a – private ambulance and you can go that way."

A No. The other Caucasian fellow in the back, taking notes, said that "we could take you to the hospitatl to ease your mind or – they pointed at Arnold -- and said he could take me.

Q Okay. And did – did Mr. Williams say that he would take you?

A He didn't answer.

Q Did you say that you were going to the hospital?

A No.[8]

Ms. Samuels testified that she declined the transportation offer because the responders had previously told her she wasn't having a stroke and she "...trusted that these guys knew what they were looking at." CP 733-34. Before answering that deposition question, Ms. Samuels gave more specific detail about when the responders issued the opinion that she wasn't having a stroke. Specifically, Samuels testified that, at the end of Responder 2's examination of her, he turned to another of the responders and said "she's not having a stroke," CP 732-33, then when she asked: "Well, what's wrong with my face then?" the responder that Responder 2 had been speaking to said: "Your face looks a little off, but you're not having a

[8] CP 53-54.

stroke." CP 732-33. As such, there is no evidence in the record to imply that a transportation offer was a transportation recommendation.

In fact, using the words "We could take you … to ease your mind or … he could take you" lends itself to a more likely layperson understanding that the professionals involved did not think the issue was serious enough for a trip to the hospital because, if it were, the responders would not be telling Ms. Samuels that the only purpose of a hospital visit was to ease her mind, as opposed to getting treatment.

As to the fourth issue, i.e., whether the responders went outside their field of expertise" when they elected not to contact a base-station physician to determine what actions to take, the standard for the responders was set by the Secretary and is written in very plain English. WAC 246-976-010(47) states: "[i]f protocols and regional patient care procedures do not provide off-line direction for the situation, the certified person in charge of the patient must consult with their online medical control as soon as possible." Therefore, provided the responders can read English, there is no need to bring in an expert to determine what the responders needed to do. The Secretary told them, via WAC 246-976-010(47), to "consult … online medical control as soon as possible." This is the standard and the responders admit they did not make contact with a base-station physician. There is no need for a standard of care expert on that question.

CONCLUSION

This case does not involve a determination as to what requisite skill and prudence levels are expected by the profession at large. This is a case where the action to be taken or not taken was written in plain English and there was a dispute at summary judgment as to whether, in the first three instances, the action was taken or not taken. As to the fourth instance, there should be no dispute as to whether the required action was taken. It wasn't. Therefore, the case should have been allowed to proceed to trial.

Respectfully submitted this 10th day of August, 2018,

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IX. CERTIFICATE OF SERVICE

The undersigned does hereby declare that on August 10, 2018, the undersigned delivered a copy of the APPELLANT'S REPLY BRIEF filed in the above-entitled case to the following persons:

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