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

JACOB IVAN SCHMITT, Appellant,

v.

POLLARD FAALOGO; PIERCE COUNTY JAIL; PIERCE COUNTY
DEPUTIES WHALES and RANKIN; RN FRANKLIN; JANE DOE 1-10;
and JOHN DOE 1-10, Respondents.

**ANSWERING BRIEF OF RESPONDENTS PIERCE COUNTY
JAIL AND PIERCE COUNTY DEPUTIES WHALES AND RANKIN**

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I. ISSUES

1. Should Schmitt's appeal be considered when he fails to identify any assignment of error?
2. Did the trial court properly grant CR 56 dismissal of Schmitt's negligence claim where he failed to provide expert testimony?
3. Even if expert testimony were required, did the trial court properly grant CR 56 because Schmitt could not establish a prima facie case of negligence?
4. Did the trial court properly grant CR 56 dismissal of Schmitt's medical negligence claim where Schmitt voluntarily dismissed that claim against all defendants?

II. STATEMENT OF THE CASE

A. FACTS

1. Procedural History

On April 17, 2018, Schmitt filed a Complaint in King County Superior Court. CP 1. Venue was subsequently transferred to Kitsap County Superior Court. In the Complaint, Schmitt alleged "the lack of medical treatment he received is below the standard for a medical treatment provider in the state of Washington" and "... Pierce County Jail [was] negligent in putting a violent inmate in a position where he could

assault plaintiff and negligently failed to provide necessary medical attention to his injuries." CP 4 at ¶¶2.13-2.14.

On November 9, 2018, Defendant Pierce County and personally named defendant Deputy Wales (hereinafter "County Defendants") filed a motion for summary judgment alleging that Schmitt's Complaint should be dismissed because Schmitt did not provide expert testimony regarding the applicable standard of care, nor did he provide evidence supporting the elements of a negligence claim. CP 7-25. County Defendants cited to the requirement of expert testimony regarding the standard of care in negligence cases, including medical malpractice cases. CP 17. County Defendants argued that Schmitt offered no experts to opine on the actions taken by corrections officials, nor to the appropriate standard of care in maintaining jail safety and security. CP 18-19.

On January 2, 2019, Schmitt, who was represented by counsel, filed his Response. CP 135. Schmitt's Response clearly stated, "Plaintiff dismisses his medical negligence claims without prejudice." CP 140.

County Defendants filed a Reply to the Motion on January 7, 2019. CP 714-722. In their brief they reiterated that the medical negligence claim had been voluntarily dismissed. CP 715. To the extent Schmitt was arguing that medication management was somehow not encompassed in his "medical negligence" claim, County Defendants pointed out that

medication management was a job function of ConMed employees, not Pierce County. CP 715, CP 719-20.

On January 11, 2019, the matter came before the Honorable Kitsap County Superior Court Judge Melissa Hemstreet. The court granted the Motion for Summary Judgment with Prejudice as to all claims against all defendants. CP 734-737. Schmitt appeals.

B. PIERCE COUNTY DETENTION AND CORRECTIONS CENTER (PCDCC'S) OBJECTIVE JAIL CLASSIFICATION SYSTEM

PCDCC utilizes an Objective Jail Classification (OJC) system for assigning inmates to cells. CP 743 at ¶8. The general purpose of classification is to assign inmates to the least restrictive housing compatible with the individual's security classification, program participation, and personal and medical/mental health needs, while simultaneously providing for the safety and security of the inmates, the facility, and the public. CP 743 at ¶8.

Classification occurs at three different stages of incarceration: initial classification at booking, primary classification for long-term housing, and re-classification when necessary after periodic classification review. CP 743 at ¶10.

Initial classification is completed by a Booking Corrections Deputy to determine temporary cell assignment.¹ Staff use all available information to assign the inmate to an area which best protects the security, safety, and welfare of staff, the facility, and the inmate. CP 743 at ¶11. When determining appropriate short-term housing placement, the Corrections Deputy considers current charges; legal status; current physical, mental, and medical condition; past institutional behavior; and predatory risk. CP 743-44 at ¶11.

Primary classification of an inmate occurs any time an inmate is moved from his initial temporary housing assignment to the general housing area of the jail. CP 744 at ¶12. Primary classification is conducted by a trained Classifications Corrections Deputy for purposes of determining an appropriate security level and long-term housing assignment.² CP 744 at ¶12. The objective is to place each inmate in a housing area that appears to be best suited to the individual's security classification, program participation, and personal and medical/mental

¹ Initial classification occurs within six (6) hours of booking and is temporary in nature; *i.e.*, inmates should be moved from the temporary holding area within 72 hours of booking. CP 743-44 at ¶11.

² PCDCC is staffed with a Classification Unit consisting of one Classification Sergeant and dedicated Classification Corrections Deputies, all of whom are specifically trained in classification methods and theory and responsible for assigning inmates to security/custody categories, holding classification reviews to ensure the inmate's appropriate classification and treatment considerations, making housing assignments, and conducting first-level inmate appeals. CP 743 at ¶9.

health needs. CP 744 at ¶12. During primary classification, inmates are assigned a custody level ranging between 1 (high maximum) and 8 (very low minimum), and then classified as requiring maximum security³ (levels 1 and 2), medium security⁴ (levels 3, 4, and 5), or minimum security⁵ (levels 6, 7, and 8). CP 744 at ¶12.

All inmates in the Pierce County Jail may request a review of their classification assignment within 10 days of the original primary classification decision. CP 744-45 at ¶13. Automatic classification reviews occur every 30 days for all inmates, except special management inmate classifications, which occur every 15 days. CP 744-45 at ¶13. Classification reviews are conducted by a Classification Corrections Deputy or the Classification Committee. CP 744-45 at ¶13. The purpose of the classification review is to assure a fair and consistent review of the inmates' classification as it relates to security, housing, and programs. CP 744-45 at ¶13. Classification staff is automatically notified of any inmate disciplinary action. CP 744-45 at ¶13. Inmates are also reviewed as a

³ These are inmates who are charged with extremely serious felony crimes, have holds or other pending court action concerning such types of crimes, and/or display a need for maximum amount of supervision. CP 744 at ¶12, fn. 2.

⁴ These are inmates who are considered an escape risk, are slightly uncooperative and resistant to jail rules, require a normal amount of staff supervision, and require continuous supervision. CP 744 at ¶12, fn. 3.

⁵ These are inmates who have no holds or other pending court action against them, display a cooperative attitude toward staff and rules and regulations of the facility, and are not considered an escape risk. CP 744 at ¶12, fn. 4.

result of any new information regarding such factors as gang affiliation, medical or mental health, behavioral issues, or any change in legal status. CP 744-45 at ¶13. All classification reviews are documented on a computerized Classification Review Form. CP 744-45 at ¶13. The form indicates the date the review was done and the results of the review. CP 744-45 at ¶13. If there is a change in classification, the justification for the change will be indicated on the form. CP 744-45 at ¶13.

C. PIERCE COUNTY JAIL'S HOUSING

The Pierce County Jail consists of two buildings, commonly referred to as the "Old Jail" facility and the "New Jail" facility. CP 742 at ¶2. The Old Jail has nine clusters: four on the 3rd floor (3 South, 3 West, 3 North, and 3 East), four on the 4th floor (4 South, 4 West, 4 North, and 4 East) and one on the 5th floor (5 West). CP 742 at ¶2. A cluster consists of a group of three contiguous inmate housing units (generally referred to as A, B, and C), adjoining a common cluster station that contains the Corrections Deputy's workstation and comprising a self-contained, distinct security zone. CP 742 at ¶2. Clusters are normally manned by one Corrections Deputy except in areas where security and enhanced security is otherwise dictated. CP 742 at ¶2.

3 West ("3W") is a general population, indirect supervision cluster that houses 88 inmates. CP 742 at ¶3. 3W is considered maximum

security. CP 742 at ¶3. Each unit within the cluster (3WA, 3WB, and 3WC) consists of a living area for 20 to 33 inmates and contains both a dayroom area and a separate sleeping area (dorm) or cells. CP 742 at ¶3. 3WB houses 30 Level 2 male inmates in single- and double-occupancy cells, divided into two tiers – an upper and a lower tier. CP 742 at ¶3.

The cells in 3WB are equipped with bedding, plumbing, a lockable door, and an emergency call button located on the interior door jamb of the cell door. CP 742 at ¶3. Cell doors are operated by a touch screen panel in the cluster station or can be opened manually by key. CP 742 at ¶3.

D. INMATE JACOB SCHMITT

On December 3, 2013, Jacob Schmitt was booked into the Pierce County Jail on charges of Robbery in the First Degree (bank robbery), Felony Elude, and Unlawful Possession of a Firearm 1. CP 745 at ¶15; CP 778-81. Schmitt also had a probation violation hold and U.S. Marshall hold. CP 745 at ¶15, CP 778-81.

Pierce County Classifications Officer F. Magana conducted Schmitt's primary classification on December 4, 2013, for assignment to general population. CP 745-46 ¶16, CP 783. Based on the PCDCC's Objective Classification (OJC) system, Magana classified Schmitt as High Maximum (1) based on Schmitt's current offense being an assaultive

felony and potential third strike; prior assaultive felony convictions, to include a prior custodial assault; and known institutional behavior problems. CP 745-46 ¶16, CP 783. Schmitt was assigned to 3 South (maximum security) with a 7-day review set for December 11, 2013, to monitor his behavior. CP 745-46 ¶16, CP 783.

From this initial classification, Schmitt was moved throughout the facility for different reasons, including to accommodate an older inmate to be closer to the bathroom; peace & harmony (a term used by staff at the PCDCC to indicate an inmate's inability to cohabitate in a housing unit due to a conflict); and fighting. CP 746 at ¶17. Jail staff attempted to move him to the least restrictive OJC housing level from High Maximum (1) to High Medium (3), but this was unsuccessful as Schmitt was moved back to High Maximum (1) on May 22, 2014, after fighting with another inmate. CP 746 at ¶17, CP 783, CP 784.

On June 6, 2014, Schmitt was reclassified from a level 1 to a level 2 after a marked improvement in his behavior and moved to 3 West ("3W"). CP at 746 ¶18, CP 787. Schmitt was assigned to 3WB3, the top bunk of a two-man cell. CP 746 at ¶18, CP 199 at 17-22. On June 16, 2014, Schmitt became the only inmate in his cell and was moved to the lower bunk (3WB2) of the same cell. CP 746 at ¶18, CP 200 at 35:9-11.

E. INMATE POLLARD FAALAGO

On May 11, 2014, Pollard Faalago was booked into the Pierce County Jail on charges of Disarming a Police Officer, Assault in the Third Degree, Assault in the Second Degree, and Obstructing a Police Officer. CP 746-47 at ¶19, CP 789-91.

Pierce County Classifications Officer J. Crews conducted Faalago's primary classification on May 12, 2014, for assignment to general population. CP 747 at ¶20, CP 793. Based on PCDCC's OJC system, Crews originally classified Faalago as Maximum (2) based on Faalago's current offense being an assaultive felony and prior assaultive felony convictions. CP 747 at ¶20, CP 793. That same day, Faalago's classification was changed to High Maximum (1) pending mental health review. CP 747 at ¶20, CP 793. Faalago was placed on a security alert,⁶ monitored by mental health and corrections staff, and housed in High Maximum housing units until June 16, 2014, when his OJC housing level was reviewed and changed to Maximum (2). CP 747 at ¶21, CP 795-800. As a result of the classification change, Faalago was moved to the next

⁶ Faalago was placed on security alert after an incident in court where he "tensed up, looked around the courtroom, and breathed erratically as if he was about to attack someone." CP 747, fn. 5. The security alert was lifted on June 1, 2014, after Lt. Jones reviewed Faalago's behavior log and had a discussion with 3S Corrections Deputies and the Duty Sergeant. Inmate Faalago had no negative behavior and appeared to be stable – no longer under the influence of a substance. CP 747, fn. 5.

least restrictive housing assignment and assigned to 3WB. CP 747 at ¶21. Faalogo was assigned to cell 4-5, immediately adjacent to Schmitt's cell (3WB2-3). CP 743 at ¶7.

F. NO ISSUES BETWEEN SCHMITT AND FAALOGO

When Faalogo arrived in 3WB on June 16, 2014, both Schmitt and inmate Jacob Belanger were out of their cells and in the day room for their four-hour "out of cell" period. CP 209 at 19-22. Schmitt and Belanger befriended Faalogo and shared food with him. CP 437 at 5-25, CP 212 at 12-13. Belanger described Faalogo as "in a good mood, smiling, happy, seemed really, like humble. And there was, like, no sign of any hostility, nothing. You know, it was like we were all good with each other." CP 437 at 13-16. Schmitt described Faalogo as "really quiet and reserved" and his first interaction with him as "favorable." CP 210 at 14-23. There were no issues between Schmitt and Faalogo at that time or that evening. CP 212 at 5-8.

G. THE ASSAULT

On June 17, 2014, at approximately 7 a.m., Corrections Deputy Kent Wales and his partner, Corrections Deputy Lynette Ranken, entered 3WB and manually opened the bottom tier cells (cells 1-9) to allow the inmates a four-hour period outside of their cell. CP 413 at 18-22, CP 429 at 20-25, CP 351-52 at 20:24-21:4, CP 353 at 16-20. Wales recalls that

the inmates in cells 1-9 were laying in their bunks when Wales unlocked the cell doors. CP 356 at 17-18. Wales and Ranken also conducted a welfare check on the remaining cells.⁷ CP 355 at 25-26:3. Wales returned to the cluster station after conducting his welfare check. CP 356 at 1-3.

Shortly after cells 1-9 were unlocked, Belanger⁸ heard "pleads for help, kind of screaming" and then "somebody screaming in pain or agony." CP 413 at 22-25, CP 414 at 1-2. Wales, who was in the cluster station at the time, also heard a scream that he described as an, "Ahh." CP 358 at 7:16-28:1, CP 359 at 7-23. Wales entered the unit seconds later.⁹ CP 414 at 6-9, CP 359 at 25-29:1. When Wales entered, the unit became quiet and the sounds stopped. CP 414 at 6-12, CP 360 15-16. Not even Belanger knew where the sounds were coming from. CP 440 at 22-25. Deputy Wales believed the sound was coming from an inmate on the upper tier who was having a bad dream. CP 359 at 22-23. Deputy Wales checked the upper tier cells, but did not find anyone in distress. CP 414 at 16-20, CP 359 at 25-29:10. Deputy Wales exited the unit without checking the lower tier.¹⁰ CP 360 at 7-16. The cluster door made a "big

⁷ Wales described a welfare check as opening the cell door and making sure the inmate was okay. CP 355 at 25-26:3.

⁸ Belanger was in Cell 8-9. CP 428 at 9-10.

⁹ According to Belanger, when an officer enters the unit, "You know that they're coming and you can hear the door, you can hear the keys. It's loud. Everything echoes. It's cement, you know. Obviously, the keys jingle." CP 440 at 17-21.

¹⁰ Belanger recalls that Deputy Wales walked to the lower tier, contacted Belanger, and asked him if the noises were coming from the lower part of the tier. CP 414 at 20-23.

boom" sound when Deputy Wales exited. CP 441 at 8-12. Immediately after Deputy Wales exited the unit, Belanger heard the sounds of the struggle recommence. CP 415 at 1-2. Belanger soon realized the sounds were coming from Schmitt's cell (3WB2-3); Belanger approached the cell and saw Faalogo¹¹ assaulting Schmitt. CP 415 at 3-23. Belanger tried pulling on the cell door, but it was locked. CP 416 at 1-3. Schmitt told Belanger through his cell door to tell the officers to "pop 2-3 house" so Belanger went to the cluster station, contacted Deputy Rankin, and told her to pop 2-3 house. CP 416 at 12:8-17, CP 433 at 13-21. Once Belanger reported the assault, Ranken unlocked Schmitt's cell and Wales, along with several Corrections Deputies, entered the unit to check on the inmates. CP 361 at 14-12-15, CP 242 at 10-12. Deputies detained Faalogo and provided care to Schmitt. Schmitt later estimated that the entire assault lasted "in all probability, less than a minute." CP 242 at 10-12.

Schmitt was taken to the PCDCC medical clinic, evaluated by ConMed staff, and then moved to 3SE5 for peace and harmony. CP 745 at ¶15, CP 778-81. Schmitt was later seen by a ConMed provider, who

Belanger told Deputy Wales, "I don't know" or "I'm not sure" or "I don't think so" and Deputy Wales exited the unit. CP 414 at 23-25, CP 441 at 1-4. Deputy Wales did not testify regarding this contact with Belanger. (See CP 359 at 22-29:16.)

¹¹ Faalogo was assigned to Cell 4-5 at the time. CP 429 at 3-8.

determined that Schmitt would be transported to the emergency room for further evaluation and medical observation. Schmitt returned to PCDCC on June 19, 2014, where he was evaluated by ConMed staff and again assigned to 3SE5. CP at 747-48 at ¶22.

Weeks after the assault, Belanger reunited with Schmitt in a different unit of the PCDCC. Schmitt still didn't understand why the assault happened. "It was like completely out of the blue." CP 438 at 11-17. At his deposition, Schmitt testified that he did nothing to provoke the attack, was caught by surprise by the attack, and did not have any anticipation that an attack like that would happen. CP 240 at 6-12.

III. LAW AND ARGUMENT

A. STANDARD OF REVIEW

An appellate court reviews CR 56 dismissals *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). A court presumes that the plaintiff's factual allegations are true and draws all reasonable inferences from the factual allegations in the plaintiff's favor. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.3d 1082 (2012) (citing *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998)).

Summary judgment is proper if pleadings, depositions, affidavits, and admissions, viewed in a light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is

entitled to judgment as a matter of law. *Visser v. Craig*, 139 Wn.App. 152, 157, 159 P.3d 453 (2007). Once the moving party points out the absence of evidence to support an essential element in the opposing party's case, the burden shifts to the nonmoving party to come forward with such evidence. *American Dog Owners Ass'n v. City of Yakima*, 113 Wn.2d 213, 218, 777 P.2d 1046 (1989). If, at this point, the plaintiff fails to make a showing sufficient to establish any element essential to his case on which he will bear the burden of proof at trial, then the trial court should dismiss the action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 770 P.2d 182 (1989).

B. SCHMITT'S FAILURE TO ASSIGN ERROR TO THE DISMISSAL ORDER PRECLUDES REVIEW

Schmitt is precluded from pursuing any of his claims on appeal because he failed to assign error to the Order Dismissing his Claims. Issues that are not raised in assignments of error will not be considered on appeal. RAP 10.3(a)(3); *Schnieder v. Forceer*, 67 Wn.2d 161, 406 P.2d 935 (1965); *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959). Generally, the court will not consider issues that are mere contentions unsupported by either argument or citations to the record. *See* RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809,

828 P.2d 549 (1992). As a result, the dismissal of Schmitt's Complaint should be affirmed.

Respondent acknowledges that the courts often provide leeway to pro se litigants. For example, in *Harris v. Urell*, 133 Wn.App. 130, 135 P.3d 530 (2006), the Court of Appeals waived technical appellate requirements of the pro se defendant by not requiring the defendant to assign error to each challenged finding of fact; as well as, not treating the trial court's unchallenged findings as verities on appeal.

Here, Schmitt's brief is completely devoid of any assignment of error and any findings of fact by the trial court. It does not appear that he appeals the trial court's denial of a continuance to obtain expert testimony. Schmitt's appeal appears to rest on his position that (1) he was not required to provide expert testimony in order to establish his claim of negligence, and (2) it was improper for the trial court to grant summary judgment on his claim that "PCJ was negligent in providing health care." Schmitt Br., pg. i. To the extent these are, in fact, the errors alleged by Schmitt, he fails to designate the relevant portion of the record to allow review of any such alleged error.

Schmitt's appeal should be denied for his failure to comply with RAP 10.3(a)(3). He has demonstrated no basis in fact or law to set aside the trial court's ruling in this matter. However, should the Court consider

his appeal, Schmitt's appeal still fails because he does not provide any evidence of the standard of care or breach of that standard, and the record demonstrates he voluntarily dismissed his medical negligence claims.

C. SCHMITT'S NEGLIGENCE CLAIM WAS PROPERLY DISMISSED BECAUSE HE FAILED TO OFFER ANY EVIDENCE OF THE APPROPRIATE STANDARD OF CARE FOR INMATE SAFETY AND PIERCE COUNTY'S FAILURE TO COMPLY WITH THAT STANDARD

1. Negligence Standard

To prove an action for negligence, the plaintiff must demonstrate that the defendant owed a duty to him, breached this duty, and that this breach proximately caused the plaintiff's injury. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). The threshold determination "is a question of law; that is, whether a duty of care is owed by the defendant to the plaintiff." *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988).

2. Schmitt Failed to Offer Any Evidence of Standard of Care for Inmate Safety or Any Evidence of Pierce County's Failure to Meet the Standard of Care

Plaintiff has the burden of offering sufficient evidence of both the standard of care and the defendant's breach of the standard of care. *Winston v. Department of Corrections*, 130 Wn. App. 61, 62, 121 P.3d 1201 (2005). "In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the

expertise of a layperson." *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (generally requiring expert testimony for the standard of care, breach of standard of care, and causation in medical malpractice cases).

In *Hughes v. District of Columbia*, 425 A.2d 1299 (D.C. Ct.App. 1981), the District of Columbia Court of Appeals affirmed a directed verdict in the prison defendant's favor where the plaintiff failed to present expert testimony or other supporting evidence regarding whether prison officials acted reasonably to secure the safety of an inmate. *Id.* at 1303. The Court specifically recognized that a plaintiff cannot "merely rely on what happened in his or her case to establish a lack of proper correctional care, but rather must show by competent expert testimony, or other supporting proof, that what occurred in the case at bar was a negligent deviation from the demonstrated acceptable standard." *Id.* Specifically, in the context of prison security, the Court found that expert testimony "is required to aid the jury in making a determination. Absent such testimony, the jury will be forced to engage in idle speculation which is prohibited." *Id.* "The question of whether prison officials acted reasonably to secure the safety of an inmate is not one within the realm of the everyday experiences of a lay person." *Id.*; *see, also, District of Columbia v. Moreno*, 647 A.2d 396 (D.C. Ct. App. 1994) (reviewing

multiple other cases applying this standard and even finding expert testimony insufficient where it did not adequately establish "a standard of care by which a reasonable trier of fact could measure the conduct [of the prison official] and determine whether that conduct deviated from that standard of care. 'Without sufficient proof of the standard of care, [plaintiff's] case should never have gone to the jury.'" (quoting *District of Columbia v. Carmichael*, 577 A.2d 31, 316 (D.C. Ct. App. 1990).

Likewise, in *Harrison v. Ohio Department of Rehabilitation and Corrections*, 695 N.E.2d 1248, 1253 (Ct. Claims Ohio 1997), the Court refused to allow a prison's housing decisions to be disturbed without, at a minimum, expert testimony evidencing negligent conduct on behalf of the prison for its housing decisions. The Court also reaffirmed the longstanding rule that a prison cannot be liable for an assault by another inmate unless it had "adequate notice of an impending assault." *Id.* Other jurisdictions are in accord. *See, e.g., Atkinson v. State*, 337 S.W.3d 199, 205-207 (Ct. App. Tenn. 2010) (requiring expert testimony to establish breach of duty in negligence action where prisoner committed suicide); *Robinson v. U.S. Bureau of Prisons*, 244 F.Supp.2d 57, 65 (N.D.N.Y. 2003) (requiring expert testimony or other sufficient evidence about rules and regulations regarding proper staffing levels, proper position of

corrections officers, proper monitoring procedures, the risk of inmate attacks during periods of movements, etc.).

Similarly here, Schmitt offers no expert to opine on the actions taken by corrections officials in this case, nor to the appropriate standard of care in maintaining jail safety and security. CP 113-116, CP 118-126, CP 128-130, CP 132-134. He likewise offers no competent evidence that Pierce County violated an established standard of care regarding jail security and inmate classification and segregation. A jury should not be left to speculate as to whether Pierce County officials acted reasonably or in accordance with policy, when the jury is not trained in jail security, nor can it possibly understand the nuances involved in maintaining jail security without the aid of expert testimony. Accordingly, Plaintiff's case must be dismissed.

D. SCHMITT FAILED TO ESTABLISH THE ELEMENTS REQUIRED TO PROCEED ON A NEGLIGENCE CLAIM FOR INMATE-UPON-INMATE ASSAULT

Even if expert testimony were not required in this negligence action, as stated earlier, in order to establish a cause of action for negligence against Pierce County, Schmitt must prove each of the following elements by a preponderance of the evidence: (1) duty; (2) breach; (3) injury; and (4) proximate cause. *See, e.g., Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 802 P.2d 1360 (1991). The duty in

the context of inmate-on-inmate assaults is limited. Prison officials are not "insurers of an inmate's safety." *Hughes*, 425 A.2d at 1302. "Thus, the fact that an inmate is assaulted and sustains injuries, does not, by itself, establish liability." *Id.* at 1302. The controlling case in situations where inmate-on-inmate violence is attempted to be imputed to their correctional custodians is *Winston v. Department of Corrections, supra*. In that case, the Court set forth the limited cause of action for negligence as follows:

In order to hold the State liable for injury to one inmate inflicted by another inmate, there must be proof of knowledge on the part of prison officials that such an injury will be inflicted, or good reason to anticipate such, and there must be a showing of negligence on the part of these officials in failing to prevent the injury.

Id. at 64 (citing *Kusah v. McCorkle*, 100 Wn. 318, 323, 170 P. 1023 (1918). *See, also, Harris v. State*, 61 N.J. 585, 591-92, 297 A.2d 561, 564 (1972) (noting this is the general rule across states); *Woody v. Ohio Department of Rehabilitation and Correction*, 61 Ohio Misc.2d 275, 277, 577 N.E.2d 1192 (1988) (holding that "Defendant is not required to guard an inmate from harm due to a sudden attack from a third person when the circumstances do not raise such an expectation"); *Saunders v. State*, 446 A.2d 748, 751 (R.I. 1982) (requiring prior knowledge of a threat specific to the injured prisoner). The *Winston* standard has been cited favorably in the Ninth Circuit on a number of occasions. *See Garrott v. Andrewjeski*,

2012 WL 2374759 at *3 (E.D. WA June 22, 2012), *affirmed by Garrott v. Vail*, 549 Fed. Appx. 669, 670 (9th Cir. 2013); *see, also, Tolsma v. King County*, 489 Fed. Appx. 178, 179 (9th Cir. 2012).¹²

Garrott v. Andrewjeski, supra, provides an illustration of the rule. In *Garrott*, the prisoner-plaintiff was involved in a dispute with other offenders regarding usage of the microwave at Coyote Ridge Corrections Center. *Garrott*, 2012 WL 2374759 at *1. After the dispute, Curry, one of the other inmates involved in the dispute, motioned for the prisoner-plaintiff to come to his cell to talk with him. *Id.* Once the prisoner-plaintiff arrived at the cell, Curry threatened him and punched him in the face. *Id.* The prisoner-plaintiff was placed in segregation to assess any future threats of harm that might exist. *Id.* The Department issued a keep separate order between the prisoner-plaintiff and Curry, allowing the prisoner-plaintiff to return to his original housing unit. *Id.* After he returned to his original housing unit, the prisoner-plaintiff was attacked by Curry's cellmate. *Id.* In dismissing the prisoner-plaintiff's negligence claim, the District Court explained:

A custodian does not violate the duty of reasonable care in failing to prevent an offender on offender assault unless the custodian had knowledge or good reason to believe that an assault was expected. *Winston v. State/Dept. of Corrections*, 130 Wash. App. 61, 64, 121 P.3d 1201 (2005),

¹² *Garrott* and *Tolsma* are cited pursuant to GR 14.1(b) and FRAP 32.1(a)(ii). Copies of these decisions are included as appendices to this memorandum.

citing *Kusah v. McCorkle*, 100 Wash. 318, 323, 170 P. 1023 (1918), and *Riggs v. German*, 81 Wash. 128, 131, 142 P. 479 (1914). For the reasons set forth above with regard to the Eighth Amendment analysis, there is no evidence creating a genuine issue of material fact that any of the Defendants had knowledge or good reason to believe that an assault on the Plaintiff was expected by offender Curry, and then later by offender Tyson upon Plaintiff's return to the H Unit.

Garrott, 2012 WL 2374759 at *3.

The case of *Miller v. Ohio Dep't of Rehab and Corrections*, 73 Ohio Misc.2d 4, 657 N.E.2d 385 (1995), is also illustrative of this rule. In *Miller*, a prisoner was assaulted by another inmate while lifting weights. *Id.* at 6. The prisoner had no idea he was in danger and was completely surprised by the attack. *Id.* at 6. Based upon these facts, the court dismissed the prisoner's claim against the State observing that, "The law is well settled in Ohio that the state is not liable for the intentional attack on one inmate by another inmate unless there is adequate notice of an impending assault." *Id.* at 7.

As detailed below, Schmitt fails to meet his burden to establish either prong necessary to survive summary judgment. Schmitt cannot show knowledge or constructive knowledge that the assault was going to occur, nor negligence in failing to prevent the assault.

1. **Pierce County Jail Officials Neither Knew nor Should Have Known That Schmitt Was Going to Be Assaulted by Pollard Faalogo**

Schmitt does not have any evidence to establish specific knowledge on the part of Pierce County Jail officials that he would be assaulted, nor that officials should have anticipated that an assault might occur. To establish liability under *Winston*, the plaintiff is required to show that jail officials knew or had good reason to anticipate that he was personally or specifically in danger. *Winston*, 130 Wn. App. at 64. Mindful that jails are inherently adversarial environments, where prisoners stare each other down, cut in front of each other, swear at each other, and even push each other aside on a daily basis, the Court must require something more specific in order to find that Pierce County was on notice of a specific threat in this case. *Id.*; *see, also, e.g., Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 463, 168 P.3d 1055, 1064 (2007) (noting "inherent potential of inmate violence in penitentiary settings," and refusing to adopt the "minority view" of a "broad-based duty" based upon "constructive notice" that unspecified potential violence is likely to occur); *Mitchell v. Ohio Dept. of Rehab. & Corr.*, 107 Ohio App. 3d 231, 235, 668 N.E.2d 538, 540 (1995) ("Where, as here, one inmate intentionally attacks another inmate, actionable negligence may arise only where there was adequate notice an impending attack."). It is not enough to show that the attacker

had a criminal history that involved assaults to put Pierce County on notice that Faalogo was going to assault Schmitt. *Winston*, 130 Wn. App. at 64. Schmitt must show that Faalogo specifically threatened to cause harm to him, personally. *Id.*

In *Winston*, the plaintiff was an inmate, who while housed at Airway Heights Correction Center in Spokane, Washington was seriously injured after being assaulted by another inmate. Winston's negligence claim against the Washington State Department of Corrections (DOC) was premised on his assertion that he had had previous problems with his assailant and that the prison was fraught with racial tension. In affirming the trial court's summary judgment dismissal of this claim, the court stated:

Here, Mr. Winston failed to show that prison officials had any reason to believe he would be attacked. Mr. Winston's own deposition testimony refutes the claim he now asserts that the atmosphere at the prison was fraught with racial tension and that he had previous problems with his assailant.

Winston, at 64.

Schmitt's negligence claim suffers from the same fatal deficiencies as *Winston*. Schmitt cannot identify a single specific threat articulated by Faalogo. It is undisputed that Schmitt did not have any issues with Faalogo and that, what little contact they did have was friendly. CP 437 at

13-16, CP 210 at 14-23. Schmitt never filed a kite nor notified Jail Staff that he had any concern for his personal safety at all, let alone a safety concern specific to Faalogo. CP 748 at ¶23. Both Schmitt and Inmate Jake Belanger admitted at deposition that the assault by Faalogo "came out of nowhere" and was completely unexpected. CP 438 at 11-17, CP 240 at 6-12. Perhaps most importantly, the undisputed expert opinion in this case is that the PCDCC staff had no information or knowledge of, nor could they have reasonably foreseen, the assault on Schmitt by Faalogo. CP 56.

To impose liability on Pierce County for inmate-on-inmate violence requires evidence that the offending inmate poses a specific, concrete danger to another inmate, and it further requires knowledge of the specific danger by Pierce County Jail Staff. *See Winston*, 130 Wn. App. at 64; *Butler*, 123 Nev. at 463 ("[P]rison officials have a specific duty to protect inmates only when they actually know of or have reason to anticipate a *specific* impending attack."). To expand liability beyond that mark would lead to Pierce County being subject to liability simply for running a jail and would punish Pierce County for its attempts to utilize classifications as a means of rehabilitation. Pierce County could not have known that Schmitt was going to be assaulted on June 17, 2014, by *anyone*, let alone Pollard Faalogo. Summary judgment is appropriate.

2. **Schmitt's Inability to Establish Pierce County's "Failure to Prevent" His Assault Necessitated Dismissal Under *Winston***

Even if Schmitt could present evidence of knowledge, his claim still fails because he cannot establish negligence by the County in failing to prevent the assault.

In addressing this question, the court's starting point must be the presumption that prison officials have performed their duties. *Winston*, 130 Wn. App. at 64. The plaintiff must offer evidence that would tend to rebut that presumption in order to create a question of fact for a jury. *Id.* at 64; *Eberhart v. Murphy*, 113 Wash. 449, 453, 194 P. 415 (1920). Plaintiff cannot point to the assault itself as the only evidence of this, since this would lead to every jail assault being evidence of a failure on the part of the correctional facility. Plaintiff is required to produce evidence that shows that Pierce County's actions prior to the assault exhibited a failure to carry out duties, and he cannot do so. Plaintiff's subjective belief that Faalogo should have never been assigned to 3W based on his limited understanding of Faalogo's history doesn't satisfy this requirement.¹³ This alone provides a basis for dismissal of Schmitt's claims.

¹³ There is no recognized authority that would permit an inmate to recover against a governmental body based upon injuries presaged only by a general and unspecified danger. Society intentionally fills prisons with individuals who pose general danger to others. See *Butler*, 123 Nev. at 463; *Casella v. State of New York*, 121 A.D.2d 495, 503 N.Y.S.2d 588, 589 (1986) ("The claimant's argument that the officer in charge should

Further, there is no evidence that Pierce County failed to do anything that would have prevented the attack. Schmitt was classified appropriately, as was Faalogo. CP 55.¹⁴ Schmitt does not dispute that Pierce County provided him with an avenue of opportunities to be transferred if he felt his personal safety was at risk – kites, access to staff. CP 216 at 5-15, CP 217 at 9-15, CP 227-229. Schmitt did not report any concerns nor request Pierce County take any action regarding Faalogo prior to the assault. CP 748 at ¶23. And again, the undisputed expert opinion in this case is that the actions of Pierce County were consistent with the standard of care in a jail setting. CP 59-60.

Schmitt may claim that Wales was negligent by failing to investigate the lower tier, but this claim also lacks merit. It is undisputed that Wales had already conducted his welfare check, that the only reason he entered the unit a second time was because he heard a scream and assumed somebody from the upper tier was having a bad dream, and that not even Belanger knew where the sounds were coming from when Wales was inside the unit. CP 414 at 16-25, CP 440 at 22-25. Again, and most importantly, the undisputed expert opinion on this issue is that Wales

have been made aware of the attacker's record was not supported by any evidence that he was more dangerous than any of the other inmates under the officer's supervision.").

¹⁴ "Using this criterion, my experience in corrections and the information provided to me for this review, the staff at the PCDCC applied the standards, policies and procedures of Pierce County to properly classify both Mr. Schmitt and Mr. Faalogo."

"acted reasonably in his response to the incident on the morning of June 17, 2014." CP 58.

E. SCHMITT VOLUNTARILY DISMISSED HIS MEDICAL NEGLIGENCE CLAIM AGAINST ALL PARTIES

To the extent that Schmitt now assigns error to the dismissal of his medical negligence claim, this argument fails because the clear record before this Court establishes that Schmitt voluntarily dismissed those claims.

1. Schmitt Abandoned his Medical Negligence Claims at Summary Judgment

Schmitt's Response brief unequivocally stated he dismissed his medical negligence claim. CP 140. At oral argument, Schmitt's attorney stated, "Plaintiff, on the first page of his motion, Line 3, dismisses the medical malpractice claim, so that's clearly off the table now." VRP 12:17-20. He went on to state that the issue before the trial court was "not one of medical malpractice," and that "with respect to the medical malpractice, that's gone." VRP 13:15, VRP 14:25-15:1. He further acknowledged that the question before the court was whether an expert was required. VRP 23:19-21.

Schmitt cannot now, on appeal, argue it was improper for the trial court to grant summary judgment as to his claim that the Pierce County Jail was "negligent in providing health care." *See* Schmitt Br., pg. i.

Schmitt abandoned that claim at summary judgment, and dismissal was proper. This Court should affirm.

2. Even if Schmitt Did Not Abandon His Medical Negligence Claim, He Still Fails to Provide Expert Testimony as Required by RCW 7.70.040

As a preliminary matter, medication management was a job function of ConMed employees, not Pierce County. CP 715, CP 719-20. However, even if this were not true Schmitt still fails to provide any expert testimony to support his "medical negligence" claims.

Washington's medical malpractice statute, chapter 7.70 RCW, exclusively governs all actions arising from healthcare. The statute states:

The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of **all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care** which is provided after June 25, 1976.

RCW 7.70.010 (emphasis added).

As stated by Division One of the Washington Court of Appeals, "This section sweeps broadly. It clearly states that RCW 7.70 modifies procedural and substantive aspects of *all* civil actions for damages for injury occurring as a result of healthcare, regardless of how the action is characterized." *Branom v. State*, 94 Wn.App. 964, 968-69, 974 P.2d 335,

review denied, 138 Wn.2d 1023, 989 P.2d 1136 (1999) (emphasis in original).

In order to survive summary judgment on his medical negligence claim, Schmitt is required to establish, through competent expert testimony of a qualified medical expert, that the County Defendants failed to comply with the standard of care in their care and treatment of Schmitt, and that such failure was a proximate cause of his alleged injuries. RCW 7.70.040. A plaintiff must submit competent, expert testimony to meet their burden of proof in a medical malpractice action. *Guile v. Ballard City Hosp.*, 70 Wn.App. 18, 25, 851 P.2d 689 (1993).

Here, despite previously dismissing his medical negligence claims, on appeal Schmitt argues that County Defendants were "negligent in providing health care." Schmitt Br., pg. 22. It is undisputed that Schmitt has failed to produce expert testimony to support this claim. Summary judgment should be affirmed.

IV. CONCLUSION

Jails or corrections facilities are a unique and dangerous environment that operate 24 hours a day, 7 days a week. Each time a security door is opened, the situation is new and different based on the behaviors, needs, and threats the inmate potentially presents. The courts have acknowledged these challenges and defer to the expertise of

corrections officials in the implementation and execution of policies and procedures and practices needed to maintain a safe and orderly environment for staff and inmates. *See Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) ("The realities of running a corrections institution are complex and difficult, courts are ill-equipped to deal with these problems and the management of these facilities is confided to the executive and legislative branches, not the judicial branch."). Even with these tools, there is no way to remove all potential violence between inmates in a jail environment. Schmitt's assault, while unfortunate, was not the result of Pierce County's negligent failure to prevent it. Schmitt cannot establish specific facts to dispute that, and therefore, summary judgment dismissal is warranted.

Schmitt fails to provide expert testimony required to sustain his claims. This lack of supporting evidence is fatal to Schmitt's claim. This Court should affirm dismissal.

RESPECTFULLY SUBMITTED this 19th day of June, 2020.

MARY E. ROBNETT, Prosecuting Attorney

s/ JANA R. HARTMAN

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CERTIFICATE OF SERVICE

On June 19, 2020, I hereby certify that I delivered a true and correct copy of the foregoing ANSWERING BRIEF OF RESPONDENTS PIERCE COUNTY JAIL AND PIERCE COUNTY DEPUTIES WHALES AND RANKIN to the U.S. Postal Service, postage pre-paid, addressed to the following:

Jacob Ivan Schmitt / DOC #711473
Monroe Correctional Complex TRU
P.O. Box 888
Monroe, WA 98272

s/ CHRISTINA WOODCOCK
CHRISTINA WOODCOCK
Legal Assistant
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APPENDIX

2012 WL 2374759

Only the Westlaw citation is currently available.
United States District Court,
E.D. Washington.

Rodney L. GARROTT, Plaintiff,

v.

Melissa ANDREWJESKI, et al., Defendants.

No. CV-10-391-LRS.

June 22, 2012.

Attorneys and Law Firms

Rodney Louis Garrott, Washington State Penitentiary,
Walla Walla, WA, pro se.

Candie M. Dibble, Attorney General's Office, Olympia,
WA, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, *INTER ALIA*

LONNY R. SUKO, District Judge.

*1 BEFORE THE COURT are the Defendants' Motion For Summary Judgment (ECF No. 67) and Plaintiffs' Motion For A Temporary Restraining Order (ECF No. 79). These motions are heard without oral argument.

I. BACKGROUND

Plaintiff asserts an Eighth Amendment claim under 42 U.S.C. § 1983, claiming he was not afforded adequate protection against a violent attack by another inmate. Defendants also believe Plaintiff is asserting a pendent state law claim for negligence.

II. UNDISPUTED FACTS

On March 14, 2010, while incarcerated at the Coyote Ridge Corrections Center (CRCC) and residing in H Unit, Plaintiff was involved in a dispute with other offenders, including offender Curry, regarding microwave usage.

Following the dispute, offender Curry motioned for the Plaintiff to come talk to him by his cell. There, Curry threatened Plaintiff and then punched him in the face.

After the altercation, Plaintiff was placed in protective segregation and to assess the potential of any future risks of injury or harm to the Plaintiff. As a result of that assessment, a "separatee" order was issued between the Plaintiff and Curry.

Offender Curry was then transferred out of the H Unit as a result of the altercation.

Based on the assessment, and believing that the situation had been remedied and Plaintiff was no longer in danger, Plaintiff was returned to H Unit.

Upon his return to the H Unit, the Plaintiff never expressed fear regarding his safety.

After returning to the H Unit, the Plaintiff was attacked by offender Tyson, a former cell-mate of offender Curry. Tyson had minimum custody review points.

III. DISCUSSION

A. Summary Judgment Standard

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir.), cert. denied, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1975). Under Fed.R.Civ.P. 56, a party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Semegen v. Weidner*, 780 F.2d 727, 732 (9th Cir.1985). Summary judgment is precluded if there exists a genuine dispute over a fact that might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248.

The moving party has the initial burden to prove that no genuine issue of material fact exists. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Once the moving party has carried its burden under Rule 56, “its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Id.* The party opposing summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

*2 In ruling on a motion for summary judgment, all inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. *Matsushita*, 475 U.S. at 587. Nonetheless, summary judgment is required against a party who fails to make a showing sufficient to establish an essential element of a claim, even if there are genuine factual disputes regarding other elements of the claim. *Celotex*, 477 U.S. at 322–23.

B. Eighth Amendment

A prison official violates the Eighth Amendment if he or she is deliberately indifferent to the need to protect an inmate from a substantial risk of serious harm from other inmates. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). A prisoner claiming an Eighth Amendment violation must establish, both objectively and subjectively, that particular conditions of confinement are cruel and unusual. *Wilson v. Seiter*, 501 U.S. 294, 297–98, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). To satisfy the objective component, a plaintiff must allege a deprivation which objectively is “sufficiently serious” to constitute an Eighth Amendment violation. *Id.* at 298. To satisfy the subjective component, a plaintiff must demonstrate that the prison official was “deliberately indifferent” to a substantial risk of serious harm. *Farmer*, 511 U.S. at 834. Deliberate indifference in this context means that an official “knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Id.* at 837. Thus, a prison official’s failure to respond to known, credible threats to an inmate’s safety constitute a violation of the inmate’s Eighth Amendment rights. *Berg v. Kincheloe*, 794 F.2d 457, 460–61 (9th Cir.1986).

Plaintiff says Curry was a “reputed gang member/leader” and because Defendants knew this, they failed to

reasonably respond to a risk to the Plaintiff. This is no more than speculation by Plaintiff. There is no evidence in the record that Curry was in fact a gang member, but even assuming it to be true, that mere fact alone would not create a known, credible threat to Plaintiff’s safety. There is no evidentiary support for Plaintiff’s assertion that all gang members pose a danger to non-gang members.

Plaintiff says that when he was advised he would be returning to the H Unit, he asked Defendant Thomas Harmon, Classification Counselor for the H Unit at the relevant time, whether he (Plaintiff) could go to the “recently opening ... G Unit.” Plaintiff asserts he received no response from Harmon. Plaintiff, however, does not assert he expressed any fear to Harmon about being returned to the H Unit. Plaintiff asserts Tyson was a fellow gang member and “homie” of Curry and that because Defendants were aware of this, they were deliberately indifferent to Plaintiff’s safety. There is no evidence in the record that Tyson was in fact a member of the same gang as Curry, and even if so, that Defendants were aware of this. According to Harmon, there was no evidence of a relationship between Curry and Tyson, other than them being former cellmates. Harmon adds that prior to Tyson’s assault upon the Plaintiff, Tyson had minimum custody review points, presumably due to his relatively good behavior.

*3 There is no evidence that Defendants were aware of facts from which they could have and should have drawn an inference that a substantial risk of serious harm to Plaintiff existed. There are no genuine issues of material fact precluding the court from ruling as a matter of law that Defendants were not deliberately indifferent to a substantial risk of serious harm to Plaintiff. Defendants are entitled to summary judgment on Plaintiffs’ Eighth Amendment claim.

C. Negligence

Negligence is a lower standard than deliberate indifference.

Nevertheless, the result is the same under state law. A custodian does not violate the duty of reasonable care in failing to prevent an offender on offender assault unless the custodian had knowledge or good reason to believe that an assault was expected. *Winston v. State/Dept. of Corrections*, 130 Wash.App. 61, 64, 121 P.3d 1201 (2005), citing *Kusah v. McCorkle*, 100 Wash. 318, 323, 170 P. 1023 (1918), and *Riggs v. German*, 81 Wash. 128,

131, 142 P. 479 (1914). For the reasons set forth above with regard to the Eighth Amendment analysis, there is no evidence creating a genuine issue of material fact that any of the Defendants had knowledge or good reason to believe that an assault on the Plaintiff was expected by offender Curry, and then later by offender Tyson upon Plaintiff's return to the H Unit.

IV. RESTRAINING ORDER/PRELIMINARY INJUNCTION

On March 29, 2012, after he had filed materials on March 13 in response to Defendants' Motion For Summary Judgment, Plaintiff filed a motion for temporary restraining order and preliminary injunction, alleging he has been denied meaningful access to the law library at the Washington State Penitentiary (WSP) and that he has "routinely" been separated from his legal materials. Even if true, it is not apparent how this has prejudiced Plaintiff with respect to his ability to defend against the Defendant's Motion For Summary Judgment. Plaintiff does not dispute he was transferred from WSP to Airway Heights Corrections Center (AHCC) on February 14, 2012 in order to have full access to a law library, that he requested to be returned to WSP on March 7, and that he was returned on March 13. The applicable and relevant law is undisputed with regard to Plaintiff's claims and the basic facts about what occurred are likewise undisputed. Plaintiff says he has been unable to provide the court with affidavits from cellmates who allegedly witnessed the assaults, but Plaintiff does not proffer what those

individuals would say. Therefore, it cannot be discerned whether what they say would have any bearing on Defendants' actual and/or constructive knowledge of a risk to Plaintiff's safety.

V. CONCLUSION

Defendants' Motion For Summary Judgment (ECF No. 67) is **GRANTED** and Defendants are awarded Judgment on the claims asserted against them by Plaintiff. Plaintiff's Motion For A Temporary Restraining Order and a Preliminary Injunction (ECF No. 79) is **DENIED**. Plaintiff's Motion For Reconsideration (ECF No. 65) of the court's Order Denying Motion For Appointment Of Counsel (ECF No. 64) is **DENIED**. Pursuant to **28 U.S.C. § 1915(a)(3)**, the court hereby **CERTIFIES** that any appeal taken from this order and the accompanying judgment is not taken in good faith.

***4 IT IS SO ORDERED.** The District Executive shall enter Judgment accordingly and forward copies of the Judgment and this order to the Plaintiff and to counsel for the Defendants.

All Citations

Not Reported in F.Supp.2d, 2012 WL 2374759

489 Fed.Appx. 178

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
Ninth Circuit.

Joshua TOLSMA, Plaintiff–Appellant,
v.
KING COUNTY; John Doe, 1 and 2,
Defendants–Appellees.

Nos. 11–35549, 11–35601.

Submitted Nov. 13, 2012.*

Filed Nov. 21, 2012.

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John R. Zeldenrust, Seattle, WA, for
Defendants–Appellees.

Appeals from the United States District Court for the Western District of Washington, Thomas S. Zilly, District Judge, Presiding. D.C. No. 2:09–cv–00489–TSZ.

Before: CANBY, TROTT, and W. FLETCHER, Circuit Judges.

*179 MEMORANDUM**

**1 Joshua Tolsma appeals from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging constitutional violations and a state negligence claim arising from an assault against him by a fellow pretrial detainee at the King County Correctional Facility. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1258 (9th Cir.1993), and we affirm.

The district court properly granted summary judgment as

to Tolsma's claims against the Doe officers because Tolsma failed to raise a genuine dispute of material fact as to whether the officers knew of and disregarded a risk to his health or safety. See *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)(a prison official cannot be found liable for failing to protect one inmate from another "unless the official knows of and disregards an excessive risk to inmate health or safety"); *Cousins v. Lockyer*, 568 F.3d 1063, 1070–71 (9th Cir.2009) (explaining that a violation of a prison regulation does not establish a constitutional violation, and concluding that further discovery on Doe defendants' identities would be futile where plaintiff failed to establish a constitutional violation); *Winston v. Dep't of Corr.*, 130 Wash.App. 61, 121 P.3d 1201, 1202–03 (2005)("In order to hold the State liable for injury to one inmate inflicted by another inmate, there must be proof of knowledge on the part of prison officials that such an injury will be inflicted, or good reason to anticipate such, and then there must be a showing of negligence on the part of these officials in failing to prevent the injury.").

The district court properly granted summary judgment as to Tolsma's claims against King County because Tolsma failed to show that the officers' actions resulted in his injuries. See *Jackson v. City of Bremerton*, 268 F.3d 646, 653–54 (9th Cir.2001)("Neither a municipality nor a supervisor ... can be held liable under § 1983 where no ... constitutional violation has occurred."); *Winston*, 121 P.3d at 1202–03 (explaining requirements for failure-to-protect negligence claim against prison officials).

The district court did not abuse its discretion in denying Tolsma's motions under Fed.R.Civ.P. 59 and 60 because Tolsma failed to show that the district court overlooked one of his claims in error. See Fed.R.Civ.P. 60(a)(reconsideration is appropriate to correct "a mistake arising from oversight or omission"); *Sch. Dist. No. 1J, 5 F.3d at 1262–63* (setting forth standard of review for denial of Rule 59 and 60 motions, and stating that, under Rule 59(e), reconsideration is appropriate if there was "clear error").

AFFIRMED.

All Citations

489 Fed.Appx. 178, 2012 WL 6053164

Footnotes

- * The panel unanimously concludes these cases are suitable for decision without oral argument. See [Fed. R.App. P. 34\(a\)\(2\)](#).
- ** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

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