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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

APPELLATE CASE NO. 374840

IRBAHIM A. ABDULWAHID,
Appellant
v.
EASTERN STATE HOSPITAL, et. al.
Respondent

APPEAL FROM THE SUPERIOR COURT OF
WASHINGTON FOR WHITMAN COUNTY
HONORABLE GARY J. LIBEY, JUDGE
Case No. 15 2 00139 4

**APPELLANT'S REPLY BRIEF TO RESPONDENT'S
ANSWERING BRIEF**

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I. REPLY TO INTRODUCTION

Respondent's Introduction, page 1, makes 2 glaring mistakes: (1) it assumes that the non-moving party has the burden to create a genuine issue of material fact before the moving party lays its foundation for the motion; and (2) that *res ipsa loquitur* cannot be a substitute for expert testimony in a hospital negligence case. These issues will be discussed later in this Reply to Respondent's Brief.

III. REPLY TO COUNTER STATEMENT OF THE CASE

Respondent further alleges at pages 2-3, III COUNTER STATEMENT OF THE CASE,

“Abdulwahid alleges that in the late afternoon, he and another patient had an altercation in the stairwell when multiple patients were going outside for a smoke break. Phillip Price, the other patient, was walking beside Abdulwahid when he stumbled. He allegedly then hit Abdulwahid in the chest when Abdulwahid asked Price if he was okay. Abdulwahid reports no necessary staff intervention, heated words exchanged, or injuries. CP 45.”

This statement is misleading when considered with the actual statement of Mr. Abdulwahid. It was Mr. Price who stumbled. There was not a altercation, only a single assault by Mr. Price on Mr. Abdulwahid. Further that Mr. Abdulwahid was injured in this initial assault. CP 45, lines 14-23.

Respondent, by footnote at the bottom of page 3, and again

at page 23, footnote 8, suggests that Mr. Abdulwahid did not provide a copy of the form he claimed to have filled out. This was never brought to the attention of the trial court and is not appropriate at this time and should be stricken. RAP 2.5(a); *State v. Nitsch*, 100 Wn.App. 512, 519, 997 P.2d 1000 (2000); *Boyer v. Morimoto*, 10 Wn.App. 2d 506, 536, ____ P.3d ____ (2019) .

At page 4, footnote 2, and again at page 14 of Respondent's Brief, by innuendo, Respondent suggests that Dr. Rubaye would not be qualified to render an opinion on the standard of care for a Washington Psychiatric Hospital. This issue was neither argued by Respondent nor addressed by the court. These arguments should be stricken and not considered on appeal. RAP 2.5(a), *Nitch, supra.*; *Boyer, supra.*

ARGUMENT

Summary Judgment:

Respondent's IV. ARGUMENT, page 8-9, states that the appellate court reviews a motion for summary judgment de novo. This is conceded. However, in reviewing the matter de novo, the first step must be to determine if the moving party has met its initial burden of proof by citing to the record the foundation for the motion. CR 56(c); *Jacobson v. State*, 89 Wn.2d 104, 108, 569 P.2d 1151 (1977). Respondent not having met the initial burden, summary judgment may not be granted regardless of whether the

non moving party submits responding materials. *Jacobson, supra.*, at 108 Therefore, the burden never shifted to Mr. Abdulwahid to come forward with evidence to rebut the moving party's motion.

In support of its position, Respondent cites *Guile v. Ballard Cmty Hosp.*, 70 Wn.App. 18, 21-22, 815 P.2d 689 (1993) (relying on answers to interrogatories as the basis for the motion); *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989) (relying on affidavits and records); and *Boyer v. Morimoto*, 10 Wn.App 2d 506, 519, 449 P.3d 282 (2019) (relying on discovery answers), to support its position that it had met its burden of proof without any citation to the record. Review of each of those cases shows that there was a record, not merely an outright speculation, that the non-moving party could not prove its case. In this case, there was no citation to the record since, as admitted by Respondent, there were no records. CP 49, line 3; VRP pg 12, line 10-15; pg 14, line 10-13.

Furthermore, as argued by Respondent, Resp. Br. 9, affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment. *Boyer, supra.* at 520. The converse should also be true. That is, mere allegation, without citation to the records on file, should not be sufficient to lay the foundation by the moving

party, for a motion for summary judgment.

Later, Resp. Brief, pages 23-24, Respondent argues that no evidence was offered by Mr. Abdulwahid that the hospital took no action to protect him. This is not borne out by the statement of Mr. Abdulwahid. He reported the first assault by Mr. Price and requested to be moved to another floor and that later he was assaulted a second time by Mr. Price. He has first hand knowledge that he had not been moved nor protected. Secondly, Mr. Price was given continued access to the floor, since this is where the assault occurred. CP 45.

Continuance (Motion to Reset Hearing):

Respondent correctly states that the denial of a continuance is review by the abuse of discretion standard.

In considering a motion to continue , the court must consider the factors defined in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Those factors being (1) whether lesser sanctions would suffice; (2) whether a party has refused to obey discovery orders; and (3) whether the opposing party is prejudiced in its preparation for trial. The trial court did not address any of these factors in denying the motion to continue and/or to file late affidavits. By granting the motion for summary judgment, this was an extreme sanction. There had been no failure to obey discovery orders, since the discovery was provided

on the day of the hearing to compel. VRP 10, line 21-22; 11, line 13-15; and 23, line 5-6. There could be no claim that the opposing party was prejudiced in preparing for trial, since the trial date was not eminent.

Considering the time line on Respondent's motion for summary judgment, it should be noted: (1) Respondent, after nearly four years questioned whether Appellant had an expert. CR 16-20 (December 26, 2020); (2) within three weeks, Appellant retained an expert to review the hospital records CP 30 (January 16, 2020); (3) Dr. Rubaye requested further information CP 70; (4) Interrogatories and Requests for Production were served on Respondent on January 20, 2020, to obtain information needed by Dr. Rubaye. CP 70.

Furthermore, as grounds for overturning the denial of the motion to reset the summary judgment hearing, CP 67-71), the authority is found in the following: *Cofer v. County of Pierce*, 8 Wn.App 258, 262, 505 P.2d 476 (1979) (duty to grant a reasonable opportunity to complete discover); *Durand v. HIMC Corp.* 151 Wn.App. 818, 823, 214 P.3d 189 (2007) (party seeking continuance must establish a good reason for delay); *Keck v. Collins*, 184 Wn.2d 358, 369, 357 P.2d 1080 (2015) (CR 56(f) should be liberally construed to allow a just determination in every action). Here, discovery served on the hospital was

outstanding, a good reason for delay was based on an expert needing additional information to form an opinion as to the standard of care for a psychiatric hospital, and time should have been given. CP 67-71. The trial court abused its discretion in not allowing the resetting of the summary judgment hearing or in the alternative allowing a late filing.

Res Ipsa Loquitur:

Respondent bases its position that res ipsa loquitur should not be applied because the negligence of the hospital was not to the level of amputating the wrong appendage, leaving a scalpel in a patient or drilling on the wrong side of a patients mouth. Resp. Br. 19-20. The foundation laid for this argument was that Mr. Abdulwahid did not sustain any injuries when he first sought to be relocated in the hospital. Resp. Br. 20. This in fact is not consistent with the facts of the case. Mr. Abdulwahid did complain of being injured when he sought his relocation after the initial assault by Mr. Price. CP 45. The hospital took no action to protect him. The standard of care of a hospital in Washington is to protect its patients. *Niece v. Elmwiew Group Home*, 131Wn.2d 39, 43, 929 P.2d 420 (1997)

Respondent's argument that res ipsa loquitur should not be applied to alleviate the necessity of an expert witness to establish the standard of care for a hospital also is not well founded. Resp.

Brief 16-17. Mr. Abdulwahid has established the circumstance by which he was assaulted and injured on two separate occasions on the same day; that he reported it to hospital staff, after the first assault; requested to be moved; that no action was taken to move him or to protect him; and that he was assaulted by the same individual approximately 6 hours later, causing serious physical injuries. CP 44-47. The established law with respect to nursing homes, the equivalent of a hospital, is that the hospital owes a duty to protect its patients. *Niece, supra.*; Restatement (Second) of Torts, Sec. 315, (1965). Similar duties have been found with schools, innkeepers, employers and common carriers. *Niece, supra.*, at 44 and footnote 1.

In *Ripley v. Lanzer*, 152 Wn.App. 296, 306-307, 215 P.3d 1020 (2009), a case where a piece of a broken scalpel was left in a patient, it was held that a medical expert was not necessary when an obvious error had occurred. That *res ipsa loquitur* provided a *prima facie* case sufficient to present the question for a jury. (Footnote citations omitted).

Shellenbarger v. Bringman, 101 Wn.App 339, 347, 3 P.3d 211 (2000) recognized that expert testimony is required unless the evidence is observable by a lay person without medical training. (Citations omitted). It did not take medical training to recognize that Mr. Abdulwahid needed to be protected from Mr. Price.

In *Miller v. Jacoby*, 145 Wn.2d 65, 74, 33 P.3d 68 (2001), a Penrose drain was not completely removed from the patient. It was held that this was negligence on the part of the physician who attempted to remove the drain, not the physician who placed the drain. The failure of the hospital to protect Mr. Abdulwahid is the equivalent of leaving a foreign object in a patient, once the hospital was on notice of him being assaulted. This assault was not the kind that ordinarily does not happen absence negligence, considering both the circumstances and the knowledge of the hospital of the dangerous propensities of Mr. Price toward Mr. Abdulwahid.

By analogy, slip and fall cases set forth the standard to determine if a property owner is negligent. Once the defendant becomes aware of a dangerous condition it is charged with knowledge and is negligent for its failure to take corrective action. *Charlton v. Toys "R" Us*, 158 Wn.App. 906, 913, 246 P.3d 199 (2010). The hospital had notice of the first assault by Mr. Price on Mr. Abdulwahid and it took no action to protect him. Clearly, it had notice of the propensities of Mr. Price to assault Mr. Abdulwahid and took no action to protect him. It had a duty to protect him. *Niece v. Elmview Group Home, supra*.

CONCLUSION

Respondents position puts the cart before the horse.

Respondent claims that Appellant must come forward with rebutting evidence before it lays a proper foundation based upon the record to support its motion. CR 56(c) requires the moving party to establish from the record that the non moving party lacks evidence to support its case. In this case, there was not any record identified by Respondent. *Jacobson v. State, supra.* at 108 states that Appellant had no duty to respond nor should summary judgment be granted when the initial burden was not met.

While it is true that two continuance had been requested and granted to Appellant. Appellant had submitted interrogatories and request for production based upon information to respond to Respondent's claims. Those were outstanding at the time of the hearing on the summary judgment motion. Appellant should have been granted additional time to receive the discovery before the hearing on the summary judgment motion. *Cofer v. County of Pierce*, 8 Wn.App. 258, 262, 505 P.2d 476 (1979).

Res ipsa loquitur provides an inference of negligence from the occurrence of the incident itself that establishes a prima facie case sufficient to present a question for the jury. *Ripley v. Lanzer, supra.* 306-307.

For the forgoing reasons, the summary judgment should be reversed and the matter remanded to the trial court for further proceedings.

Respectfully submitted this

25th day of August 2020

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CERTIFICATE OF SERVICE

I certify that on the 25th day of August 2020, I caused a true and correct copy of this Appellant's Reply Brief To Respondent's Answering Brief to be served on Counsel for Eastern State Hospital, a division of Washington State Department of Social and Health Services in the manner indicated below:

Heidi S. Holland, Asst. Atty. Gen. Washington Attorney General Tort Division 7141 Cleanwater Drive SW P. O. Box 40124 Olympia, WA 98504-0126	<input checked="" type="checkbox"/> U.S. Mail postage prepaid
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s/ Howard M. Neill

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