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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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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

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THE MOVING PARTY DID NOT LAY A PROPER FOUNDATION FOR ITS MOTION.

2. THE TRIAL COURT ERRED IN FINDING THAT AN EXPERT IS REQUIRED IN A HOSPITAL NEGLIGENCE CASE.

3. TRIAL COURT ERRED IN FAILING TO ACCEPT RES IPSA LOQUITUR TO ESTABLISH NEGLIGENCE ON THE PART OF DEFENDANT.

4. THE TRIAL COURT ERRED IN NOT ALLOWING PLAINTIFF'S MOTION TO CONTINUE THE SUMMARY JUDGMENT HEARING.

5. THE TRIAL COURT ERRED IN NOT ALLOWING A LATE FILING OF PLAINTIFF'S AFFIDAVIT OF AN EXPERT.

6. THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF'S MOTION FOR RECONSIDERATION.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1

WHEN A PARTY MOVES FOR SUMMARY JUDGMENT BASED UPON SPECULATION THAT PLAINTIFF DOES NOT HAVE EVIDENCE TO PROVE HIS CASE, HAS A PROPER FOUNDATION BEEN LAID TO SHIFT THE BURDEN TO THE NON-MOVING PARTY?

(Assignment of Error No.1)

ISSUE NO. 2

IS AN EXPERT WITNESS REQUIRED TO ESTABLISH A VIOLATION OF THE STANDARD OF CARE WHEN THE NEGLIGENCE OF A HOSPITAL IS READILY OBSERVABLE BY A LAY INDIVIDUAL? (Assignment of Error No.2)

ISSUE NO. 3

IS RES IPSA LOQUITUR AVAILABLE TO ESTABLISH NEGLIGENCE AND CAUSATION IN RESPONSE TO A MOTION FOR SUMMARY JUDGMENT? (Assignment of Error No. 3)

ISSUE NO. 4

WAS IT A MANIFEST ABUSE OF DISCRETION WHEN THE TRIAL COURT FAILED TO GRANT A CONTINUANCE OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT AT THE REQUEST OF THE PLAINTIFF?

(Assignment of Error No. 4)

ISSUE NO. 5

WAS IT A MANIFEST ABUSE OF DISCRETION WHEN THE TRIAL COURT FAILED TO ALLOW PLAINTIFF TO FILE A LATE AFFIDAVIT FROM AN EXPERT WITNESS?

(Assignment of Error No. 5)

ISSUE NO. 6

WAS IT A MANIFEST ABUSE OF DISCRETION WHEN THE TRIAL COURT FAILED TO GRANT PLAINTIFF'S MOTION FOR RECONSIDERATION? (Assignment of Error No. 6)

STATEMENT OF THE CASE

On July 10, 2012, Plaintiff was a patient at Eastern State Hospital, hereafter referred to as "Defendant". Earlier in the day, at approximately 3:00 p.m., Plaintiff was assaulted by another patient in the stairway leading to the smoking area of the hospital. He reported the assault to the staff and requested to be moved to another location in the facility. Following the smoke break, Plaintiff returned to his room until dinner time. After dinner Plaintiff returned to his room until approximately 9:00 p.m. At that time, Plaintiff left to call his aunt on the community phone. While waiting for his aunt to answer, without any provocation or warning, Plaintiff was physically assaulted by the same individual

who had assaulted him earlier in the day. CP 1-4; 44-47. As a result of the second assault Plaintiff sustained severe and disabling injuries. CP 1-4

Plaintiff commenced his suit for the injuries on July 9, 2015 against the individual who assaulted him and Defendant. On or about August 21, 2015, Defendant served Interrogatories and Requests for Production on Plaintiff. On or about June 8, 2017 counsel for their respective clients held a brief CR 26(i) conference relating to the answering the outstanding discovery requests. CP 58-59.

No further action, by either party, took place in the case until December 26, 2019 when Defendant moved for Summary Judgment. CP 16-20. The basis of the Motion was that Plaintiff had not answered discovery requests identifying each expert witness that he would rely upon for testimony at the time of trial, and to provide reports or opinions created by each expert. CP 13-14. Defendant speculated and concluded, without any citation to the record, that Plaintiff did not have an expert to establish the standard of care and proximate cause of the injuries he sustained as a result of the negligence of the hospital.

Up to December 27, 2019, Defendant had not answered Plaintiff's Complaint. As a result, on December 27, 2019 Plaintiff served a Motion For Default on Defendant. Defendant answered

the Complaint on January 2, 2020. CP 24-28.

Defendant took no action to compel the responses to it's discovery until February 12, 2020, only 15 days before the scheduled summary judgment hearing. CP 55-57. Defendant did not take any other action for discovery, such as requests for admissions or taking Plaintiff's deposition prior to serving its Motion For Summary Judgment in December 2019.

Defendant's Motion For Summary Judgment was based solely upon Defendant's unsubstantiated claim that Plaintiff's lacked competent testimony to make a prima facie case of hospital negligence. This foundation was based upon Plaintiff's having not answered interrogatories and requests for production. It should be noted that Defendant did not move to compel responses to this discovery until shortly before the hearing on the Summary Judgment Motion. CP 16 -19

Plaintiff responded to the Motion For Summary Judgment arguing: (1) That Defendant had not cited to the record any foundation for its motion, therefore failing to meet the moving party's burden for bringing it's motion; (2) That expert testimony was not necessary when obvious facts establish the breach of the duty of care; and (3) That Defendant had a duty to protect its patients, that was breached. CP 38-43.

Defendant admitted in it's Reply In Support Of

Defendant's Motion For Summary Judgment, "that there is no citation to the record because there is no record in this case." CP 49, line 3. In addition Defendant argued: (1) That it had met its burden for the Motion For Summary Judgment based upon its speculation and conjecture, thereby shifting the burden to Plaintiff to rebut the motion; and (2) That expert testimony is necessary in a hospital negligence case such as this. CP 48-52

In response to Defendant's reply, Plaintiff cited Defendant to the *res ipsa loquitur* cases wherein expert testimony is not necessary in a hospital negligence case to establish causation. Plaintiff further referred to *res ipsa loquitur* as abrogating the need for expert testimony in hospital negligence cases. CP 63-66.

Following the court's granting the Summary Judgment, Plaintiff filed a Motion For Reconsideration arguing that Defendant had not met its initial burden in bring a Motion For Summary Judgment. CP 82-84. The Motion For Reconsideration was denied. CP 89. Plaintiff timely appealed both the Order Granting Summary Judgment and the Denial Of Reconsideration. CP 80-96.

ARGUMENT

Standard For Review:

The standard for review by the appellate court of a trial court's granting of a Summary Judgment is set forth in *Korlund*

v. DynCorp Tri-Cities Services, Inc., 156 Wn.2d 168, 177, 125 P.3d 119 (2005), as follows:

“This case is here for review of the trial court’s granting of summary judgment in favor of DynCorp. Accordingly, review is de novo, with this court engaging in the same inquiry as the trial court. *Hubbard v. Spokane County*, 146 Wn.2d 699, 707-08, 50 P.3d 602 (2002). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hubbard*, 146 Wn.2d at 707. The facts and reasonable inferences therefrom are construed most favorably to the nonmoving party. *Id.* Summary judgment should be granted if reasonable persons could reach but one conclusion from the evidence presented. *Id.*”

Summary Judgment Law:

CR 56(c), Motions and Proceeding, as it pertains to this matter provides:

“The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

In *White v. Kent Medical Center*, 61 Wn.App 163, 170, 810 P.2d 4 (1991) held:

“In a summary judgment motion, the moving party has the initial burden of showing the absence of an issue of material fact. This burden can be met by showing that

there is an absence of evidence supporting the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989). In this situation, the moving party is not required to support the motion by affidavits or other materials negating the opponent's claim. *Celotex*, 477 U.S. at 322-23; *Young*, 112 Wn.2d at 225-26. The moving party must still, however, identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Coletex*, 477 U.S. 323 (quoting Fed. R. Civ. P. 56); *Baldwin v. Sisters of Providence in Wash. Inc.*, 112 Wn.2d 127,132, 769 P.2d 298 (1989). If the moving party does not meet this initial burden, summary judgment may not be entered, regardless of whether the opposing party submitted responding materials. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977); *see also Baldwin*, 112 Wn.2d at 132."

"We emphasize, however, that only rarely will a moving party comply with the strict requirements of *Celotex*, *Young*, and *Baldwin* without having made specific citations to the record in its opening materials. *White* 61 Wn.App. at 171."

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 328, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), Justice White, writing a concurring opinion, addressing the burden on the moving party for a motion for summary judgment stated:

"But the movant must discharge the burden the Rules place

upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.” at 328.

ISSUE NO. 1

WHEN A PARTY MOVES FOR SUMMARY JUDGMENT BASED UPON AN ASSUMPTION THAT PLAINTIFF DOES NOT HAVE EVIDENCE TO PROVE HIS CASE, HAS A PROPER FOUNDATION BEEN LAID TO SHIFT THE BURDEN TO THE NON-MOVING PARTY?

This matter was not at issue prior to the time Defendant served it’s Motion For Summary Judgment. Defendant only filed it’s Answer to the Complaint denying Plaintiffs claim after Plaintiff moved for an Order of Default and after Defendant moved for Summary Judgment.

Here, Defendant alleges that Plaintiff had failed to answer interrogatories and therefore concludes, without reference to the record on file or any evidence, that Plaintiff is unable to establish a breach of the standard of care by Defendant. CP 13-14. Except for this speculative and conclusory statement, Defendant has provided no evidence that Plaintiff was unable to establish a breach of the standard of care by Defendant.

Defendant did not seek to compel Plaintiff’s answers to interrogatories until approximately 2 weeks before the hearing on

it's Summary Judgment Motion (CP 55-57) and nearly a month and one-half after it filed it's Motion For Summary Judgment (CP 16-20).

Prior to the date the trial court heard the Motion For Summary Judgment, Plaintiff had not been compelled by the court to respond to Defendant's discovery requests. Defendant, therefore, had absolutely no record to point to in support of it's motion, other than it's speculative and conclusory statement that Plaintiff had no evidence to support his case. Defendant failed to meet the initial burden as the moving party for Summary Judgment and the Motion should have been denied. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977); *see also Baldwin*, 112 Wn.2d at 132 and *White*, 61 Wn.App. at 170.

Clearly, the burden placed upon a party moving for Summary Judgment is to show the absence of an issue of material fact. *LaPlante v. State*, 85 Wn.2d 154,158, 531 P.2d 299 (1975). Counsel has misconstrued the holdings of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) when arguing that the moving party may meet it's "initial showing" by merely "pointing out" that there is an absence of evidence to support the nonmoving party's case. *Young, supra.* The moving party must point to "the pleadings, depositions, answers to interrogatories,

and admissions on file, together with affidavits, if any,” to meet its burden. CR 56(c). Lack of such record by Defendant’s failure to compel under discovery rules, requires the denial of the Motion For Summary Judgment. *Jacobsen, supra.*, at 108.

Defendant’s Summary Judgment Motion may be made without supporting affidavits; however, it is essential that the moving party identify those portions of the record on file that demonstrate the absence of genuine issues of material fact. *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 21-22, 851 P.2d 689 (1993). Here, Defendant has failed to identify those portions of the record on file that support the foundation for the motion, because there were none. The sole basis of Defendant’s motion is that Plaintiff had not fully answered the interrogatories. Defendant then speculates, that since Plaintiff has not answered interrogatories, that Plaintiff cannot support his claim for hospital negligence by Defendant. Defendant has failed to show anything in the record to establish that Plaintiff was unable to support his case for hospital negligence.

ISSUE NO. 2

IS AN EXPERT WITNESS REQUIRED TO ESTABLISH A VIOLATION OF THE STANDARD OF CARE WHEN THE NEGLIGENCE OF A HOSPITAL IS READILY OBSERVABLE BY A LAY INDIVIDUAL.

In a hospital negligence case the burden is on the Plaintiff to establish that the injury resulted from the Defendant's failure to follow the accepted standard of care for the state of Washington. RCW 7.70.030(1). The burden is on the Plaintiff to prove by a preponderance of the evidence that the injury resulted from the Defendant's failure to meet the standard of care. RCW 7.70.040(1).

This case is a hospital negligence case. At issue is whether the Plaintiff must establish the standard of care by medical experts. Plaintiff contends that a medical expert is not required to establish the standard of care where the negligence of the Defendant is observable without medical training. *Shellenbarger v. Brigman*, 101 Wn.App. 339, 347, 3 P.3d 211 (2000).

To prevail in a hospital negligence case, the Plaintiff must establish a duty, a breach of that duty, injury, and that the breach of the duty was a proximate cause of the injury. *Miller v. Jacoby*, 145 Wn.2d 65, 74, 33 P.3d 68 (2001)

Defendant owed Plaintiff the duty to protect him from injuries by other patients. In *Peterson v. State*, 100 Wn.2d 421, 426, 671 P.2d 230 (1983), the court held that a special relationship existed between the psychiatrist and third parties and his patient when he had knowledge of a patient's propensities to cause harm to others. This gave rise to the other's right to protection. In this

regard, the court relied on Restatement (Second) of Torts, § 315 (1965), which provides:

“The general rule of non liability and its exceptions;
There is no duty so to control the conduct of a third person
as to prevent him from causing physical harm to another
unless
(a) a special relation exists between the actor and the third
person which imposes a duty upon the actor to control the
third person’s conduct, or
(b) a special relation exist between the actor and the other
which gives to the other a right to protection”
Peterson, at 426

This same standard was applied in *Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997). A patient in a group home for developmentally disabled persons was raped by an employee of the nursing home. It was found that the special duty of the nursing home existed to protect it’s patients and that it was responsible for not providing that protection.

In our case, Defendant was aware of the propensity of Mr. Price to assault Plaintiff. Plaintiff had reported the first assault and requested to be moved. No action was taken at the time of the first assault to remove Mr. Price from the area or to move Plaintiff. Approximately six hours later, Mr. Price again assaulted the Plaintiff, causing serious injuries. CP 44-47 Defendant had knowledge of the propensity of Mr. Price to assault Plaintiff and therefore had a duty to protect Plaintiff.

It is undisputed that Defendant had a duty to protect the health and welfare of the patients in its care. The real issue in this case is whether Defendant, by taking no action whatsoever, breached that duty. Defendant breached the duty by not taking any action to protect Plaintiff from Mr. Price. The breach resulted in serious injury to Plaintiff, caused by its failure to take action. Query, is it required to have a medical expert to establish the standard of care when the facts establish an obvious failure on the part of Defendant to protect Plaintiff. The court held in *Miller, supra.* at 74, that an expert is not necessary under such obvious circumstances.

ISSUE NO. 3

IS RES IPSA LOQUITUR AVAILABLE TO ESTABLISH NEGLIGENCE AND CAUSATION IN RESPONSE TO A MOTION FOR SUMMARY JUDGMENT?

It is Plaintiff's position that the doctrine of *res ipsa loquitur* as applied to the facts of this case eliminates the necessity of expert testimony. *Miller, supra.* at 74 held:

“For *res ipsa loquitur* to apply, the following three criteria must be met:

(1) [T]he occurrence producing the injury must be of the kind which ordinarily does not occur in the absence of negligence; (2) the injury is caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the injury-causing occurrence must not

be due to an contribution on the part of the plaintiff.”
(Citations omitted)

Res ipsa loquitur was applied and held to be proper in *Ripley v. Lanzer* 152 Wn.App. 296, 215 P.3d 1020 (2009). In that case, the doctor’s scalpel broke and he failed to remove all of the broken scalpel pieces from his patient. On appeal, after summary judgment was granted in favor of the doctor by the trial court, the court reversed, holding:

“Generally, expert testimony is necessary to establish the standard of care for a health care provider in a medical malpractice action. Expert testimony is not necessary to establish the standard of care when medical facts are observable to a layperson and describable without medical training. For example, “the doctrine of res ipsa loquitur provides an inference of negligence from the occurrence itself which establishes a prima facie case sufficient to present a question for the jury.”

“The doctrine of res ipsa loquitur recognizes that an accident may be of such a nature, or may happen under such circumstances, that the occurrence is of itself sufficient to establish prima facie the fact of negligence on the part of the defendant, without further direct proof. Thus, it casts upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the presumption or inference of negligence on his part.” (citations omitted). *Ripley, supra.* at 306-307

Here, after the Defendant had knowledge of the first assault by Mr. Price on Plaintiff and failed to take any action to

control Mr. Price or to protect Plaintiff, a duty was created. By not moving Plaintiff or isolating Mr. Price, this set in motion the breach of the duty. A hospital has an obligation to control safeguard, protect and supervise its patients. Plaintiff did nothing to contribute to the assault perpetrated on him by Mr. Price. CP 44-47. Defendant was on notice of the dangerous proclivity of Mr. Price toward Plaintiff. These facts speak for themselves. Plaintiff has established his hospital negligence claim against Defendant, without the necessity of an expert to establish the standard of care.

It is anticipated that Defendant will argue that *res ipsa loquitur* should only be applied in exceptional cases and only where the facts and demands of justice make its application essential. *McCormick v. Jones*, 152 Wash. 508, 511, 278 P. 181 (1929). This argument was debunked in *Ripley, supra*. at 309, where it was recognized when Ripley withdrew all of their medical experts for trial and relied solely on *res ipsa loquitur* to defeat Lanzer's motion for summary judgment, that the doctrine raised the inference of both negligence and causation.

Tinder v. Nordstrom, Inc., 84 Wn.App. 787, 791-792, 929 P.2d 1209 (1997) addresses the utilization of *res ipsa loquitur*, as follows:

“Whether *res ipsa loquitur* is applicable is a question of

law. *Zukowski v. Brown*, 79 Wn.2d 586,592, 488 P. 2d 269 (1971). The doctrine recognizes that an injurious occurrence may be of such a nature “that the occurrence is of itself sufficient to establish prima facie the fact of negligence on the part of the defendant, without further or direct proof thereof.” *Morner v. Union Pac. R.R. Co.*, 31 Wn.2d 282,291, 196 P.2d 744(1948).

“In deciding whether the doctrine applies, the court is to examine whether a “reasonable inference of negligence” exists. *Marshall v. Western Air Lines, Inc.*, 62 Wn.App. 251, 259, 813 P.2d 1269, review denied, 118 Wn.2d 1002 (1991). Whether or not the circumstances of an occurrence are sufficient to support this “reasonable inference of negligence” can only be determined in the context of each case.” *Zukowsky v. Brown*, 79 Wn.2d 586, 594, 488 P.2d 269 (1971). (Res ipsa loquitur applied when a boat seat collapsed without warning)

ISSUE NO. 4

WAS IT A MANIFEST ABUSE OF DISCRETION WHEN THE TRIAL COURT FAILED TO GRANT A CONTINUANCE OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT AT THE REQUEST OF THE PLAINTIFF?

Plaintiff filed several Motions For Continuance of the summary judgment hearing based upon unavailability of counsel and seeking additional time for an expert written opinion regarding standard of care. CP 29-37, 54 and 98. This would only be necessary if the court were to rule that an expert opinion was

necessary. At issue is an additional Motion To Allow A Late Filing Of An Expert's written opinion coupled with a Motion To Continue. CP 67-71.

The trial court denied the additional Request For Continuance and the Request To Allow A Late Filing by entering its order for summary judgment. CP 80-81. The practical effect of granting the summary judgment motion was to deny the motions.

In reviewing the denial of a motion for continuance the standard is whether the denial is a manifest abuse of discretion. *Lewis v. Bell*, 45 Wn.App. 192, 196, 724 P.2d 425 (1986). A manifest abuse of discretion was defined in *Mayer v. STO Industries*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) as follows:

“... An abuse of discretion occurs when a decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” (Citations omitted). A discretionary decision rests on “untenable grounds”, or is based on “untenable reasons” if the trial court relies on unsupported facts or applies the wrong legal standard; the court’s decision is “manifestly unreasonable” if “the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take.’ ” (citations omitted).”

Here, Defendant argued that this matter had been pending since 2015 with little action being taken by Plaintiff. The foundation for Defendant’s argument was that Plaintiff had not responded to discovery propounded by Defendant since 2017. However,

Defendant took no action on the matter until December 26, 2019. CP 16-20. Similar to the argument that Defendant's raised as against Plaintiff, it should be noted that Defendant had not even responded to Plaintiff's Complaint at the time it raise these arguments. CP 21-22. Plaintiff requested the continuance, to obtain the written expert's opinion, should the same be deemed necessary by the court, and also to receive outstanding discovery responses that were due from Defendant. CP 70. In *Cofer v. County of Pierce*, 8 Wn.App. 258, 262, 505 P.2d 476 (1973), it was held that a court has a duty to grant a party a reasonable opportunity to complete its discovery before ruling on a motion for summary judgment

Similar issues were raised in *Durand v. HIMC Corp.*, 151 Wn. App. 818, 828, 214 P.3d 189 (2009). There it was held that the party seeking a continuance must establish a good reason for the delay, including an affidavit stating what evidence the party seeks and how it will raise an issue of material fact. Plaintiff's Motion For Continuance (CP 67-71) set forth both the need to obtain an opinion letter, as well as the need for Plaintiff to receive his first discovery requests from Defendant.

The comment on CR 56(f) provides that a continuance of summary judgment hearings should be liberally construed to allow "a just determination in every action." *Keck v. Collins*, 184 Wn.2d

358, 369, 357 P.3d 1080 (2015). This matter had not moved forward until Defendant's Motion For Summary Judgment in late December 2019. Plaintiff, in responding to Defendant's Motion, commenced his own discovery and sought an expert opinion on the standard of care, in spite of the previously argued lack of necessity for an expert. In liberally construing the Motion For Continuance of the February 27, 2020 Summary Judgment hearing, it was a manifest abuse of discretion to deny the continuance. Had the court considered the Plaintiff's need to receive Defendant's outstanding discovery responses and Plaintiff's request for additional time to procure the expert's written opinion, if deemed necessary, it would have resulted in a more just determination of the action on its merits.

ISSUE NO. 5

WAS IT A MANIFEST ABUSE OF DISCRETION WHEN THE TRIAL COURT FAILED TO ALLOW PLAINTIFF TO FILE A LATE AFFIDAVIT FROM AN EXPERT WITNESS?

As an alternative, the court could have allowed a late filing of an expert written opinion following the hearing on the Summary Judgment Motion to address information that was not available at the time of the Summary Judgment hearing. In *Keck v. Collins*, 184 Wn.2d 358, 366, 357 P.3d 1080 (2015), the Plaintiff sought to file an additional opinion affidavit on the day

before the hearing on summary judgment or to continuance the hearing. The request was denied. However, it was held that the court neglected to consider the *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) factors in reaching its decision to exclude the late filed affidavit. Those factors being whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party. *Keck, supra.* at 368-369. In our case, none of these factors were addressed by the court. The denial of the Motion To Continue should be considered a manifest abuse of discretion, as there was no willful or deliberate violation by Plaintiff in submitting a timely opinion letter, to the extent it was necessary. The delay would not have substantially prejudiced the Defendant, since the trial date was still months away. The sanction that was imposed, “not allowing the continuance or the late filing” resulted in the greatest sanction of all, that being the complete denial of the ability to have a just determination in the action. The *Keck* decision went on to provide:

But “our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action.”[citation omitted]. The “purpose [of summary judgment] is not to cut litigants off from their right to trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial by

inquiring and determining whether such evidence exists.’’
[citations omitted]. at 369

The trial court abused its discretion in not allowing Plaintiff to either obtain a continuance or to file a late affidavit. The *Burent* factors were not addressed by the court as required in order to grant a summary judgment. This failure should be considered a manifest abuse of discretion. *Mayer, supra.* at 684.

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WAS IT A MANIFEST ABUSE ITS DISCRETION WHEN THE TRIAL COURT FAILED TO GRANT PLAINTIFF’S MOTION FOR RECONSIDERATION?

The standard for an abuse of discretion occurs when the decision is unreasonable or arbitrary. *Mayer, supra.* at 684. Plaintiff in his Motion For Reconsideration raised the issues of whether: (1) The decision was contrary to law, CR 59(a)(7); (2) The decision was an error in law argued at the summary judgment hearing, CR 59(a)(8); or (3) That substantial justice had not been done, CR 59(a)(9). CP 82-85.

The issue of whether the decision was contrary to law (CR 59(a)(7)) is based upon the fact that the Defendant, as the moving party, did not establish that Plaintiff did not have an expert to establish the standard of care for a psychiatric hospital. The motion was supported by only a speculative and conclusory

assumption made by Defendant that Plaintiff did not have this information, without any reference to the record, other than to claim that discovery had not been answered. Defendant had taken no effort to bring before the court a motion to compel the responses at the time it filed its Motion For Summary Judgment and filed counsels declaration. *Guile, supra.*, *White, supra.*, and *Baldwin, supra.* all require the moving party to do more than speculate or conclude that a foundation exists for its motion. Without the necessary foundation, the burden does not shift to the non-moving party and the motion must be denied. *White, supra.* at 170. (See also, concurring opinion of Justice White in *Celotex, supra.* at 328)

The basis of the CR 59(a)(8) Motion For Reconsideration was that the court was aware, from the Plaintiff's responses to the Motion For Summary Judgment, that it was an error of law to not address the adequacy of Defendant's failure to lay a proper foundation for its motion by addressing the CR 56(c) factors. The record, as presented, did not establish that Plaintiff did not have expert testimony and therefore did not meet its requirements to shift the burden to Plaintiff to come forth with evidence. *Ramey v. Knorr*, 130 Wn.App. 672, 686, 124 P.3d 314 (2005).

The basis for the CR 59(a)(9) Motion For Reconsideration, is that substantial justice has not been done. Here, by not

allowing a continuance, or not allowing a late filing of an affidavit and ignoring the burden that the moving party has in a summary judgment motion, the Plaintiff has been denied his day in court. *Ramey, supra.* at 687-688. Thus, substantial justice has not been done on Plaintiff's case.

Overall, Plaintiff has been denied the right to present his case, based on the lack of evidence on Defendant's behalf to support it's Motion For Summary Judgment; the error of law by granting a summary judgment that was objected to at the time of the hearing on the motion; and that substantial justice has not been done, justifies that reversal of the summary judgment and remanding the matter for further proceedings.

CONCLUSION

Defendant has failed to lay a proper foundation, as the moving party, on a motion for summary judgment by any reference to the CR 56(c) standards for a summary judgment. Not having laid that foundation, the burden did not shift to the non-moving party to refute the allegations. *White, supra.* at 170.

It cannot be disputed that the hospital had a duty to care for the patients in it's care. It should not require an expert to establish that the complete failure to act in support of it's duties is a failure to met the standard of care.

Plaintiff should not have been required to provide an expert

written opinion. The facts clearly showed an obvious breach of Defendant's duty to protect Plaintiff from assaults by a patient known specifically to have a propensity to attack the Plaintiff.

The standard in cases where the evidence is observable by lay persons, expert testimony as to the standard of care may not be required. *Shellenbarger v. Brigman, supra*. Finally, *res ipsa loquitur* establishes the negligence on the part of the Defendant in this matter. Defendant was aware of the propensity of Mr. Price to assault Plaintiff and did nothing to protect him. Being on notice of Mr. Price's danger to Plaintiff, it took no action. This violated the duty to Plaintiff and it resulted in serious injuries to Plaintiff.

Res ipsa loquitur establishes the hospital negligence on the part of Defendant satisfying the duty, the breach of the duty causing injury that was proximately caused by the Defendant's breach. *Peterson, supra*. at 426; *Niece, supra*. at 43. Defendant was aware of the propensity of Mr. Price to assault Plaintiff and did nothing to protect him. Being on notice of Mr. Price's danger to Plaintiff, it took no action. This violated the duty to Plaintiff and it resulted in serious injuries to Plaintiff.

Finally, it was a manifest abuse of discretion by the trial court in failing to rule that Defendant had not met its initial burden of proof and denying the summary judgment; by not

granting a continuance to allow Plaintiff to obtain an expert written opinion on the standard of care and to receive discovery from Defendant; and by not allowing Plaintiff to present his case in court.

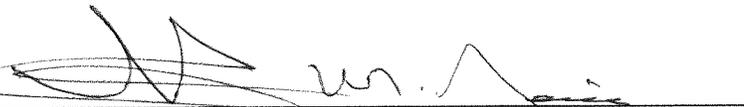
Therefore, it is respectfully requested that the Summary Judgment be vacated and the matter remanded to the trial court for further proceedings.

Respectfully submitted this

21st day of May 2020

AITKEN, SCHAUBLE, PATRICK NEILL & SCHAUBLE

By

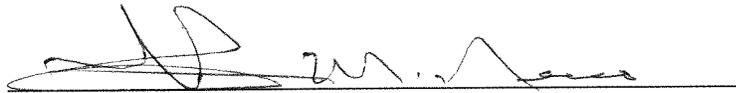


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CERTIFICATE OF SERVICE

I certify that on the 21st day of May 2020, I caused a true and correct copy of this Designation of Clerk's Papers 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. | <input checked="" type="checkbox"/> U.S. Mail |
| Washington Attorney General | postage prepaid |
| Tort Division | |
| 7141 Cleanwater Drive SW | |
| P. O. Box 40124 | |
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