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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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IBRAHIM A. ABDULWAHID,

Appellant,

v.

EASTERN STATE HOSPITAL, et al.,

Respondents.

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**RESPONDENT STATE OF WASHINGTON'S  
ANSWERING BRIEF**

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## **I. INTRODUCTION**

To forestall summary judgment, Abdulwahid had a burden to create a genuine issue of material fact regarding whether his injury was caused by a failure to comply with the applicable standard of care for an inpatient psychiatric hospital. His failure to offer any expert testimony to establish the applicable standard of care and to opine that the Hospital violated the standard of care are dispositive to his claim of medical malpractice. Moreover, *res ipsa loquitur* is inapplicable and cannot be substituted for expert testimony where Abdulwahid failed to offer any evidence that the injury is of a kind that ordinarily does not happen in the absence of negligence. In response to a motion for summary judgment, Abdulwahid failed to offer any expert testimony to establish breach or create a genuine issue of material fact. Accordingly, four and one-half years after this lawsuit was filed, his claims were properly dismissed.

## **II. COUNTERSTATEMENT OF ISSUES ON APPEAL**

1. Was summary judgment proper when Abdulwahid failed to offer any competent medical expert testimony to establish that his alleged injury was caused by a failure to comply with the standard of care for an inpatient psychiatric hospital in Washington? (Counterstatement to Issue No. 2.)

2. Was summary judgment proper when the doctrine of res ipsa loquitur does not apply? (Counterstatement to Issue No. 3.)

3. Was summary judgment and the denial of a motion for reconsideration proper when, in response to the Hospital's motion, Abdulwahid failed to offer competent evidence to make out a prima facie case of medical malpractice? (Counterstatement to Issues Nos. 1 and 6.)

4. Did the trial court appropriately exercise its discretion to deny Abdulwahid's third motion for a continuance when (a) at his request, the motion for summary judgment had already been twice rescheduled, (b) it was heard two months after it was filed and over four and one-half years after Abdulwahid filed suit, and (c) Abdulwahid failed to create a record sufficient to support his request for a continuance? (Counterstatement to Issues Nos. 4 and 5.)

### **III. COUNTERSTATEMENT OF THE CASE**

Ibrahim Abdulwahid, Plaintiff/Appellant, was an inpatient at Eastern State Hospital, a psychiatric hospital operated by the State of Washington. CP 2. He alleges the Hospital violated its professional duty to him when another patient, without warning or provocation, assaulted him on July 10, 2012.

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.

Following his smoke break, Abdulwahid claims he filled out a room change request form and, through mealtime and on the ward, did not have any further interactions with Price. CP 45.<sup>1</sup> That night, about six and one-half hours later, and without warning, Price assaulted Abdulwahid for a second time. CP 2.

On July 9, 2015, Abdulwahid brought suit. CP 1. On August 21, 2015, the Hospital served Abdulwahid with written discovery. CP 58. Among the information sought was a request to identify each expert witness that he would rely upon for testimony at the time of trial and requests for reports or opinions created by each expert. CP 13-14 ¶ 3.

After several months without any response to the Hospital's written discovery, on June 8, 2017, the parties engaged in a CR 26(i) conference. CP 58. Counsel for Mr. Abdulwahid indicated that he was waiting for his client to come in, review, and sign draft answers and, following that,

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<sup>1</sup> Abdulwahid did not provide to the trial court a copy of the form he claims to have filled out.

he would provide completed responses. No answers were ever provided. CP 59.

On July 13, 2016, an order of default was entered against the fellow patient and alleged assailant, Phillip Price. CP 9. For almost three and one-half years, Abdulwahid allowed the case to languish until, on December 26, 2019, the Hospital simultaneously filed two motions: a motion for summary judgment and a motion to dismiss for lack of prosecution pursuant to CR 41. CP 13-20. The motions were noted for hearing over a month later, on January 29, 2020. CP 11-12.

On January 6, 2020, in response to the Hospital's motions, Abdulwahid moved for default. CP 21-22. Abdulwahid also moved the court to reset the Hospital's motion for summary judgment. CP 23.

On January 16, 2020, Abdulwahid again moved the court to continue the hearing on the Hospital's motion for summary judgment, this time "to allow Plaintiff's expert to submit his affidavit as to the violation of the standard of care of Eastern State Hospital in the care of the plaintiff." CP 29. With his motion, Abdulwahid attached a curriculum vitae of his proposed expert, Dr. Safa Rubaye. CP 32-37.<sup>2</sup> Counsel indicated that Dr. Rubaye was reviewing records (CP 30) and identified the length of his

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<sup>2</sup> Dr. Rubaye resides in Texas and is neither licensed in nor has ever worked in the state of Washington. CP 32-37

requested continuance, and specifically asked that the hearing on the Hospital's motion, which was filed on December 26, be continued "until the week of February 24 to 28 . . . ." CP 29.

On February 5, 2020, the trial court granted Abdulwahid's motion for a continuance noting Abdulwahid's stated grounds for relief: "Plaintiff is seeking a report from his medical expert on the standard of care." CP 98. Per Abdulwahid's request, the hearing on the Hospital's motion was continued until February 27, 2020.

Then, on February 21, 2020, almost two months after the Hospital filed its motion, Abdulwahid moved the court "for an Order that permits the filing of the declaration of plaintiff's expert after the expiration of the time period provide [sic] in the court rules." CP 67. Abdulwahid conceded he waited until January 16, 2020 (CP 70) to retain "an expert to address the standard of care" (CP 67), over four and one-half years after he filed suit and three weeks after the Hospital filed its motion for summary judgment. It was not until February 6 that counsel had a "preliminary conversation" with Dr. Rubaye. CP 67.

Abdulwahid asked that the proposed declaration "should be . . . taken into consideration with the other arguments to be heard on February 27, 2020" at the hearing on the Hospital's motion for summary judgment. CP 68. In the alternative, Abdulwahid asked for yet another

continuance, this time to April 4, 2020, presumably because he had only recently sent a discovery request to the Hospital. CP 68, 70.

When Abdulwahid ultimately responded to the Motion for Summary Judgment, he asserted the Hospital's motion was "based upon an unfounded belief that the plaintiff does not have an expert to testify concerning the relevant standard of care and causation." CP 38. Yet, he never filed an affidavit from Dr. Rubaye, or any other expert, regarding the relevant standard of care or alleged breach thereof. He failed to file even a preliminary affidavit from Dr. Rubaye attesting to his knowledge of the standard of care in the state of Washington, his inability to offer an opinion without specified information, or a timeframe for when he would be able to offer his opinion. *See* CP 29-30 (Motion to Continue), 38-43 (Response to Motion for Summary Judgment), 63-66 ([Sur]reply to Motion for Summary Judgment), 67-71 (Motion to File Late Affidavit).<sup>3</sup>

Despite over four and one-half years since filing suit, the only evidence Abdulwahid offered in response to the Hospital's Motion for Summary Judgment was his own declaration briefly describing the

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<sup>3</sup> Abdulwahid could have filed a preliminary declaration from his proposed expert with any of these pleadings. He failed to do so even though, as of at least January 16, 2020, Dr. Rubaye was purportedly "reviewing [hospital] records and the history of the claims of the plaintiff." CP 30 (lines 10-11).

alleged events of July 10, 2012, and injuries. CP 44-46. Even in Abdulwahid's sur-reply to the Hospital's motion, he offered no additional evidence: no affidavits or declarations from experts or other witnesses, no deposition transcripts, records, or other documentary evidence - nothing. CP 67-69.

The trial court heard oral argument on February 27, 2020. Although Abdulwahid asked that his expert's declaration "be allowed and taken into consideration with the other arguments to be heard" that day (CP 68), he offered nothing for the judge to consider. The court granted the Hospital's motion for summary judgment and dismissed Abdulwahid's claims (CP 80-81). On March 9, 2020, Abdulwahid filed a Motion for Reconsideration of the order granting summary judgment. He offered no supporting affidavit from his proposed expert attesting to his knowledge of Washington's standard of care, offering an explanation as to why he was unable timely to provide an opinion, or providing a timeframe for how much additional time he needed. *See* CP 82-85. The trial court denied Abdulwahid's motion for reconsideration. CP 89.

#### **IV. ARGUMENT**

Summary judgment in favor of the Hospital should be affirmed in this medical malpractice case. To survive summary judgment, Abdulwahid

needed to present expert testimony on negligence (the standard of care and alleged breach) and causation. *See, e.g., Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). He did not do so.

In addition, the doctrine of *res ipsa loquitur* does not apply in this case. Abdulwahid failed to offer any evidence to demonstrate that his alleged injury was the kind that ordinarily does not happen absent negligence. In fact, he failed to offer *any* evidence about what a reasonable inpatient psychiatric hospital in the state of Washington should have done, that the Hospital failed to act in that manner, and that this failure caused the injuries. Summary judgment was appropriate.

**A. Standard of Review**

**1. The order granting summary judgment is reviewed de novo**

Summary judgment is appropriate when “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014); CR 56(c). The purpose of summary judgment is to avoid unnecessary trials where insufficient evidence exists. *Pelton v. Tri-State Mem’l Hosp., Inc.*, 66 Wn. App. 350, 355, 831 P.2d 1147 (1992) (citing *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989)). On appeal, “[t]he appellate court engages in the same inquiry as the trial court,

with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party.” *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). This Court may affirm for any reason supported by the record. RAP 2.5(a).

In medical malpractice cases, a defendant may move for summary judgment by either setting forth its version of facts and alleging that there is no genuine issue as to those facts, or showing an absence of competent evidence to support the plaintiff’s case. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21-23, 851 P.2d 689 (1993); *see also Young*, 112 Wn.2d at 226 (“A defendant may move for summary judgment on the ground the plaintiff lacks competent medical evidence to make out a prima facie case of medical malpractice.”). “In this latter situation, the moving party need not support its summary judgment motion with affidavits.” *Boyer v. Morimoto*, 10 Wn. App. 2d 506, 519, 449 P.3d 285 (2019).

Thereafter, the burden “shifts to the plaintiff to provide an affidavit from a qualified medical expert witness that alleges specific facts establishing a cause of action.” *Boyer*, 10 Wn. App. at 520 (citing *Guile*, 70 Wn. App. at 25, 851 P.2d 689). “Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment.” 10 Wn. App. at 520. Moreover, the non-

moving party may not rely on allegations in its pleadings to oppose a motion for summary judgment. CR 56(e).

**2. Denial of continuance is reviewed for abuse of discretion**

“In deciding a motion to continue, the trial court takes into account a number of factors, including diligence, due process, the need for an orderly procedure, the possible effect on the trial, and whether prior continuances were granted.” *In re V.R.R.*, 134 Wn. App. 573, 581, 141 P.3d 85 (2006). A trial court’s “decision to grant or deny a continuance is subject only to review for abuse.” *Harris v. Drake*, 116 Wn. App. 261, 287, 65 P.3d 350 (2003), *aff’d*, 152 Wn.2d 480, 99 P.3d 872 (2004). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

**B. Summary Judgment Was Appropriate Because Abdulwahid Lacks Expert Support on Negligence**

Abdulwahid failed to present any competent expert testimony setting out the standard of care or showing a violation of the standard of care.<sup>4</sup> In this medical malpractice case, Abdulwahid bears the burden of

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<sup>4</sup> Plaintiff/Appellant is also required to prove proximate cause; however, because he did not establish the applicable standard of care or that the Hospital’s actions violated the standard, the issue of proximate cause was never reached – although he offered no evidence in that regard either.

proving both. RCW 7.70.040, which governs his claims for injury allegedly resulting from health care, identifies the required elements of proof:

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of.

Most plaintiffs must prove violation of the standard of care and proximate cause by expert testimony. *Keck*, 184 Wn.2d at 370; *see also Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001) (“[T]o defeat summary judgment in almost all medical negligence cases, the plaintiffs must produce competent medical expert testimony establishing that the injury was proximately caused by a failure to comply with the applicable standard of care.”). This case is no different.

**1. Summary judgment was proper because Abdulwahid failed to offer expert testimony about the applicable standard of care**

When establishing negligence in a medical malpractice case, the plaintiff must establish both the standard of care in Washington and breach of that standard through the testimony of a professional equal to the

defendant. *McKee v. Am. Home Prods., Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989); *Young*, 112 Wn.2d at 227-28. A health care provider's conduct is to be measured against the standard of care of a reasonably prudent practitioner possessing the degree of skill, care, and learning possessed by other members of the same area of specialty in the state of Washington. *Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (construing RCW 7.70.040). For example, in *McKee*, the testimony of an Arizona physician did not set forth the standard of care applicable to a Washington pharmacist. 113 Wn.2d at 706-07. And in *Young*, the testimony of a pharmacist did not rebut the testimony of the defendant physicians. 112 Wn.2d at 227.

Under Washington decisions, the expert, in the declaration contravening a summary judgment motion, must declare what a reasonable doctor would or would not have done, that the defendant failed to act in that manner, and that this failure caused the injuries. The expert may not merely proclaim that the defendant physician was negligent, but must instead establish the applicable standard and detail the facts on how the defendant acted negligently by breaching that standard. Furthermore, the expert must link his conclusions to a factual basis.

*Boyer v. Morimoto*, 10 Wn. App. 2d 506, 524-25, 449 P.3d 285 (2019) (citing *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 86, 419 P.3d 819 (2018)).

Generally, jurors lack the knowledge and experience to determine violation of the standard of care. Expert testimony is required when an essential element in a case is best established by an opinion beyond the expertise of a layperson. *Harris*, 99 Wn.2d 438 at 449 (citing 5A Karl B. Tegland, *Washington Practice: Evidence* § 300 (1982)). “Medical facts in particular must be proven by expert testimony unless they are ‘observable by [a layperson’s] senses and describable without medical training.’ ” *Id.* (quoting *Bennett v. Dep’t of Labor & Indus.*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981)). For example, technical medical expertise is not required in cases where a physician amputates the wrong limb or pokes a patient in the eye while stitching a wound on the face. *Berger v. Sonneland*, 144 Wn.2d 91, 111, 26 P.3d 257 (2001).

Additionally, in response to a defendant’s motion for summary judgment, a “plaintiff [must] provide an affidavit from a qualified medical expert witness that alleges specific facts establishing a cause of action[.]” references a standard of care specifically in Washington, and shows that the purported expert is “qualified to testify to the standard of care in the state of Washington[.]” *Boyer*, 10 Wn. App. 2d at 520. The trial court must then “make a preliminary finding of fact under ER 104(a) as to whether an expert qualifies to express an opinion on the standard of care in Washington.” *Boyer*, 10 Wn. App. 2d at 521 (citing *Winkler v. Giddings*, 146 Wn. App.

387, 392, 190 P.3d 117 (2008)). It is not enough for a proposed expert to make an “educated assumption that the standard of care was the same across the country.” *Boyer*, 10 Wn. App. 2d at 523 (quoting *Winkler*, 146 Wn. App. at 392, 190 P.3d 117).

The Hospital acknowledges it has a duty to care for and protect its patients, and whether it did so must be measured against the standard of care of a reasonably prudent inpatient psychiatric hospital in Washington State. *See Harris*, 99 Wn.2d 438 (construing RCW 7.70.040).<sup>5</sup> Abdulwahid, however, offered no expert testimony about what a reasonable inpatient psychiatric hospital would or would not have done in this particular situation. *See Boyer*, 10 Wn. App. 2d at 524-25. Managing both the individual treatment needs and safety of patients in a psychiatric hospital is complicated, and a lay jury should not be left to decide for itself the acceptable standard of care for the Hospital. *See Harris*, 99 Wn.2d at 449. Additionally, despite providing a curriculum vitae of his proposed expert, Abdulwahid failed to offer any evidence that Dr. Rubaye is qualified to testify to the specific standard of care in the state of Washington. *See Boyer*, 10 Wn. App. 2d at 520.

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<sup>5</sup> Abdulwahid’s argument about a duty to protect misses the point that the breach of duty is measured against the applicable standard of care. *See CP 41; App. Br.* at 12.

The law is clear that the Hospital's conduct in managing the care and safety of its patients is to be measured against the standard of care of a reasonably prudent inpatient psychiatric hospital in this state. *See Harris*, 99 Wn.2d 438. In the absence of an affidavit from a qualified medical expert witness, Abdulwahid continued to argue the Hospital's motion was "based on the unfounded belief that the plaintiff does not have an expert to testify concerning the relevant standard of care and causation." CP 38. In addition, despite clear authority to the contrary, Abdulwahid asserted, "Mere speculation that plaintiff does not have the ability to prove the standard of care in this case should not be the basis for granting a motion for summary judgment." Yet, that is entirely the point of summary judgment: "to avoid unnecessary trials where insufficient evidence exists." *See Pelton v. Tri-State Memorial Hosp., Inc.*, 66 Wn. App. 350, 355, 831 P.2d 1147 (1992) (citing *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989)). Abdulwahid failed to meet his burden of "provid[ing] an affidavit from a qualified medical expert witness that alleges specific facts establishing a cause of action." *See Boyer*, 10 Wn. App. at 520. Accordingly, summary judgment was properly granted.

**2. In addition to failing to establish the standard of care, Abdulwahid failed to offer expert testimony related to whether there was a *breach* of the applicable standard**

In response to the Hospital’s Motion for Summary Judgment, Abdulwahid also failed to offer expert testimony that the Hospital failed to act in accordance with the applicable standard of care.

Under Washington decisions, the expert, in the declaration contravening a summary judgment motion, must declare . . . that the defendant failed to act in [a] manner [consistent with the standard of care], and that this failure caused the injuries. The expert may not merely proclaim that the defendant physician was negligent, but must instead . . . detail the facts on how the defendant acted negligently by breaching [the] standard. Furthermore, the expert must link his conclusions to a factual basis.”

*Boyer v. Morimoto*, 10 Wn. App. 2d 506, 524-25, 449 P.3d 285 (2019) (citing *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 86, 419 P.3d 819 (2018)). Expert testimony also must be based on facts and not speculation. *Seybold*, 105 Wn. App. at 677.

Abdulwahid’s failure to present any expert testimony to “detail the facts on how the [Hospital] acted negligently by breaching the standard” requires that his claims be dismissed. *See Boyer*, 10 Wn. App. 2d at 524-25. *See also Keck*, 184 Wn.2d at 370; *Harris*, 99 Wn.2d at 449.

**C. The Doctrine of Res Ipsa Loquitur Does Not Apply**

This Court should reject Abdulwahid’s attempt to rely on the doctrine of res ipsa loquitur to avoid the general rule that expert testimony

is required to prove violation of the standard of care and causation. *See* Appellant Br. at 14-17. Res ipsa loquitur means “the thing speaks for itself.” W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 39, at 243 (5th ed. 1984). This is not such an unusual case where negligence by the Hospital, or causation, can be inferred by the sudden conduct of another psychiatric patient.

Whether res ipsa loquitur applies in this case is a question of law. *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). The doctrine of res ipsa loquitur frees a plaintiff from proving specific acts of negligence in cases where a plaintiff asserts that he suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent. *Pacheco*, 149 Wn.2d at 436 (citations omitted). “Generally, it ‘provides nothing more than a permissive inference’ of negligence.” *Id.* (quoting *Zukowsky v. Brown*, 79 Wn.2d 586, 600, 488 P.2d 269 (1971)). It can also support an inference of causation. *Ripley v. Lanzer*, 152 Wn. App. 296, 307, 215 P.3d 1020 (2009). Our supreme court has cautioned that the doctrine is “sparingly applied, in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.” *Curtis v Lein*, 169 Wn.2d 884, 889-90, 239 P.3d 1078 (2010) (internal citations and quotation marks omitted).

Under proper circumstances, *res ipsa loquitur* can be applied to physicians and hospitals. *ZeBarth v. Swedish Hosp. Med. Ctr.*, 81 Wn.2d 12, 18, 499 P.2d 1 (1972). “[T]he tests for *res ipsa loquitur* have remained substantially the same as when the doctrine was first explicitly described in *Byrne v. Boadle*, 159 Eng. Rep. 299, 2 H. & C. 722 (1863), the case where a barrel for no provable reasons rolled out of an upstairs window onto the plaintiff below, injuring him.” *ZeBarth*, 81 Wn.2d at 19. In order to apply *res ipsa loquitur*, a plaintiff must prove the following elements:

(1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone’s negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

*Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 89-90, 419 P.3d 819 (2018) (internal citation and quotation marks omitted). Abdulwahid failed to offer any evidence that the incident was the kind that ordinarily does not happen absent negligence.

*Res ipsa loquitur* does not apply because Abdulwahid cannot satisfy the doctrine’s first element. The first criterion that the occurrence producing the injury is of a kind that ordinarily does not happen in the absence of negligence, may be satisfied in one of three ways:

(1) [w]hen the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.

*Reyes*, 191 Wn.2d at 90 (internal citation and quotation marks omitted).

In *Reyes*, the Washington Supreme Court concluded that prescribing the decedent Isoniazid, which sometimes can lead to fatal liver toxicity, was not so “palpably negligent” as leaving foreign objects in a body or amputating the wrong limb. 191 Wn.2d at 90. Nor could a layperson’s “general experience and observation” show that it was negligent. Thus, *res ipsa loquitur* was inapplicable and could not be substituted for expert testimony. *Id.* Similarly, in *Miller v. Jacoby***Error! Bookmark not defined.**, the Court concluded, “[w]ithout knowing the professional standard of care for a health care provider placing a Penrose drain during surgery, a layperson would not be able to determine that [the plaintiff’s] injury would not have occurred absent negligence by [the defendant surgeon].” 145 Wn.2d 65, 75, 33 P.3d 68 (2001).

By contrast, in *Pacheco*, 149 Wn.2d at 439, the court noted that the surgeon’s act of drilling on the wrong side of the patient’s mouth was akin to a surgeon’s amputation of the wrong limb and concluded that “it is within

the general experience of mankind that the act of drilling on the wrong side of a patient's jaw would not ordinarily take place without negligence." Similarly, in *Ripley*, the court noted that the defendant "does not and could not argue that a surgeon who leaves a scalpel blade in a patient without noticing the blade is there and closes the surgical portals is doing something that ordinarily happens in the absence of negligence." 152 Wn. App. at 313.

The instant case is analogous to *Reyes* and *Miller*. The Hospital's management of psychiatric patients' treatment, care, and safety is complex; it is not within "the general experience and observation of mankind." See *Reyes*, 191 Wn.2d at 90. Moreover, not immediately moving a psychiatric patient to another floor of the hospital following an incident that resulted in no injuries, involved no heated verbal exchange or threats, and did not require any staff intervention is not so "palpably negligent" that it can be compared to leaving foreign objects in a body or amputating the wrong limb. See *Reyes*, 191 Wn.2d at 90. Compare *Pacheco*, 149 Wn.2d at 439.

Further, without knowing the professional standard of care for inpatient psychiatric hospitals in dealing with the treatment, care, and safety of patients "a layperson would not be able to determine that [Abdulwahid's] injury would not have occurred absent negligence by [the Hospital]." See *Miller*, 145 Wn.2d at 75. This point is accentuated by the fact that Abdulwahid's own expert would not automatically assign negligence based

on the assault alone. Instead, he needed and requested additional information before he could offer an opinion as to whether the Hospital violated the applicable standard of care. *See* CP 68 (ll. 1-2). Accordingly, *res ipsa loquitur* was inapplicable and did not relieve Abdulwahid of his burden to present expert testimony in this case.

**D. The Hospital Was Entitled to Judgment as a Matter of Law**

In response to the Hospital's Motion for Summary Judgment, Abdulwahid failed to offer competent medical evidence to make out a *prima facie* case of medical malpractice. As Abdulwahid concedes, a party moving for summary judgment may choose to do so by "pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case." CP 39 (quoting *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21-23, 851 P.2d 689 (1993)); *see also Young*, 112 Wn.2d at 226 ("A defendant may move for summary judgment on the ground the plaintiff lacks competent medical evidence to make out a *prima facie* case of medical malpractice."). Thereafter, the burden "shifts to the plaintiff to provide an affidavit from a qualified medical expert witness that alleges specific facts establishing a cause of action." *Boyer*, 10 Wn. App. at 520 (citing *Guile*, 70 Wn. App. at 25). Further, the non-moving party may not rely on allegations in its pleadings to oppose a motion for summary judgment. CR 56(e).

Yet, Abdulwahid disregards this Court’s guidance that “In this latter situation, the moving party need not support its summary judgment motion with affidavits.” *Boyer*, 10 Wn. App. 2d at 519. Ignoring clear authority and a plaintiff’s burden of proof, he instead contends the Hospital “should support its motion for summary judgment with facts that support its claim that it has complied with the standard of care” or point to the record to show the lack of Abdulwahid’s evidence. CP 39. The Hospital has repeatedly pointed to the lack of evidence to support his claim, and in response, he continues to provide none.

In this case, Abdulwahid claims the Hospital had knowledge of “the propensity of Mr. Price to assault” him. Appellant’s Br. at 13. He has, however, offered no evidence to support his allegation: not a single affidavit, declaration, sworn deposition testimony, or document. Nothing.

Further, it appears Abdulwahid and Price did not know each other,<sup>6</sup> and Abdulwahid does not report any previous animosity, threats, or acts of violence. CP 45. After the incident in the stairwell,<sup>7</sup> Abdulwahid “did not encounter” Price or experience any threats. Rather, six hours later, without

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<sup>6</sup> “I was walking next to a person, *later identified* as Phillip Price . . . .” CP 45 (line 14) (emphasis added).

<sup>7</sup> By Abdulwahid’s account, Mr. Price hit him after he stumbled down the stairs while they were going on a smoke break. He does not allege a scuffle that staff had to break up or that Price threatened him or had to be restrained. In fact, Abdulwahid was still able to go on his smoke break. CP 45.

provocation or warning, Price allegedly came up from behind and assaulted him. CP 45.

As noted above, Abdulwahid offered no expert testimony about what a reasonable inpatient psychiatric hospital would or would not have done in this particular situation or how the hospital breached the applicable standard of care in Washington. *See Boyer*, 10 Wn. App. 2d at 524-25. Further, he relies solely on speculation that the Hospital took no action after he reported the incident in the stairwell. He offered no declaration, deposition testimony, or document to support his conclusory allegation. *See* CP 38-43 (Response to Summary Judgment Motion), CP 63-66 ([Sur]Reply to Defendant's Reply).<sup>8</sup>

“Once there has been an initial showing of the absence of any genuine issue of material fact, the party opposing the summary judgment motion must respond with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues.” *Kepl's Estate by Kepl v. Dep't of Soc. & Health Servs.*, 34 Wn. App. 5, 11-12, 659 P.2d 1108 (1983) (citing *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975); *Turngren v. King Cty.*, 33 Wn. App. 78, 84, 649 P.2d 153 (1982)). Yet, Abdulwahid has impermissibly attempted to

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<sup>8</sup> He did not even provide the trial court with the room change form he allegedly filled out. *See* CP 45.

“create genuine issues of material fact by mere allegations, argumentative assertions, conclusory statements, and speculation.” *See In re Kelly & Moesslang*, 170 Wn. App. 722, 738, 287 P.3d 12 (2012) (internal citation and quotations omitted). *See* CP 41, 65<sup>9</sup> (no evidence offered related to response by the Hospital). *See also* Appellant’s Br. at 14 (unsupported conclusory allegation of no action).

Regarding the Hospital’s alleged breach of the applicable standard of care, Abdulwahid has failed to offer anything “more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues.” *See Kepl’s Estate by Kepl*, 34 Wn. The law is unequivocal that that is not enough to create genuine issues of material fact and defeat a motion for summary judgment. *See In re Kelly & Moesslang*, 170 Wn. App. at 738. Accordingly, summary judgment was proper and should be affirmed.

**E. The Trial Court Did Not Abuse its Discretion in Denying Abdulwahid’s Request for a Third Continuance**

The trial court’s decision to deny Abdulwahid’s motion for a continuance was not manifestly unreasonable when the motion for summary judgment had already been twice rescheduled, it was heard two months after

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<sup>9</sup> Counsel, without cite to the record or any evidence, wrongly asserts “the undisputed facts that the hospital staff . . . took no action . . . .” CP 65, line 32 (emphasis added).

it was filed, and Abdulwahid failed to create a record sufficient to support his request for a continuance.

“In deciding a motion to continue, the trial court takes into account a number of factors, including diligence, due process, the need for an orderly procedure, the possible effect on the trial, and whether prior continuances were granted.” *In re V.R.R.*, 134 Wn. App. 573, 581, 141 P.3d 85 (2006). Its “decision to grant or deny a continuance is subject only to review for abuse.” *Harris v. Drake*, 116 Wn. App. 261, 287, 65 P.3d 350 (2003), *aff’d*, 152 Wn.2d 480, 99 P.3d 872 (2004). Additionally, a trial court’s decision to accept a late declaration is reviewed for an abuse of discretion. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

Abdulwahid asked that a declaration of his proposed expert “to be submitted by plaintiff should be allowed and taken into consideration with the other arguments to be heard on February 27, 2020” at the hearing on the Hospital’s motion for summary judgment. CP 68. In the alternative, Abdulwahid asked for a third continuance. None of the authority provided by Appellant supports his position that the trial court abused its discretion by proceeding with the hearing on the motion for summary judgment.

In *Cofer v. Pierce County*, 8 Wn. App. 258, 505 P.2d 476 (1973), defendant filed a motion for summary judgment and noted it for hearing two weeks later. On that date, plaintiff's counsel asked for a continuance noting, "he had a witness from whom he had not had sufficient time to secure an affidavit. This witness would testify that the floor was being maintained in a dangerous manner and contrary to the instructions given by the contractor who supplied the floor material." The judge refused to allow any affidavits, but continued the matter for one week to allow additional briefing. Nonetheless, two days later, plaintiff's counsel filed an affidavit advising the court that he was unable to secure the expert's affidavit because the expert was in the hospital and asked for a continuance until the witness was out of the hospital and could help prepare an affidavit. The trial court denied the request for a continuance and granted summary judgment.

In finding an abuse of discretion, the appellate court noted two things: plaintiff's counsel had articulated "good reason why he [could not] obtain the affidavit of the witness in time" and "the evidence plaintiff's counsel alleged he could obtain would present a genuine issue of material fact." 8 Wn. App. at 262-63.

In *Durand v. HIMC Corp.*, 151 Wn. App. 818, 214 P.3d 189 (2009), the court set the case on an expedited schedule. From the date the complaint was filed, it allowed about 20 weeks for discovery and trial was set

approximately six weeks thereafter, on May 23, 2007. Instead of filing an answer, the defendants filed a CR 12(b)(6) motion to dismiss that was denied. Defendants then moved for discretionary review, which was also denied.

On April 26, the plaintiff moved for summary judgment. On April 27, 2007, the defendants filed a motion to continue the trial date and for supplemental discovery. The basis for their motion was “that their motion for discretionary review, the unavailability of counsel, and their inability to conduct discovery entitled them to additional discovery time. [The defendants] relied on CR 56(f), but they offered no explanation, other than their pretrial pleading practice, as to why they failed to timely complete discovery.” 151 Wn. App. at 826. The trial court denied the motion for a continuance and supplemental discovery.

The appellate court noted that while CR 56(f) permits a trial court to continue a summary judgment motion, the party seeking the continuance must “offer[] a good reason for the delay in obtaining the discovery. In addition, the party must provide an affidavit stating what evidence the party seeks and how it will raise an issue of material fact to preclude summary judgment.” *Id.* at 828 (citing *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369, 166 P.3d 667 (2007), *abrogated on other grounds by Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 310 P.3d 804 (2013)). In

finding that there was no abuse of discretion, the court found the trial court properly denied the employers' motion because they failed to exercise diligence in obtaining discovery. 151 Wn. App. at 828.

*Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015) is a case that involved a claim of medical malpractice. Defendant doctors moved for summary judgment, arguing plaintiffs lacked a qualified medical expert who could provide testimony to establish their claim. In response, plaintiffs filed three affidavits, one of which was untimely and was stricken by the trial court. The first affidavit was from the plaintiffs' medical expert, but only referred to one of the named defendants. A second, corrected affidavit was filed that referred to both defendant doctors. The expert's affidavit stated that he was familiar with the standard of care in Washington State as it related to the treatment and procedures involved, that they had breached the standard, and that their breach was the proximate cause of Ms. Keck's injury. 184 Wn.2d at 364-66.

In response, the defendants argued that the expert's "affidavit contained only conclusory statements without adequate factual support." Plaintiffs then filed a third affidavit from their expert "the day before the summary judgment hearing and 10 days after the filing deadline imposed by CR 56(c)." *Id.* at 366. The trial court granted defendants' motion to strike the affidavit as untimely. The supreme court noted, "While our cases have

required the *Burnet* analysis only when severe sanctions are imposed for discovery violations, we conclude that the analysis is equally appropriate when the trial court excludes untimely evidence submitted in response to a summary judgment motion.” *Id.* at 369.

Here, the trial court did not abuse its discretion in hearing the motion for summary judgment on February 27. Abdulwahid was neither diligent in obtaining discovery nor did he articulate that the declaration from his purported expert would “raise an issue of material fact to preclude summary judgment.” *See Durand*, 151 Wn. App. at 828.

In *Durand*, the court held that defendants who only had 20 weeks to conduct discovery had not been diligent. 151 Wn. App. at 828. Here, Abdulwahid filed his lawsuit in July 2015 and the motion for summary judgment was heard in February 2020. Where the *Durand* defendants had five months to complete discovery, Abdulwahid had 55 months. In ruling on Abdulwahid’s motion, the trial court noted:

All right. Well, it does seem, from reading the documentation, that this is an untimely motion in the sense that this expert or any expert would have been – would have been identified a long time ago. This lawsuit was filed on July 9, 2015, for an incident that allegedly occurred on July 10, 2012. So we’re talking almost eight years ago that this incident happened. The lawsuit was filed right on the statute – it looks like right on the three-year statute of limitations and has lingered and languished and not had anything happen except a default against Mr. Price. And so I think the State's points are well taken that it's – time's up

and this – this expert should have been identified a long time ago. There was a request, I think, interrogatories, requests for production had asked for the expert, and that was never identified, and so they went forward with the – State went forward with its motion for summary judgment based on the answer that there was no expert that was identified.

RP 6:7-7:1. The trial court emphasized the lack of diligence in its finding:

The Court finds that the plaintiff could have found an expert witness a long time ago. The case was filed three and a half years ago, July of 2015 – four and a half years ago, and that the plaintiff could have, should have, if they were really sincere and serious about it, would have got an expert witness by now.

RP 8:2-12.

Further, the trial court did not abuse its discretion in refusing to consider the expert’s affidavit – because one was never offered. In *Keck*, the supreme court held that a *Burnet* analysis is “appropriate when the trial court excludes untimely *evidence submitted* in response to a summary judgment motion.” 184 Wn.2d at 369 (emphasis added). Abdulwahid never submitted evidence on which the court could rule.

Abdulwahid further failed to create a record sufficient to support his requests. In *Keck*, one of the expert’s timely affidavits indicated that he was familiar with the applicable standard of care, that the defendants had breached the standard, and that their breach was the proximate cause of Ms. Keck’s injury. 184 Wn.2d at 364-66. Abdulwahid offered *nothing* for the court to consider, not even a preliminary declaration indicating

Dr. Rubaye’s knowledge of the standard of care for an inpatient psychiatric facility in the state of Washington.<sup>10</sup>

In seeking a continuance, the moving party must articulate that the evidence “he could obtain would present a genuine issue of material fact.” *Cofer*, 8 Wn. App. at 262-63. While CR 56(f) permits a court to continue a hearing on a motion for summary judgment, Abdulwahid failed to “provide an affidavit stating what evidence the party seeks and how it will raise an issue of material fact to preclude summary judgment.” *See Durand*, 151 Wn. App. at 828.

The trial court voiced its concern about that very issue at the hearing.

*[W]e don’t even know what the expert is going to say, whether the expert is going to say that there was a violation of the standard of care or not. . . . And now to, again, kick this down the road further for more time for an expert that may or may not tell you what the standard of care is, we don’t know what the expert’s going to say here, and I think that the time really is up.*

RP 7:13-24 (emphasis added).

When it decided whether or not to grant Abdulwahid’s third motion for continuance, the court “[took] into account a number of factors”<sup>11</sup>:

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<sup>10</sup> *See supra* at 13. A trial court must be able to make a preliminary finding that a purported expert is “qualified to testify to the standard of care in the state of Washington[.]” *Boyer*, 10 Wn. App. 2d at 521.

<sup>11</sup> *See In re V.R.R.*, 134 Wn. App. 573, 581, 141 P.3d 85 (2006).

- 1) His Complaint had been filed four and one-half years prior and sat idle for most of that time;
- 2) The motion was initially noted for hearing a month after it was filed;<sup>12</sup>
- 3) It had been continued twice before – both times at Abdulwahid’s request and *for the amount of time he specifically requested*;<sup>13</sup>
- 4) The January 16 request was “to allow Plaintiff’s expert to submit his affidavit as to the violation of the standard of care of Eastern State Hospital in the care of the plaintiff.”;<sup>14</sup>
- 5) Abdulwahid conceded he waited until January 16, 2020,<sup>15</sup> to retain “an expert to address the standard of care”<sup>16</sup>, over four and one-half years after he filed suit and three weeks after the Hospital filed its Motion for Summary Judgment; and
- 6) Counsel did not have a “preliminary conversation” with Dr. Rubaye for another three weeks.<sup>17</sup>

The trial court did not abuse its discretion in denying Abdulwahid’s request for a third continuance, especially since he did not create a record

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<sup>12</sup> CP 11-12.

<sup>13</sup> CP 23, 29.

<sup>14</sup> CP 29.

<sup>15</sup> CP 70.

<sup>16</sup> CP 67.

<sup>17</sup> CP 67.

sufficient to support his request for a continuance, i.e., that his proposed expert was familiar with the standard of care for Washington State and that a declaration from Dr. Rubaye would raise an issue of material fact to preclude summary judgment.

## **V. CONCLUSION**

This Court should affirm summary judgment in favor of the Hospital in this medical malpractice case. Abdulwahid failed to offer any expert testimony as to the applicable standard of care for inpatient psychiatric hospitals in Washington and that the Hospital breached that standard. Expert testimony is required because determining whether the Hospital violated the standard of care in managing the care and safety of its patients is beyond the knowledge of a lay jury. Further, the doctrine of *res ipsa loquitur* is inapplicable based on the evidence, or rather the lack thereof, in the record. Finally, the trial court did not abuse its discretion in denying Abdulwahid's request for a third continuance. The trial court's dismissal of Abdulwahid's claims should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of July 2020.

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**DECLARATION OF SERVICE**

I declare that I caused to be served a copy of this document on all parties or their counsel of record on the date below as follows:

Via the Court's electronic filing system:

Howard Neill            aspnr@aspnrs.com

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of July 2020, at Toledo, WA.

*s/ Stefany Fladeland* \_\_\_\_\_  
STEFANY FLADELAND  
Legal Assistant

**ATTORNEY GENERAL'S OFFICE, TORTS DIVISION**

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