

No. 94292-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DEYANIRA ARELLANO, individually, Petitioner,

v.

DEACONESS MEDICAL CENTER, Respondent.

DEACONESS MEDICAL CENTER'S COMBINED RESPONSE TO
MOTION FOR DISCRETIONARY REVIEW AND STATEMENT OF
GROUNDS FOR DIRECT REVIEW

RYAN M. BEAUDOIN, WSBA # 30598
TIMOTHY M. LAWLOR, WSBA # 16352
MATTHEW W. DALEY, WSBA # 36711

WITHERSPOON · KELLEY
422 West Riverside Avenue, Suite 1100
Spokane, Washington 99201-0300
Phone: (509) 624-5265

Counsel for Deaconess Medical Center

TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY OF RESPONDING PARTY	1
II. DECISION SUBJECT TO THIS MOTION	1
III. RESTATEMENT OF THE ISSUE.....	1
IV. RESTATEMENT OF THE FACTS and OF THE CASE	2
A. THIS CASE AROSE FROM A PHARMACY TECHNICIAN’S ERROR.....	2
B. DEYANIRA ARELLANO BROUGHT A CLAIM FOR LOSS OF CONSORTIUM, ALLEGING DAMAGE TO HER RELATIONSHIP WITH ALYSSA HAWKINS.....	3
C. DEACONESS ADMITTED THAT THE PHARMACY TECHNICIAN WAS NEGLIGENT.	3
D. DEACONESS BROUGHT A SUCCESSFUL STATUTE OF LIMITATIONS MOTION WITH RESPECT TO MS. ARELLANO’S CONSORTIUM CLAIM.	4
V. ARGUMENT	6
A. MS. ARELLANO CANNOT DEMONSTRATE ANY BASIS FOR INTERLOCUTORY REVIEW OR FOR DIRECT REVIEW.....	6
1. <i>There is No Basis to Grant Discretionary Review of the Superior Court’s Summary Judgment Order.....</i>	<i>6</i>
2. <i>There Is No Basis to Accept Direct Review of the Superior Court’s Summary Judgment Order</i>	<i>8</i>
B. MS. ARELLANO’S CLAIM WAS PROPERLY DISMISSED AS UNTIMELY.....	10
1. <i>Settled Law Requires Loss of Consortium Claims to Be Brought Within Three Years of Accrual.....</i>	<i>11</i>

2.	<i>Settled Law Requires Ms. Arellano's Claim to Be Analyzed Independently from Ms. Hawkins' Claim</i>	12
3.	<i>There is No Factual, Legal, or Policy-Based Justification to Toll the Limitations Period for Ms. Arellano's Claim</i>	14
VI.	CONCLUSION.....	15

TABLE OF AUTHORITIES

CASES

<i>Ginocchio v. Hesston Corp.</i> , 46 Wn. App. 843 (1987)	7
<i>Green v. American Pharmaceutical Co.</i> , 136 Wn.2d 87 (1998).....	11, 13
<i>Lund v. Caple</i> , 100 Wash.2d 739, 744 P.2d 226 (1984).....	13
<i>Oltman v. Holland American Line USA, Inc.</i> , 163 Wn.2d 236 (2008).....	7, 12, 13
<i>Reichelt v. Johns-Manville Corp.</i> , 107 Wn.2d 761 (1987)	passim

STATUTES

RCW 4.16.080(2).....	11
RCW 4.16.190	5, 8, 14
RCW 4.24.010	10
RCW Ch. 7.70.....	3

RULES

CR 54(b).....	9, 10
RAP 2.3.....	1, 6, 7
RAP 2.3(b).....	6
RAP 2.3(b)(4)	7
RAP 4.2.....	1, 6, 8, 9
RAP 4.2(a)(4).....	9

OTHER AUTHORITIES

2A Wn. Prac., Rules Practice, RAP 2.3 (8th ed., 2016 Update).....	7, 8
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I. IDENTITY OF RESPONDING PARTY

This response is respectfully submitted by the Empire Health Foundation, as successor in interest to Deaconess Medical Center (hereinafter “Deaconess”). Deaconess submits this response to both Ms. Arellano’s motion for discretionary review and to her statement of grounds for direct review. This response is respectfully submitted pursuant to RAP 2.3, RAP 4.2, and pursuant to the Court’s May 8, 2017 scheduling order.

II. DECISION SUBJECT TO THIS MOTION

Ms. Arellano seeks direct interlocutory review of the Spokane County Superior Court’s March 3, 2017 order dismissing Ms. Arellano’s claim for loss of parental consortium.

III. RESTATEMENT OF THE ISSUE

Ms. Arellano’s statement of the “issues” is an improper summary of her argument. Properly stated, the issue before the Court is whether the Superior Court’s application of Washington’s three-year limitations period to the undisputed facts of this case implicates RAP 2.3’s standards for discretionary review and/or RAP 4.2’s standards for direct review.

IV. RESTATEMENT OF THE FACTS AND OF THE CASE¹

On August 9, 1998, Deyanira Arellano gave birth to twin daughters, Alyssa Hawkins and Alexis Hawkins. (Exhibit A, ¶ 3.1).² Ms. Arellano gave birth at Kadlec Medical Center in Richland, Washington. *Id.* The twins were significantly premature – 31 gestational weeks. *Id.*

Alyssa Hawkins' health was notably poor from birth. *See id. at* ¶ 3.2. She required treatment for infant respiratory distress and serious bowel defects. *Id.* Within a few days of her birth, it became apparent that Alyssa Hawkins required prompt surgical intervention. *See id.* The infant Ms. Hawkins was, therefore, airlifted to Deaconess Medical Center in Spokane. *Id., See also* Exhibit C, p. 5.

A. THIS CASE AROSE FROM A PHARMACY TECHNICIAN'S ERROR.

While at Deaconess, Alyssa Hawkins received life-saving care to stabilize her premature respiratory system and to surgically repair her bowel defects. *See id. at* ¶¶ 3.2 and 3.3. However, she also experienced a medication error while at Deaconess. *See id. at* ¶ 3.5.

¹ Deaconess' motion for summary judgment accepted the Complaint's allegations as true.

² Citations to "Exhibits" refer to the Exhibits submitted with Ms. Arellano's Motion for Discretionary Review and Statement of Grounds for Direct Review.

A Deaconess pharmacy technician made a calculation error while preparing a potassium infusion for Ms. Hawkins. *Id.* That error resulted in Ms. Hawkins receiving too large a dose of potassium. *Id.* That pharmacy error occurred on August 24, 1998. *Id.*

B. DEYANIRA ARELLANO BROUGHT A CLAIM FOR LOSS OF CONSORTIUM, ALLEGING DAMAGE TO HER RELATIONSHIP WITH ALYSSA HAWKINS.

Although the medical care that is at issue occurred in 1998, no suit was brought until 2016, when Alyssa Hawkins' 18th birthday was drawing near. *See generally id.* The suit made three separate claims: (i) Alyssa Hawkins' RCW Ch. 7.70 claim for medical negligence; (ii) Alyssa Hawkins' claim for loss of consortium; and (iii) Deyanira Arellano's claim for loss of consortium. *See id.* The pending motion for discretionary review pertains solely to Ms. Arellano's claim for loss of consortium. *See generally* Exhibit B. Ms. Arellano's claim asserts that Deaconess' medical negligence proximately caused damage to Ms. Arellano's relationship with Alyssa Hawkins. *See generally* Exhibits A & B.

C. DEACONESS ADMITTED THAT THE PHARMACY TECHNICIAN WAS NEGLIGENT.

In response to Ms. Hawkins' motion for partial summary judgment, Deaconess stipulated that the pharmacy technician's error constituted medical negligence. Appendix 1, p. 1 (filed herewith). Discovery with

respect to Ms. Hawkins' medical negligence claim, therefore, is focusing on the causation and damages elements of the claim. *See id.* at pp. 1-3. Specifically, the primary dispute in the case is whether Ms. Hawkins' claimed injuries were proximately caused by the pharmacy error or whether those claimed injuries owe themselves to one or more of the preexisting conditions that required Ms. Hawkins to be airlifted to Deaconess as an infant. *See id.*

D. DEACONESS BROUGHT A SUCCESSFUL STATUTE OF LIMITATIONS MOTION WITH RESPECT TO MS. ARELLANO'S CONSORTIUM CLAIM.

The Complaint contained a number of allegations that established that Ms. Arellano's loss of consortium claim accrued far more than three years prior to the suit's commencement. *See generally* Exhibit A.

Specifically:

- Alyssa Hawkins is one of two twins, and Ms. Arellano began to notice differences between the girls (Alyssa and Alexis Hawkins) immediately following the potassium overdose. *Id.* at ¶ 3.6.
- By preschool, Alyssa Hawkins had begun to miss developmental milestones that Alexis Hawkins had met. *Id.* at ¶¶ 3.7 – 3.9.
- Ms. Arellano understood that Alyssa Hawkins would never be able to live or work independently. *Id.* at ¶ 3.10, *see also* Appendix 2 (filed herewith).

Based upon those assertions, Deaconess brought a motion for summary judgment with respect to Ms. Arellano's claim. Exhibit B. Deaconess argued that Ms. Arellano's claim was time-barred, having accrued more than three years before the suit's commencement. *Id.*

Ms. Arellano did not deny that her claim had accrued more than three years before commencement. *See* Exhibit C. Instead, she asserted that RCW 4.16.190 (which tolls claims during a plaintiff's childhood) applied to her parental consortium claim. *See* Exhibit C.

The Superior Court held that settled law requires consortium claims to be evaluated on their own merits, separate and distinct from any claim by an injured plaintiff. *See* Exhibit C. The Superior Court also held that the statutory childhood tolling provisions were inapplicable to Ms. Arellano's claim. *Id.* And, therefore, the Superior Court dismissed Ms. Arellano's claim as time-barred. *Id.*

Ms. Arellano filed a timely notice of intent to seek discretionary review. Appendix 3 (filed herewith). Ms. Arellano opted to seek direct review to the Supreme Court of the State of Washington. *Id.*

V. ARGUMENT

A. MS. ARELLANO CANNOT DEMONSTRATE ANY BASIS FOR INTERLOCUTORY REVIEW OR FOR DIRECT REVIEW.

The Spokane County Superior Court's order dismissing Ms. Arellano's consortium claim is not an immediately appealable order. Therefore, Ms. Arellano's motion must be analyzed pursuant to RAP 2.3's discretionary review criteria.

Ms. Arellano chose to ask the State Supreme Court to accept direct review of the Superior Court's interlocutory order. Therefore, the motion must be weighed against RAP 4.2's criteria as well.

Ms. Arellano's motion fails to satisfy either Rule's requirements. Deaconess, therefore, respectfully asks the Court to deny Ms. Arellano's motion.

1. There is No Basis to Grant Discretionary Review of the Superior Court's Summary Judgment Order.

RAP 2.3 governs acceptance of discretionary review.

Subparagraph (b) of the Rule identifies four criteria for determining whether to accept review. RAP 2.3(b). The criteria ask whether the trial court proceedings involve/include: (i) obvious error rendering further proceedings useless; (ii) probable error that substantially affects the status quo or limits a party's ability to act; (iii) a significant departure from the accepted and usual course of judicial proceedings; or (iv) a trial court

certification (or a stipulation by the parties) that the order involves a **controlling question of law** as to which there is a **substantial ground for a difference of opinion** and that immediate review would **materially advance the litigation's resolution**. *Id.*

Washington's appellate courts are not required to accept a trial court's certification pursuant to RAP 2.3. *See id., see also* 2A Wn. Prac., Rules Practice, RAP 2.3 (8th ed., 2016 Update). A trial court certification is, therefore, simply one of the criteria that the Court must consider.

In this matter, the trial court certified Ms. Arellano's claim for immediate review. *See* Exhibit D. However, the trial court's certification was contrary to RAP 2.3. The Court should, therefore, disregard the certification and deny Ms. Arellano's motion.

RAP 2.3(b)(4) allows for certification only in cases involving a substantial ground for legal disagreement. The limitations issue that required Ms. Arellano's claim to be dismissed turned on settled law. Settled law holds that loss of consortium claims are separate from the injured plaintiff's claims, and settled law holds that the statute of limitations begins to run when the relationship is damaged, not when the underlying tort occurred. *Oltman v. Holland American Line USA, Inc.*, 163 Wn.2d 236, 249 (2008); *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761 (1987); *Ginochio v. Hesston Corp.*, 46 Wn. App. 843, 847 (1987). In

addition, no Washington State Court has ever applied RCW 4.16.190's tolling provisions (for children's claims) to an adult's claim. The trial court's dismissal of Ms. Arellano's claim was mandated by settled law, and there were no grounds for any reasonable difference of opinion with respect to the status of the law.

There was no error – obvious, probable, or otherwise – in the trial court's analysis. Washington State law is settled with respect to the application of limitations to consortium claims, and undisputed facts (taken from the Complaint) demonstrate that Ms. Arellano's claim was time-barred. There is, therefore, no basis or justification for accepting discretionary review.

2. *There Is No Basis to Accept Direct Review of the Superior Court's Summary Judgment Order.*

Separate and apart from her inability to demonstrate any basis for discretionary review, Ms. Arellano cannot justify her request for direct review to the State Supreme Court. RAP 4.2 permits direct review only in narrow circumstances, and none of those circumstances apply to Ms. Arellano's claim. RAP 4.2, however, does not guaranty that the State Supreme Court will accept review; even if a case fits within one of RAP 4.2's criteria, the State Supreme Court may deny review. 2A Wn. Prac., Rules Practice, RAP 4.2 (8th ed., 2016 Update).

Ms. Arellano appears to³ rely upon RAP 4.2(a)(4), which allows direct review in cases that involve “a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” *See generally*, Ms. Arellano’s Statement of Grounds for Direct Review. However, Ms. Arellano’s claim does not involve any fundamental issue; it does not include any urgent issue of broad public import, and nothing about Ms. Arellano’s claim requires prompt determination. Ms. Arellano’s claim is a straightforward claim for loss of consortium, and the legal issue involves application of settled law to undisputed facts. Nothing about Ms. Arellano’s claim justifies the extraordinary relief that she is seeking.

Importantly, Ms. Arellano opted not to pursue a final judgment, pursuant to CR 54(b). Ms. Arellano could have secured immediate review (as a matter of right) through CR 54(b). Having made the strategic decision not to do so, Ms. Arellano should not be heard to argue that interlocutory review is necessary.

Ms. Arellano’s claim does not present any issue that warrants direct review. Ms. Arellano’s claim presents a singular dispute between private parties; there is no indication that the issues implicated by Ms.

³ Ms. Arellano does not specifically address any of RAP 4.2’s provisions. However, Ms. Arellano used language from RAP 4.2(a)(4) in her Statement of Grounds for Direct Review.

Arellano's claim arise with any frequency before Washington's Courts; Ms. Arellano chose not to pursue a CR 54(b) final judgment; and Ms. Arellano will have every opportunity for appellate review when Ms. Hawkins' claims are resolved. Deaconess, therefore, respectfully asks the Court to deny Ms. Arellano's motion for direct review.

B. MS. ARELLANO'S CLAIM WAS PROPERLY DISMISSED AS UNTIMELY.

A parent's loss of consortium claim is controlled by RCW 4.24.010; the statute states:

A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child.

Id. For purposes of this motion, Ms. Arellano focuses on the proviso permitting a parent to maintain a separate action or join an action with the injured child. *See generally*, Ms. Arellano's Motion for Discretionary Review.

That proviso, however, is simply a permissive joinder provision. Nothing within the provision affects the relevant limitations period. In fact, taking Ms. Arellano's argument to its logical conclusion would permit Ms. Hawkins' father (who was not a party to the original suit) to file his own loss of consortium claim at any time before Ms. Hawkins'

21st birthday. No provision of law would allow such an absurd result; however, that is the precise result of Ms. Arellano's assertion.

1. Settled Law Requires Loss of Consortium Claims to Be Brought Within Three Years of Accrual.

A loss of consortium claim must be brought within three years of the injury to the parent-child relationship. *See*, RCW 4.16.080(2) (three-year statute of limitations applies to any other injury to a person). *See also Green v. American Pharmaceutical Co.*, 136 Wn.2d 87, 94 (1998) (RCW 4.16.080(2) applies to consortium claim).⁴

Washington law with respect to accrual is also well-established and settled. *See id.* at 95. A cause of action accrues when the plaintiff knows, or should have known, the essential elements (duty, breach, causation, and damages) of his or her claim. *Id.*, *see also Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772 (1987).

Ms. Arellano has been aware of her daughter's debility since 1998. Ms. Arellano has been aware that her daughter's debility presented damage to the mother-daughter relationship since 1998. Since then, Ms. Arellano has believed that the pharmacy technician's error caused her daughter's debility. In fact, Ms. Arellano asserted that she was aware that

⁴ The claim accrues once any damage is known. *Green*, 136 Wn.2d at 95. Ms. Arellano's assertion that Ms. Hawkins' damages continue to be revealed is, therefore, irrelevant to when the claim accrued.

her daughter suffered from developmental delays by the time that she began pre-school. *See generally*, Exhibit A. Even accepting Ms. Arellano's argument, she was aware of her loss of consortium claim by 2001 – when Ms. Hawkins would have begun pre-school.

Thus, under Washington law, Ms. Arellano's claim accrued as soon as she knew her daughter had a cognitive deficiency or developmental delays that interfered with the parent-child relationship. Pursuant to the Complaint's allegations, Ms. Arellano knew of her daughter's debility long before 2013 – three years prior to filing. The trial court, therefore, correctly held that Ms. Arellano's claim was time-barred.

2. *Settled Law Requires Ms. Arellano's Claim to Be Analyzed Independently from Ms. Hawkins' Claim.*

Loss of consortium claims are separate and independent claims that are not derivative of any underlying injury claim and that need not be joined with any underlying injury claim. *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 249 (2008). Thus, “the statute of limitations governing [a consortium] claim should begin to run when [the plaintiff] experienced her injury, not when [the underlying injury became known].” *Id.*, citing *Reichelt v. Johns–Manville Corp.*, 107 Wn.2d 761, 776 (1987). As such, “[t]imeliness of the [underlying injury claim] does not necessarily determine the” timeliness of the consortium claim. *Id.*

In *Oltman v. Holland America Line USA, Inc.*, the State Supreme Court made it clear that loss of consortium is a separate and independent claim:

In *Lund v. Caple*, 100 Wash.2d 739, 744, 675 P.2d 226 (1984), we held that the “deprived” spouse may sue for loss of consortium by either joining in a lawsuit with the injured spouse, or by bringing an independent suit. **The loss of consortium claim is separate and independent rather than derivative.** *Green v. A.P.C.*, 136 Wash.2d 87, 101, 960 P.2d 912 (1998); *Reichelt v. Johns–Manville Corp.*, 107 Wash.2d 761, 776, 733 P.2d 530 (1987). Under state law, a loss of consortium claim is not barred simply because no claim can be brought based on the injury of the injured spouse. For example, **the statute of limitations begins to run on a loss of consortium claim when the deprived spouse experiences injury, not when the injured spouse is injured.** *Reichelt*, 107 Wash.2d at 776, 733 P.2d 530. Timeliness of the injured spouse’s claim does not necessarily determine the deprived spouse’s loss of consortium claim. *Id.*

Oltman, 163 Wn.2d at 250 (boldface added). The State Supreme Court’s decision in *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761 (1987), also demonstrates the independence of consortium claims:

We recently held that a loss of consortium action is a **separate cause of action that need not be joined with the injured spouse’s claim.** Even more recently the Court of Appeals cited that holding and stated that “[w]e conclude the Supreme Court has characterized the [loss of consortium] action as **separate and independent rather than derivative.**”

* * *

Since [the plaintiff's] claim for loss of consortium is a separate cause of action in Washington, it **logically follows that the statute of limitations governing her claim should begin to run when she experienced her injury, not when her husband knew of his injury**. Based on the foregoing, we conclude that a deprived spouse's loss of consortium claim is not necessarily determined by the timeliness of the impaired spouse's claim.

In order to decide whether Mrs. Reichelt's claim is time barred, therefore, **it must first be ascertained when her cause of action as the deprived spouse accrued**.

Reichelt, 107 Wn.2d at 776-77 (boldface added & quotations and citations omitted). Thus, Ms. Arellano's claim accrued as soon as she knew that her relationship with Ms. Hawkins had been impaired – that is, as soon as Ms. Arellano knew that Ms. Hawkins suffered from a cognitive or developmental delay.

3. ***There is No Factual, Legal, or Policy-Based Justification to Toll the Limitations Period for Ms. Arellano's Claim.***

There is no authority to support Ms. Arellano's assertion that RCW 4.16.190 (which applies to claims by children) should apply to Ms. Arellano's adult claim for consortium. A child is incapable of making an effective election regarding whether to initiate suit; as a result, Washington enacted a tolling statute to ensure that the Plaintiff becomes able to make an effective election. A parent (an adult), on the other hand, is never subject to that incapacity. Once the parent knows that his or her child was injured, that parent must chose to sue or not to sue. There is no

basis in law, in equity, or in policy to excuse any parent from the consequences of making the strategic decision not to bring suit.

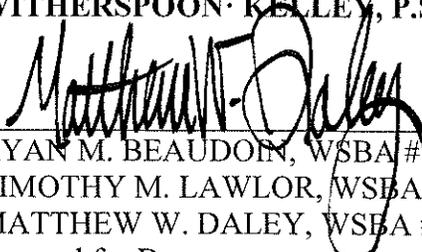
Settled law and undisputed facts required Ms. Arellano's claim to be dismissed, and the same settled law and undisputed facts require her motion for discretionary review to be denied. Settled law establishes that Ms. Arellano's consortium claim was separate and independent from Ms. Hawkins' medical negligence claim. Settled law establishes that Ms. Arellano's consortium claim was subject to a three-year limitations period. Undisputed facts demonstrate that Ms. Arellano's claim accrued far more than three years before she commenced suit. And there is no basis in law, in fact, or in policy to toll that three-year limitations period.

VI. CONCLUSION

Based upon the foregoing, the Court file, and the pleadings therein, Deaconess respectfully asks the Court to deny Ms. Arellano's motion for discretionary review.

RESPECTFULLY SUBMITTED, this 30th day of June, 2017.

WITHERSPOON · KELLEY, P.S.



RYAN M. BEAUDOIN, WSBA # 30598
TIMOTHY M. LAWLOR, WSBA # 16352
MATTHEW W. DALEY, WSBA # 36711
Counsel for Deaconess

**INDEX TO APPENDICIES TO DEACONESS MEDICAL
CENTER'S COMBINED RESPONSE TO MOTION FOR
DISCRETIONARY REVIEW AND STATEMENT OF GROUNDS
FOR DIRECT REVIEW**

Appendix	Description	Appendix Pages
1	December 5, 2016: Deaconess Medical Center's Response to Plaintiffs' Motion for Partial Summary Judgment (Superior Court Docket # 37)	1-17
2	February 27, 2017: Declaration of Timothy M. Lawlor, with Exhibits (Superior Court Docket # 80)	18-60
3	March 17, 2017: Notice of Discretionary Review to Supreme Court (Superior Court Docket # 109)	61-66

Appendix 1

DEC 05 2016

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

ALYSSA ARELLANO-HAWKINS, a minor
child, and DEYANIRA ARELLANO,
individually, and as legal guardian for the minor
child,

Plaintiffs,

vs.

DEACONESS MEDICAL CENTER, a
Washington Non-Profit Corporation;

Defendant.

NO. 16-2-00887-3

DEACONESS MEDICAL CENTER'S
RESPONSE TO PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND MEMORANDUM
IN SUPPORT OF MOTION FOR CR
56(F) CONTINUANCE

I. INTRODUCTION/RELIEF SOUGHT

Deaconess Medical Center ("Deaconess") stipulates that its pharmacy tech employee, Nancy Houghton, breached the standard of care as required by RCW 7.70.040(1) when she mixed the potassium dose on August 24, 1998. Therefore, summary judgment on that point is appropriate. All other issues of liability and causation are contested and beyond the scope of Plaintiffs' motion.

Plaintiffs have also moved for summary judgment dismissal of Deaconess' affirmative defenses numbered 6.2 (pre-existing condition), 6.3 (intervening/superseding cause), 6.4 (injuries caused by third parties); and 6.5 (apportionment of fault). This motion is not filed in good faith. Plaintiffs' own expert defeats the motion. Plaintiffs' expert, Dr. Stephen Glass, wrote a report to Plaintiffs' counsel in June of 2014 concluding that Alyssa's alleged cognitive

DEACONESS MEDICAL CENTER'S RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT AND MEMORANDUM IN SUPPORT
OF MOTION FOR CR 56(F) CONTINUANCE - 1



WITHERSPOON • KELLEY
Attorneys & Counselors

422 W. Riverside Avenue, Suite 1100 Phone: 509.624.5265
Spokane, Washington 99201-0300 Fax: 509.458.2728

1 dysfunction was caused, in part, by her underlying/pre-existing prematurity coupled with her
2 renal problems prior to the overdose.¹ Dr. Glass was in a much better position than Deaconess,
3 however, because he was given direct access to Alyssa and he was able to perform an extensive
4 medical examination and testing on her. He was also given access to all of the information held
5 by Plaintiffs' counsel, to include their ability to meet with Alyssa's treating health care providers
6 - something they have yet to allow Deaconess to do.

7 Deaconess seeks a CR 56(f) continuance of this motion. Deaconess needs the
8 depositions of the health care providers who treated Alyssa before she came to Deaconess to
9 understand her underlying and pre-existing condition. Deaconess needs the depositions of the
10 non-employee physicians who treated Alyssa while she was at Deaconess to understand how
11 her pre-existing condition impacted her outcome, how the potassium overdose impacted her
12 course of care, and the basis for their independent decision making before and after the
13 overdose to assess intervening/superseding causes and whether her alleged injuries were caused
14 by third parties. Deaconess needs the depositions of the health care providers Alyssa saw after
15 her discharge from Deaconess for the same reasons and, in particular, to gain an understanding
16 of the progression of her health condition in the few years of her life. Plaintiffs have access to
17 all of these providers but they have precluded Deaconess from talking with them outside of a
18 deposition. Deaconess has been requesting these depositions for months and not a single
19 deposition has been set. It is patently unfair and prejudicial to then move for summary
20 judgment dismissal.

21 In addition, Deaconess needs information about Plaintiffs' claims. Plaintiffs have the
22 burden of proof. Washington law requires Plaintiffs to call experts to establish certain
23 Deaconess employees/agents violated the standard of care and that those violations caused the
24 alleged damages. Last April, Deaconess issued written discovery seeking disclosure of
25 Plaintiffs' experts and their opinions. Plaintiffs' counsel has been retained and working with
26 experts since 2014, yet they answered Deaconess' written discovery in June of 2016 stating "to
27

28 ¹ Declaration of Ryan M. Beaudoin in Support of Deaconess Medical Center's Motion for CR 56(f) Continuance,
Ex. P, p. 11.

1 be supplemented" and "Plaintiffs note that discovery has only recently commenced. As the
2 facts develop through discovery, plaintiff will supplement this response with specific names of
3 individuals who were present and/or involved in the event." Five (5) months have passed and
4 Plaintiffs have refused to supplement their answers and disclose the opinions of their experts
5 despite repeated demands by Deaconess. Plaintiffs promised to address these issues by late
6 October, but nothing substantive has been produced. This is a very important issue, because
7 Deaconess cannot begin to defend the claims, or address affirmative defenses, until it knows
8 which agent/employee(s) Plaintiffs claim were negligent. Deaconess needs this information to
9 respond to the present motion, believes that it will create genuine issues of material fact, and
10 respectfully requests a CR 56(f) continuance.

11 II. SUMMARY OF MATERIAL FACTS

12 The following is a summary of the procedural history and key facts in support of
13 Deaconess' CR 56(f) motion contained in the Declaration of Ryan M. Beaudoin in Support of
14 Deaconess Medical Center's Motion for CR 56(f) Continuance ("Beaudoin Decl.") filed
15 herewith.

16 A. Underlying/Pre-Existing Conditions.

17 1. Alyssa Hawkins was born on August 9, 1998, at Kadlec Medical Center. She
18 was 2.5 lbs. at birth, born at 31 weeks gestation. Her mother Deyanira was 17 years old at the
19 time. Deyanira had developed pregnancy induced hypertension and premature rupture of her
20 membranes. Alyssa and her twin sister were born by Cesarean section. Alyssa had respiratory
21 distress syndrome requiring mechanical ventilation. Her respiratory course was complicated by
22 a heart condition (patent ductus arteriosus). *See*, Beaudoin Decl., Ex. R.

23 2. Alyssa was flown by Life-Flight Helicopter from Kadlec to Deaconess on
24 August 13, 1998. She was in critical condition. She was transferred for management of bowel
25 obstruction and she was admitted to the Neonatal Intensive Care Unit. *Id.*

26 3. Alyssa was treated by many health care providers while at Deaconess, to include
27 neonatology physicians who were not employed by Deaconess. Those physicians elected to
28 perform a bowel surgery on August 13, 1998. After this, Alyssa had difficulties with urine

DEACONESS MEDICAL CENTER'S RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT AND MEMORANDUM IN SUPPORT
OF MOTION FOR CR 56(F) CONTINUANCE - 3

 WITHERSPOON-KELLEY
Attorneys & Counselors

1 production (oliguria) requiring volume replacement. There was evidence of renal failure with
2 elevated creatinine. She also had significant respiratory difficulties when she became "very ill
3 on August 18" resulting in the collapse or closure of a lung (atelectasis) requiring Ventolin and
4 chest physiotherapy. Her physicians were also concerned from the time of admission about
5 infection, so they elected to treat her with high grade antibiotics (Ampicillin, Gentamicin,
6 Clindamycin). *Id.*

7 4. On August 24, 1998, Alyssa received an inadvertent dose of potassium. *Id.*

8 **B. Plaintiffs' Lawsuit.**

9 5. Plaintiffs filed the instant lawsuit on March 4, 2016. *See*, Dkt No. 1.

10 6. Plaintiffs identify two causes of action against Deaconess in their Complaint:

11 Negligence. Defendant owed Alyssa Arellano-Hawkins a duty of care.
12 Defendant breached said duty and plaintiffs' have suffered damages as a direct
13 and proximate cause of the Defendant breach.

14 Duty to Supervise. Defendant, Deaconess Hospital maintained a duty to
15 properly supervise their patient. Providing a lethal dose of potassium to a
16 neonatal patient constitutes a breach of said duty. As a direct and proximate
17 result of the Hospital's failure to supervise its employees and patient, plaintiffs
18 have suffered significant damages.

19 *See, Plaintiffs' Complaint, ¶¶ 4.1-4.2.*

20 7. On May 4, 2016, Deaconess answered Plaintiffs' Complaint and asserted its
21 affirmative defenses. *See Answer and Affirmative Defenses*, Dkt No. 9.

22 8. On June 3, 2016, the Court issued the Civil Case Schedule Order in this action.

- 23 • Plaintiffs' disclosure of lay and expert witnesses is due on February 27,
24 2017.
- 25 • Deaconess' disclosure of lay and expert witnesses is due May 8, 2017.
- 26 • The discovery cutoff in this case is July 24, 2017.

27 *See, Civil Case Schedule Order*, Dkt No. 10.

1 **C. Plaintiffs Have Not Allowed Access to Treaters and They have Refused to Disclose**
2 **their Claims and Expert Criticisms.**

3 9. Deaconess propounded its first discovery on Plaintiffs on April 19, 2016. *See,*
4 Beaudoin Decl., ¶ 8.

5 10. Plaintiffs served their responses on June 2, 2016. *Id.* at ¶ 9, Exhibit A.

6 11. On multiple occasions, Deaconess has requested that Plaintiffs supplement their
7 discovery responses to key interrogatories critical for Deaconess experts to formulate their
8 opinions. *Id.*, ¶¶ 33-63, Exs. B-Q.

9 12. Specifically, answers to the following interrogatories have not been properly
10 supplemented which relate to expert witnesses and facts known to Plaintiffs concerning treating
11 providers:

- 12 a. Interrogatory No. 20 regarding all medical and psychological
13 providers and entities that attended to or provided services to Plaintiffs
14 since August 9, 1998. *Id.*, Ex. A, p. 10.
- 15 b. Interrogatory No. 21 regarding the details of all injuries, pain and
16 disability Plaintiffs claim to have suffered as a proximate result of the
17 alleged negligence of Deaconess. *Id.*
- 18 c. Interrogatory No. 22 regarding opinions expressed by health care
19 providers that Deaconess' care was negligent in any manner as well as
20 the substance of the opinions expressed by each. *Id.*, Ex. A, p. 11.
- 21 d. Interrogatory No. 23 regarding the identity of all persons whom
22 Plaintiffs will call as an expert witness at trial and Interrogatory No. 25
23 regarding each opinion the experts identified in Interrogatory No. 23
24 and the basis for each opinion. *Id.*, Ex. A, p. 12.
- 25 e. Interrogatory No. 26 regarding the subject matter or area on which
26 each expert is to testify, the substance of the facts and opinions to
27 which such expert is to testify; and a summary of the grounds for each
28 opinion. *Id.*, Ex. A, p. 13.
- f. Interrogatory No. 33 regarding the names, addresses and occupations
of all persons known to Plaintiffs who have knowledge of the facts
concerning the incident which gives rise to this lawsuit including the
names and addresses of all witnesses known to Plaintiffs who will be
called at the time of trial for any purpose. *Id.*, Ex. A, pp. 14-15.

1 g. Interrogatory No. 38 regarding the health care providers and facilities
2 that have attended to or provided service to Plaintiffs since Plaintiffs'
3 discharge from Deaconess, including their names and addresses, the
4 approximate time frame of their services, and the reason for Plaintiffs'
visits or treatment with them. *Id.*, Ex. A, p. 16.

5 13. Plaintiffs' answers to each of the listed Interrogatories are insufficient based on
6 the rules of discovery, prior Court rulings, or Plaintiffs' own statements that they will
7 supplement such responses. *Id.*, ¶¶ 10-31.

8 14. At no point after responding to Deaconess' First Interrogatories and Requests for
9 Production to Plaintiffs on June 2, 2016 and prior to filing the pending motion for partial
10 summary judgment on November 10, 2016, had Plaintiffs supplemented any discovery
11 responses. *Id.*, ¶ 32.

12 **D. Deaconess Has Requested Depositions of Treating Health Care Providers.**

13 15. Plaintiffs' counsel George Telquist raised several discovery-related issues in an
14 October 20, 2016 e-mail including the depositions of non-party neonatologists who treated
15 Plaintiff; the identities of witnesses Deaconess intended to call at the time of trial; and the
16 disclosure of Deaconess' expert opinions. *Id.*, ¶ 33, Exhibit B.

17 16. On October 21, 2016, Deaconess counsel responded to Plaintiffs' e-mail and
18 outlined the following responses and issues:

- 19
- 20 1) Deaconess requested the depositions of fourteen (14) physicians who
21 treated Plaintiff at Deaconess, but Plaintiffs' counsel's assistant had not
provided any communication regarding dates.
 - 22 2) Deaconess requested the depositions of treating providers who cared
23 for Plaintiff prior to and after her hospitalization at Deaconess because
24 Deaconess is precluded from speaking directly to the providers. Their
25 deposition testimony is essential for Deaconess consulting experts so
that they can respond to "any claims or criticisms of Deaconess
Medical Center." The providers include:

26 i. Hee K. Rho, MD

27 ii. Dr. McKay

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- iii. Anthony Hadeed, MD
- iv. Miriam Bartol-Zaragoza, MD
- v. John Henriques, MD
- vi. Philip Bernard, MD

- 3) Deaconess requested the depositions of Plaintiffs' experts and reiterated that such testimony was necessary so that Deaconess' experts could prepare their own opinions.
- 4) Deaconess requested supplemental discovery responses to Interrogatory No. 33 concerning the identities of individuals with knowledge of facts giving rise to the incident in Plaintiffs' lawsuit.
- 5) Deaconess requested supplemental discovery responses to Interrogatory No. 38 regarding the health care providers Plaintiff has seen including names, address, time frame for services, and reasons for the visit and treatment.

Id., ¶ 35, Ex. C.

17. On October 24, 2016, Plaintiffs' counsel responded to Deaconess counsel's October 21, 2016 letter indicating that Plaintiffs' counsel would "find and reach out to all the physicians listed in paragraph 1 and 2 of your letter" and would "**address the alleged deficient answers to discovery this week.**" (emphasis added). *Id.*, ¶ 36, Ex. D.

18. On October 25, 2016, an attorney notified Plaintiffs that he was counsel for neonatologists Dr. Barsotti, Dr. Halpern, Dr. Hancock, Dr. Shapiro, and Dr. Strandness and that depositions of such providers would need to be scheduled by Plaintiffs through his office. *Id.*, ¶ 37, Ex. E.

19. On October 25, 2016, the parties attempted to schedule the depositions of neonatologists, including Dr. Erik Strandness. Dr. Strandness' deposition was set to occur on December 7, 2016. *Id.*, ¶¶ 38-40, Exs. F-H.

20. Counsel for Dr. Strandness later indicated that no deposition had been scheduled by Plaintiffs for December 7, 2016. *Id.*, ¶ 52, Ex. M.

1 21. On October 26, 2016, Plaintiffs' counsel wrote a letter regarding new discovery
2 requests and additional discovery issues including a request that Deaconess disclose opinions of
3 its testifying and consulting experts. *Id.*, ¶¶ 41-43, Ex. I.

4 22. Also on October 26, 2016, Deaconess served Plaintiffs with Defendant
5 Deaconess Medical Center's Fourth Set of Interrogatories and Requests for Production to
6 Plaintiffs. *Id.*, ¶ 44, Ex. J.

7 23. The Fourth Set of discovery seeks critical information about each medical
8 appointment for Plaintiffs since September 14, 1998 including the date of the appointment, the
9 reason for the appointment, each family member that was present during the appointment, the
10 substance of conversations with the healthcare provider, the chief complaint from each visit, the
11 diagnosis, and the plan for treatment. Deaconess has also requested information about the
12 recommendations made to Plaintiffs by the healthcare providers and whether Plaintiffs followed
13 those instructions. *Id.*, at ¶ 45, Ex. J, pp. 4-9.

14 24. The Fourth Set of discovery also requests additional information about Plaintiffs'
15 experts. *Id.*, at p. 10 (Interrogatory No. 75).

16 25. On October 27, 2016, Deaconess responded to Plaintiffs' October 26, 2016 letter
17 which addressed the following issues:

- 18 1) Plaintiffs' counsel made the false assertion that Deaconess was aware
19 of Plaintiffs' experts for over a year.
- 20 2) Deaconess propounded discovery on Plaintiffs concerning expert
21 witness testimony on April 19, 2016, receiving responses on June 3,
22 2016. Plaintiffs disclosed four new experts, but only provided vague
23 references to the anticipated testimony.
- 24 3) Of the "opinions" identified, Plaintiffs failed to distinguish which
25 experts would be speaking as to which subject matters or elements of
26 Plaintiffs' claims. Plaintiffs failed to identify any substantive opinions
27 or specific facts, instead answering "to be supplemented", despite
28 having been working on this case for many years prior to filing the
 lawsuit.
- 4) Plaintiffs had still not provided dates for depositions of their experts or
 treating providers, despite being the only party permitted to
 communicate with the witnesses.

DEACONESS MEDICAL CENTER'S RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT AND MEMORANDUM IN SUPPORT
OF MOTION FOR CR 56(F) CONTINUANCE - 8



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Attorneys & Counselors

422 W. Riverside Avenue, Suite 1100 Phone: 509.624.5265
Spokane, Washington 99201-0300 Fax: 509.458.2728

1 5) It was inappropriate for Plaintiffs to request the identities of consulting
2 expert witnesses, particularly since Deaconess was not in a position to
3 disclose expert opinions until Plaintiffs' expert opinions were
articulated.

4 *Id.*, ¶¶ 47-48, Ex. K.

5 26. On October 27, 2016, Plaintiffs authorized Deaconess to contact 7 of the 14
6 physicians who provided care to Plaintiff Alyssa Arellano-Hawkins at Deaconess for purposes
7 of scheduling depositions. *Id.*, ¶ 49, Ex. L.

8 27. The letter did not authorize Deaconess to contact the key treating providers from
9 Kadlec Medical Center who treated Plaintiff prior to her transfer to Deaconess. *Id.* at ¶ 50.

10 28. The letter did not authorize Deaconess to contact the key treating providers who
11 provided care to Plaintiff after her treatment at Deaconess. *Id.* at ¶ 51.

12 29. To date, the deposition of Dr. Strandness has not been rescheduled. *Id.* at ¶ 53.

13 30. No deposition dates have been provided for Plaintiffs' expert witnesses. *Id.* at ¶
14 54.

15 31. No deposition dates have been offered for Plaintiffs' treating providers that
16 Deaconess has not been authorized to contact. *Id.* at ¶ 55.

17 **E. Discovery Since Plaintiffs' Filed Their Motion for Partial Summary Judgment**

18 32. On November 10, 2016, Plaintiffs filed their motion for partial summary
19 judgment.

20 33. On November 16, 2016, the depositions of Plaintiffs Alyssa Arellano-Hawkins
21 and Deyanira Arellano and witness Alexis Arellano-Hawkins occurred at the law office of
22 Plaintiffs' counsel in Richland, Washington. *Id.*, ¶ 57.

23 34. At her deposition, Plaintiff Deyanira Arellano testified that she had prepared
24 notes pertaining to her interactions with healthcare providers at Deaconess contemporaneously
25 in 1998. She further testified that she provided those notes to her attorneys in 2014 when she
26 retained them to represent her in this action. *Id.*, at ¶ 58.

27 35. On November 17, 2016, Deaconess' counsel wrote Plaintiffs' counsel a letter
28 requesting Ms. Arellano's notes as they were responsive to Requests for Production Nos. 10 and

1 12 propounded by Deaconess. The notes are considered necessary for Deaconess' preparation
2 for Plaintiffs' depositions and could significantly impact the affirmative defenses asserted by
3 Deaconess. *Id.*, ¶ 59, Ex. N.

4 36. On November 17, 2016, Deaconess again wrote Plaintiffs' counsel to follow-up
5 on the October 21 and 27, 2016 letters requesting supplemental discovery responses and
6 additional depositions. *Id.*, ¶ 60, Ex. O.

7 37. On November 29, 2016, Plaintiffs served Deaconess with Plaintiffs'
8 Supplemental Answers to Deaconess' First Interrogatories and Requests for Production. *Id.*, ¶
9 61, Ex. P.

10 38. On December 2, 2016, Deaconess again wrote Plaintiffs' counsel about Plaintiffs'
11 deficient responses and explained that no new detail had been provided concerning Plaintiffs'
12 experts. *Id.*, ¶ 62, Ex. Q. Deaconess also addressed the fact the Plaintiffs had never responded
13 to Deaconess' Fourth Set of Interrogatories and Requests for Production which were served
14 before Plaintiffs filed their Motion for Partial Summary Judgment. *Id.*

15 III. ARGUMENT AND LAW

16 A. DEACONESS IS ENTITLED TO A CR 56(F) CONTINUANCE.

17 Under Civil Rule 56(f), a party opposing a summary judgment motion may request a
18 continuance to permit key affidavits to be obtained, depositions to be taken, or discovery to be
19 had before the application of judgment on the summary judgment motion. *See* CR 56(f). A
20 party is entitled to a 56(f) continuance if it (1) provides a reason for the delay in obtaining the
21 evidence; (2) states what evidence would be established through the additional discovery; and
22 (3) the evidence sought will raise a genuine issue of fact. *Coggle v. Snow*, 56 Wn. App. 499,
23 560 (1990), *citing Turner v. Kohler*, 54 Wn. App. 688, 693 (1988).

24 Plaintiffs have moved the Court to strike four of Deaconess' affirmative defenses:

25 6.2 That any injury or damage to plaintiffs was the result of an underlying or
26 preexisting condition, over which Deaconess had no control;

27 6.3 That any injury or damage to plaintiffs was the result of an intervening
28 or superseding cause, over which Deaconess had no control;

1 6.4 That any injury or damage to plaintiffs was the result of acts or
2 omissions by third parties over whom Deaconess had no control;

3 6.5 That any damages found to be the result of one or more individuals,
4 whether or not a party to this litigation, be appropriated to the responsible
5 party pursuant to RCW 4.22.070.

6 *See Answer and Affirmative Defenses*, ¶¶ 6.2-6.5. Dkt. No. 9. Deaconess satisfies all factors
7 established by *Coggle*, and a 56(f) continuance is appropriate. Additional time is essential to
8 conduct key discovery and for Deaconess to provide its experts with that necessary discovery --
9 including Plaintiffs' discovery responses, deposition transcripts of Plaintiffs, Plaintiffs' experts,
10 and treating providers, and complete medical records – so that the requisite affidavits can be
11 filed in response to Plaintiffs' pending motion.

12 1. Deaconess was required to assert affirmative defenses in answering Plaintiffs'
13 Complaint.

14 As set forth *supra*, this action was filed on March 3, 2016, almost eighteen years after
15 the allegations set forth in Plaintiffs' Complaint took place. In answering a plaintiff's complaint,
16 "a party shall affirmatively plead any matter constituting an avoidance or affirmative defense."
17 *Harting v. Barton*, 101 Wn. App. 954, 962 (2000) citing CR 8(c). Thus, "[a]ny matter that does
18 not tend to controvert the opposing party's prima facie case as determined by applicable
19 substantive law should be pleaded[.]" *Id.* citing *Shinn Irrigation Equip., Inc. v. Marchand*, 1
20 Wn. App. 428, 430–31 (1969). "Generally, affirmative defenses are waived unless they are (1)
21 affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or
22 implied consent of the parties." *Henderson v. Tyrrell*, 80 Wn. App. 592, 624 (1996) (quoting
23 *Bernsen v. Big Bend Elec. Coop.*, 68 Wn. App. 427, 433–34 (1993)). Deaconess filed its
24 answer on May 4, 2016 and set forth its affirmative defenses.

25 Any dismissal of Deaconess' affirmative defenses would be premature and highly
26 prejudicial. Plaintiffs have not disclosed their lay and expert witnesses and are not required to
27 do so until February 27, 2017. Deaconess' disclosure of lay and expert witnesses is due May 8,
28 2017 and the discovery cutoff in this case is July 24, 2017. Discovery has commenced in this

DEACONESS MEDICAL CENTER'S RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT AND MEMORANDUM IN SUPPORT
OF MOTION FOR CR 56(F) CONTINUANCE - 11



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Attorneys & Counselors

422 W. Riverside Avenue, Suite 1100 Phone: 509.624.5265
Spokane, Washington 99201-0300 Fax: 509.458.2728

1 action, but no depositions of any treating providers or experts have occurred and no discovery
2 has been supplemented by Plaintiffs regarding the identities of treating providers, the specific
3 allegations set forth in Plaintiffs' complaint, or the substance of Plaintiffs' experts' opinions.

4 2. Discovery is still on-going; Plaintiffs have not disclosed lay and expert
5 witnesses, provided expert opinions, no expert depositions have occurred, and no
6 treating provider depositions have occurred.

7 In a medical negligence action, the plaintiff bears the initial burden of proof to support
8 each element of a *prima facie* case. "The plaintiff in a medical negligence action must produce
9 evidence showing injury caused by the health care provider's failure to exercise that degree of
10 care, skill, and learning expected of a reasonably prudent practitioner in the state of
11 Washington." *Coggle v. Snow*, 56 Wn. App. 499, 510 (1990) citing RCW 7.70.040; *McKee v.*
12 *American Home Prods. Corp.*, 113 Wn.2d 701 (1989). "The plaintiff generally must offer proof
13 of these elements through the testimony of expert medical witnesses." *Id.* citing *Harris v.*
14 *Groth*, 99 Wn.2d 438, 449 (1983).

15 Although there is no disputed issue regarding the overdose of potassium chloride,
16 causation and damages are disputed. Plaintiffs have not identified whether additional opinions
17 regarding the standard of care beyond the potassium overdose will be asserted despite
18 identifying a nursing standard of care expert and reserving "the right to supplement [Plaintiffs']
19 response in the future should additional facts warrant the same." *See*, Beaudoin Decl., Ex. A.
20 Despite requests through written discovery, Plaintiffs have not disclosed expert opinions
21 required to support their *prima facie* case.

22 Deaconess has requested the supplemental disclosure of Plaintiffs' expert opinions,
23 deposition dates for those experts, and deposition dates of Plaintiffs treating providers (as well
24 as their identities, dates of care, a reason for care). Depositions of Deaconess neonatologists are
25 not likely to occur until at least January. Plaintiffs have not permitted Deaconess to contact
26 Kadlec Medical Center providers or Plaintiffs' subsequent treating providers after September
27 1998. Until such discovery occurs, Deaconess cannot adequately provide its own experts the
28



1 records and testimony necessary to formulate opinions responsive to Plaintiffs' own experts'
2 opinions or the pending motion.

3 3. Deaconess did not delay in obtaining evidence.

4 Deaconess has not delayed in seeking the discovery necessary to respond to Plaintiffs'
5 motion. As of the filing of this response, the opinions of Plaintiffs' expert witnesses Victoria
6 Niklas, MD (neonatology), Fe D. Severin, Pharm D (pharmacy), Dawn Workman, RN
7 (registered nurse), and David Rozansky, MD (pediatric nephrologist) have never been identified
8 despite CR 26(e)(1)(B):

9 A party is under a duty seasonably to supplement his response with
10 respect to any question directly addressed to: . . . the identity of
11 each person expected to be called as an expert witness at trial, the
12 subject matter on which the expert witness is expected to testify,
and the substance of the expert witness's testimony.

13 There was no delay on the part of Deaconess. Deaconess' June 2016 discovery specifically
14 requested the opinions of Plaintiffs' experts and Plaintiffs' response was "to be supplemented."
15 See, Beaudoin Decl., ¶ 25. Further, Deaconess has requested depositions of those experts and
16 Plaintiffs' key treating providers. Deaconess is precluded from contacting third-party healthcare
17 providers ex parte to confirm the health care provided or to schedule the provider's deposition
18 pursuant to *Smith v. Orthopedics International*, 170 Wn.2d 659 (2010) and *Loudon v. Mhyre*,
19 110 Wn.2d 675 (1988). Deaconess has requested deposition dates through Plaintiffs' counsel
20 for the providers it is currently aware of, but no dates have been forthcoming. As a result,
21 Deaconess will be unable to provide its experts with the necessary factual basis to finalize their
22 opinions concerning this affirmative defense until discovery depositions can occur.

23 4. A CR 56(f) continuance is necessary for Deaconess to respond to Plaintiffs'
24 motion for summary judgment as to each affirmative defense.

25 i. *Affirmative Defense 6.2: Underlying/Pre-Existing Condition*

26 Based on the information currently available, Deaconess has asserted that Plaintiff
27 Alyssa Arellano-Hawkins was born prematurely with certain co-morbidities and conditions that
28 pre-existed any care by Deaconess and necessitated her transfer from Kadlec Medical Center on

1 August 13, 1998. Due to a compromised kidney condition that pre-existed any allegations in
2 this case, Plaintiff may have required future medical interventions unrelated to any act or
3 omission of a Deaconess employee or agent, including a kidney transplant. It is yet to be
4 determined the extent of Plaintiff's developmental deficits and delays and whether such
5 conditions are related to her premature birth and other complications unrelated to the alleged
6 acts/omissions of Deaconess.

7 Deaconess has not had the opportunity to depose the treating providers who cared for
8 Plaintiff prior to her transfer to Deaconess. *See*, Beaudoin Decl., ¶¶ 64-72. Because Plaintiffs'
9 expert opinions have not been disclosed and discovery has not been supplemented, Deaconess
10 has no way of knowing which conditions Plaintiff suffers from that are alleged to have been
11 caused by the alleged negligence of Deaconess. *Id.* It is impossible to identify which
12 conditions are pre-existing or unrelated without knowing which conditions Plaintiffs believe *are*
13 *related* to their claims. As a result, Deaconess will be unable to provide its experts with the
14 necessary factual basis to finalize their opinions concerning this affirmative defense until
15 discovery depositions can occur.

16 Further, genuine issues of material fact exist based upon the written report of Plaintiffs'
17 retained expert Stephen T. Glass, MD. *See*, Beaudoin Decl., Ex. S. Dr. Glass was given the
18 opportunity to meet with and examine Alyssa sometime in 2014. He issued a written report to
19 Plaintiffs' counsel on June 25, 2014. He concluded, in part, that Alyssa's cognitive problems
20 were caused by her underlying/pre-existing condition related to prematurity and renal problems
21 prior to the overdose. *Id.*, pg. 11. Again, Deaconess has not been given the opportunity to
22 depose Dr. Glass to learn the basis for his opinions.

23 *ii. Affirmative Defense 6.3: Intervening/Superseding Cause*

24 Similarly, the affirmative defense of a superseding or intervening cause cannot be
25 addressed until Plaintiffs disclose opinions of their experts, including the specific acts or
26 omissions of Deaconess and the specific harm such acts or omissions proximately caused.
27 Further, the depositions of treating providers (as well as their identities and dates of treatment
28

1 which have not been provided by Plaintiffs) who have seen Plaintiff subsequent to her discharge
2 from Deaconess are required. *See* Beaudoin Decl., ¶¶ 44-46, 63.

3 Deaconess has requested the depositions of the Plaintiffs' experts, but the depositions
4 have not yet occurred. In order to adequately respond to this request, Deaconess will need to
5 determine that Plaintiff complied with each health care provider's recommendation over the
6 intervening 18 years, that the care she was provided complied with the standard of care and did
7 not cause her additional injuries or harm, and that Plaintiff did not experience some other
8 unrelated health event that contributed to her current condition.

9 *iii. Affirmative Defenses 6.4 and 6.5: Acts/Omissions of Third Parties and*
10 *Apportionment of Fault.*

11 The affirmative defenses of third party liability and apportionment of fault are
12 implicated if, through discovery, it is concluded that providers that treated Plaintiffs prior to
13 Alyssa Arellano-Hawkins' admission to Deaconess or during her subsequent care after leaving
14 Deaconess violated the standard of care. Plaintiffs have not permitted Deaconess to
15 communicate with any of the physicians from Kadlec Medical Center and have not noted any
16 depositions of subsequent treating providers for depositions. Moreover, Plaintiffs' own experts,
17 who have full access to the records and treating providers, may have already concluded that
18 additional parties are at fault, but no opinions have ever been disclosed by Plaintiffs.

19 The logistics to respond to the motion for partial summary judgment include: scheduling
20 and taking the depositions of each of Plaintiffs' experts; deposing the key treating providers
21 from Kadlec Medical Center who cared for Plaintiff prior to her admission to Deaconess in
22 August 2016; deposing the key treating providers who provided care subsequent to Plaintiffs'
23 discharge from Deaconess; awaiting the transcripts for each deposition; having the transcripts
24 reviewed by Deaconess' corresponding experts; and Deaconess filing a response. There is no
25 indication when counsel, their experts, and key treating providers are available for deposition,
26 the time needed for Deaconess' experts' review and preparation of a response. There is no
27 assurance that all of these activities can be accomplished prior to the hearing on Plaintiffs'
28 motion for partial summary judgment.

DEACONESS MEDICAL CENTER'S RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT AND MEMORANDUM IN SUPPORT
OF MOTION FOR CR 56(F) CONTINUANCE - 15

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Attorneys & Counselors

422 W. Riverside Avenue, Suite 1100 Phone: 509.624.5265
Spokane, Washington 99201-0300 Fax: 509.458.2728

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IV. CONCLUSION

Based on the foregoing, Deaconess stipulates that its pharmacy tech employee, Nancy Houghton, breached the standard of care as required by RCW 7.70.040(1) when she mixed the potassium dose on August 24, 1998. Therefore, summary judgment on that point is appropriate. All other issues of liability and causation are contested and beyond the scope of Plaintiffs' motion.

Further, pursuant to CR 56(f), Deaconess respectfully requests that Plaintiffs' Motion for Partial Summary Judgment requesting dismissal of Affirmative Defenses 6.2, 6.3, 6.4 and 6.5 be continued pending the depositions of key treating providers, supplementation of Plaintiffs' discovery responses, and the depositions of Plaintiffs' experts. Deaconess asserts that this information will create genuine issues of material fact that will preclude summary judgment.

DATED this 5 day of December, 2016.

WITHERSPOON • KELLEY

By:



RYAN M. BEAUDOIN, WSBA # 30598
SAMUEL J. THILO, WSBA # 43221
STEVEN J. DIXSON, WSBA # 38101
TODD J. ADOLPHSON, WSBA # 46755
Attorneys for Defendant DEACONESS
MEDICAL CENTER, a Washington Non-
Profit Corporation



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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 5th day of December, 2016, the foregoing was delivered to the following persons in the manner indicated:

Counsel for Plaintiffs

Andrea J. Clare
George E. Telquist
Telquist Ziobro McMillen Clare, PLLC
1321 Columbia Park Trail
Richland, WA 99352

- By Hand Delivery
 - By U.S. Mail
 - By Overnight Mail
 - By Facsimile Transmission
 - By Electronic Mail
- andrea@tzmlaw.com
George@tzmlaw.com
Kristi@tzmlaw.com
Julie@tzmlaw.com



Mary Herrera, Legal Assistant

Appendix 2

1 RECEIVED

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Original Filed

2 FEB 27 2017

FEB 27 2017

3 SUPERIOR COURT
4 ADMINISTRATOR'S OFFICE

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

5
6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 IN AND FOR THE COUNTY OF SPOKANE

8 ALYSSA ARELLANO-HAWKINS, a minor
9 child, and DEYANIRA ARELLANO,
10 individually, and as legal guardian for the minor
11 child,

NO. 16-2-00887-3

11 Plaintiffs,

DECLARATION OF TIMOTHY M.
LAWLOR

12 vs.

13 DEACONESS MEDICAL CENTER, a
14 Washington Non-Profit Corporation;

15 Defendant.
16

17 I, TIMOTHY M. LAWLOR, under penalty of perjury under the laws of the State of
18 Washington, declare and state as follows:

19 1. I am over the age of 18 and competent to testify.

20 2. I am one of the attorneys for the Defendant in this action and make this
21 Declaration upon personal knowledge.

22 3. Attached hereto as Exhibit A is a true and correct copy of the Individual
23 Academic Evaluation Summary Report produced by plaintiff Deyanira Arellano and is dated
24 May 11, 2001. Exhibit A states that Alyssa Hawkins (age 2 years and 9 months) has a
25 cognitive score in the 1% percentile.
26

27
28 DECLARATION OF TIMOTHY M. LAWLOR - 1
S1511279.DOCX

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1 4. Attached hereto as **Exhibit B** is a true and correct copy of the Re-Evaluation
2 Review produced by plaintiff Deyanira Arellano and is dated May 5, 2004. Exhibit B states that
3 Alyssa Hawkins (5 years old) has a cognitive score in the 1% percentile.
4

5 5. Attached hereto as **Exhibit C** is a true and correct copy of the Initial Psycho-
6 Educational Review produced by plaintiff Deyanira Arellano and was administered in 2009.
7 Exhibit C states that Alyssa Hawkins had been previously assessed as suffering from mental
8 retardation. The 2009 evaluation confirmed that she was mentally retarded.
9

10 4. Attached hereto as **Exhibit D** are true and correct copies of excerpts of the
11 deposition of Deyanira Arellano, taken in this case on November 16, 2016. The text
12 establishes that Ms. Arellano was informed in 1998 that her child may have mental deficits due
13 to lack of oxygen, but she would not be able to tell for a few years. *See*, 51:11-52:19.

14 5. Ms. Arellano testified that as a toddler Alyssa fell behind her twin sister in
15 everything. She had an IQ test and was enrolled in the IEP program. *Id.*, at 60:4-61:19.

16 6. Attached hereto as **Exhibit E** is a true and correct copy of the May 2, 2004,
17 disability determination by Dr. Phillip G. Bernard, Ph.D. that was contained in Dr. John
18 Henriques' medical files for Alyssa Hawkins. Dr. Bernard's report concludes that she has
19 Moderate Mental Retardation with a poor prognosis.

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

22 SIGNED in Spokane, Washington this 27th day of February, 2017.
23

24 
25 TIMOTHY M. LAWLOR
26

27
28 DECLARATION OF TIMOTHY M. LAWLOR - 2
S1511279.DOCX

 **WITHERSPOON-KELLEY**
Attorneys & Counselors

422 W. Riverside Avenue, Suite 1100 Phone: 509.624.5265
Spokane, Washington 99201-0300 Fax: 509.458.2728

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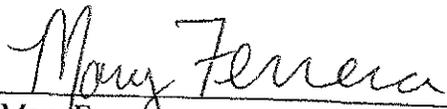
CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 2nd day of February, 2017, the foregoing was delivered to the following persons in the manner indicated:

Counsel for Plaintiffs

Andrea J. Clare
George E. Telquist
Telquist Ziobro McMillen Clare, PLLC
1321 Columbia Park Trail
Richland, WA 99352

- By Hand Delivery
 - By U.S. Mail
 - By Overnight Mail
 - By Facsimile Transmission
 - By Electronic Mail
- Andrea@tzmlaw.com
George@tzmlaw.com
Kristi@tzmlaw.com
Julie@tzmlaw.com



Mary Ferrera

DECLARATION OF TIMOTHY M. LAWLOR - 3
S1511279.DOCX

 **WITHERSPOON • KELLEY**
Attorneys & Counselors

422 W. Riverside Avenue, Suite 1100 Phone: 509.624.5265
Spokane, Washington 99201-0300 Fax: 509.458.2728

EXHIBIT A

**Kennewick School District
Special Services Department
200 South Dayton, Kennewick, WA 99336**

INDIVIDUAL ACADEMIC EVALUATION SUMMARY REPORT

NAME Alyssa Hawkins BIRTHDATE 8/9/98
 SCHOOL KBC AGE 2-9 GRADE pre-K
 EXAMINER: H. Dodel AREA OF EVALUATION: Cog.
 EVALUATION DATE(S) 5/11/01

Procedures and Instruments Used and Results Obtained:

Woodcock Johnson Psychoeducational Battery - Revised

Wechsler Individual Achievement Test

Date Given _____

Date Given _____

	GE	%ile	SS	AE
Mathematics Calculations				
Math. Applied Problems				
Broad Written Language				
Basic Reading Skills				
Reading Comprehension				

	GE	%ile	SS	AE
Basic Reading				
Reading Comprehension				
Numerical Operations				
Mathematics Reasoning				
Written Expression				
Listening Comprehension				

Other Battelle Dev. Inv.

Other _____

Date Given 5/11/01

Date Given _____

	GE	%ile	SS	AE
<u>Cognitive</u>	<u>20</u>	<u>1</u>	<u>2.33</u>	<u>12 md.</u>

	GE	%ile	SS	AE

SE-15b

(Original to Sp. Services Office, yellow to building file, pink to parents)

Other Evaluation Results-(address if applicable):

VALIDITY STATEMENT:

Results considered valid

Results not considered valid because:

Conclusions obtained from assessment observations:

Alyssa has a deficit in the cognitive domain.

Statement of the apparent significance of the findings, as related to the student's suspected disability(ies) and his/her participation in the general curriculum:

Alyssa would benefit from a Spec. Ed. program. She would not function successfully in a reg. preschool program. She was limited verbally. She was unable to match geometric shapes, could only place a circle in a puzzle, did not reach around a barrier even when shown what to do, and would not point to things when asked what their function was. Evaluator's Signature: *[Signature]* Date: *5/11/01*

SE-15b

(Original to Sp. Services Office, yellow to building file, pink to parents)

EXHIBIT B

Pasco School District #1
Special Services Department
1215 West Lewis, Pasco, WA 99301

475158
Whitehead

REEVALUATION REVIEW

Student: Alyssa Hawkins DOB: 8-9-98 Grade: K
School: Longfellow Meeting Date: 5-5-04 D/C: DD
Parent/Guardian: Devanria Arellano Address: 1927 W. Hopkins Pasco, WA 99301
Date of Evaluation: 5-5-04 Date of Next Evaluation: 5-5-07

REVIEW EXISTING EVALUATIONS

1. Evaluations and information provided by the parents of the student, previous assessment results:

Battelle Developmental Inventory
5-11-01
Cognitive: Raw=20, % = 1, SS = -2.33
1/24/00
Personal/Social: Z-score = +.50

Preschool Language Scale - 3 (PLS - 3)
Receptive = -1.40
Expressive = -1.28

2. Current classroom-based assessment and observations:

Alyssa attends class on a consistent basis. She is learning beginning math, reading, and writing skills. Alyssa can reproduce a circle and a straight line.

3. Observations by teachers and related service providers:

Alyssa can say several words. However, Alyssa seldom speaks when asked a question. Alyssa is very shy and does not begin a conversation with other students. When Alyssa becomes more comfortable with others She will reply, but seldom in an audible tone.

ENTERED

MAY 13 2004

SE-R1

- 7. The student needs the following additions or modifications (if any) to their special education and related services to enable them to meet the measurable annual goals set out in the IEP or participate, as appropriate, in the general curriculum:
Social goals and communication goals should be added to Alyssa's IEP.

SE-R1

IEP Team Members:

Name: Robert Polychetz Agree Disagree Title: School Psychologist Date: 4/20/04

Name: Amynia A. Gano Agree Disagree Title: Mother Date: 4/20/04

Name: Diana Whitehead Agree Disagree Title: _____ Date: _____

Name: _____ Agree Disagree Title: _____ Date: _____

(original in special education master file; one copy to parent, teacher, and special education office)

IEP TEAM Reevaluation Review #

SE-R1

IEP Team Members:

Name: Robert Polychuk Agree Disagree Title: School Psychologist Date: 5/5/04

Name: Deanna Whiteside Agree Disagree Title: Sp. Ed. Teacher Date: 5/5/04

Name: _____ Agree Disagree Title: _____ Date: _____

(original in special education master file; one copy to parent, teacher, and special education office)

IEP TEAM Reevaluation Review #

SE-R1

Pasco School District #1
 Special Services Department
 1215 West Lewis Street, Pasco, WA 99301

SCHOOL PSYCHOLOGIST EVALUATION REPORT

Student name Alyssa Hawkins School Longfellow Elementary
 Birthdate 8-9-1998 Age 6 Grade K
 Examiner R. Pelychaty Evaluation date 5-5-04

Evaluation purpose (how does this evaluation relate to concerns described in referral or re-evaluation?):

All students receiving special education services require an evaluation every three years to determine current needs and appropriate placement. The following assessment will provide data for the IEP team.

Evaluation procedures and instruments (must also relate to concerns described in referral or re-evaluation):

Underline the procedure(s) used: individually administered, observation, interview, other

Test/instrument used	<u>Differential Ability scale -special nonverbal section</u>	Date given	<u>4-28-2004</u>
	<u>SS (mean=100)</u>		
<u>Verbal Cluster</u>	<u>53</u>	<u>Visual Motor Integration -standard score = 65</u>	
<u>Nonverbal Cluster</u>	<u>47</u>		
<u>General Cognitive</u>	<u>47</u>		

Evaluation procedures and instruments (must also relate to concerns described in referral or re-evaluation):

Underline the procedure(s) used: individually administered, observation, interview, other

Test/instrument used	<u>Developmental Profile II</u>	Date given	<u>4-26-2004</u>
	<u>Age equivalent</u>		
<u>Physical Age</u>	<u>30months</u>		
<u>Self-Help Age</u>	<u>34months</u>		
<u>Social Age</u>	<u>30months</u>		
<u>Academic Age</u>	<u>28months</u>		
<u>Communication</u>	<u>28months</u>		

Evaluation results:

The testing results indicate that Alyssa's general cognitive ability (GCA) score of 47 is in the very low range. Compared to age related children Alyssa performed below the 1st percentile. A GCA score in the very low range indicates significant delays in cognitive development. Developmentally, Alyssa also displays significant delays in physical development, academic development, social development, self-help development, and communication development.

Significance of findings relative to instructional program (include a description of factors interfering with the student's educational performance, possible special education and related services needed, and need for extended school year services):

Based on the results of the assessment, Alyssa would likely benefit from an intensive special education program. Her

SE-12a
Rev 12/98

significant delays in cognitive ability along with developmental skills indicate the need for small group instruction with extra time for repeated exposure and retention. The results will be brought to the IEP team for discussion and recommendations.

Examiner's signature

Robert A. Kelly

Position

School Psychologist

SE-12a
Rev 12/98

EXHIBIT C

Initial Psycho-educational Report

STUDENT INFORMATION

Name: Hawkins, Alyssa
School/Agency: Ruth Livingston Elementary School
District Student ID: 675158
Gender: Female
Ethnicity: Hispanic
Examiner Name: Ron Morrison-Smith

D.O.B: 8/9/1998
Report Type: Initial Psychoeducational
Common Name: Alyssa
Grade: 4
Primary Language: English
Teacher Name: Ron Morrison-Smith

REASON FOR REFERRAL

Alyssa was placed into reevaluation due to her triennial reevaluation coming due. She was originally referred for evaluation by her classroom teacher, and was then brought to a Multi-Disciplinary Team for consideration. Her previous evaluation found that she was mentally retarded.

This new evaluation will determine whether or not the previous disability will continue, or a change in qualification is necessary.

Previous to her placement in the Life Skills classroom at Livingston Elementary, Alyssa has also been placed into a self-contained classroom, which is considered less restrictive than her previous placement.

REVIEW OF PREVIOUS ASSESSMENTS

DAS. 4/28/04

Verbal Cluster 53
Nonverbal Cluster 47
General Cognitive 47

WISC-IV. 5/25/06. L. Parra.

Verbal Comp 59
Perceptual Reas 59
Working Mem. 62
Processing Speed 73
Full Scale Score 54

Vineland Adaptive. D Whiteside.

Communication Domain 35
Daily Living Skills Domain 20
Socialization Domain 40
Adaptive Beh. Comp. 32

Confidential

Page 1

MEDICAL INFORMATION

Vision and Hearing Screening indicate that functioning is normal for both areas.

CLASSROOM OBSERVATION

During a twenty minute observation in the Life-Skills classroom by Leland Graham, the School Psychologist, Alyssa was seen as being on-task, and attentive to the tasks she was given. The assignment she was working on was a group assignment with the entire class around a table with the teacher. She did need prompting by the Parapro in the classroom, but this was no different from other students. Given the nature of the class, Alyssa's behaviors, attention, and on-task ability was completely appropriate, and consistent with the rest of the class.

TEACHER REPORT

See results on the WJ-III for information.

TESTS ADMINISTERED

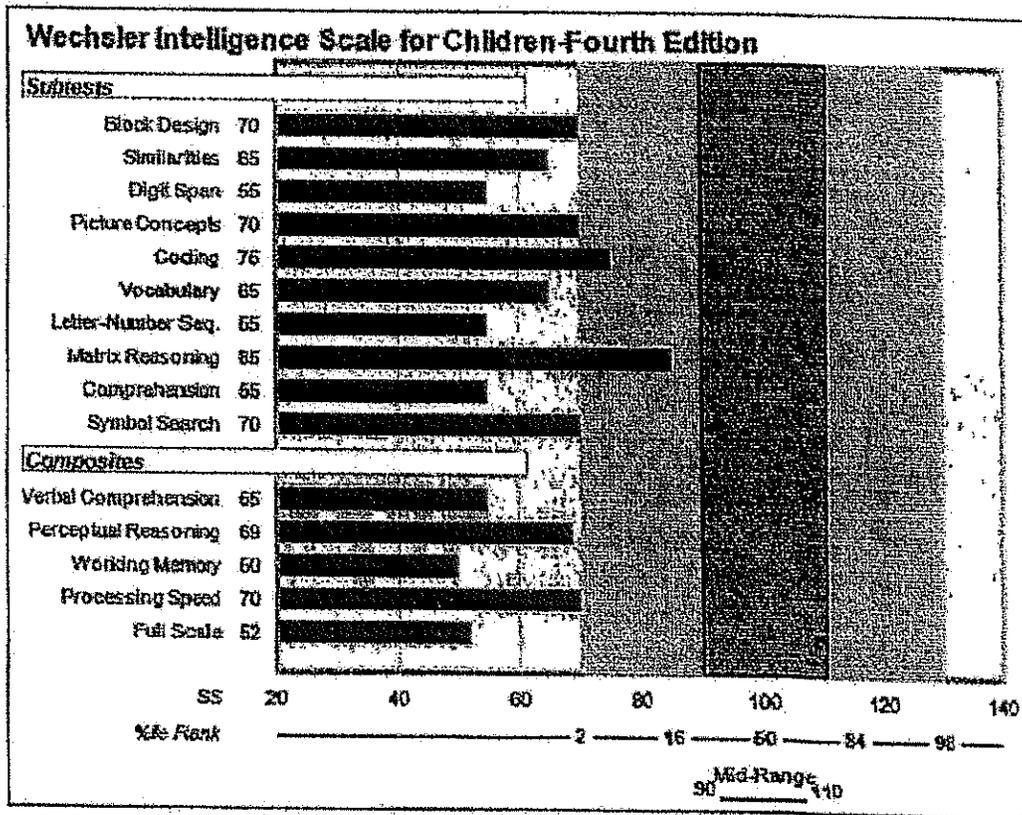
The assessment procedures used in this analysis include:

TEST GIVEN	ABRIDGE	DATE
Wechsler Intelligence Scale for Children-Fourth Edition	WISC-IV	11/07
Vanderbilt Adaptive Behavior Scale - Second Edition Teacher	VABS	5/21/2009
Kaufman Assessment Battery for Children	KABC	5/17/09
Woodcock Johnson III Tests of Achievement	WJ-III ACH	4/4/2009

TEST TAKING BEHAVIOR

Alyssa accompanied the examiner willingly. Rapport appeared to be established and Alyssa attempted the tasks. Alyssa appeared to be very friendly, polite, and was conscientious of returning to the office after recess or lunch. She appeared to be curious of her performance and appeared to enjoy the one to one attention. During testing she was dutiful in the tasks that she was given, but was a bit reserved and shy during testing. Alyssa was also very hesitant as she questions became harder, and was slower in giving her responses as she felt she didn't know. When she did not know the answer at all, she merely scrunched her face up, and shrugged.

Overall, I would consider this test to be truly representative of her intellectual ability.



Test Analysis: Wechsler Intelligence Scale for Children-Fourth Edition

Alyssa's scores on the WISC-IV indicate that her functioning is severely impaired.

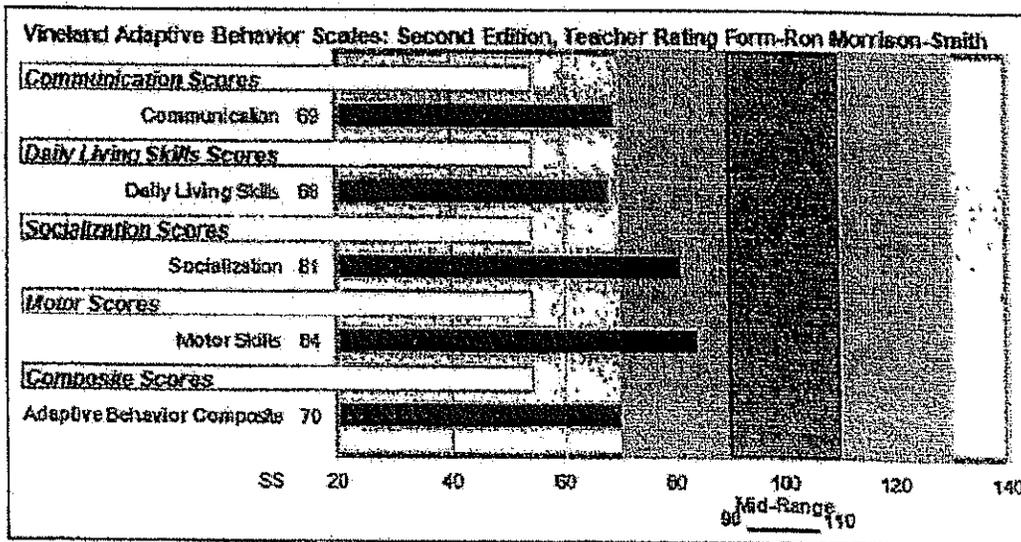
Test Intro: Vineland Adaptive Behavior Scales: Second Edition, Teacher Rating Form-Ron Morrison-Smith

The Vineland-II assesses adaptive functioning, the skills needed for daily living. Ratings on the Teacher Rating Form resulted in the following scores for Alyssa:

Scores: Vineland Adaptive Behavior Scales: Second Edition, Teacher Rating Form-Ron Morrison-Smith

Communication Score	Age	SS	Dev. Quotient
Receptive	5.6		
Expressive			
Written	5.6		
Communication			

Personal	40	
Academic	51	
School Community	51	
Daily Living Skills	68	
Socialization Scores		
Interpersonal Relationships	49	
Play and Recreational	49	
Coping Skills	40	
Socialization	81	Moderately Low
Motor Scores		
Gross	45	
Fine	70	
Motor Skills	84	Moderately Low
Composite Scores		
Adaptive Behavior Composite	70	Moderately Low



Test Analysis: Vineland Adaptive Behavior Scales: Second Edition, Teacher Rating Form-Ron Morrison-Smith

The Vineland-II was filled out by Ron Morrison-Smith, Alyssa's classroom teacher. Her full scale score on the Adaptive Behavior Composite was 70, which places her functioning in the impaired region of functioning. Her lowest area was Communication, and her highest area was Motor. Overall, these scores are within a Life-Skills classroom, and reflect an Adaptive ability to a specially designed area.

Test Intro: Woodcock-Johnson III, Tests of Achievement

The WJ-III ACH measures academic achievement in the areas of reading, math, writing, academic knowledge and oral language. On this test Alyssa earned the following scores:

Scores: Woodcock-Johnson III, Tests of Achievement

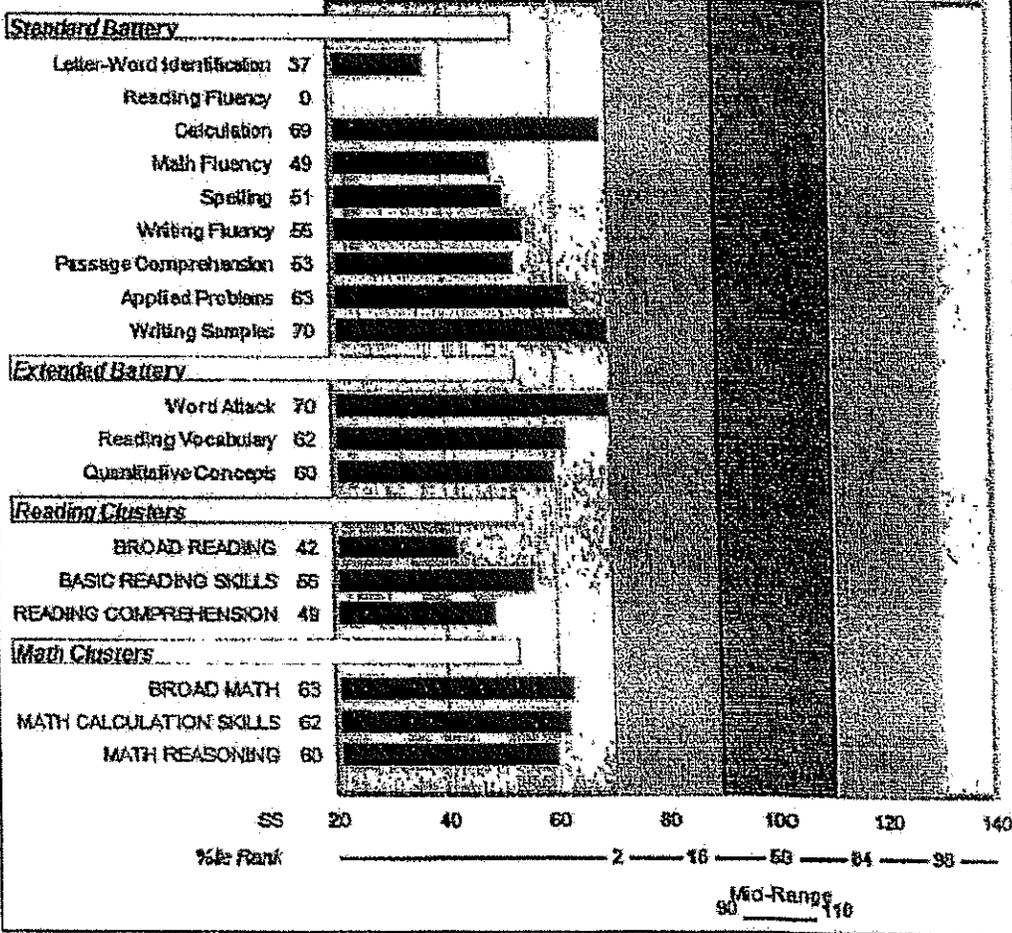
Score Specification	Score	Percentile	Age	Descriptor
Standard Battery				
Letter-Word Identification	35	11	37	<0.01 Very Low
Letter-Word Identification RPI/Implication	0/90			Impossible
Reading Fluency	36	13	00	<0.01 Very Low
Reading Fluency RPI/Implication	0/90			Impossible
Calculation	26	21	69	2 Very Low
Calculation RPI/Implication	0/90			Impossible
Math Fluency	31	16	49	0.02 Very Low
Math Fluency RPI/Implication	0/90			Impossible
Spelling	37	9	31	0.05 Very Low
Spelling RPI/Implication	0/90			Impossible
Writing Fluency	30	12	55	0.15 Very Low
Writing Fluency RPI/Implication	0/90			Impossible
Passage Comprehension	44	10	53	0.89 Very Low
Passage Comprehension RPI/Implication	0/90			Impossible
Applied Problems	62	10	63	1 Very Low
Applied Problems RPI/Implication	0/90			Impossible
Writing Sample	72	17	70	2 Low
Writing Sample RPI/Implication	0/90			Impossible
Extended Battery				
Word Attack	39	14	70	2 Low
Word Attack RPI/Implication	0/90			Impossible
Reading Vocabulary	66	12	62	1 Very Low
Reading Vocabulary RPI/Implication	0/90			Impossible
Quantitative Concepts	66	12	60	0.38 Very Low
Quantitative Concepts RPI/Implication	0/90			Impossible
Reading Fluency				
BROAD READING	63	12	142	0.01 Very Low
BROAD READING RPI/Implication	0/90			Impossible
BASIC READING SKILLS	67	12	56	0.17 Very Low
BASIC READING SKILLS RPI/Implication	0/90			Impossible
READING COMPREHENSION	54	11	49	0.03 Very Low
READING COMPREHENSION RPI/Implication	0/90			Impossible

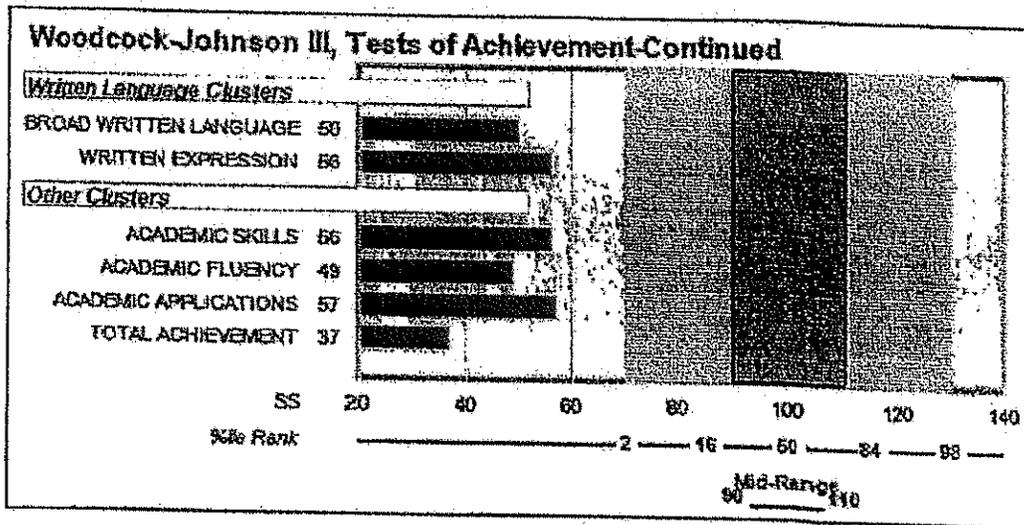
Mathematics					
BROAD MATH	6.9	15	63	1	Very Low
BROAD MATH EXPLORE/INVESTIGATION					Difficult
MATHEMATICAL REASONING SKILLS	6.2	13	62	1	Very Low
MATHEMATICAL REASONING SKILLS EXPLORE/INVESTIGATION					Difficult
MATH REASONING	6.4	14	60	0.38	Very Low
MATH REASONING EXPLORE/INVESTIGATION					Difficult

Written Language					
BROAD WRITTEN LANGUAGE	6.7	12	50	0.82	Very Low
BROAD WRITTEN LANGUAGE EXPLORE/INVESTIGATION					Difficult
WRITTEN EXPRESSION	6.8	13	56	0.17	Very Low
WRITTEN EXPRESSION EXPLORE/INVESTIGATION					Difficult

Other Skills					
ACADEMIC SKILLS	6.8	12	56	0.17	Very Low
ACADEMIC SKILLS EXPLORE/INVESTIGATION					Impossible
ACADEMIC FLUENCY	6.10	13	49	0.03	Very Low
ACADEMIC FLUENCY EXPLORE/INVESTIGATION					Impossible
ACADEMIC APPLICATIONS	6.6	12	57	0.21	Very Low
ACADEMIC APPLICATIONS EXPLORE/INVESTIGATION					Difficult
TOTAL ACHIEVEMENT	6.5	11	37	-0.03	Very Low
TOTAL ACHIEVEMENT EXPLORE/INVESTIGATION					Impossible

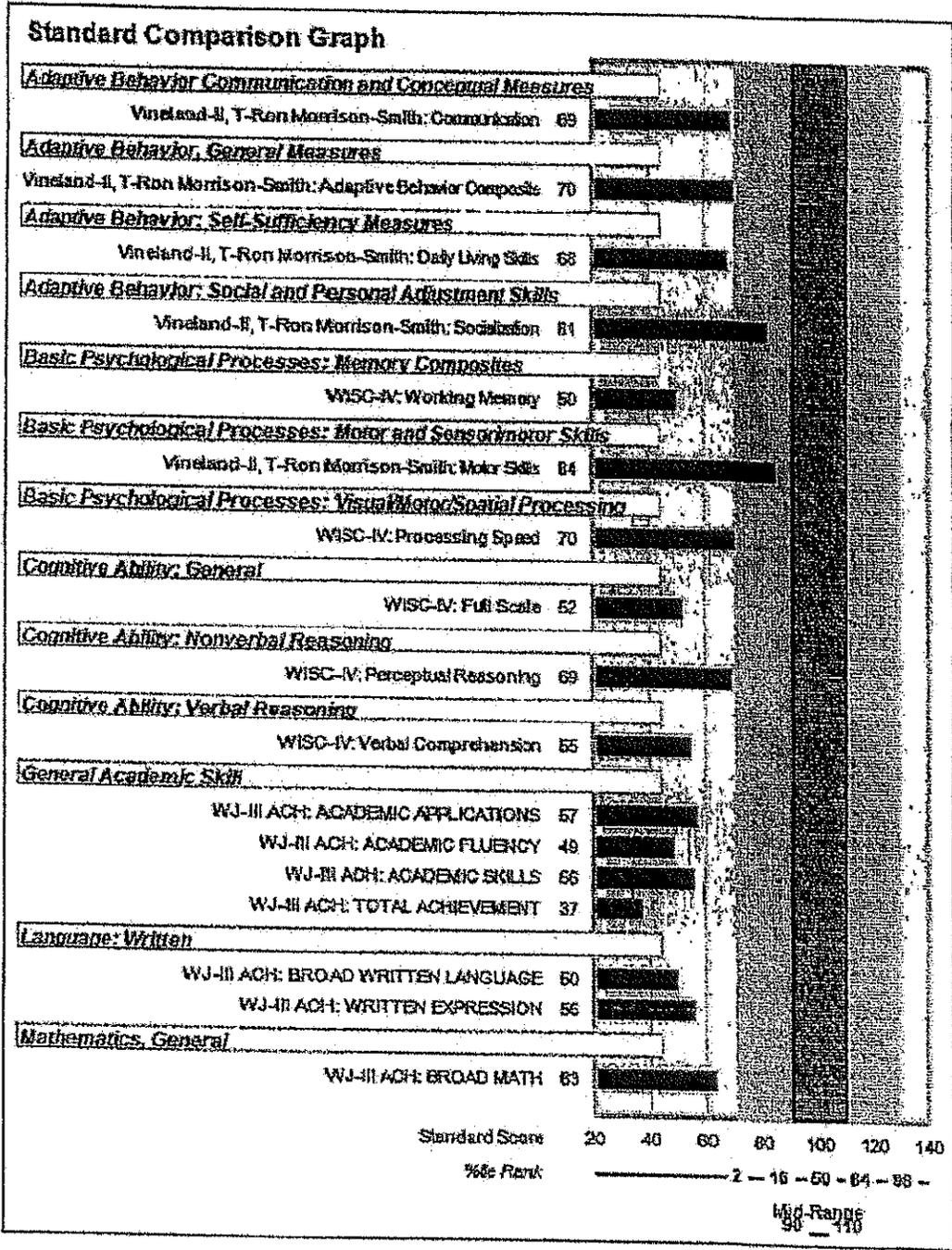
Woodcock-Johnson III, Tests of Achievement

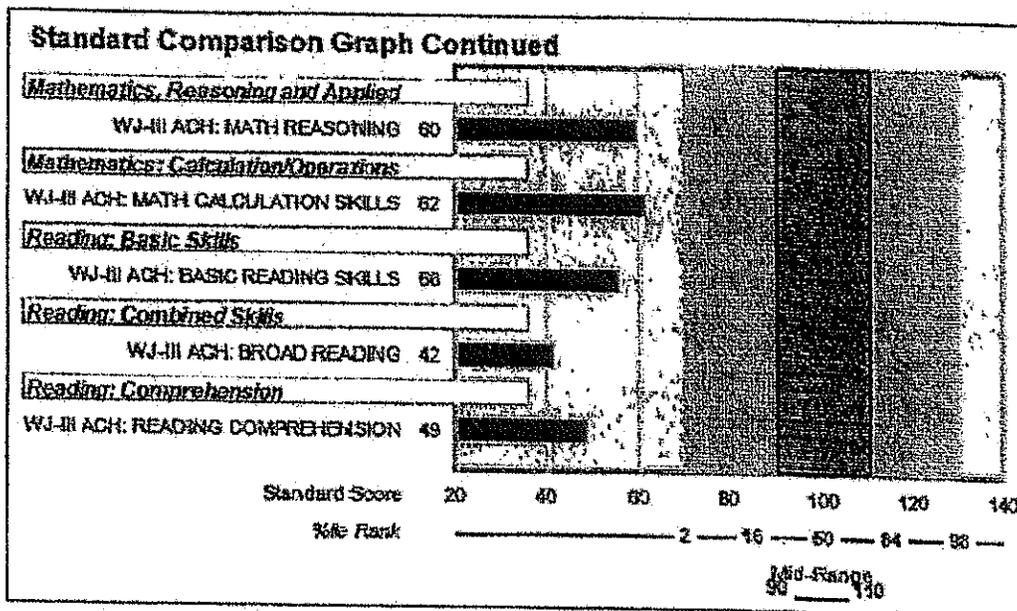




Test Analysis: Woodcock-Johnson III, Tests of Achievement

Alyssa's academic skills, her ability to apply those skills, and her fluency with academic tasks are all within the very low range. Alyssa's performance is very low in basic reading skills, reading comprehension, math calculation skills, math reasoning, written language, and written expression.





LANGUAGE FUNCTIONING

(Discussion of receptive, expressive, and pragmatic language)

Alyssa was given a speech and language reevaluation to determine her current skills at this time to determine if she continues to qualify for special education speech services. Alyssa was given the following assessments; (LPT-R) Language Processing Test-R, (PPVT-III) Peabody Picture Vocabulary Test, (EOWPVT) Expressive One Word Picture Vocabulary Test.

Alyssa was given a receptive and expressive vocabulary test to determine her vocabulary skills. At this time she scored.

The Language Processing Test-R was used to determine her overall language processing skills. She scored the following...

When looking at Alyssa's overall assessment, language, academic, cognitive, classroom performance, therapy performance, Alyssa's language skills are comparable.

It is recommended that Alyssa be dismissed from therapy at this time. It is felt that her language needs are being addressed in the classroom. Her classroom does contain many language rich opportunities for her to practice and acquire language experiences.

SUMMARY AND RECOMMENDATIONS

Alyssa was evaluated for the purpose of determining her current academic and educational needs. Previously, Alyssa had been evaluated for Special Education, and found to qualify for services under the Category of Mental Retardation. This category was based on classroom academics, Measured Academics using the WJ-III, and her Cognitive and Adaptive abilities being more than two standard deviations below the mean. According to Washington State Administrative Codes, to qualify for Mental Retardation, a person must have a Cognitive Score that is more than two standard deviations below the mean, and an accompanying Adaptive score that is below average. In this current evaluation, Alyssa scored a 54 on the

WISC-IV, which is in the impaired region, and more than three standard deviations below the mean. The Vineland as measured by her classroom teacher, Ron Morrison-Smith, indicates that her ability to function in the environment is two standard deviations below the mean, and qualifies her to continue to qualify as being Mentally Retarded.

CONSIDERATION OF SPECIAL EDUCATION CRITERIA

Alyssa was evaluated in her native language using formal and informal measures conducted by trained staff in an environment best suited for valid results.

Scores obtained are considered to be a valid measure of current developmental level.

Scores obtained are not considered to be a valid measure of current developmental level for the following reasons:

RECOMMENDATIONS

- Continue to Qualify for Special Education under the Category of Mentally Retarded.
- Receive services for Academic areas of Math, Reading, and Written Language.
- Receive services for Social.
- Exited from services for Communication.
- Services will be delivered within the Life-Skills classroom within the Pasco School District, or other restrictive environment that matches her skill level.

SIGNATURE

The multidisciplinary team signatures ensure the following:

- Tests and other evaluation materials used to assess the student were selected and administered so as not to be discriminatory on racial or cultural bases.
- Tests and other evaluation materials used to assess the student were provided and administered in the student's native language or other mode of communication, unless it is clearly not feasible to do so.
- Materials and procedures used to assess a student with limited English proficiency were selected and administered to ensure that they measure the extent to which the student has a disability and needs special education, rather than measuring the student's English language skills.
- Any standardized tests that were given to a student were validated for the specific purpose for which they were used.
- Any standardized tests that were given to a student were administered by trained and knowledgeable personnel in accordance with any instructions provided by the producers of the tests.

- If a test was administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's impaired sensory, manual or speaking skills (unless those skills are the factors that the test purports to measure).
- The evaluation is sufficiently comprehensive to identify all of the special education needs and related (supportive) services as are required to assist a student with a disability to benefit from special education, whether or not they are commonly linked to the disability category in which the student has been classified.

 Ron Morrison-Smith
 Concur with findings: Yes No

 Position

 JalLeene DeJuan
 Concur with findings: Yes No

 Position

 {TeamMember2}
 Concur with findings: Yes No

 Position

 {TeamMember3}
 Concur with findings: Yes No

 Position

 {TeamMember4}
 Concur with findings: Yes No

 Position

 {TeamMember5}
 Concur with findings: Yes No

 Position

Statement of non-concurring team member's conclusions:

Confidential

Page 13

Team Member: _____
Conclusions:

Statement of non-concurring team member's conclusions:

Team Member: _____
Conclusions:

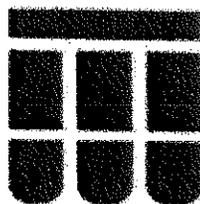
EXHIBIT D

**In The Matter Of:
Arellano-Hawkins**

vs.

Deaconess Medical Center

**Deposition of
Alyssa Hawkins
November 16, 2016**



Central Court Reporting
800.442.DEPO
Support@centralcourtreporting.com
www.centralcourtreporting.com

1 APPEARANCES:

2 For the Plaintiffs:

3 ANDREA J. CLARE
4 GEORGE E. TELQUIST
5 Telquist Ziobro McMillen Clare
6 1321 Columbia Park Trail
7 Richland, Washington 99352
8 PH: 509.737.8500
9 andrea@tzmlaw.com

7 For the Defendant:

8 RYAN M. BEAUDOIN
9 Witherspoon Kelley
10 422 West Riverside Avenue
11 Suite 1100
12 Spokane, Washington 99201-0300
13 PH: 509.624.5265
14 FAX: 509.458.2728
15 rmb@witherspoonkelley.com

16 Also present:

17 SEAN LYKKEN, Legal Videographer
18 DEYANIRA ARELLANO
19
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1 A. Once we got there, they said -- well, we got her --
2 when they called us, they said they were giving her
3 body massages and CPR, and they didn't know what had
4 caused her heart to, you know, to go down; and they
5 weren't sure what the outcome would be, so for us to
6 head over there.

7 So the whole time we headed over there, we weren't
8 sure if she was going to be alive or not. When we got
9 there, they told us, We got her stabilized. Her heart
10 rate is back up, and she's stable. She's doing fine.

11 And I asked, Well, what happened?

12 And they said, We're not sure yet.

13 Q. Who are you speaking to?

14 A. A doctor there. I believe the one that was there was
15 Dr. Strandness. We took a couple hours, and we were
16 just waiting. They said they were going to call us in
17 to give us a better reason why she went through that.

18 Then a couple hours went by, and then they called
19 me and my husband at the time and he -- the
20 Dr. Strandness told us that she's stable; that it was
21 very unfortunate, but that the reason why they -- she
22 pretty much went into cardiac arrest was because they
23 gave her the wrong dosage of potassium; that it wasn't
24 the nurse's fault; that it had to do with the pharmacy
25 not measuring the right dosage for her.



1 And he said -- the only thing he said was that
2 they weren't sure how it would affect her; that the
3 only -- since the oxygen to her brain had been stopped
4 for quite a while, which I didn't know of. They never
5 told me how long she was under until just now.

6 Q. Until just now?

7 A. Yeah. They never told me the time that she was pretty
8 much dead.

9 Q. We can take a break any time you want.

10 A. So they just said it could be a matter of nothing
11 really affecting her or it could be a matter of
12 something really affecting her mentally. He said, But
13 it's going to be years before you even notice that
14 because you have to wait until she starts walking and
15 talking and getting her, you know, motor skills.

16 And he said, So just be aware -- you know, be
17 aware of how she's growing, you know, just with her
18 mentally. He said it could affect her because of the
19 oxygen to her brain was cut off for a while.

20 And he just -- that's all he said. And I -- I
21 said, Well, how can this sort of thing happen?

22 And he told me, well, we're taking -- he said that
23 there was going to have -- the hospital was going to
24 have a meeting and that they were going to change the
25 procedures of how they did things as far as like the



1 Q. Does she have any other health care needs other than
2 the need to follow up on her kidney issues?

3 A. No.

4 Q. I want to go back in time a little bit to 1998 and the
5 next couple of years. How did Alyssa progress as a
6 young toddler?

7 A. We -- I have taken her to the ARC of Tri-Cities since
8 she was six months old. That's a program for -- that
9 helps children that are slightly delayed. I put
10 them -- I put both of them, Alexis and Alyssa, in that
11 program since they were six months to help them get
12 extra help with their motor skills, cognitive skills,
13 and just overall. They recommended that program to me.
14 So they've been -- they were going there until the age
15 of four, when they started preschool.

16 Since -- since six months old, we started -- we
17 started noticing little things that -- it was obvious
18 Alyssa was falling behind compared to her sister.
19 Alexis just started progressing at a normal rate, and
20 Alyssa just stayed behind just with everything.

21 Q. Has Alexis had testing for her IQ?

22 A. Yes.

23 Q. And what's her test results?

24 A. Well, not recently, but when -- I think her last IQ
25 test, they recommended to us a psychologist to check



1 both the girls to see where they were at for their
2 mental state; and Alexis, I think she was about five
3 years old. They just said she's normal. She doesn't
4 need extra help or extra -- as far as in school, she
5 didn't need any extra help with anything.

6 Q. But more recently, there was a development?

7 A. With Alexis?

8 Q. Yeah.

9 A. No.

10 Q. Oh, I thought you indicated that there was a need to go
11 to a psychologist?

12 A. No. When they were premature, since they were in that
13 developmental program, they recommended when they were
14 young for them to both get an IQ test to exit them
15 from -- and Alexis didn't need it anymore, but Alyssa
16 did continue to need extra help.

17 Q. Tell me about Alyssa's educational history. She's had
18 individual IEP's?

19 A. Yes.

20 Q. Tell me about that, if you would.

21 A. She's had IEP's since she started school, since
22 elementary school. They did testing on her, and they
23 consider her a special needs. So she's been in a
24 special needs class since elementary school.

25 So she has regular IEP's with her special ed.



EXHIBIT E

PHILIP G. BARNARD, Ph.D., DABPS
PSYCHOLOGICAL ASSOCIATES, P.S.

Clinical Psychology
Clinical Neuropsychology

AMON BLDG.
92 LEE BLVD.
P.O. BOX 72
RICHLAND, WA 99352
(509) 943-6866
FAX (509) 943-0223
91-1084373 TX ID #

Licensed Psychologist #281

Member in Professional Psychotherapy
National Academy of Behavioral Medicine,
Counseling and Psychotherapy

Diplomate as a Professional
Disability Consultant

Diplomate, American Board
of Psychological Specialties

March 2, 2004

Division of Disability Determination Services
Rock Pointe III Building
1330 North Washington, Suite 2080
Spokane, WA 99201-2341

RE: HAWKINS, ALYSSA
SOCIAL SECURITY NO. 533-41-7069
DOB: 08/09/98

It is alleged that Alyssa Hawkins exhibits brain damage. The Weschler Preschool Primary Scale of Intelligence-Revised (WPPSI-R) (performance intelligence estimate only), age-appropriate speech testing (i.e., the Preschool Language Scale [Fourth Edition]), and the Vineland Adaptive Behavior Scales were requested. The psychological testing was conducted on February 17, 2004.

Your referral letter included a speech and language evaluation administered in April 2002 by the Pasco School District when Alyssa was three years, nine months of age. Administration of the Preschool Language Scale (Fourth Edition) was attempted but discontinued because Alyssa would not complete the tasks. Alyssa exhibited difficulty understanding and using language appropriately. She exhibited developmental articulation errors.

There was a disability evaluation conducted by J. M. Toews, Ed.D. dated April 10, 2000. Dr. Toews administered the Bailey Infant Scales of Development. He diagnosed Alyssa with moderate mental retardation.

A note from Kennewick General Hospital prepared by Dr. Henry Chou, M.D. dated November 13, 1999 was also included. Alyssa had a low-grade fever and respiratory distress. Her diagnoses were RSV, bronchiolitis, respiratory distress, right middle lobe pneumonia, left otitis media. Oxygen support through a test was required.

CLINICAL INTERVIEW - ALYSSA HAWKINS AND MOTHER

Alyssa is now five years of age. Initially, she sat with her mother in a chair. Later, she became more active and jumped on the couch and rolled on the floor.

2-10-04
HENRIQUES 003

RE: HAWKINS, Alyssa

2

Alyssa is an identical twin. She was born ten weeks premature, weighing two pounds, fourteen ounces. There were breathing difficulties at birth. Alyssa remained in the hospital for two months. She did not develop a retinopathy. Her eyesight is adequate, as is her hearing. Alyssa did not begin walking until two years of age. She did not speak in two-word combinations until she was three years old. She participated in a program through the Tri-Cities Association for Retarded Children from six months of age until she was three years old. She is enrolled in special education classes. At the age of five, Alyssa may know fifty words. She does not speak in full sentences. She does not know all of her colors. She is able to count from one to ten, and knows her ABC's.

Alyssa takes no medication on a regular basis. She just finished a trial period of Amoxicillin, which is an antibiotic. Alyssa does not have seizures, blackouts, dizzy spells, or headaches. She has had pneumonia on two occasions.

Alyssa has had an RSV. Her sister is physically larger. Her sister does not participate in special education. The two relate relatively well. Alyssa is cooperative at times. She is more of a follower, with her twin sister being the leader. Alyssa has problems with her attention span. She may be able to concentrate for one-half hour in watching a favorite movie.

Alyssa vacillates between normal activity levels and hyperactivity. She has temper tantrums two to three times per day. She throws herself on the floor. Lately, she will run and hide.

Alyssa is a picky eater. She likes vegetables and saltine crackers. She is somewhat below the 50th percentile in her height and weight. She weighs thirty-eight pounds. Her sister weighs fifty-eight pounds. Alyssa sleeps through the night. She goes to bed by 9:00 p.m. and is up by 7:30 a.m.

Alyssa had an intestinal blockage, which was repaired surgically at five days of age. She developed a kidney infection after the surgery. There was a lack of oxygen during that period of time. The doctor has told Alyssa's mother that is when brain damage may have occurred.

There is no history of head injuries. Alyssa has had high fevers with ear infections, with no convulsions. There have been no tubes in her ears. There have been no toxic exposures.

Alyssa likes to play with dolls. Her play was fairly aggressive in nature. Her language verbalizations were unintelligible. She engaged in repetitive play.

BEHAVIORAL OBSERVATIONS

Alyssa is somewhat small for her age. She has dark hair, which was pulled back. She was initially somewhat shy. She has a big smile with missing teeth. She was wearing a pink sweatshirt, jeans, and tennis shoes. She has a short attention span. She became restless quickly. She distracted easily. She does not speak in complete sentences. Her language was intelligible only because she was looking at the pictures and saying the words at the same time. There were very few intelligible words, perhaps five to seven, "feet, shoes, ball, kitty." She said "bird" and

2-10-01
HENRIQUES 004

RE: HAWKINS, Alyssa

3

"spoon" in Spanish. When given her choice of pictures, she would point to all of them. She had difficulty following directions.

It is felt that the best effort possible was obtained from Alyssa. The test results are considered to be valid.

PSYCHOLOGICAL TEST RESULTS

On the Performance Subtests from the WPPSI-R, Alyssa obtained a Performance Estimate of 50. On the Performance Subtests of Object Assembly, Geometric Design, Block Design, Mazes, and Picture Completion she obtained Scale Scores of 1, 2, 3, 1, and 2, respectively. All of the scale scores are within a range one would expect at her intelligence level.

On the Preschool Language Scale (Fourth Edition) Alyssa obtained an Auditory Comprehension Standard Score of 63, which placed her at the 1st percentile and yielded an Age Equivalency of 3 years-5 months. Alyssa was five years, six months of age at the time of the evaluation. Her Expressive Communication Standard Score was 50, which yielded a percentile rank of 1 and an Age Equivalency of 1 year-9 months. Her Total Language Combined Standard Score was 52, which yielded a percentile rank of 1 and an Age Equivalency of 2 years-4 months. Alyssa shows significant delays in her language functions, both receptive and expressive.

The Vineland Adaptive Behavior Scales were administered with Alyssa's mother as the informant. Alyssa obtained an Adaptive Behavior Composite Standard Score of 48, which yielded an Age Equivalency of 2 years-1 month. Her Communication Domain Standard Score was 50, which yielded an Age Equivalency of 1 year-8 months. Her Daily Living Skills Domain Standard Score was 50, which yielded an Age Equivalency of 2 years-3 months. Her Socialization Domain Standard Score was 56, which yielded an Age Equivalency of 1 year-9 months. Her Motor Skills Domain Standard Score was 50, which yielded an Age Equivalency of 2 years-8 months. Alyssa shows significant delays in all areas of her adaptive behaviors.

SUMMARY

In summary, Alyssa Hawkins is an identical twin. She was born premature. There was a significant anoxia subsequent to surgery for an intestinal blockage at five days of age. She has exhibited RSV. There has been no retinopathy. Hearing and eyesight are adequate.

Alyssa did not walk until two years of age; two-word combinations did not begin to develop until after she was three years old. She is enrolled in special education classes. She has difficulty with cooperative play. She exhibits temper tantrums several times per day. She is somewhat of a follower, rather than a leader. She is somewhat shy. She is able to count from one to ten and knows her ABC's, but has not yet learned all of her colors. She may know fifty words total at this time.

In terms of Alyssa's perceptual-motor abilities, as measured by the WPPSI-R, she obtained a Standard Score of 50. In her adaptive behaviors on the Vineland, she obtained an Adaptive Behavior Composite Standard Score of 48, which yielded an Age Equivalency of 2 years-

HENRIQUES 095⁰¹¹

RE: HAWKINS, Alyssa

4

1 month. She is showing deficits in all areas of her adaptive abilities, including communication, daily living skills, socialization, and motor skills. She has problems with attention and concentration and persistence and pace. She is highly distractible.

With respect to language functions on the Preschool Language Scale (Fourth Edition), Alyssa obtained an Auditory Comprehension Standard Score of 63, an Expressive Communication Standard Score of 50, and a Total Language Standard Score of 52, placing her at the 1st percentile, with an Age Equivalency of 2 years-4 months.

Diagnostically, Alyssa demonstrates a Mixed Receptive-Expressive Language Disorder (DSM-IV-315.32). On Axis-II she exhibits Moderate Mental Retardation (DSM-IV-318). The prognosis in this situation is poor.

Thank you very much for this referral. If I may be of any further assistance, please feel free to contact me.

Sincerely,



Philip G. Barnard, Ph.D.
Licensed Clinical Psychologist

PGB:sr/WD113

1.8.12
3-10-22

HENRIQUES 006

Appendix 3

FILED

MAR 17 2017

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR SPOKANE COUNTY

ALYSSA ARELLANO-HAWKINS, a minor child, and DEYANIRA ARELLANO, individually, and as legal guardian for the minor child,

Plaintiffs,

vs.

DEACONESS MEDICAL CENTER, a Washington Non-Profit Corporation;

Defendants.

Case No. 16-2-00887-3

NOTICE OF DISCRETIONARY REVIEW TO SUPREME COURT

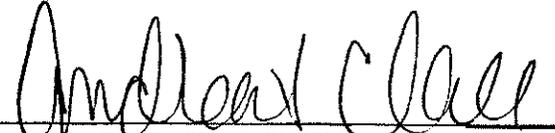
Pursuant to RAP 4.2(a), Plaintiffs, by and through their attorneys of record, hereby seek direct review by the Supreme Court of the Superior Court's attached Order Granting Deaconess Medical Center's Motion to Dismiss Plaintiff Deyanira Arellano's claim for loss of parental consortium entered on March 3, 2017.



1 DATED this 16th day of March, 2017.

2 TELQUIST ZIOBRO McMILLEN CLARE, PLLC

3
4
5 By:



6 ANDREA J. CLARE, WSBA #37889

7 GEORGE E. TELQUIST, WSBA #27203

8 Attorneys for Plaintiffs

9 1321 Columbia Park Trail

10 Richland, WA 99352

11 Telephone: (509) 737-8500

12 Fax: (509) 737-9500

13 Attorneys for Defendant:

14 Ryan M. Beaudoin, WSBA #30598

15 Timothy M. Lawler, WSBA #16352

16 Matt W. Daley, WSBA #36711

17 Steven J. Dixson, WSBA #38101

18 Todd J. Andolphson, WSBA #46755

19 Witherspoon Kelley

20 422 West Riverside Avenue

21 Suite 1100

22 Spokane, WA 99201-0300

23 Telephone: (509) 624-5265

24 Fax: (509) 458-2728

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby declares, under penalty of perjury, under the laws of the State of Washington, that on March 17, 2017, I caused the original of the foregoing document to be:

- filed
- sent for filing, with a bench copy to Judge Cooney
- e-mailed for Judge Cooney's bench copy

with the Spokane County Superior Court.

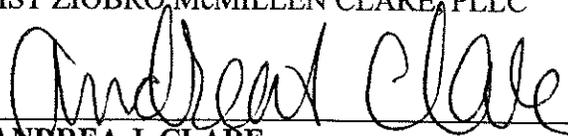
I also caused a true and correct copy of the foregoing document to be served on the following, via:

Ryan M. Beaudoin Steven J. Dixon Todd J. Adolphson Witherspoon Kelley 422 West Riverside Avenue Suite 1100 Spokane, WA 99201-0300	<input type="checkbox"/> Regular U.S. Mail, postage prepaid <input checked="" type="checkbox"/> E-Mail to rmb@witherspoonkelley.com , sjd@witherspoonkelley.com & tja@witherspoonkelley.com <input type="checkbox"/> Hand delivery <input type="checkbox"/> Facsimile to (509) 458-2728
Mary Ferrera, Assistant	E-Mail to maryf@witherspoonkelley.com

DATED this 17TH day of March, 2017, at Richland, Washington.

TELQUIST ZIOBRO McMILLEN CLARE, PLLC

By: _____


ANDREA J. CLARE

COPY
ORIGINAL FILED

MAR - 3 2017

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

ALYSSA ARELLANO-HAWKINS, a minor
child, and DEYANIRA ARELLANO,
individually, and as legal guardian for the minor
child,

Plaintiffs,

vs.

DEACONESS MEDICAL CENTER, a
Washington Non-Profit Corporation;

Defendant.

NO. 16-2-00887-3

ORDER GRANTING DEACONESS
MEDICAL CENTER'S MOTION TO
DISMISS

I. RELIEF SOUGHT

Defendant Deaconess Medical Center moves the Court for an Order of Summary Judgment dismissing Plaintiff Deyanira Arellano's ^{parental} loss of consortium claim.

Hearing was held on March 3, 2017. ~~George Telquist~~ and Andrea Clare appeared on behalf of the Plaintiffs. Timothy M. Lawlor appeared on behalf of Defendant.

II. MATERIALS REVIEWED

1. Deaconess Medical Center's Motion to Dismiss Deyanira Arellano's Loss of Consortium Claim;

ORDER GRANTING DEACONESS MEDICAL
CENTER'S MOTION TO DISMISS DEYANIRA
ARELLANO'S LOSS OF CONSORTIUM CLAIM - 1



WITHERSPOON • KELLEY
Attorneys & Counselors

Appendix Page 64

422 W. Riverside Avenue, Suite 1100 Phone: 509.624.5265
Spokane, Washington 99201-0300 Fax: 509.458.2728

1 Presented by:

2
3 **WITHERSPOON • KELLEY**

4 

5
6 RYAN M. BEAUDOIN, WSBA # 30598
7 TIMOTHY M. LAWLOR, WSBA # 16352
8 MATTHEW W. DALEY, WSBA # 36711
9 Attorneys for Defendant DEACONESS
10 MEDICAL CENTER

11 Approved as to Form and Content
12 Notice of Presentment Waived

13 **TELQUIST ZIOBRO MCMILLEN CLARE**

14 

15 ANDREA J. CLARE, WSBA # 37889
16 GEORGE E. TELQUIST, WSBA # 27203
17 Attorneys for Plaintiffs

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28 ORDER GRANTING DEACONESS MEDICAL
CENTER'S MOTION TO DISMISS DEYANIRA
ARELLANO'S LOSS OF CONSORTIUM CLAIM - 3

Appendix Page 66

 **WITHERSPOON • KELLEY**
Attorneys & Counselors

422 W. Riverside Avenue, Suite 1100 Phone: 509.624.5265
Spokane, Washington 99201-0300 Fax: 509.458.2728

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 30th day of June, 2017, the foregoing was delivered to the following persons in the manner indicated:

Andrea J. Clare
George E. Telquist
Telquist Ziobro McMillen Clare, PLLC
1321 Columbia Park Trail
Richland, Washington 99352

Counsel for Ms. Arellano

- By Hand Delivery
- By U.S. Mail
- By Overnight Mail
- By Facsimile Transmission
- By Electronic Mail
Andrea@tzmlaw.com
George@tzmlaw.com
Kristi@tzmlaw.com
Julie@tzmlaw.com



Mary Ferrera

WITHERSPOON KELLEY

June 30, 2017 - 11:56 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94292-7
Appellate Court Case Title: Alyssa Arellano-Hawkins et al. v. Deaconess Medical Center
Superior Court Case Number: 16-2-00887-3

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