

NO. 71123-7 -I
WASHINGTON STATE COURT OF APPEALS
DIVISION I

FILED
COURT OF APPEALS DIV. I
WASHINGTON
STATE
2011 MAR 11 PM 1:20

JOHN DOE, a single man;
and JANE DOE, a single woman,

Appellants,

vs.

PHILLIP J. ZYLSTRA, M.D. and BARBARA ZYLSTRA, husband and wife, and the marital community composed thereof; MARK SPENCER, M.D. and CYNTHIA SPENCER, husband and wife and the marital community composed thereof; VERNON HALL, M.D. a single man; GLEN ISHAM; ANN DOE; TANYA DOE; SHERRI DOE; CORRIN DOE; KIM DOE; and SHAYNI DOE,

Respondents.

APPEAL FROM THE
SUPERIOR COURT FOR SNOHOMISH COUNTY
THE HONORABLE DAVID A. KURTZ

APPELLANTS' OPENING BRIEF

Eugene Nelson Bolin, Jr., WSBA #11450
Law Offices of Eugene N. Bolin, Jr., P.S.
114 Railroad Avenue, Suite 308
Edmonds, WA 98020
425-582-8165
Attorney for Appellants

Jules R. Butler, WSBA #41772
Butler Law Firm, PLLC
19502 48th Ave. W
Lynnwood, WA 98036
425-774-1199
Attorney for Appellants

TABLE OF CONTENTS

I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR.....	4
III. STATEMENT OF ISSUES.....	4
IV. APPELLANTS' STATEMENT OF THE CASE	6
A. Timeline	6
B. The Plaintiff's Response To The Plaintiff's Motion.....	7
1. The Deposition Of The Defendant Glen Isham, MA.....	7
2. The Affidavit Of The Plaintiff Jane Doe	8
3. The Declaration Of The Plaintiff John Doe.....	9
4. The Deposition Of The Defendant Dr. Vernon Hall	9
5. The Deposition of the Defendant Dr. Phillip Zylstra.....	12
6. The Declaration Of Plaintiffs' Expert Dr. William Fassett	13
7. The Declaration of Plaintiffs' Expert Michaelann Allen	14
8. Hearing On Defendants' Motion For Summary Judgment	16
V. LAW AND ARGUMENT.....	20

A.	The Defendants' Motion For Summary Judgment.....	20
B.	The Does Established The Prima Facie Elements Of Medical Negligence	21
C.	The Defendants Failed To Carry Its Burden On Summary Judgment.	23
VI.	CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<u>Barnes v. McLennod</u> , 128 Wn.2d 563,810 P.2d 469 (1996).....	21
<u>Castro v. Stanwood School Dist. No. 401</u> ,151 Wn.2d 221, 86 P.3d 1166 (2004)	23
<u>Folsom v. Burger King</u> , 135 Wn. 2d 658, 663, 958 P.2d 301 (1998).....	20
<u>Hansen v. Wash. Natural Gas Co.</u> , 95 Wn.2d 773, 776, 632 P.2d 504(1981)	22
<u>Homeowners Association v. Tydings</u> , 72 Wn. App. 139, 864 P.2d 392 (1993)	20
<u>Hooper v . Yakima County</u> , 79 Wn. App. 770, 904 P.2d 1183 (1995)	21
<u>Jones v. Allstate Ins. Co.</u> , 146 Wn.2d 291, 45 P.3d 1068 (2002)	23
<u>Judy v. Hanford Env'tl. Health Found.</u> , 106 Wn. App. 26, 38,22 P.3d 810 (2001)	21
<u>McLaughlin v. Cooke</u> , 112 Wn.2d 829, 836-37, 774 P.2d 1171 (1989).....	22
<u>Miller v. Peterson</u> , 42 Wn.App. 822, 832, 714 P.2d 695 (1986)	22
<u>Morinaga v. Vue</u> , 85 Wn.App. 822, 831-32, 935 P.2d 637 (1997).	22
<u>Nicholson v. Deal</u> , 52 Wn.App 814, 764 P .2d 1007 (1988)	21
<u>Pedroza v. Bryant</u> , 101 Wn.2d 226, 228, 677 P.2d 166 (1984)	22

<u>Safeco Insurance v. Butler</u> , 118 Wn.2d 383, 823 P.2d 499 (1992)	21
<u>Seybold v. Neu</u> , 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).....	22
<u>Tabak v. State</u> , 73 Wn. App. 691, 870 P.2d 1014 (1994)	20
<u>Van Hook v. Anderson</u> , 64 Wn.App. 353, 358, 824 P.2d 509 (1992)	22
<u>Yuan v. Chow</u> , 92 Wn. App. 137, 960 P.2d 1003 (1998).....	20
 Statutes	
RCW 18.130.180(14)	13
RCW 7.70.040(1)	21
 Other Authorities	
WAC 246-16-100	13
 Rules	
CR 56	4, 17, 20
ER 702	22

I. INTRODUCTION

Jane and John Doe and their children received all of their medical care from the Arlington Medical Clinic for ten years or more. The Clinic was managed by three physicians: Dr. Zylstra, Dr. Spencer and Dr. Hall, all of which provided care and treatment to the Doe family. In 2007, the Clinic hired Glen Isham as a Medical Assistant licensed by the Washington Department of Health. Medical Assistants are regulated by the DOH to the same extent as all other health care providers in Washington, all of whom are prohibited from engaging in inappropriate social or sexual relationships with patients.

After grooming Jane Doe for approximately a year during her visits to the Clinic, Isham initiated a sexual affair with Jane Doe on February 9, 2009. Like Jane Doe, Isham was also married. When John Doe discovered the affair, he moved out of the family home and filed for divorce. Isham moved in with Jane Doe in June of 2009 and the Clinic began forwarding his calls and mails to Jane Doe's residence. This established the Clinic's knowledge of the affair. Jane Doe also testified that she and Isham met with other Clinic employees after hours.

The defendant Dr. Hall admits that John Doe complained to him about the affair on or about June 20, 2009, while Isham was still employed by the Clinic. Dr. Hall also testified that he told Dr. Spencer, but neither of them took any action against Isham.

Dr. Zylstra was also told about the affair by Jane Doe, but he too did nothing. None of the doctors, nor any of the other licensed health care providers, notified the Department of Health of Isham's misconduct, as they were required to do. Isham finally left the employ of the Clinic on September 9, 2009, seven months after initiating the affair.

Isham later proposed to Jane Doe in a sham marriage, which Isham believed would immunize him from liability to his former patients. At his deposition, Isham could not remember "off hand" who he slept with the night of his wedding to Jane Doe.¹ Isham subsequently divorced Jane Doe, and married his fifth wife almost immediately thereafter.

The Clinic Defendants filed a motion for summary judgment, seeking the dismissal of all claims against all defendants, except for Isham. ("Clinic Defendants" hereafter refers only to the moving

¹ CP 82 at 54/14.

parties in the summary judgment proceedings below, and does not include Isham.

In response, the plaintiffs filed the declaration of John Doe, the affidavit of Jane Doe, and deposition testimony of three defendants (Isham, Zylstra and Hall), which corroborated the factual claims by the plaintiffs. The plaintiffs also filed two well-reasoned declarations of two experts, both of whom testified unequivocally that the defendants violated the standard of care in multiple respects.

The defendants moved to strike the declarations of both of the plaintiffs' experts (Fassett and Allen) as well as the affidavit of Jane Doe² and the declaration of John Doe. However, a minute entry made following its ruling, states that the court "directs the declarations do not really affect the court's decision here; and the trial court and appellate court can take portions of the declarations with a grain of salt."³ This is a stunning announcement in a trial court in summary judgment proceedings – especially where all of

² The defendants moved to strike the declaration of Jane Doe on a bare claim that it was "inherently unreliable" which, by definition, requires a weighing of evidence. See CP 191-192. The affidavit of Jane Doe was dated April 5, 2011, and had been in the possession of the defendants since approximately that date. The defendants took Jane Doe's deposition but failed to include any portions of her testimony to support their motion to strike.

³ CP 141-142.

the non-moving party's allegations are uncontroverted. Clearly the court chose to *weigh* (if not disregard) the evidence in contravention of CR 56 and all case law interpreting the rule.

The appellants herein are John and Jane Doe, who were the plaintiffs in the trial court. The respondents are all of the Clinic Defendants in the trial court, except Glen Isham (against whom a judgment was subsequently entered). The trial court granted summary judgment to all defendants other than Glen Isham, in an order dated September 19, 2013.

The plaintiffs proceeded against Glen Isham, who did not appear on the morning of trial. The Hon. George Bowden awarded the Does a total of \$1,019,800 in damages.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the Clinic Defendants' motion for summary judgment in light of the numerous factual disputes provided to the court in depositions, declarations, and affidavit, all of which were uncontroverted.

III. STATEMENT OF ISSUES

1. Did the court err in granting summary judgment to the Clinic Defendants when the Does claims were supported by substantial and unrefuted facts?

2. Did the court err in granting summary judgment to the Clinic Defendants when the Does claims were supported by the unrefuted testimony from two experts?
3. Did the court err in granting summary judgment to the defendants when the dismissed defendants presented *no evidence* that they conformed to the standard of care?
4. Did the court err in granting summary judgment to the defendants on the conclusion that there was no proximate cause, when the plaintiffs provided substantial evidence to support their direct claims of negligent hiring, retention, and supervision of clinic employees, all of which preceded the affair?
5. Did the court err in granting summary judgment to the defendants when the testimony of Drs. Zylstra and Hall revealed ignorance regarding the standard of care owed by their licensed healthcare subordinates, to their patients?
6. Did the court err in granting summary judgment to the defendants when the testimony of Drs. Zylstra and Hall revealed ignorance regarding their own supervisory duties over their medical assistants?
7. Did the court err in granting summary judgment to the defendants when John Doe told his physician about his wife's illicit

affair with Isham, who was still employed by the Clinic, and the defendants took no corrective action whatsoever?

IV. APPELLANTS' STATEMENT OF THE CASE

A. Timeline:

- 1993 or 1994:** Jane Doe begins receiving medical care at the Clinic.⁴
- 1999:** John Doe begins receiving medical care at the Clinic.⁵
- July, 2007:** Isham is employed by the Clinic.⁶
- 8/20/07:** Isham becomes a licensed Medical Assistant.⁷
- 2/2009:** Isham provides medical care to Jane and John Doe.⁸
- February, 2009:** Isham initiates a sexual affair with Jane Doe.⁹
- June, 2009:** Isham moves in with Jane Doe.¹⁰
- 7/13/09:** John Doe files for divorce against Jane Doe.¹¹
- 9/4/09:** Isham leaves his employment with the Clinic.¹²
- 2009:** Isham leaves for Washington State for California.¹³

⁴ CP 544

⁵ CP 545

⁶ CP 73 (See pages 17 and 18, where Isham testified that his first job as a medical assistant was at the Cascade Medical Clinic, now the Arlington Clinic).

⁷ CP 26 (citing Allen's declaration testimony at page 5, lines 16-18).

⁸ CP 549-550

⁹ CP 552

¹⁰ CP 556

¹¹ CP 523

¹² CP 8 (Defendants response to RFA #19).

¹³ CP 560

9/12/10: Isham marries Jane Doe.¹⁴

5/30/13: Isham divorces Jane Doe.¹⁵

B. The Plaintiff's Response To The Plaintiff's Motion

The Clinic Defendants filed their motion for summary judgment on August 21, 2013. In opposition to the motion, the Does filed the deposition testimony of Glen Isham; the affidavit of Jane Doe; the declaration of John Doe; the deposition testimony of two of the three defendant physicians, Dr. Hall and Dr. Zylstra; and the declarations of their two experts William Fassett, PhD., and Michaelann Allen. This evidence is summarized below.

1. The Deposition Of The Defendant Glen Isham, MA

In his deposition on August 28, 2013,¹⁶ Medical Assistant Glen Isham testified that he asked Jane Doe out on a date while he was employed by the Clinic. Jane Doe called Isham at work and the calls went through the front desk. Isham could not recall *any* Clinic policies regarding sexual contact with patients. The doctors did not provide any instruction regarding prohibitions on social or sexual contact with patients. Neither Dr. Zylstra nor Dr. Hall

¹⁴ CP 373

¹⁵ CP 567

¹⁶ Isham's deposition testimony can be found at CP 69-86 and actual page and line citations to his testimony summarized here, can be found at CP 24-25.

admonished Isham about his affair with their patient. Dr. Zylstra never told Isham about ethical guidelines applicable to medical assistants at the Clinic and Isham therefore believed it was OK to have sex with Clinic patients “off the clock.” Isham video-taped himself having sex with Jane Doe and somebody later posted the video on the internet. Isham moved in with Jane Doe while he was still employed by the Clinic. Isham testified that Dr. Hall never mentioned the affair to Isham. Isham married Jane Doe to “end the stupid lawsuit thing” and he cannot remember “offhand” ¹⁷who he slept with the night that he married Jane Doe.

2. The Affidavit Of The Plaintiff Jane Doe

In an affidavit dated April 11, 2011,¹⁸ Jane Doe testified that the defendants provided her medical care for years. She also testified that Isham spent long periods of unsupervised time with her at the Clinic, often touching her inappropriately. She also testified that Isham initiated a sexual affair with her on February 9, 2009, and the Clinic staff knew of the affair. Dr. Zylstra asked Jane questions about the affair, but none of the doctors did anything to

¹⁷ CP 82 at 54/14.

¹⁸ Jane Doe’s affidavit can be found at CP 542-565 and actual page and line citations to her testimony summarized here, can be found at CP 22-23.

stop the affair. Perhaps this was because the sale of the Clinic was pending during the affair.

3. The Declaration Of The Plaintiff John Doe

John Doe testified in opposition to the defendants' motion for summary judgment in his declaration dated January 24, 2013.¹⁹ Mr. Doe testified that he expressly told Dr. Hall about the affair between his wife and Isham and Hall responded "What do you want me to do about it?" John felt betrayed by the Clinic physicians and staff.

4. The Deposition Of The Defendant Dr. Vernon Hall

The plaintiffs also provided excerpts from the deposition of Vernon Hall, dated February 1, 2013,²⁰ in opposition to the defendants' motion for summary judgment. Dr. Hall testified that John Doe told him that his wife was having an affair with medical assistant Glen Isham. Dr. Hall then told Dr. Spencer about the affair, but no one else. Dr. Hall believed that his only duty was to his employer, regarding the affair (not the Does or other patients

¹⁹ John Doe's testimony can be found at CP 305-306 and actual page and line citations to his testimony summarized here, can be found at CP 23.

²⁰ Dr. Hall's deposition can be found at CP 249-258 and actual page and line citations to his testimony summarized here, can be found at CP 24.

treated by Isham). Dr. Hall testified that John Doe was upset when he reported his wife's affair.

It appears from Dr. Hall's deposition testimony that John Doe told Dr. Hall of the affair no later than June 20, 2009:

Q. BY MR. BOLIN: Your lawyer has handed me a document which appears to have been signed off by you on 6/20/2009, and it's marked in the lower right Page 32 of 75, and it is dated in the lower right November 3, 2011, 2:49 p.m., which appears to look like a date when the record was printed last. You've taken an opportunity to read this for several minutes, and the part I wanted you to focus on is the fourth line under history where you state: Patient has moved to his mother's house and is divorcing his wife because of infidelity. I'm handing the record back to you so you can confirm that I've got that right. Is there a reason that you didn't include Mr. Isham's name in the record or that the person that [John Doe's] wife was being unfaithful with was an employee of the clinic where you were employed?

MS. MOORE: Object to form. Mischaracterizes.

A. [Mr. Doe] did not present any objective evidence of who it was.

Q. BY MR. BOLIN: He didn't –

A. Only his statement.

Q. You're saying that he didn't name Glen Isham by name?

A. I'm saying that he did not provide objective evidence of who his wife was unfaithful with.

Q. What do you mean by that?

A. What I mean by that is in medicine there is the use of subjective evidence and objective evidence. Subjective evidence is something that somebody tells you. Objective evidence is something you measure, you put your hands on, you can feel, you can take pictures of, et cetera, et cetera, et cetera.

Q. So –

A. Subjective evidence under common practice is not acceptable as proof, only objective evidence.

Q. Did he name Mr. Isham when he complained of his wife's affair?

A. I think probably so, but I don't know.

Q. What kind of objective evidence would you have required [John Doe] to produce before you thought that he met his level of proof with you?

MS. MOORE: I object to form.

A. Something objective.

Q. BY MR. BOLIN: For example, what?

A. What is objective evidence? I already told you.

Q. So if he had produced a picture of his wife in bed with Mr. Isham, that would have been sufficient proof for you?

MS. MOORE: Object to form.

A. Yes.

CP 257-257, at 32/19 – 34/18

5. The Deposition of the Defendant Dr. Phillip Zylstra

The plaintiffs also provided the trial court with the deposition testimony of Dr. Zylstra,²¹ which was taken on February 1, 2013. Dr. Zylstra was told about the affair by Jane Doe. Dr. Zylstra testified that he does not know the ethical rules applicable to medical assistants, even though he was Isham's designated supervisor with the Department of Health. However Dr. Zylstra conceded that if the rules for medical assistants and physicians are the same, then Isham's relationship with Doe was inappropriate.

Dr. Zylstra also testified that he did not know if he was required to report the affair to the Department of Health. He did not tell either Dr. Hall or Dr. Spencer about the affair and he was not concerned about the affair "from a clinical point of view."²² Isham worked more with Dr. Zylstra than any other medical assistant. Amazingly, Dr. Zylstra also testified that he did know the organizational structure of the Clinic.

²¹ Dr. Zylstra's deposition excerpts can be found at CP 237-247 and actual page and line citations to his testimony summarized here, can be found at CP 23.

²² This testimony, combined with the uncontroverted evidence that the affair took place for at least seven months while Isham was employed by the Clinic, should be sufficient to establish liability alone, given the testimony of the plaintiffs' experts.

6. The Declaration Of Plaintiffs' Expert Dr. William Fassett

The plaintiffs' expert, Dr. William Fassett, testified by declaration dated January 24, 2013. He was also deposed by the defense on August 26, 2013. Dr. Fassett was unequivocal in his testimony; the defendants violated the standard of care applicable to all health care providers in the State of Washington regarding prohibitions on inappropriate and sexual relationships. These violations caused harm to the Does.

Dr. Fassett testified that Health care providers owe five major ethical and fiduciary obligations to patients: beneficence, nonmaleficence, respect for autonomy, fidelity, and justice. Each health care assistant must be also be provided with appropriate supervision by a physician. The failure to adequately supervise auxiliary staff to the extent that the consumer's health or safety is at risk is a violation of RCW 18.130.180(14).

Dr. Fassett also testified that Isham violated all or most of the numerous prohibited acts under WAC 246-16-100 relating to sexual misconduct between a licensed health care provider and a

patient. Further, all licensees have an obligation to report other licensees engaged in unprofessional conduct.²³

Dr. Fassett also testified that Dr. Hall's failure to act when informed of the affair violated his duties to the plaintiffs. In fact, Dr. Fassett found that the conduct of the physicians fell below the appropriate standard of care in ten different areas relevant to Isham's affair with Jane Doe. The non-physician licensed health care providers at the Clinic violated the appropriate standard of care in three different areas. Dr. Fassett specifically correlated the violations with citations to authority, including Washington law.

Dr. Fassett concluded that the multiple failures of the defendants to meet the appropriate standard of care caused the plaintiffs to sustain damages in including emotional harm and distress and are directly attributable to the physicians of the Clinic and persons under their control.

7. The Declaration of Plaintiffs' Expert Michaelann Allen

The plaintiffs retained Michaelann Allen to testify in opposition to the motion for summary judgment.²⁴ She is the

²³ All of the Clinic physicians and all or most of the staff knew of the affair, and no one reported the incident to the Department of Health as they are required to do.

Coordinator in charge of instruction at the Medical Assistant program at North Seattle Community College. Ms. Allen also has substantial employment experience as a Medical Assistant. In her declaration dated June 10, 2011, she testified that Isham was issued a Washington Health Care Assistant Certification on August 20, 2007.

Ms. Allen also testified that evidence of Isham's involvement in two different domestic violence cases in Washington (and filed in Snohomish County Superior Court) would have likely disqualified him for work as a health care assistant or medical assistant. Even if the Arlington Clinic failed to check easily accessible information on the internet about Isham, an effective employment interview would have resulted in further investigation. Isham's reputation in the community (as revealed by his court files) was apparently well known and revealed that he was indeed such a potential threat.

Ms. Allen concluded that Isham should have never been hired by any medical facility because he represented an actual threat to patient safety and well-being. The court files contain evidence that he is a racist, misogynist, a drug dealer, amused by

²⁴ The declaration of Ms. Allen can be found at CP 399-420 and actual page and line citations to his testimony summarized here, can be found at CP 26-27.

violence, and has an irrational fascination with illegal weapons, including bombs.

Besides her conclusion that the defendant physicians wrongfully hired Isham, Ms. Allen also concluded that there was a complete abrogation of the delegator's [Dr. Zylstra's] duties to supervise Isham. In fact, Ms. Allen asserted that the physicians and staff at the Arlington Clinic actually appeared to condone the illicit relationship Isham initiated with Jane Doe.

Had the Clinic enacted or enforced any policies applicable to its Medical Assistants, to reflect the ethical and fiduciary duties owed to patients by everyone working in the Clinic, or provided close supervision of Isham, Ms. Allen opined that none of the events alleged by the plaintiffs would have occurred.

8. Hearing On Defendants' Motion For Summary Judgment

The defendants' motion for summary judgment was heard by the trial court on September 19, 2013. CP 596-618. The defendants moved to strike the declarations of both of the plaintiffs' experts (Fassett and Allen) as well as the affidavit of Jane Doe ²⁵

²⁵ The defendants moved to strike the declaration of Jane Doe on a bare claim that it was "inherently unreliable" and (among other things) lacked foundation. See CP 191-192. The affidavit of Jane Doe was dated April 5, 2011, and had been in the possession of the defendants since approximately that date. The

and the declaration of John Doe. However, in a minute entry following its ruling, the trial court stated that it “directs the declarations do not really affect the court’s decision here; and the trial court and appellate court can take portions of the declarations with a grain of salt.”²⁶ Inasmuch as virtually all of the factual claims by the plaintiffs were uncontroverted, this is a shocking statement for a trial court. Clearly the court chose to simply disregard the non-moving parties’ evidence in contravention of CR 56.

The motion was granted as to *all* defendants except Glen Isham. *Id.* The plaintiffs’ motion for reconsideration was denied on October 15, 2013. CP 5-6.

The plaintiffs proceeded to trial against the only remaining defendant on October 7, 2013, before the Hon. George Bowden. CP 11-14. Thereafter, the court made ten separate findings of fact. *Id.* The court found that 1) John Doe and Jane Doe were married prior to mid-March of 2009; 2) the Does received medical care at the Clinic for ten years or more; 3) Isham was employed by the Clinic until sometime in September of 2009 and provided medical care and treatment to the Does at the Clinic; 4) Isham

defendants took Jane Doe’s deposition but failed to include any portions of her testimony to support their motion to strike.

²⁶ CP 141-142.

groomed Jane Doe for a sexual relationship by engaging inappropriate communications, inappropriate touching, and extended visits in examination rooms without supervision; 5) on February 9, 2009, Isham initiated an illicit sexual relationship with Jane Doe that continued for several months; 6) Isham remained an employee of the Clinic for approximately seven months thereafter, during which Jane Doe made personal calls to the Clinic to speak with Isham, met Isham at the Clinic, attended functions with Isham and other Clinic employees; Isham moved into Jane Doe's home where the Clinic began forwarding his mail and Clinic employees phoned Isham at Jane Doe's residence; 7) in June of 2009, approximately two months after the relationship began, John Doe reported his wife's illicit affair to his Clinic physician, Dr. Hall, but he did nothing; 8) the Does divorced in Snohomish County and Isham persuaded Jane Doe to loan him \$15,000 from her property settlement which he never repaid; 9) Isham followed Jane Doe to Oregon and married her in a quick ceremony; the marriage was a sham from the beginning because Isham's intent was to terminate his liability to the plaintiffs; immediately after the marriage ceremony, Isham left to spend the night with another woman and he and Jane Doe never lived as husband and wife; Isham later

initiated and obtained a divorce from Jane Doe in Oregon and married another woman; and 10) both Jane and John Doe suffered substantial emotional distress and other damages which were proximately caused by Isham; John Doe suffered damages in the amount of \$500,000 and Jane Doe suffered damages in the amount of \$519,900. *Id.*

The trial court also entered five conclusions of law, including: 1) the court had jurisdiction of the parties and subject matter of the action; 2) Isham owed various legal and ethical duties to the Does as their medical assistant, including a duty to do no harm to his patients, a duty to protect the confidences of his patients, a duty to respect the dignity of his patients, a duty to refrain from engaging in inappropriate behaviors and communications with his patients, and a duty to never engage in sexual relationships with patients; 3) Isham breached such legal duties which proximately caused each of the Does to sustain substantial damages including emotional distress; the Does presented substantial evidence to support their claims of liability and damages against Isham; and 4) Isham was grossly negligent in violating virtually every legal and ethical duty owed to both of the Does, since both were his patients and patients of his employer, the Clinic. *Id.*

On October 21, 2013, the Hon. George Bowden entered judgment for Jane Doe in the amount of \$519,800. CP 7-8. Judgment was also entered for John Doe in the amount of \$500,000. CP 9-10.

V. LAW AND ARGUMENT

A. The Defendants' Motion For Summary Judgment

Appellate review of a summary judgment proceeding is reviewed *de novo*. Folsom v. Burger King, 135 Wn. 2d 658, 663, 958 P.2d 301 (1998). In assessing a motion for summary judgment, a reviewing court must view the facts in a light most favorable to the non-moving party. Homeowners Association v. Tydings, 72 Wn. App. 139, 864 P.2d 392 (1993). In this instance, that is the Does. All reasonable inferences from the evidence must be drawn in favor of the non-moving party. Tabak v. State, 73 Wn. App. 691, 870 P.2d 1014 (1994). In this instance, that is also the Does.

Dismissal of a lawsuit under CR 56 is sustainable only if there are no genuine issues of material fact. Homeowners, *supra* at 154. The party resisting summary judgment must present some evidence, even inconsistent evidence, which will support the existence of a material issue of fact. Yuan v. Chow, 92 Wn. App.

137, 960 P.2d 1003 (1998); Barnes v. McLennod, 128 Wn.2d 563,810 P.2d 469 (1996).

The burden lies with the moving party to show the absence of material facts as to the various claims. Safeco Insurance v. Butler, 118 Wn.2d 383,823 P.2d 499 (1992); Nicholson v. Deal, 52 Wn.App 814, 764 P .2d 1007 (1988). Where issues of fact are presented, a court may not decide a factual issue unless reasonable minds can reach only one conclusion from the evidence presented. Hooper v . Yakima County, 79 Wn. App. 770, 904 P.2d 1183 (1995).

B. The Does Established The *Prima Facie* Elements Of Medical Negligence

To recover on a claim of medical negligence, a plaintiff must show that a health care provider failed to exercise the degree of care, skill, and learning expected of a reasonably prudent health care provider at that time and in that profession, in the State of Washington, and under the same or similar circumstances. RCW 7.70.040(1); Judy v. Hanford Env'tl. Health Found., 106 Wn. App. 26,38,22 P.3d 810 (2001). "[E]xpert testimony is required to establish the standard of care and most aspects of causation in a medical malpractice action." Seybold v. Neu, 105 Wn. App. 666,

676, 19 P.3d 1068 (2001).

To make a prima facie case for medical negligence under RCW 7.70.010, the plaintiff must show duty, breach, causation, and damages. Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984) (*citing* Hansen v. Wash. Natural Gas Co., 95 Wn.2d 773, 776, 632 P.2d 504(1981)). Evidence is sufficient if it supports a "reasonable inference" of all the elements. Van Hook v. Anderson, 64 Wn.App. 353, 358, 824 P.2d 509 (1992). A "reasonable inference" is founded on expert medical testimony rising to the level of reasonable medical certainty. McLaughlin v. Cooke, 112 Wn.2d 829, 836-37, 774 P.2d 1171 (1989).

Generally, expert medical testimony is required to show causation. Morinaga v. Vue, 85 Wn.App. 822, 831-32, 935 P.2d 637 (1997). A trial court's ruling regarding competence of an expert to testify will not be reversed absent a manifest abuse of discretion. Miller v. Peterson, 42 Wn.App. 822, 832, 714 P.2d 695 (1986). Under ER 702, a witness may testify as an expert if he or she possesses knowledge, skill, experience, training, or education that will assist the trier of fact.

C. The Defendants Failed To Carry Its Burden On Summary Judgment.

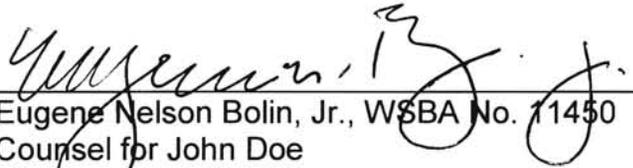
A trial court's ruling on a motion for summary judgment is reviewed *de novo*. Castro v. Stanwood School Dist. No. 401, 151 Wn.2d 221, 86 P.3d 1166 (2004); Jones v. Allstate Ins. Co., 146 Wn.2d 291, 45 P.3d 1068 (2002). Summary judgment is only proper if there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Id.* When reviewing the evidence in the context of summary judgment, a reviewing court does so in the light most favorable to the nonmoving party. Jones, *supra*, 146 Wn.2d 300.

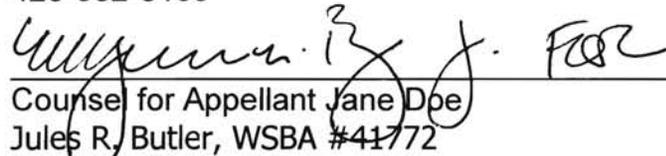
VI. CONCLUSION

The trial court's dismissal of the plaintiffs' complaint against all defendants except Glen Isham, was error. The plaintiffs submitted substantial lay and expert testimony, including specific admissions from the defendants themselves, that they violated nearly every standard of care respecting the hiring and supervision of the medical assistant Glen Isham. The defendants also failed to establish a single policy or procedure for their subordinate staff, regarding the prohibitions on inappropriate relationships with

patients. For these reasons, the trial court's order granting summary judgment should be reversed.

RESPECTFULLY SUBMITTED this 10th day of March, 2014.


Eugene Nelson Bolin, Jr., WSBA No. 11450
Counsel for John Doe
Waterfront Park Building
144 Railroad Avenue, Suite 308
Edmonds, WA 98020
425-582-8165


Counsel for Appellant Jane Doe
Jules R. Butler, WSBA #41772
19502 48th Ave. W
Lynnwood, WA 98036
425-774-1199

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I mailed and emailed a true copy of appellants' motion for an extension of time to counsel and parties at the following addresses:

Jennifer L. Moore, WSBA #30422
Amy J. DeLisa, WSBA #31763
Michael Madden, WSBA #8747
Bennett Bigelow & Leedom, PS
601 Union Street, Suite 1500
Seattle, WA 98101
206-622-5511
Attorneys for defendants
Zylstra, Spencer, Hall, and Defendants Doe

Jules R. Butler, WSBA #41772
Butler Law Firm, PLLC
19502 48th Ave. W
Lynnwood, WA 98036
Attorney for Plaintiff Jane Doe

Glen Isham
515 South 8th Street, Apt. 5
St. Helens, OR 97051
Pro se Defendant

DATED this 10th day of March, 2014.



Counsel for Appellant John Doe
Eugene Nelson Bolin, Jr., WSBA No. 11450
Waterfront Park Building
144 Railroad Avenue, Suite 308
Edmonds, WA 98020
425-582-8165