NO. 332012

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

SHERRIE LENNOX, as Personal Representative of the ESTATE OF VIOLA WILLIAMS,

Appellant,

vs.

LOURDES HEALTH NETWORK, ET AL.,

Respondents.

BRIEF OF RESPONDENT LOURDES HEALTH NETWORK

JEROME R. AIKEN, WSBA #14646
PETER M. RITCHIE, WSBA #41293
MEYER, FLUEGGE & TENNEY, P.S.
230 S. Second Street
Yakima, WA 98901
(509) 575-8500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

It is difficult to imagine a more challenging job than that of a mental health professional. They are perpetually in a Catch-22 situation. Due to more recent enlightened thought there is a strong policy that the mentally ill have rights and should be restrained and/or institutionalized only in the most extreme circumstances. However, if the mentally ill harm themselves or others the mental health professional will be second-guessed and most likely sued for not restraining and/or institutionalizing the mentally ill. Adding to this almost impossible task is the problem that mental health is a low priority in the federal and state scheme and receives woefully inadequate funding.

Perhaps recognizing the herculean task of the mental health professional, the Legislature has thrown these people a lifeline by adopting an immunity statute, RCW 71.05.120. Courts interpreting this statute should act as a stern gatekeeper. Courts should only permit cases against mental healthcare

professionals to proceed if there is almost a complete absence of care. Such is not the case here.

The folks in the Lourdes' PACT team sincerely cared for Mr. Williams and provided substantial services for him in an effort to protect him and others. They and the other defendant exercised their judgment based upon information they had and perhaps more importantly substantial experience in dealing on a daily basis with patients that had similar issues. Hindsight does not render their experience and judgment grossly negligent.

II. RESPONSE TO PLAINTIFF'S ASSIGNMENTS OF ERROR

1. Plaintiff did not present a prima facie case of gross negligence.

2. Portions of the declaration of Matthew Layton, M.D. were improper.

III. COUNTER STATEMENT OF CASE

A. Summary of Background Facts

At the outset it is important to emphasize that the facts here should not be viewed in a vacuum. In fairness, the facts should

be viewed through the eyes of the mental health professionals that were regularly providing care. It must be remembered that they deal with issues presented by Mr. Williams on a regular basis. What may seem extremely bizarre and perhaps alarming to the uninitiated is common place to these professionals.

This case involves the numerous and substantial, but ultimately unsuccessful, attempts by Lourdes' staff over a 10 month period from March, 2011 until January, 2012 to provide psychiatric care to Mr. Williams—a difficult patient with a long and complicated history of mental health problems. At the time Lourdes began caring for Mr. Williams in March, 2011, he was 32 and had just been released Eastern State Hospital after a five year period of involuntary commitment. He was diagnosed at Eastern State Hospital with severe mental health conditions including chronic paranoid schizophrenia, major depression with suicide ideations, and recurrent polysubstance abuse. CP 111-15.

He was released from Eastern State Hospital on March 17, 2011, after completing his commitment term, under what is

known as a Least Restrictive Alternative ("LRA"). In short, an LRA is an alternative to involuntary commitment in an inpatient facility for psychiatric patients. CP 238. It allows the mentally ill to be released into outpatient care in the hope they can be reintroduced into society. Mr. Williams was released into the care of the Lourdes Program of Assertive Community Treatment ("PACT") for 180 days and ordered to comply with the terms of the LRA. CP 238.[1]

The Court may not be familiar with the concept of a PACT team. PACT teams are relatively new to Washington; Lourdes' PACT was only adopted in approximately 2006. A PACT is an alternate to institutionalization for the mentally ill. It is a "person-centered recovery-oriented mental health service delivery model that has received substantial empirical support for facilitating community living, psychosocial rehabilitation, and recovery for persons who have the most severe mental illnesses

[1] His initial LRA expired in June, 211; it was extended another 180 days. On December 6, 2011, his LRA was extended another 180 days. CP 257.

. . . ." CP 227. The Lourdes program was one of the highest rated in the State. CP 928.

A PACT operates by providing a multidisciplinary team of mental health staff to provide individually tailored treatment and support services to the mentally ill. CP 227. Basically, the goal is to help the mentally ill to stay in the community, better manage symptoms, and achieve individual goals, rather than keeping them institutionalized. CP 227.

The Lourdes PACT team agreed to accept Mr. Williams for ongoing treatment because he had been institutionalized at Eastern State Hospital for the maximum amount of time allowed, and there were really no other options for him at that time. He needed support, and Lourdes agreed to provide it. As one of the team member's, Dana Oatis, MSW, noted on February 24, 2011, shortly before he was released: "There is a [sic] plead to us to help this young man as they are afraid that he will leave ESH [Eastern State Washington Hospital] after 5 years and have no supports." CP 231.

When Mr. Williams was released he had what is known as a Global Assessment of Functioning ("GAF) score of 55. CP 111. A GAF is, as it sounds, an assessment of his overall function.

Mr. Williams was also released under the general supervision of Benton/Franklin County. Benton/Franklin County had a Crisis Response Unit ("CRU"), which is ultimately responsible for ensuring that the mentally ill comply with the LRA by revoking it. It is important for the Court to note that Lourdes does not have any ability to revoke an LRA and detain or institutionalize a mentally ill patient. That is solely the prerogative of the CRU, as Plaintiff has conceded. RCW 71.05.340; CP 972.

B. Summary of Care Provided

Despite the difficult nature of the job, the PACT team provided consistent, constant, and good care to Mr. Williams for approximately ten months from March 17, 2011 to January 26, 2012. During that time, members from the PACT team met with Mr. Williams approximately 117 times. CP 929. The PACT team

had frequent telephone conversations with him. There were at least 169 telephone calls in the records. CP 658-887. There were calls made to Mr. Williams, at times daily, and towards the end of his care at least twice a day reminding him to take his medications. CP 658-887.

Mr. Williams initially appeared to be making progress. He did not have suicidal ideations. CP 1000. He was not depressed or anxious. CP 1001. He presented well, and his psychiatric symptoms appeared stable. CP 1000, 1002.

Unfortunately, Mr. Williams had a downturn at the end of July, 2011. He was hospitalized from July 31, 2011 to August 1, 2011 at Kadlec Regional Medical Center. CP 335-337. He was evaluated by the CRU's Designated Mental Health Provider ("DMHP") Cameron Fordmeir on August 1, 2011. CP 367-371. As noted, the DHMP alone had the responsibility and ability to revoke the LRA and involuntary detain Mr. Williams. At that time, Mr. Williams had a GAF score of 40. CP 75.

The DHMP, however, made the judgment call not to revoke the LRA and detain him. CP 367-371. Mr. Williams admitted to drug use at that time. CP 1005. However, he did not have any suicidal or homicidal ideations. CP 1005. He promised not to take drugs and appeared to improve in the middle of August. CP 1008.

Plaintiff states that Lourdes did not contact CRU regarding Mr. Williams' hospitalization on July 31, 2011. *Plaintiff's Opening Brief at 10-11*. Plaintiff is critical of this. Plaintiff misinterpreted these events. Lourdes did not contact CRU because its members knew CRU had already been contacted. CP 315.

In late December, 2011 or early January, 2012, the PACT team became more concerned with Mr. Williams' conduct. CP 419, 431, 434, 439, 442. He was more disheveled. CP 410, 442. However, at no time did he express any violent or homicidal intent or tendencies towards himself, or anyone else. CP 419, 431, 434, 439, 442.

The care provided by the PACT team increased during that time when it appeared that Mr. Williams was again going through one of his down phases. CP 658-887. PACT member Linda Schroeder in particular was close to Mr. Williams and had frequent contact with him. Between December 29, 2011 and January 26, 2012, in addition to other PACT member contacts, she had 13 contacts with him including at least 7 times when she was alone with him. She at times drove him to different locations. CP 416-17, 434, 437, 445, 452. She was last alone with him as late as January 18, 2012. CP 461.

Commencing January 2, 2012, the PACT team members began becoming concerned with Mr. Williams' conduct. Members suggested implementing a plan of action to deal with him. CP 437. Then on or about Monday, January 16, 2012 is the first time one of the PACT members specifically addressed the idea that Mr. Williams' LRA should be revoked. CP 450.

The PACT team immediately acted on that concern and contacted the CRU to set in motion a plan to have Mr. Williams

evaluated by the CRU. The plan was that he would be evaluated for revocation of his LRA two days later on Wednesday, January 18. CP 450, 452. Unfortunately, on January 18 there was a snow storm. The PACT team and the CRU were shorthanded, and the decision was made to postpone the evaluation. CP 459.

The PACT team members met with Mr. Williams on January 18 and January 20. He appeared "internally preoccupied," but there is no indication in the records of any violent, homicidal, or suicidal plan or intent. CP 455, 459, 461. He was "calm and cooperative." CP 456. There was no indication at those times that he was dangerous or violent.

Mr. Williams returned to the PACT office on January 23, 2012. At that time he appeared polite and cordial. He had the competency to state that someone he knew needed help and wanted to know how to make that happen. CP 930.

On January 25, 2012, he again returned to the PACT office and was carefully evaluated by ARNP Michelle Aronow for 45 minutes. CP 470-472. He denied any suicidal or homicidal plan

or intent at that time. CP 470. He denied he had any access to firearms. CP 470. He told Michelle Aronow that he was using street drugs. CP 470.

Michelle Aronow then called the CRU to request that it evaluate him. CP 652. The record is clear that the purpose of the call was for the CRU to evaluate Mr. Williams to determine if it should revoke his LRA due to his drug use and sexual statements to female staff. CP 471-472.

The evaluation occurred the same day by DMHP Kathleen Laws at the PACT facility. CP 471. Again, as the DMHP, Ms. Laws alone had the power to revoke the LRA and detain Mr. Williams. So there can be no dispute what Ms. Laws saw and did at that time, we will quote solely from her own contemporaneous notes:

> C was in ESH for five years after assaulting a healthcare worker . . . . Is in and out of patient services with LCC PACT team. . . . History of being sexually inappropriate with female staff . . . I was asked to eval C who has disclosed recent drug use (violating conditions of LRA) and distracting thoughts of a sexual nature. The C has also not been

> taking meds as prescribed -- Michelle reported . . . . Stream of thought was relatively clear but underlying paranoia was present. Some tangentiality also noted . . . the C has reportedly not been taking meds as RX and using street drugs -- violating LRA conditions. PACT team's Michelle Aranow requested an eval. . . .

CP 96-97 (emphasis supplied).

Thus, Ms. Laws' own notes reveal that she clearly was requested to do an evaluation. It is also clear that she knew the following about Mr. Williams: (1) he had violated the terms of his LRA by taking illegal drugs; (2) he had distracting thoughts of a sexual nature; (3) he had not been taking meds as prescribed, also in violation of his LRA; and (4) he had a history of being sexually inappropriate with Lourdes female staff.

Further evidence that Ms. Laws undeniably did an evaluation on January 25, 2012 is demonstrated by the form she used. Those forms should be compared with the forms used by Mr. Fordmeir on August 1, 2011. There is no question that Mr. Fordmeir did an evaluation. A comparison of the forms

reveals they are virtually identical and the same process occurred on both occasions. CP 95-100, 174-80.

Plaintiff attempts to create some type of issue by stating there is contradicting testimony between Lourdes and CRU as to what Ms. Laws did on January 25, 2012. However, this is purely a matter of semantics. A review of Ms. Laws' own records clearly demonstrates what she did and what she was informed. There is really no conflict and certainly no material issue of fact created once Ms. Laws' own records are examined. Ms. Laws clearly was asked to evaluate Mr. Williams. She was provided all significant information and all the information that Plaintiff's expert Dr. Layton states she should have been told. CP 545-46.

Critically, during the evaluation Ms. Laws observed no indication that Mr. Williams was in imminent danger to himself or to others. CP 651-653. He expressed no threats to others. CP 653. He specifically denied any homicidal ideations. CP 653. There is no evidence he was targeting any person for violence.

Exercising her judgment, she decided he did not meet the standards for revocation at that time. CP 652.

It is important to note that at that time, Mr. Williams had a GAF score of 52, essentially the same score he had when he was released from Eastern State Hospital (55) and considerably higher than the 40 reported by Crisis Response on August 1, 2011. CP 96. Thus, his condition at the time when Plaintiff alleges he should have been detained and was a danger to others was almost the same as when Eastern released him.

On the following day, Thursday, January 26, 2012, Mr. Williams voluntarily came to the PACT office. CP 656. The purpose was so that he could pick up his psychiatric medication. CP 656. He was acting odd, "reading a Bible aloud and talking to someone who was not there." CP 656. Michele Aronow called Kathleen Laws to report the new information and informed her Mr. Williams exhibited "bizarre" behavior. CP 656.

Kathleen Laws again decided not to revoke the LRA at that time:

> Kathleen stated that she saw him yesterday and he stated an understanding of taking his meds and not using drugs. He also evidenced [sic] good judgment by coming back and getting his med box filled, but talking to himself is typical with his diagnosis. I stated to her again that staff continue to be fearful of him and I do not want him to be alone with a female staff. . . . She agreed that was a good plan to have only males I said I would take a male staff out with me Monday am and see if he has been taking his medication. She agreed. She said—then if he has not been and you want him revoked—we will revoke him as he has been explained what is in the LRA.

CP 656 (emphasis supplied).

Thus, the plan was for PACT members to once again see Mr. Williams four days later on Monday, January 30, 2012. At that time, CRU was once again to evaluate him.

Unfortunately and tragically, despite never indicating any specific plans of violence or having any homicidal ideations, Mr. Williams murdered his grandmother on Friday, January 27, 2012. CP 42. Even his father and aunt, the people who knew him the longest and the best, did not predict this. He was later found

guilty by reason of insanity, CP 498, and was readmitted to Eastern State Hospital. CP 403.

It should be emphasized that all treatment by the PACT team and CRU was under the context of and within the purview of RCW Chapter 71.05. Mr. Williams was on a LRA. Thus, all action by the PACT team and CRU are to be measured by RCW 71.05.120.

C. Summary of Procedural Facts and Summary Judgment

Plaintiff brought this lawsuit against Lourdes and the CRU, alleging that the Defendants "were negligent or grossly negligent in treating, supervising, monitoring and evaluating Adam Williams." CP 42. Plaintiff further alleges that Defendants' "negligent failure to intervene in his [Mr. Williams'] dangerous downward spiral was a proximate cause of the death of Viola Williams and the harm to plaintiffs." CP 42.

Plaintiff identified two alleged experts, Dr. Layton and Mr. Heusler. Plaintiff initially represented that Mr. Huesler would express opinions primarily aimed at Lourdes and Dr. Layton's opinion would relate primarily to CRU. CP 625-47, 892-917. Mr. Huesler had no previous experience with a PACT program. He obtained his claimed expertise by reading a few articles after being retained as an expert. CP 894-95, 900, 905.

Defendants moved to dismiss on the basis that Plaintiff failed to establish gross negligence under the immunity statute, RCW 71.05.120. CP 47-150, 128-149, RP 1-51. Lourdes submitted the declaration from a nationally recognized PACT expert, Dr. Lorna Moser, who testified that "the PACT team provided reasonable care to Mr. Williams. The care was not substandard." CP 950.

At no time did Plaintiff contest that the gross negligence standard applied. In fact, Plaintiff argued that she produced enough evidence for a jury to conclude that the PACT team was grossly negligent. CP 180.

Lourdes also argued that the Plaintiff could not satisfy the proximate cause element and CRU was an unforeseen superseding cause because it had the opportunity—and sole authority—to detain Mr. Williams on January 26. CP 137-140, 146-148. Lourdes pointed out that gross negligence is unforeseeable as a matter of law. CP 946-947.

Plaintiff responded that the CRU's actions were foreseeable and thus not a superseding cause. Significantly, Plaintiff provided no supporting authority suggesting that gross negligence is foreseeable. CP 183-186.

At the summary judgment hearing, Plaintiff presented a calendar exhibit. The calendar contained the numerous times PACT members had contact with Mr. Williams. RP 42.

The trial court granted the summary judgment motions on March 13, 2013, finding that Plaintiff did not establish gross negligence. RP 50. The trial court held:

> In this case, I believe that the evidence that I've seen through the affidavits establishes that—that the

> defendants in this case exercised more than a slight level of care.
>
> I think—I'm going to rule—I'm going to grant the summary judgment to both defendants. The defendants were in contact with Mr. Williams. The contact increased. The contact was frequent. The PACT workers were frequent. They were attempting to work with him. You know, it's not a negligence standard; it's gross negligence. And I don't think plaintiffs have established gross negligence . . . .

RP 50.

The trial court entered a written order the same day. CP 1030. Plaintiff filed a timely appeal.

IV. ARGUMENT

A. Standard of Review

Plaintiff failed to address the standard of review regarding the judge's reasonable decision to redact portions of Dr. Layton's declaration. The admissibility of evidence is reviewed on an abuse of discretion standard. Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 572, 719 P.2d 569 (1986). "Abuse occurs only where discretion is exercised on untenable grounds

or for untenable reasons." Id. Courts of Appeals will not disturb the trial court's ruling "[i]f the reasons for admitting or excluding the opinion evidence are both fairly debatable." Moore v. Hagge, 158 Wn. App. 137, 155, 241 P.3d 787 (2010).

B. Standard for Summary Judgment

At summary judgment, "the judge must view the evidence presented through the prism of the substantive evidentiary burden." Adams v. Allen, 56 Wn. App. 383, 393, 783 P.2d 635 (1989) overruled on other grounds by Caughell v. Group Health Co-op. of Puget Sound, 124 Wn.2d 217, 876 P.2d 898 (1994) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S.Ct. 2505 (1986)). This determination may involve both substantive law and the burden of proof. Sedwick v. Gwinn, 73 Wn. App. 879, 885, 873 P.2d 528 (1994).

As this Court stated in Adams, "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." Adams, 56 Wn. App. at 393 (emphasis added) (viewing the

plaintiff's fraud claims at the summary judgment stage through the prism of the heightened clear, cogent and convincing standard and finding that "[s]o viewed, the evidence here does not raise an issue that Dr. Allen acted with intent to deceive," the plaintiffs had not met their substantive burden.). Thus, the Court must view the evidence through the prism of the much higher "gross negligence" standard, which only requires Lourdes to demonstrate that it provided slight care.

Plaintiff fails to recognize that this case deals with a higher standard of proof since this case does not deal with ordinary negligence. Plaintiff, as the nonmoving party, must demonstrate she can establish her claim with prima facie proof supporting the higher level of proof. Woody v. Stapp, 146 Wn. App. 16, 22, 189 P.3d 807 (2008); Johnson v. Spokane to Sandpoint, LLC, 176 Wn. App. 453, 309 P.3d 528 (2013). She did not do so, and cannot do so.

C. The Trial Court Properly Dismissed Plaintiff's Claims Against Lourdes

1. Plaintiff failed to state a *prima facie* case of gross negligence

One of the primary issues involved in this appeal is straight forward. That issue is whether Plaintiff at the summary judgment hearing demonstrated she could support her claim with *prima facie* proof supporting the higher level of "proof, gross negligence," standard. Plaintiff failed to address this crucial issue in her opening brief. *Plaintiff's Brief at 23-24*. This is tacit recognition by Plaintiff that she cannot prevail on this crucial issue.

In a case such as this where the issue is whether a defendant was grossly negligent "the plaintiff must offer something more substantial than mere argument that the defendant's breach of care arises to the level of gross negligence." Johnson, 176 Wn. App. at 460; Boyce v. West, 71 Wn. App. 657, 666, 862 P.2d 592 (1993). Here, Plaintiff did not offer anything more substantial than mere argument.

The appellate courts of Washington, and particularly this Court on several occasions, have upheld a trial court's decision granting summary judgment in favor of defendants dismissing a plaintiff's claim for failure to establish that defendants were grossly negligence. See e.g., Boyce v. West, 71 Wn. App. 657, 862 P.2d 592 (1993); Johnson, 176 Wn. App. at 453; O'Connell v. Scot Paper Co., 77 Wn.2d 186, 460 P.2d 282 (1969); Kelly v. State, 104 Wn. App. 328, 17 P.3d 1189 (2000); Whiteall v. King County, 140 Wn. App. 761, 167 P.3d 1184 (2007).

The gross negligence standard applicable here is derived from the involuntary commitment immunity statute, RCW 71.05.120:

> (1) No officer of a public or private agency, nor the superintendent, professional person in charge, his or her professional designee, or attending staff of any such agency, nor any public official performing functions necessary to the administration of this chapter, nor peace officer responsible for detaining a person pursuant to this chapter, nor any county designated mental health professional, nor the state, a unit of local government, or an evaluation and treatment facility shall be civilly or criminally liable for performing duties pursuant to this chapter with

> regard to the decision of whether to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment: PROVIDED, That such duties were performed in good faith and without gross negligence.
>
> (2) This section does not relieve a person from giving the required notices under RCW 71.05.330(2) or 71.05.340(1)(b), or the duty to warn or to take reasonable precautions to provide protection from violent behavior where the patient has communicated an actual threat of physical violence against a reasonably identifiable victim or victims . . . .

RCW 71.05.120 (emphasis added).

The immunity statute clearly covers the allegations in this case. Again, this is because Mr. Williams was under an LRA governed by RCW Chapter 71.05, distinguishing this case from other reported decisions. "The immunity provision in RCW 71.05.120 applies to a mental health professional's duties under the involuntary commitment law." Estate of Davis v. State, Dep't of Corr., 127 Wn. App. 833, 840, 113 P.3d 487 (2005), as amended (June 2, 2005), publication ordered (June 2, 2005) (finding immunity). The statute specifically applies to

allegations that a mental health providers failed to detain patient. Id.; Volk v. Demeerleer, 184 Wn. App. 389, 424, 337 P.3d 372 (2014) review granted, 183 Wn. 2d 1007, 352 P.3d 188 (2015) ("When the plaintiff claims the mental health professional should have detained the patient, the plaintiff is claiming the professional should have involuntarily committed the patient."). "Under such circumstances, RCW 71.05.120 controls and the mental health professional is entitled to immunity under the statute." Id.

In Poletti v. Overlake Hosp. Med. Ctr., 175 Wn. App. 828, 303 P.3d 1079 (2013), the trial court ruled that the plaintiff needed only to satisfy a negligence standard when presenting evidence that a mental health hospital should have detained a patient. The Court of Appeals reversed, ruling that RCW 71.05.120's immunity applied because the only authority under that the hospital could have detained the patient was under the involuntary treatment act. Id. at 831.

Likewise, in Estate of Davis v. State, Dep't of Corr., 127 Wn. App. 833, this Court affirmed summary dismissal of the plaintiffs' negligence claims against a Stevens County mental health counselor, Jones, and Stevens County for failure to screen and supervise a patient, Erickson. Id. In that case, Erickson had been subject to community supervision by the Department of Corrections after committing a non-violent crime. He violated the terms of his supervision by testing positive for marijuana use, and subsequently met with a mental health counselor from the County. After Erickson denied wanting to hurt himself or others, the counselor did not seek to detain him. Erickson later shot and stabbed Davis, whose estate sued. Id.

The trial court granted summary judgment under RCW 71.05.120. The plaintiffs argued there was no immunity because Jones was not making an assessment for involuntary commitment. Id. at 840. This Court affirmed dismissal, noting that the claims arose from allegations that the defendants failed to detain the patient, which is covered under RCW 71.05.120:

> The estate's amended complaint, however, alleges Mr. Jones evaluated Mr. Erickson for the purpose of providing mental health assistance and supervision. The complaint then alleges Mr. Jones failed to provide assistance or take any action, despite the need to do so. To the extent the estate alleged Mr. Jones was liable because he failed to detain Mr. Erickson, the immunity provision of RCW 71.05.120 applies because the only authority for him to detain Mr. Erickson was under chapter 71.05 RCW.

Id. at 840-41.

But "application of the gross negligence standard provided by RCW 71.05.120(1) is not limited only to decisions to *detain* a person against her will. It covers decisions whether or not 'to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment.'" Id. at 835 (quoting RCW 71.05.120(1)) (emphasis in original). "It is clear the legislature intended to provide limited immunity for a range of decisions that a hospital can make when a patient arrives, whether voluntarily or involuntarily, for evaluation and treatment." Id.

In the present case, Plaintiff claims that Defendants "were negligent or grossly negligent in treating, supervising, monitoring and evaluating Adam Williams." CP 42. Her expert actually claims Lourdes acted appropriately until January 6, 2012, and that is the first time that Lourdes should have taken steps to have Mr. Williams institutionalized. CP 973. At that point the only available remedy to Lourdes was to request evaluation for purposes of commitment. RCW 71.05.150, 71.05.052, 71.05.340.

Because Plaintiff alleges that Defendants should have had Mr. Williams committed, her claims squarely fall under RCW 71.05.120 and trigger immunity. Plaintiff alleges that Mrs. Williams' death was caused by the decision not to detain Mr. Williams—a decision expressly mentioned in and covered by RCW 71.05.120(1). Under such circumstances, RCW 71.05.120 controls especially since all treatment provided to Mr. Williams was under the auspices of RCW Chapter 71.05.

Pursuant to the immunity statute, a mental health professional or evaluation and treatment facility "is immune from tort liability in the performance of his duties unless he acted in bad faith or with gross negligence," Estate of Davis, 127 Wn. App. at 840, or unless the patient identifies a specific target of violence. RCW 71.05.120(2). It is undisputed that Lourdes is an "evaluation and treatment facility." RCW 71.05.020(16).

Plaintiff does not claim that Lourdes or the CRU acted in bad faith. Thus, the issue is whether Defendants were grossly negligent. Lourdes is entitled to immunity if it acted without gross negligence.

2. Plaintiff failed to establish that Lourdes was grossly negligent

Gross negligence is a much higher burden than ordinary negligence. "Gross negligence is that which is substantially and appreciably greater than ordinary negligence. Estate of Davis, 127 Wn. App. at 840. "Gross negligence is the failure to exercise slight care. It is negligence that is substantially greater than

ordinary negligence. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care." WPI 10.07 (emphasis added). The issue is whether there was some care versus an absence of care. See Kelley v. State, 104 Wn. App. 328, 17 P.3d 1189 (2000).

Courts in Washington have dismissed claims on summary judgment where there was evidence of some care provided. In Estate of Davis, 127 Wn. App. 833, the plaintiffs alleged that the counselor's assessment of the patient was "incomplete and unreasonable." Id. at 841. This Court held that did not establish gross negligence and affirmed summary dismissal under RCW 71.050.120. Id.

Plaintiff did not present any evidence that Lourdes failed to use even slight care. The record amply demonstrates that Lourdes provided significant care to Mr. Williams from March, 2011 to January, 2012. The PACT team was in regular contact with him, and the care increased toward the end of 2011 and into 2012. This included evaluations by his ARNP and individual

therapy sessions. Lourdes' experts, Dr. Lorna Moser and Dr. Russell Vandenbelt testified the PACT team provided reasonable care.

Plaintiff's position that the care was inadequate and deficient and the PACT team should have requested revocation of the LRA misses the point. This argument merely reinforces why summary judgment was appropriate, because it acknowledges the team provided care. That Plaintiff may raise questions whether the care provided was appropriate, reasonable, or sufficiently thorough does not preclude summary judgment. Whether Lourdes complied with the standard of care in every instance does not matter. The dispositive issue is whether there is evidence of some care, and not an absence of care. If Lourdes had provided no care or had failed to contact Mr. Williams or evaluate him at all, or had ignored him as he decompensated, this would be a different matter. But that is not the case.

Plaintiff did not present anything approaching gross negligence. No reasonable jury could have found that Lourdes

failed to provide even slight care. Summary judgment was appropriate. Summary judgment is appropriate if reasonable minds could reach but one conclusion. Cotton v. Kronenberg, 111 Wn. App. 258, 44 P.3d 878 (2002).

Plaintiff's own experts admit that whether Lourdes should have taken actions to commence the process of having Mr. Williams detained was a judgment decision. CP 897, 568, 629, 640, 646. It is clear under Washington law that a mere error of judgment does not constitute negligence. See Fergun v. Sestero, 182 Wn.2d 794, 346 P.3d 708 (2015); Thomas v. Wilfac, Inc., 65 Wn. App. 255, 828 P.2d 597 (1992). The members of the Lourdes PACT team exercised their judgment in deciding whether to seek detainment of Mr. Williams. Since Plaintiff's own experts admit this is a judgment decision it cannot be determined that the members of the Lourdes PACT team were grossly negligent in doing so.

3. There is no evidence that Mr. Williams identified his grandmother or anyone else as a victim of violence

The only other time RCW 71.05.120 immunity can be inapplicable is if the provider failed to "warn or to take reasonable precautions to provide protection from violent behavior where the patient has communicated an actual threat of physical violence against a reasonably identifiable victim or victims . . . ." RCW 71.05.120(2).

There is absolutely no evidence in the record showing that Mr. Williams communicated an actual threat of physical violence against Viola Williams or any other person. There is no evidence in the record that he ever made any threat of any kind against any reasonably identified victim. Plaintiff's experts even recognized this fact. CP 635, 899. Thus, the exception in RCW 71.05.120(2) does not apply.

4. Plaintiff cannot establish traditional proximate cause

The testimony of Plaintiff's own expert establishes that she cannot establish the traditional element of proximate cause. Dr. Layton appears at this point to be the Plaintiff's primary expert although this decision only occurred after the Defendants moved for summary judgment.

Dr. Layton candidly admitted in his testimony that the extent of the PACT team members' authority is to suggest to CRU that the patient be evaluated for revocation. CP 640. It is his testimony that it was acceptable for the PACT team not to attempt to take this action until January 6, 2012. CP 641. Dr. Layton admits that at least by January 18 the PACT team had come to the conclusion to have Mr. Williams' evaluated for revocation. He further admits that on January 25 there was a request that Mr. Williams be evaluated for the purpose of determining if he should be revoked. Again, on January 26 they

provided the CRU another chance to re-evaluate the patient to decide if he should be revoked. CP 640.

It is undisputed that Mr. Williams did not harm anybody prior to January 26, 2012. Thus, whether the PACT team made a recommendation on January 6, 2012, it is not a proximate cause of any injury in this case. This is because they clearly contacted CRU on January 16, 18, 25, and 26 and provided CRU an opportunity to evaluate and detain Mr. Williams. Dr. Layton essentially admitted this. CP 641, 642.

This Court had the opportunity to address the traditional proximate cause element in Rounds v. Nellcor Puritan Bennett, 147 Wn. App. 155, 194 P.3d 274 (2008), rev. den., 165 Wn.2d 1047 (2009). In Rounds, this Court observed:

> "A 'proximate cause' of an injury is defined as a cause which, in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which the injury would not have occurred." . . . Cause and fact concerns "the 'but for' consequences of an act, or the physical connection between an act and the resulting injury."

Id. at 162.

Here, it cannot be argued that the "but for" consequences of Lourdes' alleged failure to detain Mr. Williams on January 6, 2012, caused injury. Mr. Williams injured no one between January 6 and January 26. If he had, perhaps there would be a material issue relating to the proximate cause element. However, since he did not and since the PACT team did everything they could do within that time, Plaintiff cannot establish the traditional proximate cause element.

5. Plaintiff's allegation that CRU was grossly negligent relieves Lourdes of liability

Plaintiff at the trial court level and here fervently claim that CRU was grossly negligent. Plaintiff admitted that she must prove gross negligence on the part of CRU if CRU is to be liable. However, Plaintiff by making the decision to assert this claim against CRU has as a matter of law conclusively established that it has no claim against Lourdes.

Where the defendant's negligence, if any, was superseded by the action of the plaintiff or third party as a matter of law, a

trial court may grant summary judgment for the defendant. Cramer v. Dep't of Highways, 73 Wn. App. 516, 521, 870 P.2d 999 (1994). If the independent intervening cause, force or act is not reasonably foreseeable, it is deemed to supersede the defendant's original negligence. The defendant's original negligence ceases to be the proximate cause. Maltman v. Sauer, 84 Wn.2d 975, 530 P.2d 254 (1975); Cook v. Seidenverg, 36 Wn.2d 256, 217 P.2d 799 (1950).

Consequently, it is clear that if an intervening cause was not foreseeable then it is a superseding cause. Applying that to this case if gross negligence of CRU was not foreseeable then its actions are a superseding cause relieving Lourdes of liability.

There does not appear to be any Washington case law addressing the issue of whether gross negligence is foreseeable. This issue has been addressed by other jurisdictions. It appears that the majority rule from other jurisdictions is that as a matter of law gross negligence is not foreseeable. See e.g. Love v. City of Detroit, 27 Mich. App. 563, 573, 716 N.W.2d 604 (2006);

People v. Gulliford, 86 Ill. App. 3d 237, 241, 407 N.E.2d 1094 (1980); People v. Saavedra-Rodriguez, 971 P.2d 223, 226 (Colorado 1988), as modified (Feb. 11, 1999); People v. Schafer, 473 Mich. 418, 437, 703 N.W.2d 774 (2005), holding modified by People v. Derror, 47 Mich. 316, 750 N.W.2d 822 (2006).

Lourdes presented this issue at the trial court and strenuously argued it. Plaintiff failed to provide any citation at the trial court level that gross negligence is foreseeable. RP 38-39.

Similarly, Plaintiff has failed to present to this Court any such authority. Since Plaintiff has failed to adequately rebut this argument this alone provides this Court with a basis to affirm the trial court's decision as it relates to Lourdes.

The only argument presented by Plaintiff on this issue is that it is premature because there has been no finding that CRU was grossly negligent. This misses the point. Plaintiff is contending and has asserted in pleadings that the CRU was grossly negligent. *Plaintiff's Opening Brief at 45-46.* Plaintiff

only recovers against CRU if CRU is grossly negligent. Plaintiff is bound by her arguments.

> A statement of fact by a party in his pleading is an admission the fact exists as such and is admissible against him in favor of his adversary . . . . Where the pleadings and memorandum of counsel indicate that an issue has been impliedly withdrawn from the contest, the party so doing waives the necessity of proof of the issue by the opposing party.

Neilson v. Vaschon School Dist., 87 Wn.2d 955, 958, 558 P.2d 167 (1976).

Moreover, Plaintiff never raised this issue at the trial court. The Court of Appeals "do not review issues raised for the first time on appeal." State v. Holzknecht, 157 Wn. App. 754, 759, 238 P.3d 1233 (2010). Plaintiff cannot have it both ways.

The fact that the LRA was not revoked on January 25 or 26 is a superseding cause as a matter of law that relieves Lourdes from liability.[2] It is undisputable that the PACT team provided the CRU with an opportunity to revoke the LRA on January 25 and 26, 2012. The PACT team requested that the CRU evaluate

[2] Lourdes reiterates that it does not believe any care provided was substandard.

Mr. Williams for the purpose of revoking his LRA. CP 96-97. Kathleen Laws evaluated Mr. Williams and in her clinical judgment she elected not to revoke the LRA on January 25, 2012. CP 651-653. Lourdes again gave CRU a second opportunity to revoke on January 26. CP 482. CRU again exercised its judgment and decided not to do so.

The intervening judgment decisions of the CRU not to detain Mr. Williams on January 25 and January 26 were clearly subsequent superseding causes which relieve Lourdes from liability. This is reinforced by the testimony of Plaintiff's own expert, Dr. Layton, who testified that the CRU was grossly negligent in failing to detain Mr. Williams on January 25 and 26. CP 547. There is no basis in the record by which a jury would reasonably conclude that it was foreseeable that the CRU would not revoke the LRA.

Plaintiff argues that the CRU is not a superseding cause because there is a dispute between the CRU and Lourdes whether the PACT team actually requested revocation on January 7. That

argument misses the point and confuses the facts. The CRU alone had authority and power and prerogative to detain Mr. Williams and revoke the LRA. RCW 71.05.340; CP 640. It had the independent responsibility to detain him if it felt in the exercise of its clinical judgment that it needed to revoke the LRA. Plaintiff concede that point. *Plaintiff's Opening Brief at 38.*

Ultimately it does not matter if the PACT team requested revocation or merely asked the CRU to remind Mr. Williams of the LRA. The important, undisputed fact is that the PACT team provided the CRU with the opportunity to revoke Mr. Williams on January 25 and 26, and the CRU did in fact evaluate Mr. Williams. At that time, the decision whether to detain Mr. Williams was CRU's alone. This is a quintessential example of a superseding cause.

Plaintiff also argues there is no superseding cause because it was foreseeable that the CRU would not detain Mr. Williams since it was not aware he was violating the LRA. *Plaintiff's Opening Brief at 38.* This apparently is based on Dr. Layton's

testimony in his declaration that the PACT team failed to notify the CRU that Mr. Williams was using street drugs, not taking his medication, was more delusional, and was sexually fixated. CP 544-46.

That is completely inaccurate and belied by the record. It is clear that the PACT team provided that information. Kathleen Laws' evaluation records from January 25 specifically note that she was informed of that information. CP 651-653. *See also* CP 95-100. Moreover, Plaintiff admits that the CRU had "more than enough evidence to act and that it breached its duty when it dialed to do so." *Plaintiff's Opening Brief at 40.* The CRU was aware of the violations on January 25.

6. The PACT's alleged negligence prior to January 6, 2012 is irrelevant

Plaintiff spends a significant amount of time recounting the care provided from March, 2011 to the end of December, 2011. She especially focuses on the July, 2011 hospitalization. That is a red herring. All care provided by the PACT team prior

to January 6, 2012 is irrelevant and is not a proximate cause. This is because Dr. Layton testified that the PACT team did not have a duty to request revocation until January 6, 2012. CP 547. Thus, Plaintiff's own expert is not critical of the PACT team until January 6. As a result, any allegations of deficient care prior to that time are irrelevant and certainly not a proximate cause of Mrs. Williams' ultimate outcome.

7. Lourdes owed no duty

The case of Volk v. Demeerleer, 184 Wn. App. 389, 337 P.2d 372 (2014), review granted, 183 Wn.2d 1007 (2015), is currently before the Washington State Supreme Court. The Volk case is much different than the case presented here because all actions here by the Defendants were under the umbrella of RCW Chapter 71.05. Nevertheless, the duty issue is the same here as in Volk. Should the Supreme Court determine that under circumstances such as presented here a plaintiff cannot establish the duty element of a negligence claim, that holding would apply

equally here. That holding would result in further grounds to uphold the trial court's decision here.

D. The Trial Court Properly Struck Portions of the Declaration of Dr. Matthew Layton

"The trial court has wide discretion in ruling on the admissibility of expert testimony." Moore v. Hagge, 158 Wn. App. 137, 155, 241 P.3d 787 (2010). There is no evidence that the trial court abused its discretion here.

The trial court struck all of Paragraphs 11 and 12 and portions of Paragraphs 7-10 of the March 2, 2015 Declaration of Matthew Layton, M.D. Plaintiff, however, only objects to the exclusion of Paragraph 12. *Plaintiff's Opening Brief at 47-50.* Thus, Lourdes assumes that Plaintiff has conceded that the trial court properly did not consider the remaining paragraphs for the reasons set forth in Lourdes' summary judgment materials. Because Paragraph 12 does not directly discuss the care provided by Lourdes' staff, Lourdes does not address it.

V. CONCLUSION

The trial court did not err in granting Lourdes' motion for summary judgment. The record is clear that Lourdes' staff provided more than slight care to Mr. Williams. It provided substantial care. The trial court properly determined that Plaintiff failed to meet the higher gross negligence standard.

Moreover, even if Lourdes were grossly negligent in the care and treatment of Mr. Williams, any alleged substandard care was not the proximate cause of the death of Viola Williams because any gross negligence by the CRU would have been unforeseeable and a superseding cause as a matter of law. The Court should affirm the decision of the trial court with respect to Lourdes.

Respectfully submitted this 22 day of October, 2015.

JEROME R. AIKEN, WSBA #14647
PETER M. RITCHIE, WSBA #41293
Meyer, Fluegge & Tenney, P.S.
Attorneys for Defendant Lourdes

CERTIFICATE OF TRANSMITTAL

I certify under penalty of perjury under the laws of the state of Washington that the undersigned caused a copy of this document to be sent to the attorney(s) of record listed below as follows:

For Plaintiffs: Ms. Rebecca J. Roe Ms. Anne Kysar Schroeter, Goldmark & Bender 810 Third Avenue, Suite 500 Seattle, WA 98104	✓ via U.S. Mail ___ via fax ✓ via e-mail ___ via hand delivery
For Defts Benton/Franklin Counties: Mr. West H. Campbell Thorner, Kennedy & Gano, P.S. 101 South 12th Avenue P.O. Box 1410 Yakima, WA 98907	✓ via U.S. Mail ___ via fax ✓ via e-mail ___ via hand delivery

DATED this 22 day of October, 2015 at Yakima, Washington.

SHERYL A. JONES