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No. 97541-8

Court of Appeals No. 76797-6-I

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

JOEL KELLY, individually and by and through JACQUELINE KELLY, JAKE KELLY, JESSICA KELLY, and JOSHUA KELLY, for themselves and as the children of Joel Kelly,

Respondents,

and

COUNTY OF SNOHOMISH, by and through NORTH SOUND REGIONAL SUPPORT NETWORK d/b/a NORTH SOUND MENTAL HEALTH ADMINISTRATION, a Washington municipal corporation and regional support network,

Petitioners,

PROVIDENCE HEALTH & SERVICES-WASHINGTON, d/b/a PROVIDENCE REGIONAL MEDICAL CENTER EVERETT,

Defendant.

PETITION FOR REVIEW

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INTRODUCTION

Throughout his six-week stay at Providence Medical Center, brain-injured patient Joel Kelly was a known elopement risk who perseverated on leaving. Kelly was often restrained for his own safety, failed to grasp his severe cognitive deficits, and lacked decision-making capacity. He could not decide to leave, yet Providence let him. He then entered an unprotected construction site nearby, fell 15-to-20 feet, and suffered more severe injuries.

Petition Snohomish County's only involvement was that its Designated Mental Health Professional did not evaluate Kelly at Providence after being told, as Plaintiffs concede, that he was not medically ready for discharge. That common practice is consistent with DSHS protocols adopted by Legislative directive. Since the County cannot be grossly negligent for DMHP conduct that meets the standard of care, the appellate court erred in affirming the trial court's refusal to decide gross negligence as a matter of law.

The appellate court erred too in affirming the sanction striking the County's affirmative defenses against those responsible for the construction site where Kelly fell. The court's holding that ***Burnet***, *infra*, does not apply directly contradicts its most recent progeny.

This Court should accept review and reverse.

IDENTITY OF PETITIONERS AND COURT OF APPEALS DECISION

Appellant Snohomish County asks this Court to review the decision terminating review by the Court of Appeals, Division One, issued on April 22, 2019 (attached as appendix A). The appellate court denied the County's timely motion for reconsideration on July 2, 2019 (Motion, Opposition, and Order attached as Appendix B-D).

ISSUES PRESENTED FOR REVIEW

RCW 71.05.153(1) authorizes a Designated Mental Health Professional ("DMHP") to detain a person under the Involuntary Treatment Act ("ITA"), who "as the result of a mental disorder, presents an imminent likelihood of serious harm, or is in imminent danger because of being gravely disabled …." RCW Ch. 71.05 does not define DMHP action, directing the Department of Social and Health Services ("DSHS") to adopt protocols for implementing the ITA. One such protocol provides that DMHPs will not evaluate hospital patients who are not medically ready for discharge. Local policies concur. Where the Snohomish County DMHP followed these protocols and policies in declining to further evaluate plaintiff Joel Kelly, who was not medically ready for discharge, did the appellate court err in affirming the trial court's orders declining to rule as a matter of law that the County is not grossly negligent?

Based on CR 12(i), CR 26, and ***Burnet v. Spokane Ambulance***, 131 Wn.2d 484, 933 P.2d 1036 (1997), the trial court denied the County's request to assign fault to third parties responsible for the construction site where Kelly fell after eloping from Providence. Did the appellate court err in affirming and in holding that ***Burnet*** does not apply to a severe sanction levied for failing to comply with court-rule deadlines?[1]

FACTS RELEVANT TO PETITION FOR REVIEW

A. After being admitted to Providence Medical Center with a serious traumatic brain injury, Joel Kelly perseverated on leaving throughout his six-week stay.

Plaintiff Joel Kelly was admitted to the Providence Medical Center Everett on October 16, 2013, after falling from a ladder and suffering a serious traumatic brain injury ("TBI"). Ex 386; RP 559-60, 1686. Kelly was placed in a medically induced coma for his safety. RP 560, 1686.

Kelly's TBI affected his impulse control, insight, judgment, and ability to follow directions. RP 1309, 1689-90. Throughout his stay he was given antipsychotics and benzodiazepines for agitation. Exs 38, 397, 401; RP 640-41, 674, 1434; CP 4531, 4536-39, 4545. He was

[1] Although it is these two issues that meet the grounds for this Court's review, the County asks this Court to review all issues that were before the appellate court if this Court accepts review.

an "elopement/wander risk," perseverating on leaving without any insight or awareness of his severe cognitive deficits. Exs 38, 394-97, 401, 402, 403; RP 637, 649; CP 4512, 4567. Providence assigned Kelly a "1:1" (one-on-one aid), and used restraints to keep Kelly safe. Exs 38, 379, 386-94, 400, 401, 403; CP 4508.

Due to his "severe cognitive deficits," Kelly lacked decision-making capacity, so could not, for example, decide to leave Providence. RP 604-05; CP 4524. Kelly's ex-wife and his daughter had his power of attorney for medical decisions. *Id*.

Kelly transferred to the rehabilitation unit on November 22, over five weeks after arriving at Providence. RP 1307-08. He continued to perseverate on leaving, still showing no understanding of his cognitive deficits. Exs 38, 374, 375, 400-03. Once on November 23rd and twice on the 24th, Providence staff asked security to intervene when Kelly attempted to leave. Ex 400, 401. Over the next three days, Kelly continued to perseverate on leaving, telling staff he needed to find his truck and to return work. Exs 38, 374, 375, 402, 403, 404. On the 28th – Thanksgiving – staff asked Kelly's family to stay away to avoid agitating him. Ex 375; RP 648-49; CP 4556-57.

B. Nursing staff called for a County DMHP on Thanksgiving evening, when Kelly attempted to leave Providence.

Nursing staff called security at 5:45 that evening as Kelly attempted to leave. RP 2069, 2074. Although Kelly wandered the halls "adamant about leaving," security was eventually able to talk Kelly back into his room. RP 2074-76. But within ten minutes, more security was called and stood blocking Kelly's doorway. RP 2076. The on-call physician, Steven Lee, then decided to call a DMHP. *Id.*

C. Since on-call Dr. Lee told the DMHP that Kelly was not medically ready for discharge, she did not assess him at Providence.

After speaking to dispatcher Walter Garre, and nurse Linda Albizu, County DMHP Andrea Waldschmidt spoke to Dr. Lee at about 6:39 p.m. RP 570, 672, 675, 747, 752-53, 755-58, 760, 812, 865-66. Dr. Lee, who was covering for Kelly's doctor, Catherine Dalton, told Waldschmidt that Kelly was, and would continue receiving medical care, and that Dr. Dalton anticipated discharging him four days later, on December 2. RP 606, 688; CP 4576. Dr. Lee made clear that Kelly "was not medically cleared for discharge." RP 778, 780. Plaintiffs concede that Dr. Lee told Waldschmidt Kelly "wasn't medically clear for discharge," consistent with testimony from their own expert that "Dr. Lee didn't think [Kelly] was medically clear in his medical opinion. . .." BR 21 n.12 (citing RP 900, 944-45).

Despite these concessions, whether Kelly was medically clear for discharge became the subject of great, but irrelevant, debate. Waldschmidt must act based on what she was told, and the Plaintiffs conceded that Dr. Lee told her Kelly was not medically clear for discharge. *Id.*

Dr. Lee was correct. It was up to Dr. Dalton to determine when Kelly would be discharged. RP 688, 1289. Dr. Dalton had not cleared Kelly for discharge on November 28, when Lee spoke to Waldschmidt. CP 4575-76. She had not cleared him for discharge on the 29th, 30th, or on December 1. RP 606; CP 4575-76. Rather, she anticipated discharging Kelly on December 2. *Id.* And even then, his anticipated discharge was not based on his readiness, but on his insurance running out, though of course the jury could not be given that information. RP 475-77, 1291.

When specifically asked whether Kelly discharged himself, Dr. Dalton testified that he did not self-discharge, but ran away:

> Q. And so do you believe Mr. Kelly discharged himself against medical advice?
>
> [A.] I believe Mr. Kelly didn't discharge himself. I believe he eloped.
>
> Q. How do you distinguish the two?
>
> [A.] In general, when a patient is leaving against medical advice, they tell us they want a discharge; we tell them we

> disagree with that. They have decision making capacity. They say they're going to anyway. We have them sign a form acknowledging we don't think it's a good idea. Eloping is just more or less running away.

CP 4576-77. Lacking decision-making capacity, Kelly could not elect to "discharge[] himself" against medical advice. RP 604-05; CP 4524.

Plaintiffs have successfully capitalized on dispatcher Garre's testimony that although he does not recall talking to Waldschmidt, he would have told her, based on his notes, that Kelly was medically clear for discharge. RP 870-72. Even if Garre made that misstatement, which Waldschmidt did not recall, Garre was wrong. RP 813. But again, any fact dispute on this point is irrelevant: Plaintiffs concede that Dr. Lee – who spoke to Waldschmidt after Garre – told Waldschmidt that Kelly was not medically clear for discharge. BR 21 n.12 (citing RP 900, 944-45). So informed, the applicable protocols prevented further evaluation. *Infra*, Argument § A. There was no basis for Waldschmidt to visit Kelly. RP 1289.

D. Although Providence restrained Kelly before and after calling the County because he lacked decision-making capacity, staff allowed him to leave.

The ITA governs the process for involuntarily detaining a psychiatric patient. RCW 71.05.020(12). That process is distinct from "restraints" used to limit patient mobility for safety. Ex 16 at 2; RP 1147, 1978. Restraints are dictated by hospital policy. RP 1146.

As mentioned above, Providence used physical and chemical restraints throughout Kelly's stay. *Supra*, Facts Relevant to Petition for Review § A. This continued on Thanksgiving evening, starting at 6:00 p.m. when nursing staff administered Seroquel to calm Kelly. RP 580, 2073, 2076-77. While communicating with Waldschmidt, Dr. Lee ordered two-point wrist restraints. RP 572, 640, 652-53, 2077. Three security-officers and staff later secured Kelly's arms in the soft restraints attached to his bed. RP 2077-78. Providence administered Valium at 11:00 p.m., and removed Kelly's wrist restraints at 2:45 a.m., after he fell asleep. Ex 378; RP 674, 2053.

The next morning, Dr. Dalton concluded Kelly had returned to "baseline," meaning he was agitated, but not more so than normal. CP 4558-59. Later, Kelly suddenly told his 1:1 China Ekeh that he wanted to leave to catch a bus, could not be redirected, and walked off the rehab unit to the downstairs lobby. RP 506-07 Security-officer Carl Swope intercepted Kelly downstairs, and Swope and Ekeh were able to redirect Kelly to his room. RP 507, 532. Yet Dr. Dalton did not order restraints even after Kelly insisted that he needed to go "put in bids." CP 4564, 4567-68.

About 30-minutes later, Kelly again told Ekeh that he needed to catch a bus, left his room, and started down the hallway. RP 507.

Swope again intercepted them downstairs, but Kelly insisted he was going to his brother's paint shop nearby. RP 507-09, 537-38. Swope tried to convince Kelly to return to rehab, but refused to physically prevent Kelly from leaving, instead letting him "walk out the door." RP 508, 512, 538.

This violated Providence's policy on "Leaving Against Medical Advice," providing that a patient, like Kelly, who lacks decision-making capacity "is not allowed to leave the healthcare facility." Ex 20 ¶1 b(i); RP 1556, 1565-72; CP 4524. Simply stated, Providence should have "literally put their hands on" Kelly to redirect him, or even "tackle[d]" him if necessary. RP 1585, 2018.

E. After Providence allowed Kelly to elope, he entered an unprotected construction site down the street, fell into an unguarded stairwell, and sustained more serious injuries.

Ekeh followed Kelly onto the street and watched him enter a nearby construction site. RP 509-10. Ekeh and Michael Pirkle, the director of inpatient and outpatient rehab, saw no signs and entered the construction site without any obstruction. RP 446, 485-86, 509. The building was "pitch dark," so they used Pirkle's cellphone light to search for Kelly. RP 487, 512-13.

Shannon Pada, a certified nursing assistant at Providence, entered the construction site after noticing Kelly walking down the

street in his hospital pants. RP 1197, 1200, 1204-06. Pada too saw no signs or fencing. RP 1211. It was so dark inside that Pada walked right up to the ledge of an unfinished stairwell lacking rails or guards before seeing Pirkle's cellphone light one floor down. RP 439, 1207.

Kelly was lying on the ground below, apparently having fallen 15-to-20 feet down the unfinished, unprotected stairs Pada encountered. RP 439, 443. An ambulance returned him to Providence. RP 440, 1207.

REASONS THIS COURT SHOULD ACCEPT REVIEW

A. The appellate decision on gross negligence conflicts with a recent decision from this Court and presents an issue of substantial public interest this Court should determine. RAP 13.4(b)(1)&(4).

After briefing was complete in this matter, this Court decided ***Harper v. Dep't of Corr.***, reversing the appellate court and affirming summary judgment that the Department of Corrections ("DOC") was not grossly negligent as a matter of law. 192 Wn.2d 328, 348-49, 429 P.3d 1071 (2018). The appellate decision conflicts with ***Harper*** (and others) in affirming the trial court's refusal to rule, as a matter of law, that a DMHP who abides the standard of care is not grossly negligent. This Court should accept review and reverse.

Harper uses ordinary negligence as the "baseline for comparison," holding that gross negligence, the "failure to exercise

slight care," is "'substantially and appreciably greater than ordinary negligence.'" 192 Wn.2d at 342-43 (quoting ***Nist v. Tudor***, 67 Wn.2d 322, 324, 331, 407 P.2d 798 (1965)). Gross negligence "requires a greater breach" than ordinary negligence: the plaintiff must prove that the defendant "'substantially' breached [her] duty …" *Id.* at 341.

Before a court can discern whether the breach constitutes gross negligence, it must discern the duty allegedly breached. In ***Harper***, the parties agreed that DOC had a duty to supervise a parolee. 192 Wn.2d at 331. The appellate court seemed to understand this, stating that to "analyze a claim of gross negligence on a motion for summary judgment, the court should specifically identify the action 'the plaintiff claims the defendant should have taken but did not, allegedly causing the plaintiff's injury.'" Op. at 7 (quoting *id.* at 343). Only then can the court determine "'whether the plaintiff presented substantial evidence that the defendant failed to exercise slight care under the circumstances presented ….'" *Id.*

But the appellate court never identified Waldschmidt's duty, failing to address the action, if any, she had to take after Dr. Lee told her that Kelly was not medically clear for discharge. Op. at 7-9. There is literally no mention of the standard of care governing DMHPs. *Id.*

The DMHP standard of care is found in: (1) statewide protocols established by DSHS through legislative directive; and (2) polices issued by North Sound Mental Health Administration ("NSMHA"), the agency acting as a go-between for DSHS and several counties (including Snohomish) who, by interlocal agreement, provide all behavioral-health services across this region. *See* RCW 71.05.214; RP 1131-35, 1141, 1222-23. DSHS and NSMHA both require that a patient "shall be medically ready for discharge from the hospital" before he may even be assessed under the ITA. Ex 15; RP 1228, 1957. Snohomish County adopted that policy. RP 1959-60.

These policies exist for good reason. The ITA is intended to provide mental-health services in the least-restrictive way possible. RP 1220. It cannot be used to force medical care. RP 756, 1150.

These policies are followed. Expert Ian Harrell, the COO of a company overseeing all levels of mental health services for three counties, believes that every county in the state requires patients to be medically ready for discharge to qualify for ITA detention. RP 1215-16, 1237. DMHPs routinely ask during the initial referral whether a patient is medically ready for discharge. RP 1237. Most

will not even respond where, as here, they are told that the patient is not medically ready for discharge. *Id.*

Under DSHS, NSMHA, and local protocols and polices, Waldschmidt had no duty to evaluate Kelly after Dr. Lee told her he was not medically ready for discharge. BR 21 n.12 (citing RP 900, 944-45). Again, the only way the appellate court could ascertain whether Waldschmidt was grossly negligent in electing not to evaluate Kelly further, was to determine whether she had any duty to do so.

Plaintiffs have argued these protocols cannot trump the ITA, providing that a DMHP may issue an ITA detention not exceeding 72 hours after evaluating a person who, "as the result of a mental disorder, presents an imminent likelihood of serious harm, or is in imminent danger because of being gravely disabled." Opp. to Mot. for Recon. at 7 (quoting RCW 71.05.153(1)). The protocols do not "trump" the ITA – they define how it will be implemented, just as the Legislature intended. RCW 71.05.153.

While the ITA authorizes a DMHP to issue a detention, it does not say *how*. *Id.* Indeed, the ITA does not provide any specifics about DMHP conduct, instead directing DSHS to develop the protocols

DMHPs use to administer the ITA. Former RCW 71.05.214.[2] DSHS did so, directing DMHPs not to evaluate a patient in a hospital setting unless he is medically ready for discharge. RP 1228. Under that protocol (and NSHMA and local policies), Waldschmidt had no duty to evaluate Kelly once Dr. Lee told her he was not medically ready for discharge. Ex 15; RP 1288, 1957, 1959-60. As a matter of law, the County cannot be grossly negligent when Waldschmidt followed DSHS, NSMHS, and local policies. RP 756.

In failing to identify the applicable duty, defined by these protocols, the appellate decision conflicts with ***Harper*** and ***Nist***, under which courts should discern the relevant duty before deciding whether the conduct at issue substantially breaches it. *See* ***Harper***, 192 Wn.2d at 341-45 (discussing ***Nist***). As in ***Harper***, the trial court should have ruled, as a matter of law, that the County is not grossly negligent when its DMHP followed DSHS, NSMHA, and local protocols and policies. 192 Wn.2d at 341-45. The appellate court curiously attempted to distinguish ***Harper*** on the ground that it was

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[2] In 2018, the statute was amended to direct the "authority" to adopt implementing protocols in consultation with DSHS and others. Second Engrossed SHB 1388 §§ 3001 and 3007.

decided on summary judgment. Op. at 8. But that is exactly the point – this case too should have been resolved on summary judgment.

The appellate decision also conflicts with ***Shea v. City of Spokane***, under which a healthcare provider acts negligently if she fails to comply with the relevant standard of care. 17 Wn. App. 236, 244-45, 562 P.2d 264 (1977), *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978). Again, under Legislative directive, DSHS determined that DMHPs will not evaluate hospital patients who are not medically ready for discharge. RP 1228. Waldschmidt followed that protocol, so was not negligent, much less grossly negligent.

The appellate decision also presents an issue of substantial public interest this Court should review. RAP 13.4(b)(4). Tasked with implementing the ITA, DMHPs are on the front line of providing health care for the mentally ill, a woefully underserved population. Under the appellate decision they are capable of gross negligence for *following* DSHS, NSMHA, and local protocols and policies. This jeopardizes the entire system, and all the patients protected by it.

This Court should accept review and hold that since DMHPs are not required to evaluate hospital patients who are not medically ready for discharge, the County was not grossly negligent as a matter of law when Waldschmidt declined to do so.

B. The appellate decision on *Burnet* sanctions conflicts with numerous decisions from this Court and from other appellate courts. RAP 13.4(b)(1) & (2).

At Plaintiffs' invitation, the appellate court incorrectly held that ***Burnet*** does not apply to the trial court's ruling precluding the County from asserting non-party fault for "failure to disclose on a timely basis." CP 1243. This decision directly contradicts this Court's decision in ***Keck v. Collins***, 184 Wn.2d 358, 368-69, 357 P.3d 1080 (2015) and others. This Court should accept review and reverse.

A court imposing a "severe" sanction must consider "whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party." ***Keck***, 184 Wn.2d at 368-69 (citing ***Jones v. City of Seattle***, 179 Wn.2d 322, 338, 314 P.3d 380 (2013) (addressing ***Burnet***, *supra*)). In ***Keck***, this Court held for the first time that ***Burnet*** applies not only to severe sanctions imposed for discovery violations, but also to evidence excluded for failure to comply with a court rule. 184 Wn.2d at 368-69. There, the plaintiff in a medical malpractice case filed three affidavits from her medical expert, one of which was untimely. *Id.* The trial court granted the defendant's motion to strike the untimely affidavit and their motion for summary judgment, ruling that the two timely affidavits were

insufficient to support the plaintiff's claim. *Id*. Thus, at issue in ***Keck*** was whether ***Burnet*** applies when a party fails to abide by deadlines in court rules, there CR 56(c). *Id*. at 364, 368-69. This Court held that the trial court abused its discretion in failing to apply ***Burnet***, reversing and remanding for trial. *Id*. at 362, 374.

Here, Plaintiffs moved to strike as "untimely" one expert and several lay witnesses related to the "Construction Entities" in charge of the construction site where Kelly fell, and sought to preclude the County from assigning fault to the Construction Entities. CP 108-15, 481-90, 647-58. Plaintiffs argued that no lesser sanction would suffice, citing ***Burnet***, *supra*, and ***Jones***, *supra.* CP 653-55. The trial court denied the County's request to name the Construction Entities as non-parties "based upon failure to disclose on a timely basis and non-compliance with CR 12(i) and CR 26." CP 1243.The court purported to conduct a ***Burnet*** analysis on the record, but, as addressed below, fell far short. CP 1243; RP 292-93, 300-01. Seven months later, after Providence amended its Answer to add affirmative defenses against the Construction Entities,[3] the court

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[3] Providence later agreed to withdraw all nonparty fault experts in a settlement with Plaintiffs. CP 2135-40, 2474.

denied the County's motion to amend its Answer to add affirmative defenses against the Construction Entities. CP 2447-67, 2584-86.

Even though the trial court purported to apply ***Burnet*** at Plaintiffs' behest, the appellate court held that ***Burnet*** does not apply, where "CR 12(i) is a clearer fit." Unpub. Op. at 11-12. But under ***Keck***, it makes no difference whether the trial court effectively struck the County's affirmative defenses as a sanction for failing to comply with CR 12(i) or CR 26 – both cited by the trial court. *Cf.* Unpub. Op at 11-12; CP 1242-43. This Court could have decided ***Keck*** like the appellate court here, holding that ***Burnet*** did not apply on the basis that the expert declaration was stricken not as a discovery sanction, but as an application of CR 56(c). ***Keck*** rejects that approach, holding that ***Burnet*** applies not only to severe sanctions for discovery violations, but also to the exclusion of evidence as untimely under the court rules. 184 Wn.2d at 368-69. As in ***Keck***, the offense here is the failure to comply with court-rule deadlines. The appellate decision plainly conflicts with ***Keck***.

The appellate decision also conflicts with ***Keck*** and numerous other cases applying the ***Burnet*** test in that it allows to stand an utterly inadequate ***Burnet*** analysis, resulting in a harmful error. *See e.g.* ***Teter v. Deck***, 174 Wn.2d 207, 217, 274 P.3d 336 (2012)

("[f]indings regarding the ***Burnet*** factors must be made on the record"); ***Jones***, 179 Wn.2d at 338-41 (same); ***Blair v. Ta-Seattle E. No. 176***, 171 Wn.2d 342, 349, 254 P.3d 797 (2011) (holding the appellate court misread ***Mayer v. Sto Indus., Inc***, 156 Wn.2d 677, 688, 690, 132 P.3d 115 (2006) in concluding that ***Burnet*** did not require an on-the-record analysis).

The trial court does not even mention lesser sanctions. RP 240-305; CP 1242-43. This alone requires reversal. ***Keck***, 184 Wn.2d at 368-69; ***Jones***, 179 Wn.2d at 345.

The trial court misstates the law on willfulness as being "without reasonable justification." RP 293. This plainly contradicts this Court's holding in ***Jones*** that equating willfulness with a lack of "reasonable justification" impermissibly presumes that late disclosure results in exclusion. 179 Wn.2d at 343. "***Burnet*** and its progeny require the opposite presumption: that late-disclosed testimony will be admitted absent a willful violation, substantial prejudice to the nonviolating party, and the insufficiency of sanctions less drastic than exclusion." *Id.* (citing ***Mayer***, 156 Wn.2d at 688; ***Burnet***, 131 Wn.2d at 494).

Equally lacking is the trial court's discussion of prejudice: the mere mention that allowing the County to pursue the Construction

Entities would necessitate a continuance. RP 293. When the court later granted Providence a continuance totaling 8.5 months from the prior hearing striking the Construction Entities, it still refused to allow the County to identify them as nonparties at fault. 3/14/16 RP 86, 88. If prejudice had not entirely abated by that point, it became nonexistent when the Plaintiffs prepared to meet Providence's affirmative defenses against the Construction Entities. CP 2139-40. And yet the court still precluded the County from assigning fault to the Construction Entities. CP 2447-67, 2584-86.

The appellate decision conflicts with ***Keck*** and others in multiple ways. This Court should accept review and reverse.

CONCLUSION

This Court should accept review and reverse.

RESPECTFULLY SUBMITTED this 1st day of August 2019.

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APPENDIX A

No. 76797-6-I
Unpublished Opinion
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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOEL KELLY, individually and by and through JACQUELINE KELLY, JAKE KELLY, JESSICA KELLY and JOSHUA KELLY, for themselves and as the children of Joel Kelly, Respondent, v. COUNTY OF SNOHOMISH, by and through NORTH SOUND REGIONAL SUPPORT NETWORK d/b/a NORTH SOUND MENTAL HEALTH ADMINISTRATION, a Washington municipal corporation and regional support network, Appellant, and PROVIDENCE HEALTH & SERVICES-WASHINGTON, d/b/a PROVIDENCE REGIONAL MEDICAL CENTER EVERETT, Defendant.	No. 76797-6-I DIVISION ONE UNPUBLISHED OPINION FILED: April 22, 2019

HAZELRIGG-HERNANDEZ, J. —We will not substitute our judgment for that of a properly instructed jury. Neither will we require a court to reconsider its denial of a request to amend pleadings when its decision was based on the unnecessary delay of the party seeking amendment. Snohomish County asks us to reconsider

jury determinations of facts, and to remand to amend its pleadings. We decline to do so, and affirm the verdict of the jury and the judgment of the trial court.

FACTS

Joel Kelly suffered a serious brain injury after falling from a ladder. After Kelly was treated at a critical care unit, he was transferred to an inpatient rehabilitation unit at Providence Medical Center. Kelly did not have the decision making capacity to decide to leave Providence. His ex-wife had his power of attorney for medical decisions and could have chosen to take him out of the rehabilitation unit. He was an elopement/wander risk. Within his first hour of arrival on the rehabilitation unit, Kelly was assigned a one-on-one sitter to help keep him safe and redirect him. He required the one-on-one sitter throughout his entire stay. Kelly perseverated on leaving throughout his stay.

On Thursday, November 28, 2013, Kelly's family visited him at the rehabilitation unit. After Kelly's family left, he became more agitated and wanted to leave. Kelly continued to be confused, agitated, and disoriented. Providence placed him in soft, two-point restraints, connecting his wrists to the bed. The subsequent events were contested at the trial court.

That evening, Walter Garre, a dispatch line volunteer with Volunteers of America, received a call regarding Kelly. Garre's notes from the call indicated that Kelly was acutely psychologically distressed, uncontrollable, uncooperative, was unable to make safe decisions, exhibited poor judgment, had no safety awareness, and was not oriented to his surroundings. His notes also indicated Kelly was medically cleared for discharge. Garre had no independent recollection of the call,

but he testified he would have read everything in the note to the County Designated Mental Health Professional (DMHP), Andrea Waldschmidt. He also testified that he would have included that Kelly was physically aggressive with staff in his notes if that information was communicated to him.

Linda Albizu, the nurse caring for Kelly that day, testified that she told DMHP Waldschmidt that Mr. Kelly wanted to leave but was unable to make safe decisions for himself. She told Waldschmidt she wanted to have Kelly evaluated in the interest of his safety. She recalled telling Waldschmidt that Kelly believed he was in Mexico, but could not recall if she told her Kelly was combative.

Dr. Steven Lee, the on-call physician working at the time, testified that he spoke with Waldschmidt regarding Kelly, and wanted her to evaluate Kelly to take him out of the rehabilitation unit and to a safer place. He testified that Waldschmidt told him she could not evaluate Kelly because his behaviors and confusion were due to traumatic brain injury, not a psychiatric issue. Lee testified that Kelly's medical treatment was not a barrier to transferring him to another facility. Lee was not at the hospital that night.

Charge Nurse Megan Stefanich oversaw patient care on Kelly's rehabilitation unit. She testified she called either an intake person or DMHP. She testified the person she spoke with asked about Kelly's behaviors, confusion, diagnosis, and general questions about the situation. She explained Kelly's mood, temper, and actions, including shoving staff, being verbally abusive, kicking, and hitting. She was told the DMHP was not coming out for an evaluation because Kelly was an in-patient at the hospital.

Waldschmidt recalled speaking with Garre, Albizu, and Lee. She did not recall speaking with Stefanich, but her phone records indicated there were phone calls she did not remember. Waldschmidt testified that no one told her Kelly was combative. She testified that Lee did not want Kelly forced from the medical facility, was still providing medical treatment to Kelly, and was not interested in psychiatric treatment. She testified that Lee was unaware that a patient could not be forced to undergo medical treatment during an Involuntary Treatment Act[1] (ITA) detention.

Waldschmidt testified that the purpose of ITA detention was to force psychiatric treatment. She testified that she determined not to evaluate Kelly because he was not medically cleared for discharge. She suggested Lee contact the hospital's legal department to keep Kelly at the hospital for medical reasons. Waldshmidt was unaware that Lee was not at the hospital. She was unaware that Kelly was in restraints at the time of the call. Waldshmidt testified that if she was informed that Kelly was in restraints or acting combative toward the staff, she would have documented that information in her notes. She believed Kelly was not gravely disabled because the hospital was providing for his care.

Kelly returned to baseline the next morning. His doctor did not expect to have any further issues with him. His doctor did not think it was necessary to call mental health crisis services. Kelly attempted to elope in the early afternoon of the next day, but was redirected to his room and medicated. Kelly stayed in his room for approximately half an hour. Kelly then exited the facility. Providence staff

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[1] Chapter 71.05 RCW

attempted to redirect Kelly, but refused to restrain him. Providence's security staff, Carl Swope, testified that he would have forcefully restrained Kelly if Kelly was held by an ITA detention. After Kelly eloped, he fell down an unfinished staircase at a construction site. As a result of the fall, Kelly suffered grave injuries.

Kelly and his family filed the present action against Snohomish County in King County Superior Court. Snohomish pleaded an affirmative defense against Providence. Kelly reluctantly amended his complaint to include Providence. Kelly settled with Providence before trial.

At trial, Kelly's expert, Dave Stewart, testified that Waldschmidt should have done more investigation. He also believed Kelly was gravely disabled at the time of the call and that his brain injury was a mental disorder that would support an ITA detention. He opined that if Waldschmidt had exercised reasonable standards for a DMHP, Kelly would not have injured himself.

The jury awarded Kelly 10.8 million dollars in damages and found Providence 60 percent at fault and Snohomish 40 percent at fault.

DISCUSSION

After a trial on the merits, with a properly instructed jury, Snohomish County asks this court to review the trial court's denial of its motions for summary judgment, motions for judgment as a matter of law, and motion for a new trial. Denial of a motion for summary judgment is generally not an appealable order. DGHI, Enters. v. Pac. Cities, Inc., 137 Wn.2d 933, 949, 977 P.2d 1231 (1999), (citing Sea-Pac Co., Inc. v. United Food and Commercial Workers Local Union 44, 103 Wn.2d 800, 801-02, 699 P.2d 217 (1985)).

While Washington courts occasionally permit discretionary review from an order of summary judgment under RAP 2.3(b)(1), the purpose of that review is to correct "an obvious error which would render further proceedings useless" RAP 2.3(b)(1). We are not aware of a Washington court that has reviewed denial of summary judgment after a trial on the merits, and Snohomish does not call such a case to our attention. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Washington courts also consider orders denying summary judgment to be interlocutory in nature and permit the issues raised in the motion to be reviewed after trial in an appeal from final judgment. DGHI, Enters., 137 Wn.2d at 949, (citing Rodin v. O'Beirn, 3 Wn. App. 327, 332, 474 P.2d 903, review denied, 78 Wn.2d 996 (1970)). We therefore decline to consider Snohomish's motions for summary judgment, and instead review their post-trial motion for judgment as a matter of law and motion for a new trial.

"Courts are appropriately hesitant to take cases away from juries." H.B.H. v. State, 192 Wn.2d 154, 162, 429 P.3d 484 (2018). Judgment as a matter of law should only be granted when "after viewing the evidence in the light most favorable to the nonmoving party, there is no substantial evidence or reasonable inferences therefrom to support a verdict for the nonmoving party." Id. at 162, (citing Goodman v. Goodman, 128 Wn.2d 366, 371, 907 P.2d 290 (1995)). "We review judgments as a matter of law de novo." Paetsch v. Spokane Dermatology Clinic, P.S., 182

Wn.2d 842, 848, 384 P.3d 389 (2015), (citing Faust v. Albertson, 167 Wn.2d 531, 539 n.2, 222 P.3d 1208 (2009)).

I. Gross Negligence

Snohomish argues that it was not grossly negligent as a matter of law. We disagree. Harper v. State, recently decided by the Supreme Court, clarifies the standard for proving gross negligence. 192 Wn.2d 328, P.3d at 1071 (2018).

There is no dispute that liability in this case is governed by the ITA, and that Snohomish can only be held liable if it was grossly negligent. RCW 71.05.120(1). To prove gross negligence, a plaintiff must show the defendant "'substantially' breached its duty by failing to act with even slight care." Harper, 192 Wn.2d at 341, (quoting Nist v. Tudor, 67 Wn.2d 322, 331, 407 P.2d 798 (1965) (emphasis omitted)).

Courts "may determine [breach of duty] as a matter of law 'if reasonable minds could not differ.'" Id. To analyze a claim of gross negligence on a motion for summary judgment, the court should specifically identify the action "the plaintiff claims that the defendant should have taken but did not, allegedly causing the plaintiff's injury." Id. at 343 The court then determines "whether the plaintiff presented substantial evidence that the defendant failed to exercise slight care under the circumstances presented, considering both the relevant failure and, if applicable, any relevant actions that the defendant did take." Id., (citing Nist, 67 Wn.2d at 332). If the evidence shows the defendant may have failed to exercise slight care in the specific area relevant to the case, judgment as a matter of law

should not be granted even if a defendant exercised great care in other respects. Id. at 344.

In Harper, the Supreme Court considered the actions that the defendant, Department of Corrections (DOC), performed to prevent the supervised offender from contacting the protected party against the further investigative actions the plaintiff alleged the DOC should have performed. Id. at 348-49. The Court found that reasonable minds could not differ about the fact that DOC exercised slight care. Id. at 340.[2]

This case comes to us in a very different posture from Harper. Harper was decided on summary judgment. Id. at 331. This case went before a jury that was properly instructed on gross negligence and returned a verdict for the plaintiffs. In Harper, the facts regarding what DOC knew and did were mostly undisputed. Instead, the parties argued about what DOC should have known and should have done. Here, there was significant dispute about what Waldschmidt actually did and what she actually knew. Conflicting evidence supported Kelly's version of events, and even if reasonable minds could come to a different conclusion, the jury was entitled to resolve those conflicts in Kelly's favor.

We agree with the trial court that whether or not Kelly has proved gross negligence is a close question. The closeness of that question makes it an

[2] In Nist the Court considered a very narrow set of actions by the defendant; evaluating the defendant's conduct regarding an oncoming truck and ignoring the defendant's care in regard to following cars. 67 Wn.2d at 331. Harper does not contradict that approach. In Nist, the breached duty was to yield to oncoming traffic. Id. (Defendant driver slowing her car, using her turn signal, and waiting "had reference to following cars and little or no relationship to the hazards generated by the approaching truck, for the truck had right of way, and the duty to yield rested upon the [defendant's] car before making its left turn.").

appropriate question for the trier of fact. The properly instructed jury considered the disputed facts and standard of care, and returned a verdict for the plaintiff. Substantial evidence supports that verdict, and we will not disturb it. We affirm the judgment of the trial court.

II. Proximate Cause

Proximate cause consists of two elements: cause in fact and legal causation. Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985), (citing Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460, 475, 656 P.2d 483 (1983)). "Cause in fact refers to the 'but for' consequences of an act—the physical connection between an act and an injury." Hartley, 103 Wn.2d at 778, (citing King v. City of Seattle, 84 Wn.2d 239, 249, 525 P.2d 228 (1974)). Legal causation rests on policy considerations regarding how far the consequences of action or inaction should extend. Hartley, 103 Wn.2d at 779. We find that both elements of proximate cause support the jury verdict.

A. Cause in Fact

Cause in fact is normally a question for the jury. N.L. v. Bethel School District, 186 Wn.2d 422, 437, 378 P.3d 162 (2016), (citing Hartley, 103 Wn.2d at 778). But "[c]ause in fact does not exist if the connection between an act and the later injury is indirect and speculative." Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections, 122 Wn. App. 227, 240, 95 P.3d 764 (2004), (citing Walters v. Hampton, 14 Wn. App. 548, 555, 543 P.2d 648 (1975)).

Snohomish argues that the jury can only find cause in fact in this case through speculation. The evidence of cause in fact here is not as speculative as

the evidence in the cases Snohomish relies on to support its argument. cf. Bordon, 122 Wn. App. at 240 (Finding plaintiff provided no evidence that offender supervised by DOC would have remained in jail if not for DOC's negligence.); Hungerford v. State Dept. of Corrections, 135 Wn. App. 240, 253, 139 P.3d 1131 (2006) (same); Smith v. Washington State Dept. of Corrections, 189 Wn. App. 839, 359 P.3d 867 (2015) (same).

Here, viewing the facts in the light most favorable to the plaintiff, Kelly met the criteria for an ITA detention. If an ITA detention had been ordered Kelly would have at least been certified for detention at Providence.

The strongest argument in favor of Kelly is that security guard Swope testified that he would have restrained Kelly if Kelly had been the subject of ITA detention. The only counterargument is that under Providence's elopement policy, he should have restrained Kelly regardless. A scenario where Swope forcefully stopped Kelly from leaving the building because Kelly was held by an ITA detention is not so speculative to prevent this case from being decided by a jury. Viewing the evidence in the light most favorable to Kelly, we find that cause in fact was an appropriate question for the jury and affirm their verdict.

B. Legal Causation

Legal cause "involves a determination of whether liability should attach as a matter of law." State v. Bauer, 180 Wn.2d 929, 936, 329 P.3d 67 (2014), (citing Hartley, 103 Wn.2d at 779). That determination requires "'mixed considerations of logic, common sense, justice, policy, and precedent.'" Hartley, 103 Wn.2d at 779, (quoting King, 84 Wn.22d at 250). Legal cause focuses on "whether . . . the

connection between the ultimate result and the tortfeasor's act is too remote or attenuated to impose liability." Dewar v. Smith, 185 Wn. App. 544, 563, 342 P.3d 328 (2015), (citing Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 609-10, 257 P.3d 532 (2011)). "Legal cause is a question . . . for the court to decide." Minahan v. Western Washington Fair Ass'n, 117 Wn. App. 881, 888, 73 P.3d 1019 (2003), (citing Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 204, 15 P.3d 1283 (2001)).

The clearest test of legal causation is foreseeability: whether the result of the action or inaction is within the general field of danger covered by the duty imposed on the defendant. Rikstad v. Holmberg, 76 Wn.2d 265, 269, 456 P.2d 355 (1969). A patient injuring themselves or others after a DMHP fails to initiate an ITA detention is exactly the type of harm the detention is intended to prevent. Kelly's injury is not too remote or attenuated from Snohomish's failure for the court to impose liability. We find legal causation satisfied under the foreseeability analysis.

III. Construction Entities

Snohomish argues that the trial court denied its motion to amend its answer as a sanction for late disclosure, and asks this court to reverse because the trial court failed to conduct a Burnet test on the record and failed to consider whether lesser sanctions would have sufficed. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Kelly argues that the court instead denied Snohomish's motion to amend its answer on CR 12(i) grounds. Reviewing courts can affirm the judgment of the trial court on any basis found in the record. Backlund v. Univ. of Wash., 137 Wn.2d 651, 669-70, 975 P.2d 950 (1999), (citing LaMon v.

Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027, cert. denied, 493 U.S. 814 (1989). CR 12(i) is a clearer fit with the substance of Snohomish's request. Snohomish not only sought to present additional evidence, it asked to apportion fault to a party not named in its pleadings, requiring an amendment to those pleadings. Analysis under CR 12(i) also appears more consistent with the court's oral ruling.[3]

Under CR 8(c), parties must plead affirmative defenses or risk waiving them. Beaupre v. Pierce County, 161 Wn.2d 568, 575, 166 P.3d 712 (2007), (citing Farmers Ins. Co. of Wash. v. Miller, 87 Wn.2d 70, 76, 549 P.2d 9 (1976)). Affirmative defenses are deemed to be waived if not pleaded, asserted with a motion under CR 12(b), or tried by consent of the parties. The decision to grant or deny leave to amend pleadings is within the discretion of the trial court. Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc., 166 Wn.2d 475, 483, 209 P.3d 863 (2009), (citing Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). Appellate courts affirm the trial court's ruling unless it is manifestly unreasonable, or was exercised on untenable grounds or for untenable reasons. Id. at 483.

Leave to amend pleadings "shall be freely given when justice so requires." CR 15(a). Undue delay is not normally enough to deny an amendment to the pleadings without prejudice to the opposing party. Caruso v. Local Union No. 690 of Intern. Broth. Of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., 100 Wn.2d 343, 349, 670 P.2d 240 (1983) (citing Appliance Buyers Credit Corp. v. Upton, 65 Wn.2d 793, 800, 399 P.2d 587 (1965)). However, where leave to add

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[3]The trial court talks about Burnet and strikes Snohomish's expert witness, and then goes on to state "I am absolutely not allowing an empty chair allocation to the construction company under CR 12(i)"

additional parties has been sought, "inexcusable neglect alone is a sufficient ground for denying the motion." Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 174, 744 P.2d 1032 (1987) (citing North St. Ass'n v. City of Olympia, 96 Wn.2d 359, 368, 635 P.2d 721 (1981)). If the parties to be added were apparent or discoverable upon reasonable investigation, the failure to name them is inexcusable. Id. at 174.

Here, the decision to deny Snohomish's motion to amend its pleadings fell within the trial court's broad discretion. Snohomish failed to name the construction entities in its initial answer. Snohomish did not seek to attribute fault to the construction entities until almost a year after it filed its answer, only three weeks before the then scheduled trial date. The trial court specifically found that Snohomish's failure to name the construction entities in its answer was inexcusable. The facts regarding the construction entities were present at the beginning of the case and were available to Snohomish. Rejecting the amendment on the basis of Snohomish's undue delay was an appropriate exercise of the court's discretion.

While Snohomish argues that the court should have reconsidered its ruling after the prejudice to Kelly abated, the court's ruling was based on Snohomish's inexcusable delay to name the construction entities in its answer. Between the initial motion to amend its pleadings and the motion for reconsideration, nothing had changed regarding the delay, and the court was not required to find prejudice to support its ruling. We affirm.

IV. Misconduct

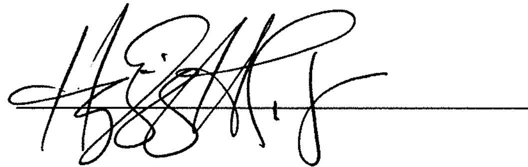
This court reviews a trial court's order granting or denying a new trial for abuse of discretion when it is not based on an error of law. Teter v. Deck, 174 Wn.2d 207, 222, 274 P.3d 336 (2012), (citing Detrick v. Garretson Packing Co., 73 Wn.2d 804, 812, 440 P.2d 834 (1968)). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Id. at 222, (citing In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 362 (1997)). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. Littlefield, 133 Wn.2d at 47.

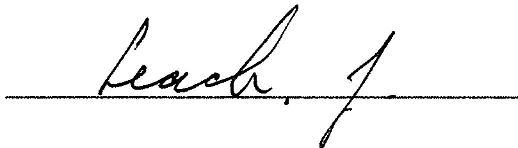
A trial court may grant a new trial where misconduct of the prevailing party materially affects the substantial rights of the losing party. Teter, 174 Wn.2d at 222. (citing Alum. Co. of Am. V. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 539, 998 P.2d 856 (2000)). A court properly grants a new trial where "(1) the conduct complained of is misconduct, (2) the misconduct is prejudicial, (3) the moving party objected to the misconduct at trial, and (4) the misconduct was not cured by the court's instructions." Id.

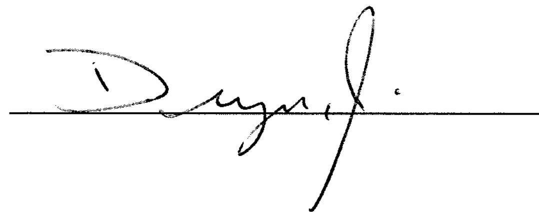
Snohomish alleges that Kelly's counsel violated motions in limine by expressing opinions suggesting that Providence was not at fault and attempting to elicit testimony that Waldschmidt didn't want to leave her home. Additionally, Snohomish alleges that Kelly's counsel did not have a good-faith basis to ask

Waldschmidt whether she had read a newspaper article regarding Kelly's fall before submitting her notes regarding the call. Here, the trial court found misconduct by Kelly's counsel, but even assuming it found prejudice, and Snohomish objected to the misconduct at trial, the trial court's oral findings make it clear that the court found the prejudice was cured by the jury instructions. While reasonable minds could differ as to the trial court's conclusion, nothing in the record indicates that the court's decision was outside the range of acceptable choices, based on unsupported facts, or a misapplication of the facts to the rule. We affirm the trial court's order to deny a new trial.

WE CONCUR:







APPENDIX B

No. 76797-6-I
Motion for Reconsideration
(May 13, 2019)

FILED
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Division I
State of Washington
5/13/2019 2:36 PM

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOEL KELLY, individually and by and through JACQUELINE KELLY, JAKE KELLY, JESSICA KELLY, and JOSHUA KELLY, for themselves and as the children of Joel Kelly, Respondents, v. COUNTY OF SNOHOMISH, by and through NORTH SOUND REGIONAL SUPPORT NETWORK d/b/a NORTH SOUND MENTAL HEALTH ADMINISTRATION, a Washington municipal corporation and regional support network, Appellant, PROVIDENCE HEALTH & SERVICES-WASHINGTON, d/b/a PROVIDENCE REGIONAL MEDICAL CENTER EVERETT, Defendant.	No. 76797-6 MOTION FOR RECONSIDERATION

I. Introduction

Appellant Snohomish County asks this Court to reconsider its decision under RAP 12.4, where it overlooked or misapprehended the controlling law on both gross negligence and sanctions. This Court should grant reconsideration and reverse.

II. Points of law this Court overlooked or misapprehended.

A. This Court has dangerously failed to answer the central issue in this case, leaving many affected counties – and even more patients – in a precarious position.

This Court overlooked or misapprehended the DMHP standard of care, so it could not, and did not determine whether the County, through Waldschmidt, was grossly negligent. Unpub. Op. at 7-9. This is a dangerously vacant decision. The Court should grant reconsideration and reverse.

A healthcare provider acts negligently if she fails to comply with the relevant standard of care. *See, e.g.,* ***Shea v. City of Spokane***, 17 Wn. App. 236, 244-45, 562 P.2d 264 (1977), *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978). But mere negligence is not enough here. RCW 71.05.120(1). The County is immune so long as it performed its duties in good faith and without gross negligence. *Id*. Or at least that is what the statute says.

Gross negligence is the "'failure to exercise slight care.'" ***Harper v. Dep't of Corr.***, 192 Wn.2d 328, 343, 429 P.3d 1071 (2018) (reversing the court of appeals and affirming summary judgment that DOC was not grossly negligent as a matter of law) (quoting ***Nist v. Tudor***, 67 Wn.2d 322, 324, 407 P.2d 798 (1965)). Using ordinary negligence as the "baseline for comparison," gross negligence is "'substantially and appreciably greater than ordinary negligence.'" ***Harper***, 192 Wn.2d at 342 (citing and quoting ***Nist***, 67 Wn.2d at 331). Gross negligence "requires a greater breach" of the relevant duty than ordinary negligence: the plaintiff must prove that the defendant "'substantially' breached [her] duty …." *Id*. at 341.

Therefore, the correct starting point for any proper gross-negligence analysis must be to discern the relevant duty. In ***Harper***, for example, the parties agreed that DOC had a duty to supervise a parolee. 192 Wn.2d at 331. Yet this Court never defines Waldschmidt's duty, overlooking the dispositive issue: what duty, if any, does a DMHP have upon learning that the patient is still receiving medical care in a hospital and is not medically ready for discharge? *Cf.* Unpub. Op. at 7-9. Getting an answer to this question was, quite frankly, *the entire point of bringing this appeal*.

And as the County repeatedly explained, the standard of care for DMHPs is found in statewide protocols established by the Department of Social and Health Services ("DSHS") through legislative directive, and in polices issued by North Sound Mental Health Administration ("NSMHA") – the agency acting as a go-between for DSHS and several counties (including Snohomish) who provide all behavioral-health services across this region. *See* RCW 71.05.214; RP 1131-35, 1141, 1222-23. Both DSHS and NSMHA require that a patient must be medically ready for discharge before he may even be *assessed* under the ITA. RP 1228, 1957; Ex 15.[1] Snohomish County adopted that policy in its policy and procedure manual. RP 1959-60.

Waldschmidt followed this policy when she declined to assess Kelly upon learning that he was not medically ready for discharge. RP 756. It is common for DMHPs not to respond when told that a patient is not medically ready for discharge. RP 1237. A DMHP cannot "substantially" breach her duties by following DSHS, NSMHA, and County protocols. Holding otherwise places the entire system – and all the patients protected by it – in serious jeopardy.

[1] This is consistent with Providence's own policy that an ITA detention cannot be used to force "medical care." Ex 20 ¶1 b(iii)(1); RP 756, 1150.

Kelly largely ignored this issue. BR 9-22; Reply 17-22. This Court apparently follows suit. But overlooking this central issue and its controlling legal analysis is an error of law. And in this case, that error is dangerous. All the affected counties in this Court's jurisdiction need an answer from this Court. It must reconsider.

Beginning from the sound basis of the relevant duty, ***Harper*** goes on to require a two-pronged approach: first, specifically identify the defendant's alleged "failure" to act; and second, decide whether the defendant failed to exercise even slight care, considering both the "relevant failure" and any relevant actions the defendant did take. ***Harper***, 192 Wn.2d at 343. This analysis plainly requires this Court to (1) identify the hazard confronting the plaintiff; (2) consider what the defendant did or did not do to prevent that hazard; and (3) determine whether there is substantial evidence of a "seriously negligent act or omission." 192 Wn.2d at 345-46.

But this Court erred again in failing to follow ***Harper***'s two-part analysis. Here, the "hazard" confronting Kelly was his elopement from Providence; the allegedly "relevant failure" was Waldschmidt's decision not to assess Kelly for an ITA detention upon learning that he was not medically ready for discharge; and the remaining question is whether that amounts to a "substantial

breach." Waldschmidt (1) spoke to nurse Linda Albizu, who told her that Providence was still providing Kelly medical treatment; (2) followed up with on-call doctor Steven Lee, who confirmed that Providence was providing, and would continue to provide, medical treatment and stated that Kelly was not medically ready for discharge; and (3) therefore, elected not to go to Providence to investigate further, entirely consistent with DSHS, NSMHA, and County protocols. RP 570, 672, 757-58, 764, 778, 780, 1132, 1213-14, 1228, 1237, 1957, 1959; Ex 15. She was not grossly negligent.

But this Court failed to even address this controlling legal analysis – nor could it without first identifying Waldschmidt's duty. Unpub. Op. at 7-8. It also failed to call for briefing. RAP 12.1(b).

Rather than follow ***Harper***, this Court attempts to distinguish it on the basis that ***Harper*** was resolved on summary judgment. Unpub. Op. at 8. That is not a valid distinction. The County moved for summary judgment, sought a directed verdict, and sought a new trial, all on the basis that the County was not grossly negligent as a matter of law. CP 20-38, 3633-49, 3943-71. That question never should have gone to a jury. That is a central contention of this appeal. BA 39-44.

The Court again attempts to distinguish ***Harper*** on the basis of a "significant dispute about what Waldschmidt" did and knew. Unpub. Op. at 8. There is no "dispute" about the only fact that matters: what Waldschmidt knew about Kelly's readiness for discharge. Nurse Albizu and Dr. Lee both told Waldschmidt that Kelly was not medically ready for discharge, *a fact Plaintiffs and their expert admitted as to Lee*. BR 21 n.12 (citing RP 900, 944-45). Thus, it is entirely irrelevant that a dispatcher claimed he "would have" *previously* told Waldschmidt that Kelly was medically ready for discharge. BR 16-17; Unpub. Op at 2-3. As a matter of law, it cannot be grossly negligent to rely on qualified, subsequent statements from Kelly's medical providers.

In sum, this Court fails to apply the controlling law, leaving a dangerous void. It should reconsider and reverse.

B. This Court overlooks or misapprehends that under *Keck*, the trial court was required to comply with *Burnet*, regardless of whether it struck the County's affirmative defenses as a discovery sanction or for a failure to comply with CR 12(i).

The trial court denied the County's motion to amend its answer to include claims against the construction "Entities," which fell below the standard of care in safeguarding the construction site where Kelly fell 15-to-20 feet down unfinished, unprotected stairs.

RP 439, 486-87, 512-13, 1207, 1211; BA 23-32. At plaintiffs' behest, the trial court purported to apply the three-part ***Burnet*** test, effectively striking the County's affirmative defenses against Entities upon finding that the County's failure to timely and affirmatively plead those defenses was "inexcusable." RP 293-94; CP 647-58, 1242-43; ***Burnet v. Spokane Ambulance***, 131 Wn.2d 484, 933 P.2d 1036 (1997). This Court affirmed, holding that "CR 12(i) is a clearer fit." Unpub. Op. at 11-12. That overlooks or misapprehends that a ***Burnet*** analysis is required where, as here, the sanction is severe, whether it is based on a discovery or a rule violation. This Court should grant reconsideration and reverse.

It has long been the law that a court imposing a "severe" sanction must consider "whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party." ***Keck v. Collins***, 184 Wn.2d 358, 368-69, 357 P.3d 1080 (2015) (citing ***Jones v. City of Seattle***, 179 Wn.2d 322, 338, 314 P.3d 380 (2013) (addressing ***Burnet***, *supra*)). In ***Keck***, our Supreme Court held for the first time that ***Burnet*** applies not just to discovery sanctions, but also to evidence excluded for failure to comply with a court rule. 184 Wn.2d at 368-69.

Plaintiff Darla Keck brought a medical malpractice case, arguing that her post-operative medical treatment fell below the standard of care. *Id*. When the defendant doctors moved for summary judgment on the basis that Keck lacked a qualified medical expert, ***Keck*** filed three affidavits from her medical expert, one of which was untimely. *Id*. The trial court granted the doctors' motion to strike the untimely affidavit, ruled that the two timely affidavits were insufficient to support plaintiff's claim, and granted the doctors' motion for summary judgment. *Id*.

Thus, at issue in ***Keck*** was whether ***Burnet*** applies when a trial court excludes evidence untimely submitted in response to a summary judgment motion. *Id*. 368-69. Put another way, does ***Burnet*** apply when a party fails to abide by deadlines in court rules, there CR 56(c)? *Id*. at 366. The answer is yes (*id*. at 368-69):

> Our precedent establishes that trial courts must consider the factors from ***Burnet***, 131 Wn.2d 484, before excluding untimely disclosed evidence . . . . We have said that the decision to exclude evidence that would affect a party's ability to present its case amounts to a severe sanction. *Id*. And before imposing a severe sanction, the court must consider the three ***Burnet*** factors on the record . . . .
>
> While our cases have required the ***Burnet*** analysis only when severe sanctions are imposed for discovery violations, we conclude that the analysis is equally appropriate when the trial court excludes untimely evidence submitted in response to a summary judgment motion.

Keck held that the trial court abused its discretion in failing to consider the ***Burnet*** factors and remanded for trial. *Id.* at 362, 374. This Court should have followed ***Keck***.

Under ***Keck***, it does not (and could not) matter whether the trial court effectively struck the County's affirmative defenses as a sanction for its noncompliance with CR 12(i), or as a discovery sanction. *Cf.* Unpub. Op. at 11-12. ***Keck*** could have been decided on the alternate basis that striking the affidavit was not a discovery sanction, but an application of CR 56(c). But ***Keck*** rejects that approach. This Court's approach conflicts with ***Keck***.

This Court again failed to apply controlling precedent. It should reconsider and reverse.

III. Conclusion

This Court should reconsider and reverse.

RESPECTFULLY SUBMITTED this 13th day of May 2019.

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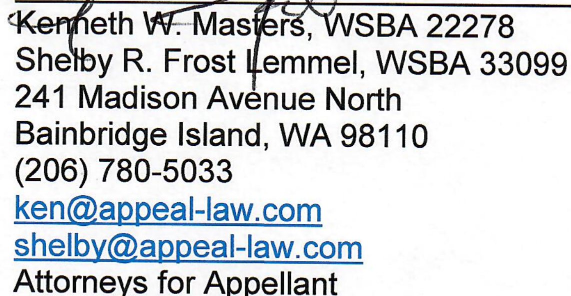

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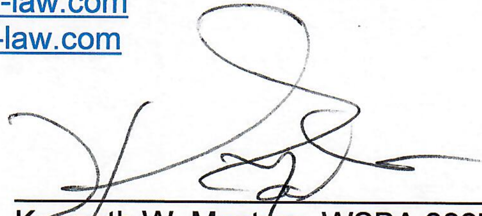

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APPENDIX C

No. 76797-6-I
Opposition to Motion for Reconsideration
(June 17, 2019)

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No. 76797-6-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

JOEL KELLY, individually and by and through
JACQUELINE KELLY, JAKE KELLY, and
JESSICA KELLY, JOSHUA KELLY, for themselves and
as the children of Joel Kelly,

Respondents,

v.

COUNTY OF SNOHOMISH, by and through NORTH SOUND
REGIONAL SUPPORT NETWORK d/b/a NORTH SOUND
MENTAL ADMINISTRATION, a Washington municipal
Corporation and regional support network,

Appellants.

OPPOSITION OF RESPONDENTS KELLY TO COUNTY'S MOTION FOR RECONSIDERATION

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A. INTRODUCTION

Recognizing the weakness of its arguments on appeal, Snohomish County ("County") resorts to blatant misstatements of the record to justify its contention that the jury mistakenly found it grossly negligent in causing Joel Kelly's injuries. The Court's decision is far from what the County insultingly described as a "dangerously vacant decision." Motion at 1.

Rather, after a nearly three-week trial, on proper instructions, the jury correctly found that the County was grossly negligent when its mental health professional ("CDMHP") failed to evaluate Joel Kelly at for an involuntary hold despite *repeated* requests from the staff at Providence Medical Center ("Providence") in Everett for such an evaluation because of his combative conduct arising out of his mental disorder. Providence staff told intake staff at the Volunteers of America ("VOA") and the CDMHP that Kelly was delusional, believing he was in Mexico, he was a danger to himself or others, and he could not be controlled. But the CDMHP refused to even assess Kelly for treatment at a secure evaluation and treatment ("E&T") facility under the Involuntary Treatment Act, RCW 71.05 ("ITA"). As a result, Kelly was not detained, left Providence on his own, entered a construction site while in his delusional state, and fell, causing him to suffer massive injuries.

When the actual record before the trial court is considered, as this Court did in its opinion, and when the law of gross negligence and amendment of pleadings is applied, as this Court did in its opinion, it is clear that this Court's opinion is sound. The County's motion for reconsideration, calculated to drag out the process for Joel Kelly and his family, should be denied.

B. RESPONSE TO COUNTY'S FACTUAL ASSERTIONS

Although the County did not provide a separate section on the factual basis for reconsideration in its motion, Kelly feels compelled to respond to the County's intentional, repeated misstatements of the record.

First, as this is a review from the County's CR 50 motion, such a motion cannot be granted unless "as a matter of law, that there is neither evidence nor reasonable inference therefrom sufficient to sustain the verdict." *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 529, 998 P.2d 856 (2000) ("Alcoa"). A CR 50 motion admits the truth of Kelly's evidence and all inferences that can be reasonably drawn therefrom, and requires the evidence be interpreted most strongly against the County and in the light most favorable to Kelly. *Id.*

Second, throughout its motion, the County obstinately insists that Kelly was not medically ready to be discharged from Providence. Motion

at 3, 4, 5, 6, 7. That assertion is *false*, just as is the County's claim at 5 that "Kelly largely ignored this issue."

Kelly's treating physician, Dr. Catherine Dalton, testified that Kelly was medically ready for discharge from Providence's rehabilitation unit where he was a voluntary patient; he was scheduled for release on the Monday following the Thanksgiving holiday. CP 4575-76, 4587-89. Dr. Steven Lee, Providence's on-call physician, testified that Kelly was *medically* stable at the time he contacted CDMHP Andrea Waldschmidt for an evaluation of Kelly. RP 680-81. Walter Garre, the VOA staffer who did the initial intake on Kelly, reported to Waldschmidt that Kelly was medically ready to discharge. Op. at 2; Ex. 61; RP 871-72.

Moreover, the County's focus on whether Kelley was medically ready for discharge is irrelevant where the jury heard from a well-qualified expert that Kelly "clearly met the criteria for ITA commitment" under the statute, regardless of any alleged protocol regarding his discharge status. RP 955. The County's own alleged policy on ITA detention containing the putative requirement that a detainee must be medically ready for discharge is not hard and fast; exceptions on a case-by-case basis were contemplated. Ex. 15. Had Waldschmidt evaluated Kelly, as she was asked, this exception would have controlled. *See, e.g.*, RP 960-64 (expert witness testifying that Kelly's alleged discharge status was irrelevant to

whether Waldschmidt should have evaluated and put a hold on him, given the circumstances of his case).

But Waldschmidt never evaluated Kelley that day. The County ignores the fact that, despite pleas from Linda Albizu, the Providence nurse caring for Kelly, RP 568-69, Providence charge nurse Megan Stefanich, RP 638-39, 647,[1] and Dr. Lee for an evaluation of Kelly so that he could be treated at a safer, more appropriate secure facility,[2] RP 674-76, Waldschmidt *did nothing*. She wrongfully believed that she had no "jurisdiction" to evaluate patients with organic brain injuries, and she inextricably refused to investigate his condition because she believed HIPAA precluded her from asking follow-up medical questions. RP 676-77, 779, 906-07. The jury heard from an expert – and from Waldschmidt's own supervisor – that no reasonable CDMHP would have acted the way Waldschmidt did that day. RP 888-89, 944-45.

Just as the County misrepresents whether there was evidence that Joel Kelly was medically ready for discharge when its CDMHP refused to evaluate him under the ITA, the County repeatedly contends that its

[1] Waldschmidt did not even remember receiving a call from Stefanich. Op. at 4.

[2] Persons detained under the ITA must be taken to a certified E&T facility that is, by its nature, more secure than a voluntary rehabilitation unit as here. *In re Detention of D.W.*, 181 Wn.2d 201, 332 P.3d 423 (2014). Providence, or its separate rehabilitation unit, is not an ITA evaluation and treatment facility as defined in RCW 71.05.020(21). RP 942-43.

motion to amend to assert a claim against the operators of the construction site was denied as a "sanction" susceptible to the protocol of *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). Motion at 7-10. That assertion, too, is *false*.

The procedural history of the trial court's decision to deny the County's belated motion to amend its answer is recounted in detail in Kelly's brief at 39-42. The experienced trial judge here did not sanction the County. Rather, he denied a motion to amend the pleadings that the County failed to raise until *13 months into litigation*, on the eve of trial. After the trial was continued – through no fault of Kelly – the trial court refused to reward the County for its poor behavior and upheld its prior decision that the County waived the right to amend its pleadings to add a non-party fault claim against the contractors. That decision was well within the trial court's discretion to manage the case and to protect Kelly from significant prejudice.

C. ARGUMENT WHY RECONSIDERATION SHOULD BE DENIED

(1) The Court Properly Addressed the Gross Negligence Issue Here

The County implies that the Supreme Court's opinion in *Harper v. Dep't of Corrections*, 192 Wn.2d 328, 429 P.3d 1071 (2018) somehow changed the law on gross negligence within the meaning of RCW

71.05.120(1). Motion at 3. That is wrong. Moreover, *nowhere* in the County's motion does it assert that the jury was erroneously instructed on gross negligence in Instruction 12 based on WPI 10.07. CP 4447. This Court's observation that it "will not substitute [its] judgment for that of a properly instructed jury" (op. at 1) is particularly apt.

Washington courts have *frequently* held that gross negligence is a fact question for the jury in the ITA setting where the County's CDMHP had a clear-cut statutory duty to evaluate Kelly. RCW 71.05.153(1).[3] The County complains in its motion at 3 that this Court did not "discern the relevant duty." But that duty is unambiguously articulated by the Legislature, as this Court impliedly noted in its opinion at 10. Explicitly,

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[3] *E.g., Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) (treating physician failed to commit patient who relapsed on drugs and injured a woman in a car crash five days after release from Western State Hospital); *Volk v. DeMeerleer*, 187 Wn.2d 241, 386 P.3d 254 (2016) (psychiatrist treating a patient in outpatient setting who expressed homicidal ideations and then acted on them). *See also*, *Bader v. State*, 43 Wn. App. 223, 716 P.2d 925 (1986) (summary judgment in favor of treatment center reversed where there were fact questions as to whether it should have detained mental patient on community release who killed his neighbor); *Poletti v. Overlake Hosp. Medical Ctr.*, 175 Wn. App. 828, 303 P.3d 1079 (2013) (this Court reversed summary judgment in favor of hospital where the hospital discharged an ITA who was killed in a subsequent auto crash; fact issue as to hospital's gross negligence where hospital discharged patient in violation of its own policy on referring patient to CDMHP for evaluation); *Lennox v. Lourdes Health Network*, 195 Wn. App. 1003, 2016 WL 3854589 (2016), *review denied*, 187 Wn.2d 1013 (2017) (unpublished) (Div. III reversed summary judgment in favor of outpatient treatment facility, despite RCW 71.05.120, concluding that there were fact questions as to whether it was grossly negligent in failing to take more aggressive steps to detain conditionally released patient); *Dalen v. St. John Medical Ctr.*, __ Wn. App. 2d __, 436 P.3d 877 (2019) (Division II reversed a summary judgment in favor of a hospital under RCW 71.05.120(1) where there were fact questions as to the hospital's gross negligence in initially detaining, and continuing to detain, a patient with an organic brain injury).

RCW 71.05.153(1) directs CDMHPs to conduct assessments of persons when requested and detain them for 72 hours where necessary:

> When a designated mental health professional receives information alleging that a person, as the result of a mental disorder, presents an imminent likelihood of serious harm, or is in imminent danger because of being gravely disabled, after investigation and evaluation of the specific facts alleged and of the reliability and credibility of the person or persons providing the information if any, the designated mental health professional may take such person, or cause by oral or written order such person to be taken into emergency custody in an evaluation and treatment facility for not more than seventy-two hours as described in RCW 71.05.180.

As noted *supra*, the County's assertion that a CDMHP's duty is circumscribed by whether or not a potential ITA patient is "medically ready to discharge" has no relevance here where Kelly was to be discharged imminently. In any event, this limitation on the County's duty is based on "protocols" and not the ITA itself. Kelly's expert testified pointedly that policies or protocols may not contradict a CDMHP's ITA duty. RP 940. Such "protocols" cannot trump the language of the statute. *See Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 852-54, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007) (agency interpretation of statute in place for 15 years could not overcome statutory requirements).

Harper, a case that did not involve the ITA, did not change this. The *Harper* court noted that a plaintiff must adduce substantial evidence

that the defendant exercised substantially or appreciably less than that degree of care a reasonably prudent entity would have exercised in the same or similar circumstances for gross negligence to go to the jury but the case did not alter the fact that gross negligence is generally a fact question for the jury, as Division II understood in *Dalen*. Here, Kelly adduced evidence that the County's Waldschmidt, in dereliction of her duty under the ITA, exercised substantially less than the degree of care a CDMHP would exercise in similar circumstances by blowing off *repeated* Providence staff pleas for her to conduct an evaluation of Kelly.

Here, ample facts noted by this Court in its opinion at 2-5, 8-9 documented the fact issues surrounding the County's gross negligence that were for the jury. The County failed to make an *informed assessment* of Kelly's violent tendencies and did not use the standards of the medical profession. Waldschmidt refused to even meet with Kelly to determine whether he should be detained, despite ample evidence available to her that he should have been. And she failed to grasp the basic definition of "mental disorder" under the statute, claiming that brain injuries were not her jurisdiction. She was confused about why she should not interview Kelly, believing he was not within "her jurisdiction." Resp'ts Br. at 19-21. Nothing in the "DSHS protocols" excuses these basic failures under the ITA.

Waldschmidt knew of impending danger to Kelly and failed to take appropriate action as the CDMHP under the ITA. She refused to conduct an in-person assessment of Joel Kelly on November 28, 2013, despite her actual knowledge that Kelly was a danger to himself, others and/or gravely disabled. Multiple staff members and medical professionals told her that Kelly was a danger and gravely disabled, yet she failed to even evaluate Kelly under RCW 71.05.153(1) for a 72-hour hold. Even Waldschmidt herself, RP 746-48, and her supervisor Carola Schmid, an experienced CDMHP, recognized that had Waldschmidt asked more questions of Providence staff to understand that Kelly was violent, further investigation and an in-person interview of Kelly would have resulted. RP 1150-51.

Kelly's expert, David Stewart, a former Pierce County CDMHP with an extensive background in CDMHP responsibilities and activities, CP 243, RP 884-86, testified that Waldschmidt's excuses for not assessing Kelly were baseless and that Waldschmidt's conduct fell substantially below the standard of care:

> Q. Can you tell me whether or not Ms. Waldschmidt met her professional obligations in relation to the relation to Joel Kelly and the issues in this case?
>
> A. Unfortunately, I can only conclude that Ms. Waldschmidt utterly failed to exercise common practice that would be expected of any DMHP when presented with the situation that Mr. Kelly was facing.

RP 888-89.[4]

This was not mere negligence. The County engaged in gross negligence, as the jury determined on proper instructions, when its CDMHP failed to execute her statutory duty under RCW 71.05.153(1) in the face of *repeated* requests for a face-to-face evaluation of Kelly from Providence staff noting his combativeness. A rehab unit was no place for Kelly. The jury's verdict and this Court's opinion got it right.

(2) This Court's Opinion Properly Addressed the Trial Court's Decision to Deny the County's Motion to Amend

As noted *supra*, the County wants to transform the trial court's denial of its motion to amend into a discovery sanction question. Motion at 7-10. This Court properly rejected the County's contention, ruling that the trial court did not abuse its discretion on CR 12(i) grounds. Op. at 11-12. The County failed to plead empty chair, non-party fault, as it must under the rule, and as the trial court ruled.

A trial court's decision on the amendment of pleadings is within its discretion, and amendment may be denied if the amendment causes undue

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[4] Stewart testified at trial that Kelly met the criteria for a 72-hour hold on November 28, 2013 and that Waldschmidt should have conducted an assessment, issued a 72-hour hold, and arranged for Kelly's transportation to an E&T facility or kept him at Providence using what is called a single-bed certification. RP 896 ("She should have interviewed all of the relevant witnesses on the phone at least and determined – and I believe that if she did that, she couldn't have made any other determination than that Mr. Kelly required further investigation for an involuntary commitment."). He also testified that Kelly's injury would have been prevented if Waldschmidt conducted the evaluation required under the ITA. RP 907, 942-43. Waldschmidt agreed that a bed would have been available for Kelly. RP 798.

delay, unfair surprise, or jury confusion, or amendment would be futile. *Cambridge Townhomes LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 484, 209 P.3d 863 (2009). More to the point, non-party fault must be *timely* pleaded and proven or the issue is waived. CR 8(c); *Adcox v. Children's Ortho. Hosp. & Med. Ctr.*, 123 Wn.2d 15, 24-25, 864 P.2d 921 (1993); *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 858, 313 P.3d 431 (2013). Indeed, in *Dormaier*, Division III expressly noted that waiver occurs if counsel is dilatory in asserting the defense, as here. *Id.* at 859 (citing *Lybbert v. Grant Cty.*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000)).

The County played games in delaying raising the contractor liability issue. The County disclosed an expert witness to opine on non-party fault 13 months into the case, on the eve of trial, but it never identified the entities it alleged were at fault in its pleadings as required by CR 12(i). The only explanation the County offered for its late disclosure was that it retained new counsel after the parties' failed mediation who re-analyzed the case just before trial. CP 2340-41. The trial court correctly concluded that this explanation was unacceptable given the requirements of CR 12(i), and, if accepted, it would create perverse incentive for parties to delay trials by switching counsel at the last minute. CP 2342-43. The trial court exercised proper discretion by denying the County's last-minute

attempt to assign non-part fault to the contractors. *See, e.g., Gunn v. Riely*, 185 Wn. App. 517, 530, 344 P.3d 1225, *review denied*, 183 Wn.2d 1004 (2015) (holding that trial court properly denied an untimely non-party fault claim raised on the eve of trial in a trial brief).

Even after the trial was continued – through no fault of Kelly – the County failed to join Providence's motion to amend its pleadings to identify the contractors as potential non-parties at fault. The trial court acted within its discretionary authority to hold the County accountable for its inexplicable undue delay in pleading non-party fault, as this Court properly determined. Op. at 13.

The County relies on *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015) to support its position. Motion at 8-9. *Keck* does not help the County. There, the trial court excluded an untimely declaration submitted in connection with a response to a motion for summary judgment as equivalent to a sanction on discovery. *Id.* at 369-70. By contrast, a trial court decision to grant a motion to amend falls squarely within the *Cambridge Townhomes* analytical framework that specifically includes "undue delay." A decision on a CR 15 motion to amend stands apart from a *Burnet*-type sanctions analysis. Simply put, not every decision by a trial court to exclude evidence, or deny a motion falls within *Burnet*.

In any event, the trial court conducted a *Burnet* analysis even though it did not need to do so. On February 11, 2016, the trial court struck the County's expert on contractor liability, Mark Lawless, because the County willfully failed to disclose him. Out of caution, the trial court conducted a *Burnet* analysis contemporaneously with its decision to exclude Lawless. CP 1242-43, 2352. Thus, the trial court conducted a thoughtful analysis to ensure that it considered the entire issue, even when it had the discretionary authority to deny a motion to amend the pleadings without necessarily going through the *Burnet* factors. That was sufficient even under an extreme interpretation of *Keck*, extending it to CR 15 motions to amend. The Court correctly analyzed this issue. Op. at 12.

Finally, should it choose to do so, this Court can rest its decision to affirm the trial court's discretionary CR 15 motion decision on the futility of any amendment. If the Court were to conclude that *Burnet* extends to CR 15 motion decisions, and the trial court's *Burnet* analysis here was somehow insufficient (which it was not), any alleged error was harmless. *Jones v. City of Seattle*, 179 Wn.2d 322, 356, 314 P.3d 380, 397 (2013). The non-party fault amendment was futile because the non-parties could not be liable for Kelly's injuries, therefore any error in refusing to allow a non-party fault argument was harmless.

Kelly was a trespasser under principles of premises liability law. The construction entities were not liable to a trespasser unless they exhibited willful or wanton misconduct. *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 41, 846 P.2d 522 (1993); *Johnson v. Schafer*, 110 Wn.2d 546, 756 P.2d 134 (1988); *Winter v. Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453, 454 (1966) ("One who enters upon the premises of another as a trespasser does so at his peril."). "Whether the doctrine of wanton misconduct applies is initially a question of law for the court." *Johnson*, 110 Wn.2d at 548. "Wanton misconduct is not negligence" – it requires a positive showing that the landowner intentionally acted or failed to act in reckless disregard of the consequences. *Id.* at 549. There must be reason to know with "a high degree of probability" that substantial harm to another would occur. *Id.*

In *Johnson*, the Supreme Court ruled that summary judgment should be granted to a landowner where a trespassing motorcyclist struck a steel cable across the landowner's private road. *Id.* at 551. The landowner posted signs warning against the entry upon the property and had yellow ribbons marking the cable. *Id.* at 449. The Court found as a matter of law that the landowner was not liable. *Id.* at 551. *See also*, *Estate of Wheat v. Fairwood Park Homeowners Ass'n*, 3 Wn. App. 2d 1011, 2018 WL 1641017, *review denied*, 191 Wn.2d 1005 (2018) (on

issue of attributing fault to empty chair defendants, Division III held that homeowners association owed no duty to a trespasser who drove his golf cart into a gate placed by the association across its private road).

Kelly was a trespasser at a private construction site. The record shows that there were warning signs at the construction site and a barricade at the stairway where Kelly fell. CP 2486-87, 2500-04. The contractors' employees on shift documented that Kelly climbed over barricades before he fell. CP 2487. There is *nothing* in the record to show that any of the identified non-party contractors engaged in any form of willful or wanton misconduct towards Kelly, a trespasser on their jobsite.

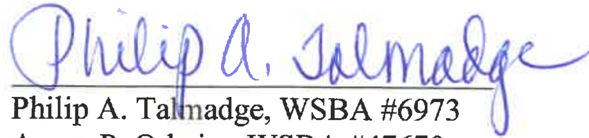
D. CONCLUSION

The County's motion for reconsideration is a heartless delaying tactic, bereft of merit, that resorts to continued distortions of the record to fuel its contentions. The jury was properly instructed on gross negligence and causation and its verdict was amply supported. The trial court did not abuse its discretion in rejecting the County's unsupported, prejudicial motion to amend to submit a claim when it failed to comply with CR 12(i). The trial court properly entered its judgment on the jury's verdict, and did not err in denying the County's post-trial motions.

This Court's opinion was sound in rejecting the County's arguments, and the County's motion for reconsideration should be denied.

DATED this 17th day of June, 2019.

Respectfully submitted,



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Attorneys for Respondents

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Opposition of Respondents Kelly to County's Motion for Reconsideration*** in Court of Appeals, Division I Cause No. 76797-6-I to the following:

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Original e-filed with:
Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

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

DATED: June 17, 2019 at Seattle, Washington.

Patrick J. Aguilar, Legal Assistant
Talmadge/Fitzpatrick

APPENDIX D

No. 76797-6-I
Order Denying Motion for Reconsideration
(July 2, 2019)

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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July 2, 2019

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CASE #: 76797-6-I
Joel Kelly, et al, Resp/X-App v. County of Snohomish, App/X-Resp

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: Reporter of Decisions

FILED
7/2/2019
Court of Appeals
Division I
State of Washington

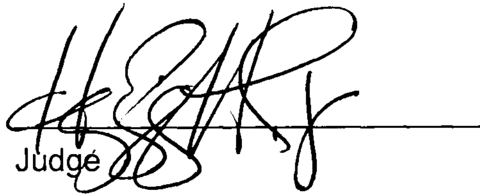
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOEL KELLY, individually and by and through JACQUELINE KELLY, JAKE KELLY, JESSICA KELLY and JOSHUA KELLY, for themselves and as the children of Joel Kelly, Respondent/Cross-Appellant, v. COUNTY OF SNOHOMISH, by and through NORTH SOUND REGIONAL SUPPORT NETWORK d/b/a NORTH SOUND MENTAL HEALTH ADMINISTRATION, a Washington municipal corporation and regional support network, Appellant/Cross-Respondent, and PROVIDENCE HEALTH & SERVICES-WASHINGTON, d/b/a PROVIDENCE REGIONAL MEDICAL CENTER EVERETT, Defendant.	No. 76797-6-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Snohomish County, filed a motion for reconsideration of the opinion filed on April 22, 2019. The respondents, Joel Kelly et al., have filed a response. A majority of the panel has determined that the motion should be denied. Now therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

For the Court:



Judge

MASTERS LAW GROUP PLLC

August 01, 2019 - 3:52 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76797-6
Appellate Court Case Title:	Joel Kelly, et al, Resp/X-App v. County of Snohomish, App/X-Resp

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