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99643-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

APPELLATE CASE NO. 37484-0-III

IBRAHIM A. ABDULWAHID,
Petitioner
v.
EASTERN STATE HOSPITAL, a division of WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES, a Washington State Agency; and PHILLIP PRICE,

Respondent

AMENDED PETITION FOR DISCRETIONARY REVIEW BY SUPREME COURT SUPREME COURT NO. 99643-1

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IDENTITY OF PETITIONER

Ibrahim A. Abdulwahid, asks this court to accept review of the decision or parts of the decision designated in Issues Presented For Review of this Petition.

DECISION

The Division III of the Court of Appeals decision affirming the Whitman County Superior Court, Case Number 15 2 00139 4 entered by the Court of Appeals on February 9, 2021; and the Order Denying Motion For Reconsideration entered March 11, 2021. A copy of the Court Of Appeals decision, Appendix I, and the denial of the motion for reconsideration, Appendix II, are attached.

ISSUES PRESENTED FOR REVIEW

1. The decision is in conflict with the decisions of the Supreme Court, namely:

Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989); *Baldwin v. Sisters of*

Providence , 112 Wn.2d 127,132, 769 P.2d 298 (1989); *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977); *Graves v. P.J. Taggares Co*, 94 Wn. 2d 298, 302, 616 P.2d 1223 (1980); *Parkin v. Colocousis*, 53 Wn.App. 649, 769 P. 2d 326 (1989); and *Zamora v. Mobil Oil Corporation*, 104 Wn.2d 199, 208-209, 704 P.2d 584 (1985).

2. The Court of Appeals erred in determining that Respondent made a prima facie showing that Petitioner lacked evidence to establish an essential element of his case without facts or pointing to the record. Opinion 6-8

3. The Court of Appeals erred in finding that an expert was necessary to to support Petitioner's case. Opinion 9-12

4. The Court of Appeals erred in finding that res ipsa loquitur did not cerate a genuine issue of material fact. Opinion 13-14

5. The Court of Appeals erred in not allowing a continuance to obtain discovery and to provide additional information from his expert. Opinion 14-15.

STATEMENT OF THE CASE

I. PROCEDURAL MATTERS:

Petitioner filed suit on July 9, 2015. CP 1-4. Eastern State Hospital, hereafter Respondent, submitted discovery to Petitioner on August 21, 2015. CP 58. A CR 26(i) conference was held on June 8, 2017. CP 58. No action was taken by Respondent to compel the answers to discovery until February 12, 2020, 48 days after its summary judgment motion was filed. CP 55-56. On December 26, 2019, Respondent filed a declaration of Jacob Brooks, Assistant Attorney General representing Respondent, stating that Petitioner had not responded to the discovery previously submitted. CP 13-14. Respondent filed its motion for summary judgment December 26, 2019. CP 16-19. The motion alleges that Petitioner lacked

competent evidence to make a prima facie case of professional negligence. CP 16. Petitioner responded to the motion alleging that Respondent had not met its initial burden for its motion; that expert testimony was not necessary; and that Respondent owed a duty to protect Petitioner. CP 38-43. In addition, Petitioner further submitted the affidavit of Petitioner outlining the breach of duty by Respondent and the causal connection of the breach that resulted in Petitioners injuries. CP 44-46. The hearing on Respondents motion was scheduled for January 29, 2020. CP 11. Petitioner filed a Motion to Reset Hearing on the motion for summary judgment due to counsels unavailability on the January 29, 2020 date. CP 23. On January 16, 2020, Petitioner then filed a Motion To Continue Summary Judgment Hearing to allow time to receive an experts opinion on the standard of care and review the information from the expert after counsels return from vacation. CP 29-37. The court granted the motion on February 5, 2020. CP 54 After

consulting with Petitioners expert, more information was requested and a new Motion To File Late Declaration; or Reset Summary Judgment Hearing based upon additional information requested by Petitioners expert and outstanding interrogatories and requests for production previously submitted to respondent on January 20, 2020, was filed on February 21, 2020. CP 67-70. On February 27, 2020 the court granted Respondents motion for summary judgment, dismissing Petitioners claim. CP 80-81. Petitioner timely filed a motion for reconsideration, CP 82-84. The motion was denied. CP 89. Petitioner appealed to Division III of the Court of Appeals. CP 90-97. The Court of Appeals affirmed. Appendix I. Petitioner submitted a motion for reconsideration, which was denied. Appendix II.

II. FACTS FOR SUIT:

Petitioner was a patient at Eastern State Hospital in July, 2012. He was assaulted by another patient in the afternoon and he reported this to the staff, requesting to be moved to another

location. The staff did not move him. Later that evening, he was assaulted a second time by the same individual, resulting in serious physical injuries. CP 1-4 and CP 44-46.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1.The decisions of the Court of Appeals is contrary to and in conflict with the decisions of the Supreme Court and Court of Appeals. RAP 13.4(b)(1);

2. There is an issue of substantial public interest for the clarification of the CR 56(c), burden on the moving party in moving for summary judgment. RAP 13.4(b)(4).

STANDARD FOR REVIEW:

In reviewing a trial courts order on summary judgment, the appellate court engages in the same inquiry as the trial court; that summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Disputed facts are considered in the light most favorable to the nonmoving party. *Afoa v.*

Port of Seattle, 176 Wn.2d 460, 466, 296 P.3d 800 (2013).

FAILURE OF MOVING PARTY TO MEET BURDEN:

The Supreme Court and Court of Appeals have held that the burden is on the moving party to establish either by facts or pointing to the pleadings, depositions, answers to interrogatories and admission on file, that there is no genuine issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989). If the burden is not met, then summary judgment should not be granted. *Baldwin v. Sisters of Providence* , 112 Wn.2d 127,132, 769 P.2d 298 (1989) (no reference to the record nor affidavit); *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977) (no affidavit or reference to the record); *Graves v. P.J. Taggares Co*, 94 Wn. 2d 298, 302, 616 P.2d 1223 (1980) (no reference to the record and statement of counsel did not establish facts); *Parkin v. Colocousis*, 53 Wn.App. 649, 769 P. 2d 326 (1989) (conclusory

statement of defendant that he had met the standard of care, without factual support or reference to the record); and *Zamora v. Mobil Oil Corporation*, 104 Wn.2d 199, 208-209, 704 P.2d 584 (1985) (defendant statement that it met the code standard for odorization of gas was inconclusive)

In this case, Respondent has not set forth a factual basis for its motion, other than Petitioner had not answered discovery. Respondent did not met its initial burden for summary judgment and the judgment should not have been granted. *Jacobsen v. State*, supra.

CONCLUSORY FACTS TO SUPPORT MOTION:

In several cases, the facts set forth by the moving party have been held to not be sufficient, since they are conclusions without any supporting facts. See *Parkin, supra.* at 653-654 and *Graves, supra.* at 302

In the case at bar, Respondents have only set forth a conclusion, unsupported by the record, that Petitioner did not

have an expert to establish the standard of care. Since there had been no motion to compel answers to interrogatories that they could point to the court, then the initial burden had not been met by the conclusory statement of Respondents attorney. CP 13-19. The initial burden on the moving party not having been met, then the burden neither shifted to Petitioner nor did the obligation to respond. *Parkin, supra.,* and *Graves, supra...*

NECESSITY OF AN EXPERT/ RES IPSA LOQUITUR

1. EXPERT:

This case is a hospital negligence case. At issue is whether the Petitioner must establish the standard of care by medical experts or whether the doctrine of res ipsa loquitur is available to prove Petitioner case.

A medical expert is not necessary when the negligence of the defendant is observable by a lay individual without medical training. *Shellenbarger v. Brigman*, 101 Wn.App. 339, 347, 3 P.3d 211 (2000).

To prevail in a hospital negligence case, the Petitioner must establish a duty, a breach of that duty, injury, and that the breach of the duty was a proximate cause of the injury. *Miller v. Jacoby*, 145 Wn.2d 65, 74, 33 P.3d 68 (2001)

Respondent owed Petitioner the duty to protect him from injuries by other patients. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997), the court held that a special relationship existed between a hospital and its patients where

> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
> (b) a special relation exist between the actor and the other which gives to the other a right to protection"
> Restatement (Second) of Torts, § 315 (1965)

The case dealt with a patient in a group home for developmentally disabled persons who was raped by an employee of the nursing home. It was found that the special duty of the nursing home existed to protect it's patients and that it was responsible for not providing that protection.

2. RES IPSA LOQUITUR:

Res ipsa loquitur as applied to the facts of this case also eliminates the necessity of expert testimony. *Miller, supra.* at 74 held:

> "For res ipsa loquitur to apply, the following three criteria must be met:
> (1) [T]he occurrence producing the injury must be of the kind which ordinally does not occur in the absences of negligence; (2) the injury is caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the injury-causing occurrence must not be due to an contribution on the part of the plaintiff." (Citations omitted)

Res ipsa loquitur was applied and held to be proper in *Ripley v. Lanzer* 152 Wn.App. 296, 308-309, 215 P.3d 1020 (2009). In that case, the doctor's scalpel broke and he failed to remove all of the broken scalpel pieces from his patient. Res ipsa loquitur was applied to the case when plaintiff withdrew all medical experts and proceeded solely on the doctrine. On appeal, after summary judgment was granted in favor of the doctor by the trial court, the court reversed, holding:

> "Generally, expert testimony is necessary to establish the standard of care for a health care provider in a medical malpractice action. Expert testimony is not necessary to establish the standard of care when medical facts are observable to a layperson and describable without medical training. For example, "the doctrine of res ipsa loquitur provides an inference of negligence from the occurrence itself which establishes a prima facie case sufficient to present a question for the jury."
>
> "The doctrine of res ipsa loquitur recognizes that an accident may be of such a nature, or may happen under such circumstances, that the occurrence is of itself sufficient to establish prima facie the fact of negligence on the part of the defendant, without further direct proof. Thus, it casts upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the presumption or inference of negligence on his part." (citations omitted). *Ripley, supra.* at 306-307
>
> Whether the doctrine of res ipsa loquitur is applicable to a particular case is a question of law, which is reviewed de novo. *Id.,* at 308

Although our case is not a foreign object case, it is analogous to the slip and fall cases where the defendant is on notice of a defect and fails to take action to repair the defect. *Brant v. Market Basket Stores, Inc.*72 Wn. 2d 446, 433 P.2d 863 (1967). A slip and fall case affirming a dismissal of the suit. The standard addressed was that as a prerequisite to

liability, the defendant knew of the danger or should have known of the danger in time to have remedied the situation before the party was injured. *Id.,* at 452.

Here, after the Respondent had knowledge of the first assault by Mr. Price on Petitioner and failed to take any action to control Mr. Price or to protect Petitioner, a duty was created. By not moving Petitioner or isolating Mr. Price, this set in motion the breach of the duty. A hospital has an obligation to control safeguard, protect and supervise it's patients. *Niece, supra.* Petitioner did nothing to contribute to the assault perpetrated on him by Mr. Price. CP 44-47. Respondent was on notice of the dangerous proclivity of Mr. Price toward Petitioner. These facts speak for themselves. Petitioner has established his hospital negligence claim against Respondent, without the necessity of an expert to establish the standard of care. Therefore there existed a genuine issue of material fact.

CONTINUANCE / LATE FILING:

Petitioner moved for a continuance of the summary judgment hearing or to allow the late filing of an opinion declaration and to receive outstanding discovery from Respondent. CP 67-70. In *Perez-Crisantos v. State Farm*, 187 Wn.2d 669, 389 P. 3d 479 (2017) where plaintiff requested an continuance of the summary judgment hearing to allow the receipt of additional discovery from defendant. It was held pursuant to CR 56(f) the motion for a continuance should be granted if the requesting party has a good reason for delay in obtaining the evidence; that the evidence could be established by further discovery, or the new evidence would raise a genuine issue of fact. *Id.*, at 686.

The trial court denied the additional Request For Continuance and the Request To Allow A Late Filing. RP pg 8, ln 10-11. In reviewing the denial of a motion for continuance the standard is whether the denial is a manifest abuse of

discretion. *Lewis v. Bell,* 45 Wn.App. 192, 196, 724 P.2d 425 (1986).

Petitioner requested the continuance, to obtain the written expert's opinion, should the same be deemed necessary by the court, and also to receive outstanding discovery responses that were due from Respondent. CP 70. *Cofer v. County of Pierce*, 8 Wn.App. 258, 262, 505 P.2d 476 (1973), held that a court has a duty to grant a party a reasonable opportunity to complete its discovery before ruling on a motion for summary judgment. See also *Durand v. HIMC Corp.,* 151 Wn. App. 818, 828, 214 P.3d 189 (2009).

The comment on CR 56(f) provides that a continuance of summary judgment hearings should be liberally construed to allow "a just determination in every action." *Keck v. Collins,* 184 Wn.2d 358, 369, 357 P.3d 1080 (2015).

In liberally construing the Motion For Continuance of the February 27, 2020 Summary Judgment hearing, it was a

manifest abuse of discretion to deny the continuance. Had the court considered the Petitioner's need to receive Respondent's outstanding discovery responses and Petitioner's request for additional time to procure the expert's written opinion, if deemed necessary, it would have resulted in a more just determination of the action on it's merits.

In *Keck v. Collins, supra* at 366, the Plaintiff sought to file an additional opinion affidavit on the day before the hearing on summary judgment or to continuance the hearing. The request was denied. However, it was held that the court neglected to consider the *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) factors in reaching its decision to exclude the late filed affidavit. Those factors being whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party. *Keck, supra.* at 368-369. In our case, none of these factors were addressed by the court. The

denial of the Motion To Continue should be considered a manifest abuse of discretion, as there was no willful or deliberate violation by Petitioner in submitting a timely opinion letter, to the extent it was necessary. The delay would not have substantially prejudiced the Respondent, since the trial date was still months away. The sanction that was imposed, "not allowing the continuance or the late filing" resulted in the greatest sanction of all, that being the complete denial of the ability to have a just determination in the action. The *Keck* decision went on to provide:

> But "our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action."[citation omitted]. The "'purpose [of summary judgment] is not to cut litigants off from their right to trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial by *inquiring and determining whether such evidence exists.*'" [citations omitted]. *supra,* at 369

The trial court abused its discretion in not allowing Petitioner to either obtain a continuance or to file a late

affidavit. The *Burnet* factors were not addressed by the court as required in order to grant a summary judgment. This failure was a manifest abuse of discretion. *Lewis, supra* at 196.

CONCLUSION:

The decision of Division III of the Court of Appeals is contrary to the decision of both the Supreme Court and the Court of Appeals. The decision of both the Court of Appeals and of the trial court should be reversed and remanded to the trial court.

Respondent failed to meet its initial burden in moving for summary judgment without setting forth a factual basis for the motion or pointing to the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any. CR 56(c), *Young, supra., Graves, supra., Zamora, supra., Parkin, supra., Baldwin, supra.*. The summary judgment should be reversed on this ground alone.

In the event that the decision should not be reversed on the

foregoing grounds, then the court should consider the following issues, which also support the reversal of the decision of both the trial court and the Court of Appeals.

1. The need for an expert to establish Petitioners case should not have been required. The failure to protect Petitioner from assaults by another patient once the Respondent had knowledge of the first assault, was a genuine issue of material fact and summary judgment should not have been entered. *Miller, supra. and Niece, supra..*

2. Res Ipsa Loquitur is also applicable to Petitioners claim. *Miller, supra., and Ripley, supra..* Negligence has been shown based upon the non actions of Respondent. This was a genuine issue of material fact.

3. Petitioner request for a continuance should have been granted. Petitioner had both outstanding discovery, as well as, a request for additional time to receive responses from his expert, once the discovery was completed. CR 56(f); *Perez-*

Crisantos, supra., Cofer, supra., Durand, supra., and Keck, supra...

4. Petitioners request to file a late affidavit from his expert should have been granted. Petitioners discovery had not been completed and the factors to be considered by the trial court in denying the request were not addressed by the court. *Keck, supra., Burnet., supra.*

Finally, the Division III Court of Appeals decision allows a moving party on a summary judgment motion to have met its burden to shift the burden to the nonmoving party with conclusory facts and without pointing the court to the "pleadings, depositions, answers to interrogatories, and admissions on file", thereby setting a new standard for the moving party, this not consistent with prior Washington law. *Young, supra ..*

Respectfully submitted
this 13th day of April 2021

AITKEN, SCHAUBLE, PATRICK,
NEILL & SCHAUBLE

Howard M. Neill

Howard M. Neill WSBA No. 05296
Attorney for Petitioner

CERTIFICATE OF MAILING

I certify that on this 13th day of April, 2021, I caused a full, true
and correct copy of this PETITION FOR DISCRETIONARY REVIEW BY SUPREME COURT to be mailed to attorney for Respondents, Robert W. Ferguson, Attorney General, Heidi S. Holland, Assistant Attorney General, 1116 West Riverside Ave.,Suite 100, Spokane, WA 99201-1106, by first class United States Mail, with postage fully prepaid thereon.

Howard M. Neill

Howard M. Neill

APPENDIX I

COURT OF APPEALS DECISION

FILED
FEBRUARY 9, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

IBRAHIM A. ABDULWAHID, Appellant, v. EASTERN STATE HOSPITAL, a division of WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES, a Washington State Agency; and PHILLIP PRICE, Respondents.	)	No. 37484-0-III UNPUBLISHED OPINION

SIDDOWAY, J. — Ibrahim Abdulwahid appeals the summary judgment dismissal of his lawsuit against Eastern State Hospital seeking to recover for damages suffered when he was assaulted in 2012 by another patient. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Ibrahim Abdulwahid was an inpatient at Eastern State Hospital in July 2012 when he was assaulted and allegedly seriously injured by Phillip Price, another inpatient. It was after dinner, while Mr. Abdulwahid was making a phone call, that Mr. Price

allegedly attacked him from behind. Earlier in the day, Mr. Price had inexplicably struck Mr. Abdulwahid in the chest during a smoke break. Mr. Abdulwahid responded by completing paperwork asking to be moved to a different floor of the hospital.

Just short of three years later, Mr. Abdulwahid sued Mr. Price and the hospital. Among the allegations in support of his negligence claim against the hospital were the following:

> 4.2. Eastern State Hospital, by and through its employees, was in exclusive control of Plaintiff's environment. Eastern State Hospital and its employees owed Plaintiff the duty to exercise ordinary care to protect him and provide for his safety while he was in Defendant Eastern State Hospital's care.
>
> 4.3. Eastern State Hospital, by and through its employees, knew or should have known that Phillip S. Price presented an unreasonable risk of harm to other patients, including Plaintiff.
>
> 4.4. Eastern State Hospital, by and through its employees acting within the scope of their employment, failed to exercise reasonable care to adequately supervise and monitor Phillip S. Price, or otherwise take reasonable measures to protect Plaintiff from harm.

Clerk's Papers (CP) at 3. Mr. Abdulwahid obtained a default judgment against Mr. Price in July 2016.

Over three years later, on December 26, 2019, the hospital moved for summary judgment dismissal of Mr. Abdulwahid's claim, noting its motion for hearing on January 29, 2020. In a supporting affidavit, an assistant attorney general (AAG) testified on personal knowledge that

> 3. On August 21, 2015, Defendant Eastern State Hospital served Plaintiff with written discovery. Among the information sought through

> interrogatories and requests for production was discovery requests for the Plaintiff to identify each expert witness that he would rely upon for testimony at the time of trial and requests for reports or opinions created by each expert.
>
> 4. After several months without any response to Defendant's written discovery, both sides engaged in a CR 26(i) conference.
> 5. Plaintiff never submitted responses to Defendant's written discovery, nor has Plaintiff identified any expert witnesses or opinions that he would rely upon at trial.

CP at 13-14. The hospital argued that the claims against it should be dismissed since Mr. Abdulwahid did not have expert testimony establishing the relevant standard of care and causation.

On January 6, 2020, Mr. Abdulwahid moved to re-set the summary judgment hearing to a date on or after February 6, based on his lawyer's unavailability. The hearing was re-set for February 11.

On January 16, Mr. Abdulwahid moved for a further continuance of the hearing until the week of February 24 to 28 "to allow plaintiff's expert to submit his affidavit as to the [hospital's] violation of the standard of care." CP at 29. In a supporting declaration, Mr. Abdulwahid's lawyer explained that his office had retained Dr. Safa Rubaye, an expert in hospital administration, to review hospital records and the history of Mr. Abdulwahid's claims. The lawyer stated he would be out of the office until February 4 and unable to review Dr. Rubaye's findings and prepare an affidavit until his return. He provided the curriculum vitae (CV) of Dr. Rubaye that revealed that the doctor was

not licensed in Washington. The CV gave no indication that Dr. Rubaye had ever practiced medicine in Washington.

In opposing the hospital's summary judgment motion, Mr. Abdulwahid argued that the hospital had only speculated, not shown, that he lacked an expert to provide required evidence of a breach of the standard of care. Alternatively, he argued that expert testimony was not required in his case.

In an accompanying affidavit, Mr. Abdulwahid elaborated on the assault and the events preceding it:

> [A]t approximately 3:00 p.m. a number of patients gathered in the hallway preparing for our 3:00 smoke break. There were approximately 20 to 30 of us waiting. In addition, there were counselors present to escort us to the smoking area. As we were going down the stairs, I was walking next to a person, later identified as Phillip Price. Mr. Price stumbled on the stair and when I asked if he was alright, he hit me with his fist in the middle of my chest with such force that it hurt. I then left the group and went immediately to the supervisors station and told the supervisor of the assault by Mr. Price and asked to be moved to a different floor of the hospital. I then went on my smoke break.
>
> Following the smoke break, I returned to the nurses station and requested to be moved to another floor. I was told that I needed to fill out a form. I filled out the form, showing my name and my current room number. The form required me to state why I wanted to be moved. I stated on the form that I did not feel safe because of the assault and that my chest was still hurting from Mr. Price having punched me.
>
> . . . .
>
> . . . At approximately 9:00 p.m. I went to the phone location, across the hall from the nurses station. I was attempting to call my aunt. While waiting for her to answer, Mr. Price came up behind me and struck me in the back of the head, forcing my face onto the telephone desk. I turn to face him and he continued to punch me in the face, about 5 or 6 times. At

> this time I fell out of the chair, that I had been sitting in, and fell to the floor. A male nurse came to see what had occurred. At that time Mr. Price ran from the area.

CP at 45.

On February 5, the court granted Mr. Abdulwahid's request to continue the hearing a second time. It re-set the hearing for February 27.

On February 21, Mr. Abdulwahid filed a motion for leave to file Dr. Rubaye's declaration late, or to re-set the summary judgment hearing a third time. A supporting affidavit from Mr. Abdulwahid's lawyer explained that on January 20 he had served written discovery on the hospital seeking information "relevant to Mr. Price and the actions taken by the hospital once the initial assault on plaintiff was reported to the hospital staff." CP at 70. The affidavit stated he had not yet received responses and that in a "preliminary conversation" with Dr. Rubaye on February 6, the doctor had "requested additional background information concerning Mr. Price." *Id.* at 67, 70.

The trial court proceeded with the summary judgment hearing on February 27. It considered and denied Mr. Abdulwahid's request to extend time to file an expert opinion. It granted the hospital's motion for summary judgment and dismissed Mr. Abdulwahid's claims with prejudice.

Mr. Abdulwahid filed a motion for reconsideration, which was denied. He appeals.

ANALYSIS

Standard of Review

When the issue on appeal is the entry of summary judgment, this court's review is de novo; it engages in the same inquiry as the trial court. *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). Summary judgment is appropriate if the pleadings demonstrate that there is no genuine issue as to any material fact. CR 56(c). This court views all facts and all reasonable inferences in the light most favorable to the nonmoving party. *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 758, 63 P.3d 142 (2002). Summary judgment is proper only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

I. THE HOSPITAL MADE A PRIMA FACIE SHOWING THAT MR. ABDULWAHID LACKED EVIDENCE TO ESTABLISH AN ESSENTIAL ELEMENT OF HIS CASE

There are two ways a defendant can move for summary judgment. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993). "First, the defendant can set out its version of the facts and allege that there is no genuine issue as to the facts as set out." *Id.* "Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case." *Id.* A defending party employing the second option "must identify those portions of the record, together with the affidavits, if any, which he or she believes

demonstrate the absence of a genuine issue of material fact." *Id.* at 22. The requirement that the moving party set forth specific facts does not apply because "'a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" *Id.* at 23 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). A defendant may bring a motion for summary judgment before discovery is complete. *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 685-86, 389 P.3d 476 (2017).

The hospital supported its motion for summary judgment with the affidavit of an AAG stating that well over three years earlier, the hospital had served Mr. Abdulwahid with written discovery seeking his disclosure of the expert witnesses on who he would rely at the time of trial and their opinions. The civil rules generally require answers or objections to such discovery within 30 days. CR 33(a), 34(b)(3). The AAG further stated that counsel for the hospital had requested and engaged in a CR 26(i) conference with plaintiff's counsel in an effort to obtain responses. The declaration of a second AAG submitted in February 2020 established that at the CR 26(i) conference, which took place in June 2017, Mr. Abdulwahid's lawyer represented that discovery responses would be forthcoming as soon as draft answers could be reviewed and signed by his client.

The hospital's demonstration that Mr. Abdulwahid failed to respond for well over three years to discovery seeking his expert's identification and opinions satisfied its burden in moving for summary judgment.

II. MR. ABDULWAHID'S SUBMISSIONS DID NOT PRESENT EVIDENCE OF (1) A WASHINGTON STANDARD OF CARE HE CONTENDED WAS BREACHED, (2) A GROSS DEVIATION FROM THE STANDARD OF CARE RECOGNIZABLE BY A LAYPERSON, OR (3) CIRCUMSTANCES SUPPORTING AN INFERENCE OF NEGLIGENCE UNDER THE DOCTRINE OF RES IPSA LOQUITUR

In Washington, actions for injuries resulting from health care are governed by chapter 7.70 RCW. *Miller v. Jacoby*, 145 Wn.2d 65, 72, 33 P.3d 68 (2001). Liability can be established by proving that the "injury resulted from the failure of a health care provider to follow the accepted standard of care." RCW 7.70.030(1). For purposes of the statute, "health care providers" include hospitals. RCW 7.70.020(3). RCW 7.70.040 provides that the plaintiff in an action asserting an injury resulting from a health care provider's failure to follow the accepted standard of care must show that the defendant health care provider "failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances," and that "[s]uch failure was a proximate cause of the injury complained of."

"In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson. Medical facts in particular must be proven by expert testimony unless they are observable by [a layperson's] senses and describable without medical training. Thus, expert testimony will generally be necessary to establish the standard of care and most aspects of

causation." *Harris v. Robert C. Groth, MD, Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (alteration in original) (footnote, internal citations and quotations omitted).

Mr. Abdulwahid failed to present expert testimony establishing the hospital's standard of care and causation. Two of his arguments on appeal are that expert testimony was not required for the type of negligence he was asserting. We address them in turn.

Facts establishing negligence that Mr. Abdulwahid contends are observable and describable without medical training

Mr. Abdulwahid contends the hospital owed him a duty of protection, because there is a special relation between a mental health care provider and potential victims of a patient who the provider knows has propensities to harm others. The hospital acknowledges it has a duty to protect patients against reasonably foreseeable risks of harm including dangerous patients, but it argues that Mr. Abdulwahid does not present facts that lay jurors could determine constituted negligence without expert testimony about what a reasonable inpatient psychiatric hospital would or would not have done in this situation.

Mr. Abdulwahid conflates the existence of a mental health care provider's "special relation" with medical negligence that can be proved without expert testimony. They are two different things. The significance of a special relation is that it gives rise to a duty to prevent a third party from causing harm to another that does not otherwise exist. *Volk v. DeMeerleer*, 187 Wn.2d 241, 255, 386 P.3d 254 (2016) (discussing RESTATEMENT

(SECOND) OF TORTS § 315 (AM. LAW. INST. 1965)). A claim stemming from a mental healthcare provider's breach of this duty is a medical negligence claim. *Id.* at 254. Establishing that the defendant breached the duty might be provable without expert testimony, but often it will not be. As the Supreme Court observed in *Volk*, "[t]he foreseeability of the victim, as well as what actions are required to fulfill this duty, is informed by the standards of the mental health profession." *Id.* at 255.

Mr. Abdulwahid relies on *State v. Petersen*, 100 Wn.2d 421, 671 P.2d 230 (1983) in conflating the issues, but *Petersen* analyzes them as distinct. The plaintiff in that case sued Western State Hospital (Western) for its decision to release rather than seek additional confinement for Larry Knox, who had been involuntarily committed after cutting out his left testicle. Five days following Knox's release from Western, Cynthia Petersen was making a lawful turn at an intersection when her car was struck by a vehicle driven by Knox, who ran a red light driving 50 to 60 miles an hour. *Id.* at 422-23.

Evidence at trial established that at the time of Knox's involuntary commitment he was serving probation for a burglary conviction, and among conditions of his probation were that he participate in mental health counseling and refrain from using controlled substances. *Id.* at 423. Knox's treating provider at Western was aware Knox was on probation but was evidently unaware of the probation terms. The provider learned that Knox had an extensive history of drug abuse, including frequent recent use of angel dust. *Id.* Knox was released based on the treating provider's opinion that he was not

schizophrenic but had suffered a schizophrenic reaction to the angel dust, from which he had recovered. *Id.* at 424. This, despite Knox being apprehended the day before by hospital security personnel when he drove his car on hospital grounds recklessly, spinning it in circles (he had been allowed to go home for Mother's Day). *Id.* at 424.

Evidence at trial established that Knox was under the influence of drugs at the time he struck Petersen's car and that he had flushed the antipsychotic medication he received from Western down the toilet. *Id.* The jury also learned that a half year after Knox drove into Petersen's car, he killed a couple and raped their daughter. It heard the testimony of three psychiatrists who had treated Knox in periods either before or following his release from Western, all of whom testified that he *did* suffer from schizophrenia. *Id.* at 438-39.

While Petersen presented the misdiagnosis evidence, she did not call an expert to testify to the standard of care of a psychiatric hospital making discharge decisions. For that reason, Western's appeal challenged the sufficiency of her evidence to establish a violation of the standard of care that would support her claim. The Supreme Court held that given Petersen's other evidence, the standard of care evidence was not required. "Even in a professional malpractice case . . . expert testimony is not required if the

practice of a professional is such a gross deviation from ordinary care that a lay person could easily recognize it." *Id.* at 437.[1]

Unlike the evidence presented in *Petersen*, Mr. Abdulwahid offered no clinical diagnoses of Mr. Price or evidence that he had dangerous propensities. His own complaint included a necessary averment that the hospital "knew or should have known that Phillip S. Price presented an unreasonable risk of harm to other patients," CP at 3, yet the only evidence Mr. Abdulwahid offered of the hospital's notice was testimony that he requested a room change and attributed it to being struck by Mr. Price. (As the hospital points out, the request form was not itself submitted as evidence by Mr. Abdulwahid.)

By Mr. Abdulwahid's lawyer's own admission, Dr. Rubaye was not prepared to express an opinion without more information about what the hospital knew about Mr. Price. Since Mr. Abdulwahid did not present evidence of "such a gross deviation from ordinary care that a lay person could easily recognize it," he needed expert testimony.

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[1] Probably the best known example of a deviation recognizable by laypersons is leaving a foreign object in a patient's body, which is negligent as a matter of law. *See Miller*, 145 Wn.2d at 72 (citing *McCormick v. Jones*, 152 Wash. 508, 510-11, 278 P. 181 (1929)). "Simply put, it is not reasonable prudence to unintentionally leave a foreign substance in a surgical patient." *Bauer v. White*, 95 Wn. App. 663, 668, 976 P.2d 664 (1999).

Res ipsa loquitur

Alternatively, Mr. Abdulwahid argues that res ipsa loquitur should have substituted for proof of negligence. In some cases, breach of duty may be proved by circumstantial evidence under the doctrine of res ipsa loquitur. *Miller*, 145 Wn.2d at 74. Three criteria must be met:

> (1) [T]he occurrence producing the injury must be of a kind which ordinarily does not occur in the absence of negligence; (2) the injury is caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the injury-causing occurrence must not be due to any contribution on the part of the plaintiff.

Id. (alteration in original) (internal quotation marks omitted) (quoting *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 58, 785 P.2d 815 (1990)).

An injury caused by an assault by another patient in a mental health facility is not an injury of a kind that ordinarily would not occur absent negligence. And while Mr. Price, as an inpatient, was subject to the hospital's authority and control, that is not the same as saying that his *actions* were within the hospital's exclusive control. It was Mr. Price's independent, not hospital-controlled, actions that caused Mr. Abdulwahid's injury.

Finally, the basis on which the res ipsa loquitur doctrine will permit an inference of negligence is when evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person. *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). Mr. Abdulwahid is not alleging that the cause of his injuries is not

knowable to him. He asserts that the hospital, aware that Mr. Price posed a danger to Mr. Abdulwahid, did nothing. It is easy to imagine the type of evidence Mr. Price could have obtained through discovery that would support or refute this assertion. He has simply failed to obtain it.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A CONTINUANCE

Finally, Mr. Abdulwahid argues the court abused its discretion when it denied his motion for a continuance and refused to consider a late affidavit.

At the time of the duly-noted and twice-continued hearing on the hospital's summary judgment motion, there *was* no late-produced affidavit. There was only the question of whether the trial court would decide the motion based on the evidence filed up to that time or grant a continuance. Cases like *Keck v. Collins*, 184 Wn.2d 358, 369, 357 P.3d 1080 (2015), and *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498, 933 P.2d 1036 (1997), involve a plaintiff's evidence that is sufficient and available at the time of decision but that is disregarded because it was tardily produced. That case law does not apply. At issue is CR 56(f), which authorizes a continuance where it appears, "for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition."

It is well settled that a party asking for a continuance of a properly-noted summary judgment hearing must make a heightened showing of need for particular discovery. The trial court may deny a CR 56(f) motion for continuance if:

> "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact."

Farmer v. Davis, 161 Wn. App. 420, 430-31, 250 P.3d 138 (2011) (quoting *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)). We review a trial court's decision to deny a continuance under CR 56(f) for abuse of discretion. *Id.* at 431.

Mr. Abdulwahid had been on notice since receiving the hospital's discovery in August 2015 that it would probably hold him to his burden of presenting expert testimony. The need to line up an expert should have taken on new urgency when the hospital requested a CR 26(i) conference. By February 27, 2020, Mr. Abdulwahid did not have in hand even the declaration of a qualified expert suggesting that the expert was familiar with the Washington standard of care and close to being in a position to provide opinion testimony in support of Mr. Abdulwahid's claim.

Mr. Abdulwahid's argument that the hospital was itself a largely inactive litigant is unpersuasive. If a defendant health care provider believes a plaintiff will be unable to obtain essential expert testimony on the standard of care and causation, it is unsurprising that it will defer other trial preparation activity. It was evident from the outset of the case that Mr. Abdulwahid would need to establish what the hospital knew about any dangerous propensities of Mr. Price. Mr. Abdulwahid should have conducted discovery into what the hospital knew, and was or was not doing.

Mr. Abdulwahid fails to show an abuse of discretion in denying a continuance.

Affirmed.[2]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, A.C.J.

WE CONCUR:

Lawrence-Berrey, J.

Staab, J.

[2] Mr. Abdulwahid assigns error to the denial of his motion for reconsideration, but that motion simply reargued matters sufficiently raised in the parties' summary judgment briefing. Those issues are resolved by our review of the order granting summary judgment.

APPENDIX II

COURT OF APPEALS DENIAL OF RECONSIDERATION

FILED
MARCH 11, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

IBRAHIM A. ABDULWAHID, Appellant, v. EASTERN STATE HOSPITAL, a division of WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES, a Washington State Agency; and PHILLIP PRICE, Respondents.	)	No. 37484-0-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of February 9, 2021, is hereby denied.

PANEL: Judges Siddoway, Lawrence-Berrey, Staab

FOR THE COURT:

Siddoway, ACJ

LAUREL H. SIDDOWAY
Acting Chief Judge

AITKEN SCHAUBLE PATRICK NEILL & SCHAUBLE

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