NO. 99643-1

SUPREME COURT OF THE STATE OF WASHINGTON

IBRAHIM A. ABDULWAHID,

Petitioner,

v.

EASTERN STATE HOSPITAL, et al,

Respondents.

STATE RESPONDENT'S ANSWER TO PETITIONER'S AMENDED PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Employing well-established standards, the Court of Appeals correctly affirmed the trial court's order granting summary judgment in favor of Eastern State Hospital, dismissing Abdulwahid's medical negligence claims. This Court's precedent make clear that medical negligence claims require either expert testimony or evidence of gross deviation from ordinary care that is easily recognizable by a lay person. After more than four years of opportunity, Abdulwahid came forward with neither.

It is firmly settled that a defendant in a medical negligence case may obtain summary judgment by identifying the absence of evidence supporting an essential element of a plaintiff's case. The Hospital did so here. Abdulwahid's argument that negligence was so obvious as to not require expert testimony is belied by his own prospective expert's indication of a need for additional information. Finally, Abdulwahid fails to identify an abuse of discretion in the trial court's denial of a third continuance, when, after more than four years of opportunity, he failed to create a record sufficient to support his request for a continuance by showing diligence and how the evidence he sought would raise an issue of material fact to preclude summary judgment.

The unpublished Court of Appeals opinion correctly applies well-settled law and Abdulwahid's failure to come forward with evidence in response to summary judgment is not an issue of substantial public interest. This Court should deny review.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether summary judgment was appropriate on Abdulwahid's claim for medical malpractice when he failed to offer any expert testimony to establish that his injury was caused by a failure to comply with the standard of care for an inpatient psychiatric hospital in Washington.

2. Whether summary judgment was proper when Abdulwahid failed to offer any evidence that an injury caused by an assault by another patient in a psychiatric hospital is not an injury of a kind that ordinarily would not occur absent negligence.

3. Whether summary judgment was appropriate on Abdulwahid's claim of medical negligence when the doctrine of res ipsa loquitur does not apply.

4. Whether the trial court appropriately exercised its discretion to deny Abdulwahid's third motion for a continuance when, (a) at his request, the motion for summary judgment had already been twice rescheduled, (b) it was heard two months after it was filed and over four and one-half

years after Abdulwahid filed suit, and (c) Abdulwahid failed to create a record sufficient to support his request for a continuance.

III. COUNTERSTATEMENT OF THE CASE

Ibrahim Abdulwahid was a patient at Eastern State Hospital, an inpatient psychiatric hospital operated by the State of Washington. CP 2. He alleges the Hospital violated its professional duty to him when another patient, without warning or provocation, assaulted him. CP 3.

Abdulwahid claims that, on July 10, 2012, he and another patient[1] had a brief altercation in the stairwell when multiple patients were going outside for a smoke break. CP 45. The other patient, P.P., was walking beside Abdulwahid when P.P. stumbled. *Id*. He allegedly then hit Abdulwahid in the chest when Abdulwahid asked P.P. if he was okay. *Id.* That was the end of the incident. Abdulwahid reports no necessary staff intervention, no heated words exchanged, no threats, and no resultant injuries. CP 45.

Abdulwahid finished his smoke break and claims he then filled out a room change request form.[2] CP 45. Through mealtime and thereafter on the ward, Abdulwahid did not have any further interactions with P.P. *Id.*

[1] Initials are being used instead of the other patient's name.

[2] Abdulwahid did not provide to the trial court a copy of the form he claims to have filled out. CP 44-47.

That night, about six and one-half hours later, and without warning, P.P. assaulted Abdulwahid for a second time. CP 2.

On July 9, 2015, Abdulwahid brought suit. CP 1. In August 2015, the Hospital served Abdulwahid with written discovery. CP 58. Among the information sought was a request 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. CP 13-14, ¶ 3. After no response, the parties engaged in a CR 26(i) conference. CP 58. Counsel for Abdulwahid indicated that he was waiting for his client to review and sign draft answers and, following that, he would provide completed responses. No answers were ever provided. CP 59.

In July 2016, an order of default was entered against the fellow patient and alleged assailant, P.P. CP 9. Then, for over three years, Abdulwahid allowed the case to languish until, on December 26, 2019, the Hospital filed its motion for summary judgment, which was noted for hearing on January 29, 2020. CP 11-20. In a declaration supporting its motion, the Hospital explained its efforts to obtain discovery. CP 13-14. On January 6, in response to the Hospital's motion, Abdulwahid moved to reset the Hospital's motion. CP 23. On January 16, Abdulwahid again moved to continue the hearing on the Hospital's motion, this time "to allow Plaintiff's expert to submit his affidavit as to the violation of the standard of care of

Eastern State Hospital in the care of the plaintiff." CP 29. With his motion, Abdulwahid attached a curriculum vitae of his proposed expert, Dr. Rubaye. CP 32-37.[3] Counsel indicated that Dr. Rubaye was reviewing records (CP 30) and specifically asked that the hearing be continued "until the week of February 24 to 28 . . . ." CP 29. Per Abdulwahid's request, the hearing was continued until February 27.

Although his time to respond to the twice-continued motion expired on February 16, on February 21, Abdulwahid moved "for an Order that permits the filing of the declaration of plaintiff's expert after the expiration of the time period provide [sic] in the court rules." CP 67. Abdulwahid conceded he waited until January 16, 2020, (CP 70) to retain "an expert to address the standard of care." CP 67. Abdulwahid asked that his expert's declaration "should be . . . taken into consideration with the other arguments to be heard on February 27, 2020," at the hearing on the Hospital's motion. CP 68. However, with his February 21 motion, he did not attach a declaration from Dr. Rubaye for the trial court to consider. He failed to file even a *preliminary* affidavit attesting to Dr. Rubaye's knowledge of the standard of care in the state of Washington, his inability to offer an opinion

[3] Dr. Rubaye's CV "revealed that [he] was not licensed in Washington. The CV gave no indication that Dr. Rubaye had ever practiced medicine in Washington." *Abdulwahid v. E. State Hosp.*, No. 37484-0-III, 2021 WL 475986, slip op. at 3-4 (Feb. 9, 2021); *see also* CP 32-37.

without specified additional information, or a timeframe for when he would be able to offer his opinion. *See* CP 67-71.

The only evidence Abdulwahid offered in response to the Hospital's motion for summary judgment was his own declaration briefly describing the alleged events of July 10, 2012, and injuries. CP 44-46. Even in his sur-reply to the Hospital's motion, he offered no additional evidence: no affidavits or declarations from experts or other witnesses, no deposition transcripts, records, or other documentary evidence – nothing. CP 67-69.

The trial court heard argument and, although Abdulwahid asked that his expert's declaration "be allowed and taken into consideration with the other arguments to be heard" that day (CP 68), he neither offered anything for the judge to consider nor proffered what he expected Dr. Rubaye's declaration testimony would be and how it might create a genuine issue of material fact. The trial judge expressed concern in that regard:

> [W]e don't even know what the expert is going to say, whether the expert is going to say that there was a violation of the standard of care or not. . . . And now to, again, kick this down the road further for more time for an expert that may or may not tell you what the standard of care is, we don't know what the expert's going to say here, and I think that the time really is up.

RP 7:13-24. The court granted the Hospital's motion and dismissed Abdulwahid's claims. CP 80-81. On March 9, Abdulwahid filed a motion for reconsideration. Still, he offered no supporting affidavit from his

proposed expert. *See* CP 82-85. Reconsideration was denied. CP 89.

The Court of Appeals affirmed the dismissal of Abdulwahid's claims, applying this Court's precedents such as *Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983), *State v. Petersen*, 100 Wn.2d 421, 437, 671 P.2d 230 (1983),[4] *Miller v. Jacoby*, 145 Wn.2d 65, 72, 33 P.3d 68 (2001), *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 58, 785 P.2d 815 (1990), *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). This Petition followed.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals' Opinion Does Not Conflict With Controlling Authority

Abdulwahid's suggestion that "clarification" of CR 56(c) is an issue of substantial public interest is misplaced. If ever there were a well-settled area of law, it would be as to summary judgment standard, and both the Court of Appeals and trial court followed CR 56 and binding precedent. They both found that, in response to the Hospital's motion, Abdulwahid lacked competent medical evidence to make out a prima facie case of medical malpractice.

[4] On a different issue, *Petersen* has been superseded by statute, as recognized in *Magney v. Truc Pham*, 195 Wn.2d 795, 466 P.3d 1077 (2020).

The purpose of summary judgment is to avoid unnecessary trials where insufficient evidence exists. *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wn. App. 350, 355, 831 P.2d 1147 (1992) (citing *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989)). In medical malpractice cases, a defendant may move for summary judgment two ways: (1) by setting forth its version of facts and alleging that there is no genuine issue as to those facts, or (2) "inform[ing] the trial court that the plaintiff lacks competent evidence to support an essential element of [his] case." *Boyer v. Morimoto*, 10 Wn. App. 2d 506, 519, 449 P.3d 285, 292, *review denied*, 194 Wn.2d 1022, 455 P.3d 121 (2020). Thereafter, the burden "shifts to the plaintiff to provide an affidavit *from a qualified medical expert witness* that alleges specific facts establishing a cause of action." *Id.* at 520 (emphasis added).

Notably, Abdulwahid ignores this Court's directive in *Young*: "A defendant may move for summary judgment on the ground the plaintiff lacks competent medical evidence to make out a prima facie case of medical malpractice." 112 Wn.2d at 226; *see also Berger v. Sonneland*, 144 Wn.2d 91, 110-11, 26 P.3d 257 (2001) ("Expert testimony will generally be necessary to establish the standard of care and most elements of causation.").

Medical defendants are not required to support their motion with affidavits. *Young*, 112 Wn.2d at 226. Rather, "[t]he moving defendant may meet the initial burden by showing—that is, pointing out to the court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 225 n.1. That is precisely what the Hospital did in this matter. By declaration of two assistant attorneys general, it "point[ed] out to the court" that Abdulwahid did not have the requisite testimony of a medical expert to establish the standard of care for an inpatient mental hospital or causation. CP 13-15, 58-60; *see Young*, 112 Wn.2d at 225 n.1.

The Court of Appeals held, "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." *Abdulwahid*, slip op. at 7. The decision followed the clear directives of CR 56 and established precedent of this Court and published decisions of the Court of Appeals. Abdulwahid is not entitled to review pursuant to RAP 13.4(b)(1) or (4).

B. Abdulwahid Failed to Present Evidence Establishing a Genuine Issue of Material Fact

Despite his protestations that it was a "conclusory statement"[5] to say he could not produce expert medical testimony as to standard of care and

[5] Am. Pet. for Review at 8.

causation, it is undisputed that he failed to do so. Once the Hospital met its initial burden under CR 56, the burden shifted to Abdulwahid "to provide an affidavit from a qualified medical expert witness that alleges specific facts establishing a cause of action." *Boyer*, 10 Wn. App. 2d at 520. He never did so.

Further, while expert testimony is not required in some limited circumstances, Abdulwahid failed to offer evidence of a gross deviation from ordinary care such that a lay person could easily recognize it. Finally, Abdulwahid failed to demonstrate facts sufficient to support the application of res ipsa loquitor. The Court of Appeals decision followed this Court's established precedent requiring more than conclusory allegations in response to a motion for summary judgment and does not conflict with a published decision of the Court of Appeals. Abdulwahid is not entitled to review pursuant to RAP 13.4(b)(1) or (2).

1. Abdulwahid failed to present the requisite evidence of a standard of care he contended was breached

Abdulwahid's failure to offer *any* evidence of the relevant standard of care was dispositive of his claim of medical negligence. RCW 7.70.030(1) specifically provides that in a medical negligence case, to establish liability, a plaintiff must prove "injury resulted from the failure of a health care provider to follow the accepted standard of care."

RCW 7.70.030(1).[6] Further, as the Court of Appeals correctly recognized, under RCW 7.70.040, a plaintiff has the burden of proving "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.'" *Abdulwahid*, slip op. at 8; *see also Harris*, 99 Wn.2d at 449 (construing RCW 7.70.040). Generally, expert testimony is required because jurors lack the knowledge and experience to determine violation of the standard of care. 99 Wn.2d at 449.

Despite claiming he had retained an expert, Abdulwahid never offered a declaration from one. "The whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence." *W.G. Platts, Inc. v. Platts*, 73 Wn.2d 434, 443, 438 P.2d 867 (1968). Abdulwahid filed suit in July 2015. He was "on notice since receiving the hospital's discovery in August 2015 that [the Hospital] would probably hold him to his burden of presenting expert testimony. The need to line up an expert should have

[6] As the Court of Appeals noted, "For purposes of the statute, "health care providers" include hospitals. RCW 7.70.020(3)." *Abdulwahid*, slip op. at 8.

taken on new urgency when the hospital requested a CR 26(i) conference." *Abdulwahid*, slip op. at 15. In December 2019, the Hospital filed its motion for summary judgment. "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." *Abdulwahid*, slip op. at 15.[7] There is no dispute; Abdulwahid never presented the requisite competent expert testimony establishing the Hospital's standard of care and causation.

2. Abdulwahid failed to establish evidence of a gross deviation from the standard of care recognizable by a layperson

There are limited circumstances where a deviation from the standard of care is so obvious that it does not require expert testimony. This is not one of those cases. Abdulwahid, however, argues without authority that when a special relationship exists, there is no requirement to prove the applicable standard of care. As the Court of Appeals noted, Abdulwahid "conflates the existence of a mental health care provider's 'special relation'

[7] It is not enough for a proposed expert to make an "educated assumption that the standard of care was the same across the country." *Boyer*, 10 Wn. App. 2d at 523 (quoting *Winkler*, 146 Wn. App. at 392); *see also* RCW 7.70.040 (requiring proof of violation of standard of care in the state of Washington).

with medical negligence that can be proved without expert testimony. They are two different things." *Abdulwahid*, slip op. at 9.

It is not enough for there to be a duty; to establish negligence, a plaintiff must prove the defendant deviated from the relevant standard of care. *Amend v. Bell*, 89 Wn.2d 124, 132, 570 P.2d 138 (1977). In parsing out Abdulwahid's muddling of duty and standard of care, the Court of Appeals explained,

> 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. A claim stemming from a mental healthcare provider's breach of this duty is a medical negligence claim.

Abdulwahid, slip op. at 9-10 (citing *Volk v. DeMeerleer*, 187 Wn.2d 241, 255, 386 P.3d 254 (2016)).

"Medical facts in particular must be proven by expert testimony unless they are 'observable by [a layperson's] senses and describable without medical training.'" *Harris,* 99 Wn.2d at 449. For example, technical medical expertise is not required to establish the standard of care in cases where a physician amputates the wrong limb or pokes a patient in the eye while stitching a wound on the face. *Berger v. Sonneland*, 144 Wn.2d 91, 111, 26 P.3d 257 (2001).

The Hospital acknowledges it has a duty to care for and protect its patients. Whether it did so must be measured against the standard of care of

a reasonably prudent inpatient psychiatric hospital in Washington. *See Harris*, 99 Wn.2d 438 (construing RCW 7.70.040). Managing both the individual treatment needs and safety of patients in a psychiatric hospital is complicated and "'[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.'" *Abdulwahid*, slip op. at 10 (quoting *Volk,* 187 Wn.2d at 449). A lay jury should not be left to decide for itself the acceptable standard of care for the Hospital. *See Harris*, 99 Wn.2d at 449.

Further, Abdulwahid offers no evidence to demonstrate that the Hospital so grossly deviated "from ordinary care that a lay person could easily recognize it." *See Petersen*, 100 Wn.2d at 437. Unlike in *Petersen*, Abdulwahid "offered no clinical diagnoses of [P.P.] or evidence that he had dangerous propensities." *Abdulwahid*, slip op. at 12. And, while "[h]is own complaint [alleged] the hospital 'knew or should have known that [P.P.] presented an unreasonable risk of harm to other patients . . . the only evidence Mr. Abdulwahid offered of the hospital's notice was . . . that he requested a room change and attributed it to being struck by [P.P.]." *Id.* Even Abdulwahid's proposed expert was not willing to opine that that was sufficient to establish negligence. *See* CP 68.

Abdulwahid failed to meet his burden "to provide an affidavit from a qualified medical expert witness that alleges specific facts establishing a

cause of action." *See Boyer*, 10 Wn. App. 2d at 520. The Court of Appeals, following *Petersen*, held that because Abdulwahid failed "to present evidence of 'such a gross deviation from ordinary care that a lay person could easily recognize it,' he needed expert testimony." *Abdulwahid*, slip op. at 12. Accordingly, his Petition does not warrant review.

3. Abdulwahid failed to offer evidence of circumstances supporting an inference of negligence under the doctrine of res ipsa loquitur

The trial court and Court of Appeals both followed this Court's established precedent in rejecting Abdulwahid's attempt to infer negligence and causation by application of the doctrine of res ipsa loquitur.

The doctrine of res ipsa loquitur frees a plaintiff from proving specific acts of negligence in cases where a plaintiff asserts that he suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent. *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). For the doctrine to apply, a plaintiff must satisfy three elements: "(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." *Abdulwahid*, slip op. at 13 (quoting *Miller*, 145 Wn.2d at 74).

> The first criterion may be satisfied in one of three ways:
>
> > (1) [w]hen the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.

Reyes v. Yakima Health Dist., 191 Wn.2d 79, 90, 419 P.3d 819 (2018) (negligent diagnosis and improper treatment could not be inferred, but required comparison to standard of care); *see also Miller*, 145 Wn.2d at 75.

Relying on *Miller*, the Court of Appeals found that Abdulwahid had failed to offer evidence to satisfy the criteria for applying the doctrine. *Abdulwahid*, slip op. at 13-14. It explained, "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." This point is accentuated by the fact that Dr. Rubaye would not automatically assign negligence based simply on Abdulwahid's description of what occurred. *See id.* at 12.

As to the second criterion, whether the instrumentality is within the exclusive control of the defendant, the Court of Appeals held, "while [P.P.], 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 [P.P.'s] independent, not hospital-controlled, actions that caused Mr. Abdulwahid's injury." *Abdulwahid*, slip op. at 13. "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. Mr. Abdulwahid is not alleging that the cause of his injuries is not knowable to him." *Id.* at 13-14 (citing *Pacheco*, 149 Wn.2d at 436). Yet, Abdulwahid offered nothing but bare allegations about what the Hospital knew and did or did not do.[8]

The purpose of summary judgment "is to avoid a useless trial. It is to test, in advance of trial, whether evidence to sustain the allegations in the complaint actually exists." *W.G. Platts, Inc.*, 73 Wn.2d at 442-43. "Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment." *Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011). Further, this Court has cautioned that the doctrine of res ipsa loquitor should be "sparingly applied, in peculiar and exceptional

[8] Tellingly, and in violation of RAP 10.3(a)(6), Abdulwahid argues *without citation to the record* what actions he alleges the Hospital took or failed to take. Am. Pet. for Review at 13. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument without reference to the record is not entitled to review).

cases," *Curtis v Lein*, 169 Wn.2d 884, 889-90, 239 P.3d 1078 (2010), and the Court of Appeals' opinion was not in conflict with this Court's precedent. It correctly held that Abdulwahid's failure to establish the requisite elements of res ipsa loquitur precluded him from being relieved from the requirement to provide expert medical evidence to survive the Hospital's summary judgment motion.

C. The Trial Court Did Not Abuse its Discretion in Denying Abdulwahid's Request for a Third Continuance

Abdulwahid's argument that the trial court abused its discretion when it denied his motion for a continuance is not supported by the law or the facts. Further, it ignores his failure to create a record to justify a continuance, as contemplated by CR 56(f). "In deciding a motion to continue, the trial court takes into account a number of factors, including diligence, due process, the need for an orderly procedure, the possible effect on the trial, and whether prior continuances were granted." *In re V.R.R.*, 134 Wn. App. 573, 581, 141 P.3d 85 (2006). Its "decision to grant or deny a continuance is subject only to review for abuse." *Harris v. Drake*, 116 Wn. App. 261, 287, 65 P.3d 350 (2003). None of the authority provided by Abdulwahid supports his position that the trial court abused its discretion.

Abdulwahid's reliance on *Burnet v. Spokane Ambulance*, 131 Wn.2d at 498, and *Keck v. Collins*, 184 Wn.2d at 369, is misplaced. Those

cases apply "when the trial court excludes untimely evidence *submitted* in response to a summary judgment motion." *Keck*, 184 Wn.2d at 369 (emphasis added). Abdulwahid never submitted evidence on which the court could rule, and the Court of Appeals correctly distinguished those cases. *Abdulwahid*, slip op. at 14; *see* CR 56(e).

And, unlike in *Cofer v. Pierce County*, 8 Wn. App. 258, 505 P.2d 476 (1973), Abdulwahid failed to articulate "good reason why he [could not] obtain the affidavit of the witness in time . . . ." *See* 8 Wn. App. at 262-63. Further, he failed to even "provide an affidavit stating what evidence the party seeks and how it will raise an issue of material fact to preclude summary judgment." *See Durand*, 151 Wn. App. at 828. That deficiency was expressly raised by the trial court judge: "[W]e don't even know what the expert is going to say, whether the expert is going to say that there was a violation of the standard of care or not." RP 7:13-24. For that same reason, *Durand v. HIMC Corp.*, 151 Wn. App. 818, 214 P.3d 189 (2009), cited by Abdulwahid, cuts against him.[9] Like the parties seeking to invoke CR 56(f), Abdulwahid "offered no explanation . . . as to why they failed to timely complete discovery." *See* 151 Wn. App. at 826. [10]

[9] Am. Pet. for Review at 15.

[10] Abdulwahid notes that he had an outstanding discovery request to the Hospital. Am. Pet. for Review at 5. That information was not requested until January 2020 and, notably, Abdulwahid offered no good reason for waiting well over four years to request discovery. CP 68, 70 ¶ 3, 1 (Complaint filed July 2015).

While CR 56(f) permits a court to continue a summary judgment motion, the party seeking the continuance must "offer[] a good reason for the delay in obtaining the discovery." In addition, the party must provide an affidavit stating what evidence the party seeks and how it will raise an issue of material fact to preclude summary judgment." *Id.* at 828. The trial court and Court of Appeals expressly noted Abdulwahid's lack of diligence. *Abdulwahid*, slip op. at 14-15; RP 6:7-7:1, 8:2-12. Similarly, Abdulwahid failed to create a record sufficient to support his requests. It is uncontroverted that he did not even offer a preliminary affidavit from Dr. Rubaye indicating his knowledge of the standard of care for an inpatient psychiatric facility in Washington.[11] The trial court did not abuse its discretion in denying Abdulwahid's request for a third continuance, and the Court of Appeals opinion affirming that decision does not conflict with the established precedent of this Court.

V. CONCLUSION

The Court of Appeals correctly affirmed the dismissal of Abdulwahid's claims under well-settled law. The Petition for Review should be denied.

11 The trial court must "make a preliminary finding of fact under ER 104(a) as to whether an expert qualifies to express an opinion on the standard of care in Washington." *Boyer*, 10 Wn. App. 2d at 521.

RESPECTFULLY SUBMITTED this 13th day of May, 2021.

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DECLARATION OF FILING AND SERVICE

I declare under penalty of perjury in accordance with the laws of the State of Washington that on the below date the original of the preceding "STATE RESPONDENT'S ANSWER TO PETITIONER'S AMENDED PETITION FOR DISCRETIONARY REVIEW" was filed in the Supreme Court of the State of Washington, and electronically served on the following parties, according to the Court's protocols for electronic filing and service.

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