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No. 62904-2-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

MINNIE THOMAS,

Appellant,

v.

UNIVERSITY OF WASHINGTON AND
HARBORVIEW MEDICAL CENTER,

Respondents.

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF CASE	1
A. Facts	1
B. Procedure	6
I. ISSUES	9
IV. ARGUMENT	9
A. The Trial Court Was Obligated to Grant Summary Judgment	9
1. Appellant had no Valid Claim under the Health Care Information Act.....	10
2. Appellant had no Valid Claim under Ch. 7.70 RCW	12
3. Appellant had no Valid Claim under the ITA.....	13
B. The Trial Court did not Err by Denying Reconsideration	16
C. The Trial Court did not Err by Imposing Terms.....	17
V. CONCLUSION.....	21
CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Adams v. Western Host, Inc.</i> , 55 Wn. App. 601, 779 P.2d 281 (1989).....	17
<i>Boyce v. West</i> , 71 Wn. App. 657, 862 P.2d 592 (1993).....	16
<i>Branom v. State</i> , 94 Wn. App. 964, 974 P.2d 335 1999)	12
<i>Cooper v. Viking Ventures</i> , 53 Wn. App. 739, 770 P.2d 659 (1989).....	21
<i>Estate of Davis v. State Dept. of Corrections</i> , 127 Wn. App. 833, 113 P.3d 487 (2005).....	15
<i>Fluke Capital & Management Servs. Co. v. Richmond</i> , 106 Wn.2d 614, 724 P.2d 356 (1986).....	18
<i>Guile v. Ballard Comm'ty Hosp.</i> , 70 Wn. App. 18, 851 P.2d 689, review denied, 122 Wn.2d 1010, 863 P.2d 72 (1993))	16
<i>Harris v. Groth</i> , 99 Wn.2d 438, 663 P.2d 113 (1983).....	13
<i>Hontz v. State</i> , 105 Wn.2d 302, 714 P.2d 1176 (1986).....	15
<i>In re Detention of C.W.</i> , 147 Wn.2d 259, 53 P.3d 979 (2002).....	13, 14
<i>In re Guardianship of Lasky</i> , 54 Wn. App. 841, 776 P.2d 695 (1989).....	21
<i>Jeckle v. Crotty</i> , 120 Wn. App. 374, 85 P.3d 931 (2004).....	20

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Kearney v. Kearney</i> , 95 Wn. App. 405, 974 P.2d 872 (1999).....	18
<i>Kleyer v. Harborview Medical Ctr.</i> , 76 Wn. App. 542, 887 P.2d 468 (1995).....	15
<i>McCallum v. Allstate Property and Cas. Ins. Co.</i> , 149 Wn. App. 412, 204 P.3d 944 (2009).....	16
<i>McLaughlin v. Cooke</i> , 112 Wn.2d 829, 774 P.2d 1171 (1989).....	13
<i>Morinaga v. Vue</i> , 85 Wn. App. 822, 935 P.2d 637.....	13
<i>Reed v. Davis</i> , 65 Wn.2d 700, 399 P.2d 338 (1965).....	16
<i>Richter v. Trimberger</i> , 50 Wn. App. 780, 750 P.2d 1279 (1988).....	17
<i>Smith v. Okanogan County</i> , 100 Wn. App. 7, 994 P.2d 857 (2000).....	19
<i>State ex rel. Quick-Ruben v. Verharen</i> , 136 Wn.2d 888, 969 P.2d 64 (1998).....	18, 19
<i>State v. Robinson</i> , 38 Wn. App. 871, 691 P.2d 213 (1984).....	18
<i>State v. Thang</i> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	19
<i>Suarez v. Newquist</i> , 70 Wn. App. 827, 855 P.2d 1200 (1993).....	18
<i>Tiger Oil Corp. v. Department of Licensing</i> , 88 Wn. App. 925, 946 P.2d 1235 (1997).....	18

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Trohimovich v. State</i> , 90 Wn. App. 554, 952 P.2d 192 (1998).....	20, 21
<i>West v. Thurston County</i> , 144 Wn. App. 573, 183 P.3d 346 (2008).....	17

Court Rules

CR 11	20, 21
CR 56	21
CR 56(c).....	7, 8
CR 56(e).....	10, 16
CR 56(f)	9
CR 59(a)(4)	17

Statutes

L. 2008, ch. 375, § 8	13
RCW 4.84.185	1, 17, 18, 19, 20
RCW 7.70	12, 13
RCW 7.70.010	12
RCW 7.70.040(1).....	13
RCW 7.70.100(1).....	12
RCW 70.02	10, 11, 12
RCW 70.02.010(4)(a)	12
RCW 70.02.020	10

TABLE OF AUTHORITIES

	<u>Page</u>
RCW 70.02.020(1).....	10
RCW 70.02.050	10, 11
RCW 70.02.170(1).....	11
RCW 70.02.170(3).....	11
RCW 71.05	1, 5
RCW 71.05.050	13, 14
RCW 71.05.120(1).....	14, 15
RCW 71.05.150	3, 4

I. INTRODUCTION

Appellant (hereinafter “Ms. Thomas” or “Plaintiff”) sued the Respondents University of Washington and Harborview Medical Center, which the University operates, as a result of her emergency detention under the Involuntary Treatment Act, Ch. 71.05 RCW (“ITA”). When the University moved for summary judgment, appellant failed to respond. The superior court granted the motion and also imposed terms under RCW 4.84.185 for bringing a frivolous action. Appellant then sought reconsideration, which the trial court denied.

Appellant’s complaint, her motion for reconsideration, and her appellate brief each fail to articulate any legal theory under which she would be entitled to relief based on the facts in the record. Even when all plausible theories are considered, it is clear that Ms. Thomas was not entitled to relief. Therefore, the trial court should be affirmed.

II. STATEMENT OF CASE

A. Facts.

On May 4, 2005, Ms. Thomas, who was at the time being treated at Harborview’s Dermatology Clinic, called to cancel an appointment scheduled for May 6, 2005 with her treating dermatologist, Dr. Philip Kirby. CP 59. Sheri Ewers, the Medical Assistant who took the call, asked Plaintiff why she was canceling the appointment, to which Plaintiff

answered “I just don’t want Dr. Kirby to worry about me if I don’t show up for my appointment.” CP 59. When Ewers asked why Plaintiff believed that Dr. Kirby would worry, Plaintiff told Ewers that “[h]e knows that sometimes I feel down, and I just don’t want him to worry if I don’t show up.” CP 59. When Ewers asked Plaintiff if she would be willing to talk to a nurse, to which Plaintiff refused, stating “I don’t want to talk to anybody else.” CP 59. Ewers then asked Plaintiff how she was feeling at that moment, to which Plaintiff responded “I’m embarrassed to be seen right now, because I haven’t combed my hair or gotten dressed in a while.” CP 59. Ewers asked why, to which Plaintiff responded “I don’t feel good inside and my life is not worth living.” CP 59. Plaintiff continued, stating “I’ve lost the battle, every day is too hard and I don’t want to go on.” CP 59. In response to these statements, Ewers asked Plaintiff if she was having thoughts of hurting herself, to which Plaintiff said “No, but I just want to die.” CP 59.

Ms. Ewer notified the Charge Nurse on duty, Heidi Sitton, R.N., of Ms. Thomas’s statements. A hospital social worker was also consulted. CP 63. The social worker advised that it was not appropriate to assess the risk of suicide over the telephone. *Id.* Nurse Sitton tried unsuccessfully to each

Plaintiff's psychiatrist, Dr. Sharon Romm.¹ CP 63. Nurse Sitton then called 911 and reported Ms. Thomas as possibly suicidal. The 911 operator responded that the police would conduct a "welfare check." CP 59, 63. Ms. Ewers informed Plaintiff that 911 had been called and attempted to engage Plaintiff in conversation about positive things in her life. CP 59. The medical record reflects that Plaintiff was grateful for her conversation with Ewers, and that Plaintiff was again reminded that 911 had been called and was on its way. CP 59.

After contacting her at home, Seattle Police directed that Ms. Thomas be transferred by ambulance to the Harborview,² where she was admitted at 6:10 PM.³ CP 70. Under the ITA,

if a person is brought to the emergency room of a public or private agency or hospital for observation or treatment, the person refuses voluntary admission, and the professional staff of the public or private agency or hospital regard such person as presenting as a result of a mental disorder an imminent likelihood of serious harm, or as presenting an imminent danger because of grave disability, they may

¹ Dr. Romm diagnosed Ms. Thomas with Mood Disorder not otherwise specified. CP 70.

² The ITA, as effective in 2005, provided that "[a] peace officer may take or cause [a] person to be taken into custody and immediately delivered to an evaluation and treatment facility or the emergency department of a local hospital" when "he or she has reasonable cause to believe that such person is suffering from a mental disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled." Former RCW 71.05.150. This language was amended and recodified as RCW 71.153 by Laws 2007, ch. 145, § 8.

³ According to the ambulance service record, Plaintiff had hid in her home upon being contacted by Seattle Police, and had yelled and screamed at officers upon their arrival at her home. CP 66.

detain such person for sufficient time to notify the county designated mental health professional of such person's condition to enable the county designated mental health professional to authorize such person being further held in custody or transported to an evaluation treatment center pursuant to the conditions in this chapter, but which time shall be no more than six hours from the time the professional staff determine that an evaluation by the county designated mental health professional is necessary.

RCW 71.05.050.

Consistent with statute, Ms. Thomas was evaluated shortly after admission and noted to be exhibiting "psychotic maladaptive behavior." CP 68. She was again evaluated at 7:15 PM, at which time she complained of high blood pressure and feeling dizzy. *Id.* Joyce Farrell, the Advanced Registered Nurse Practitioner ("ARNP") on duty, was notified. CP 68. Farrell began evaluating Plaintiff at 7:45 PM, and had completed her evaluation by 8:25 PM, just over two hours after admission. CP 70. Farrell diagnosed Ms. Thomas as paranoid and suffering from a major depressive disorder, and determined that she was gravely disabled and had an impaired ability to care for herself. CP 71. Unsuccessful efforts were made to contact Plaintiff's sister and son by telephone. CP 71. Accordingly, Ms. Farrell recommended hospitalization pending an evaluation pursuant to the ITA by a County Designated Mental Health Provider ("CDMHP") for suicidal intent. CP 68, 71.

Before 1:00 AM on May 5, 2005, Ms. Thomas was evaluated by a CDMHP.⁴ CP 72. At that time, Plaintiff denied any suicidal ideation. CP 72. The CDMHP was unable to interview any witnesses to Plaintiff's earlier statements and could identify no threats of self-harm in the Police Report. CP 72. The CDMHP therefore concluded there was insufficient evidence to detain Plaintiff under the provisions of RCW 71.05, and she was released. CP 68, 72.

In summary, Plaintiff was assessed within two hours of her arrival at Harborview to determine whether she required evaluation by a CDMHP, and once it was determined further evaluation was necessary, Plaintiff was evaluated by a CDMHP within five hours, whereupon she was immediately released.

After her release, Plaintiff refused to leave the hospital to be transported home by taxi, insisting that she required an ambulance to take her home because she was unable to walk. CP 73. At the same time, Plaintiff refused a medical examination to assess her condition, stating she "would rather die" than be treated at Harborview. CP 73. After it was explained to Plaintiff that her inability to walk may constitute a medical emergency requiring involuntary treatment, Plaintiff stood up and opted to

⁴ Although the CDMHP record of the evaluation (CP 72) is dated 1:00 AM on May 5, 2005, the Patient Assessment and Restrained Patient Flowsheet (CP 68) records the CDMHP evaluation as beginning at midnight.

walk out to wait for a taxi. CP 73. The medical record reflects that Plaintiff walked out of Harborview unassisted. CP 73.

B. Procedure.

Plaintiff filed her lawsuit in King County Superior Court on July 3, 2008. CP 78-81. The Complaint alleged that a University of Washington staff member “made a false 911 welfare check report which caused a horrible chain of events[.]” CP 79. It also alleged that, after being taken to Harborview against her will, Plaintiff was held at Harborview for “many hours” and the attending staff members at Harborview were “very impatient” with her. CP 79. The Complaint did not allege that the Defendants committed any intentional torts or negligence. Nor did Plaintiff identify in her Complaint any legal duty owed to her that was breached by Defendants.

In particular, Plaintiff did not allege that the Defendants violated the applicable standard of care in their medical care and treatment of her, nor did she allege that any violation of the applicable standard of care proximately caused her injury or damage. Finally, Plaintiff did not identify any common law or statutory right that was violated by Defendants. Nevertheless, Plaintiff claimed to be entitled to economic damages in the amount of \$10.5 million dollars, as well as unspecified damages for “great pain and suffering.” CP 80.

On July 31, 2008, Defendants served their Answer on Plaintiff. CP 85-88.⁵ Accompanying the Answer was a cover letter stating Defendants' position that the lawsuit was legally barred on a number of grounds, and urging Plaintiff to retain counsel to advise her regarding the lawsuit. CP 83-84. The letter also notified Plaintiff that, should she not voluntarily dismiss the lawsuit, Defendants would bring a motion for summary judgment and might seek costs. CP 83.

On September 3, 2008, Plaintiff contacted counsel for Defendants by telephone. Counsel for Defendants again advised Plaintiff to seek legal advice on whether her lawsuit had merit, and again requested that she drop the lawsuit. CP 56-57 at ¶ 3. Plaintiff refused. CP 57 at ¶ 3. Accordingly, defendants moved for summary judgment and set a hearing on December 5, 2008. CP 54-55.

The motion and related documents were served on Plaintiff by mail on October 27, 2008, deemed to be complete on October 30, 2008. The October 30, 2008 service date provided Plaintiff with more than a full week's additional notice of the motion than the notice required under CR 56(c). CP 98-99. The pleadings served on Plaintiff were accompanied by a cover letter, explicitly warning Plaintiff that "[u]nder the Washington

⁵ Plaintiff and counsel for Defendants had agreed that all service on Plaintiff would be by mail, at Plaintiff's request. CP 56 at ¶ 2. Plaintiff does not raise the issue of insufficiency of service of process in her appeal.

Civil Rules, any opposition you wish to file to the motion must be filed and served by Monday, November 24, 2008.” CP 101. Plaintiff telephoned defense counsel on October 29, 2008, at which time defense counsel personally notified Plaintiff of the date, location, and time of the hearing on the motion, and also notified her that the pleadings had been mailed to her on October 27, 2008. CP 92 at ¶2.

Pursuant to CR 56(c), Plaintiff was to have filed and served any opposition to the motion by Monday, November 24, 2008. However, as of December 1, 2008, a full week after the deadline, Plaintiff had failed to file any opposition. CP 95. The only filing of Plaintiff in the docket as of that date was Plaintiff’s initial Complaint. CP 95. Plaintiff later admitted in her motion for reconsideration that she was “not prepared properly to argue [her] case on 12-5-08 which includes having a written respond (sic) on file before the hearing.” CP 39.

At the December 5, 2008 hearing for summary judgment, the Court granted summary judgment for Defendants on the basis that Plaintiff had failed to oppose the motion, noting that “[t]he plaintiff has not submitted any documents other than the initial complaint.” CP 106. The Court also imposed terms in favor of Defendants in the amount of \$1,500, and imposed terms in favor of King County Superior Court in the amount of

\$1000, based on its finding that the lawsuit was frivolous and without merit. CP 36-37, 106-109, 111-112.

On December 15, 2008, Ms. Thomas moved for reconsideration. CP 38-48. Her motion consisted of recitation of alleged facts, but did not provide the court with any legal authority supporting her position. *Id.* On December 29, 2008, the superior court denied the motion. CP 49. On January 22, 2009, Ms. Thomas appealed from both orders. CP 50-53.

III. ISSUES

1. Did the superior court err when it granted Respondents' unopposed motion for summary judgment?

2. Did the superior court abuse its discretion when it awarded terms for filing a frivolous action?

3. Did the superior court abuse its discretion when it denied Appellants' motion to reconsider the summary judgment dismissal order?

IV. ARGUMENT

A. The Trial Court Was Obligated to Grant Summary Judgment.

Respondents' summary judgment motion established the facts set forth above and demonstrated why Ms. Thomas was not entitled to relief under any plausibly applicable legal theories. Ms. Thomas did not submit any evidence or legal authority in opposition to that motion or request a continuance under CR 56(f). Therefore, the trial court was obliged to

grant it. *See* CR 56(e).⁶ On appeal, appellant is still unable to articulate any legal theory under which she is entitled to relief, and a brief review of the pertinent authorities shows why.

1. Appellant had no Valid Claim under the Health Care Information Act.

Appellant had no valid claim for wrongful disclosure of protected health information under the Washington Health Care Information Act, Ch. 70.02 RCW because: (1) the express terms of RCW 70.02 permit a health care provider to disclose patient health information (“PHI”) without advance patient consent in order to avoid or minimize an imminent danger to the patient; and (2) the two-year statute of limitations for any claim under Ch. 70.02 RCW had expired.

More specifically, RCW 70.02.020 generally limits the ability of a health care provider to disclose confidential information without advance consent of the patient⁷ and a patient has a civil remedy under RCW

⁶ CR 56(e): “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.”

⁷ RCW 70.02.020(1) reads in relevant part:

Except as authorized in RCW 70.02.050, a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent and employee of a health care provider may not disclose health care information about a patient to any other person without the patient’s written authorization. A disclosure made under a patient’s written authorization must conform to the authorization.

70.02.170(1) for breach of these obligations. However, RCW 70.02.050, entitled “Disclosure without Patient’s Authorization,” expressly permits a health care provider to disclose health care information about a patient without the patient’s permission in, *inter alia*, the following circumstance:

1) A health care provider or health care facility may disclose health care information about a patient without the patient’s authorization to the extent a recipient needs to know the information, if the disclosure is:

(d) To any person if the health care provider or health care facility reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the patient or any other individual, however there is no obligation under this chapter on the part of the provider or facility to so disclose.

Here, the record shows that Respondents called 911 to initiate a “welfare check” by police based on the reasonable belief that Ms. Thomas posed an imminent danger to her own health or safety. CP 59, 63, 71. Ms. Thomas submitted no admissible evidence, and specifically no expert testimony, to show that Respondents acted unreasonably. Accordingly, Ms. Thomas had no valid claim under Ch. 70.02.

Additionally, any action under Ch. 70.02 was time-barred. RCW 70.02.170(3) provides that “[a]ny action under this chapter is barred unless the action is commenced within two years after the cause of action is discovered.” Plaintiff alleged in her Complaint that Defendants caused

her injury on May 4, 2005. CP 79. The medical record reflects that the very next day Plaintiff twice called Heidi Sitton, the RN who placed the 911 call, to threaten her with a lawsuit. CP 61. For this reason, there can be no dispute that any cause of action had accrued at that time. Yet Plaintiff filed her Complaint on July 3, 2008, well over two years after her discovery of the cause of action. For this independent reason, any claim under Ch. 70.02 was time-barred.

2. Appellant had no Valid Claim under Ch. 7.70 RCW.

When an injury occurs as a result of health care, any action for damages based on that injury is governed exclusively by Ch. 7.70 RCW, whether the claim is based on “tort, contract, or otherwise.” RCW 7.70.010; *Branom v. State*, 94 Wn. App. 964, 968-69, 974 P.2d 335 1999). “Health care” is defined in RCW 70.02.010(4)(a) as “any care, service, or procedure provided by a health care provider: (a) To diagnose, treat, or maintain a patient’s physical or mental condition.”

There are two independent reasons why Ms. Thomas could not make a valid claim under Ch. 7.70. First, she failed to provide ninety days notice of intent to sue as required under RCW 7.70.100(1). CP 24-25. Second, Ms. Thomas did not produce any expert testimony to show that Respondents breached the applicable standard of care or that a breach proximately caused injury or damage, as required by RCW 7.70 and the

case law interpreting the statute.⁸ CP 27-29. Nothing in the record, including Ms. Thomas's submission in connection with her reconsideration motion, is sufficient to discharge this burden. As such, summary judgment was mandatory.

3. Appellant had no Valid Claim under the ITA.

As previously noted, as effective in 2005, RCW 71.05.050 allowed hospitals to detain persons whom they "regard ... as presenting as a result of a mental disorder an imminent likelihood of serious harm, or as presenting an imminent danger because of grave disability" for a period of six hours "from the time the professional staff determine that an evaluation by the county designated mental health professional is necessary."⁹ *In re Detention of C.W.*, 147 Wn.2d 259, 271, 53 P.3d 979 (2002) considered the issue of when the six hour time period begins to run. It held that "the six-hour time limitation in RCW 71.05.050 begins to run

⁸ Under Ch. 7.70, a plaintiff who seeks recovery from a health care provider for injuries resulting from medical treatment must, except under the most unusual circumstances, offer expert testimony to establish the essential elements of her claim. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). A plaintiff must establish by expert testimony that the defendant failed to "exercise the 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 belongs, in the State of Washington, acting in the same or similar circumstances" and that the alleged negligence was the proximate cause of injury. RCW 7.70.040(1); *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989); *Morinaga v. Vue*, 85 Wn. App. 822, 831-32, 935 P.2d 637 (1997); *Harris v. Groth*, 99 Wn.2d at 451. A health care provider is entitled to summary judgment dismissal once the provider establishes that the plaintiff lacks competent expert testimony. *Morinaga* at 833.

⁹ In 2007, the Legislature expanded the time limit to 12 hours. L. 2008, ch. 375, § 8.

when the professional staff determine that the statutory requirements have been met and that the person should be referred to the CDMHP.” *Id.* at 273-74.

Here, the record shows that assessment by the ARNP began at 7:45 PM, within two hours after Plaintiff was admitted to the Harborview ED. CP 68. The evaluation by a CDMHP occurred less than five hours after the determination that Plaintiff required such evaluation. CP 70, 72. As such, Defendants acted within their statutory authority as provided in RCW 71.05.050.

In addition, RCW 71.05.120(1), entitled ‘Exemptions from Liability,’ provides as follows in relevant part (emphasis added):

No officer of a public or private agency, nor the superintendent, professional person in charge, his or her professional designee, or attending staff of any such agency, nor any public official performing functions necessary to the administration of this chapter, nor peace officer responsible for detaining a person pursuant to this chapter, nor any county designated mental health professional, **nor the state**, a unit of local government, or an evaluation and treatment facility shall be civilly or criminally liable for performing duties pursuant to this chapter with regard to the decision of whether to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment: **PROVIDED, That such duties were performed in good faith and without gross negligence.**

Pursuant to this statute, “a mental health professional is immune from tort liability in the performance of his duties unless he acted in bad

faith or with gross negligence.” *Estate of Davis v. State Dept. of Corrections*, 127 Wn. App. 833, 840, 113 P.3d 487 (2005) citing *Spencer v. King County*, 39 Wn. App. 201, 205, 692 P.2d 874 (1984), overruled on other grounds by *Frost v. City of Walla Walla*, 106 Wn.2d 669, 724 P.2d 1017 (1986).

This statute is applicable here because Harborview and the University of Washington are arms of the state. *Hontz v. State*, 105 Wn.2d 302, 310, 714 P.2d 1176 (1986). Washington courts have consistently found that Harborview is a state agency, subject to the same immunities, entitlements, and requirements associated with other state agencies.¹⁰ Thus, Harborview and the University of Washington are exempt from liability regarding mental health decisions made in good faith and without gross negligence by its agents and employees under RCW 71.05.120(1).

The record does not contain any evidence sufficient to create a genuine issue regarding Respondents’ immunity. Her appellate brief contains only a naked allegation that the decision to call 911 constituted “gross negligence.” Appellant’s Brf. at Argument, 1 of 3. However, Appellant did not allege gross negligence in her Complaint. CP 4-7. Nor

¹⁰ For example, the court in *Kleyer v. Harborview Medical Ctr.*, 76 Wn. App. 542, 543 n.1, 887 P.2d 468 (1995) applied the state tort claims act requirements to Harborview, stating simply that “Harborview Medical Center (Harborview) is owned by King County. The University of Washington (the University) operates and manages the hospital by virtue of a contract with King County. Employees of Harborview are state employees.”

did she point to any evidence prior to the time of the December 5, 2008 summary judgment hearing that would support a claim of gross negligence. That failure precludes Plaintiff from raising an issue of material fact as to gross negligence. *Boyce v. West*, 71 Wn. App. 657, 665, 862 P.2d 592 (1993) (“Evidence of negligence is not evidence of gross negligence; to raise an issue of gross negligence, there must be substantial evidence of serious negligence”) (citing *Nist v. Tudor*, 67 Wn.2d 322, 332, 407 P.2d 798 (1965)). A mere allegation of gross negligence, “supported by nothing more substantial than argument,” is insufficient to defeat a motion for summary judgment. *Boyce*, 71 Wn. App. at 666 (citing CR 56(e)); *Guile v. Ballard Comm’ty Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689, *review denied*, 122 Wn.2d 1010, 863 P.2d 72 (1993)). “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.” *Reed v. Davis*, 65 Wn.2d 700, 707, 399 P.2d 338 (1965) (citing 3 Barron and Holtzoff, Federal Practice and Procedure s 1235, p. 141). For these reasons, the Court should affirm the trial court’s summary judgment dismissal of Plaintiff’s claims.

B. The Trial Court did not Err by Denying Reconsideration.

A trial court’s denial of a motion for reconsideration is reviewed for abuse of discretion. *McCallum v. Allstate Property and Cas. Ins. Co.*,

149 Wn. App. 412, 420, 204 P.3d 944 (2009). Here, there was no abuse of discretion because no new evidence was timely filed that would lead to a different result than was reached by the trial court in its rulings granting Defendants' motion for summary judgment and imposing terms. There is nothing in the record in support of Plaintiff's motion for reconsideration other than the motion itself, which consists of a recital of Plaintiff's allegations. Even had Plaintiff designated evidence in the record to support the motion that could be reviewed by this Court, which she did not, the trial court cannot consider on a motion for reconsideration evidence that could have been discovered prior to the trial court's ruling that is the subject of the motion for reconsideration. CR 59(a)(4); *West v. Thurston County*, 144 Wn. App. 573, 580, 183 P.3d 346 (2008); *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989); *Richter v. Trimberger*, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988). Because Plaintiff has not met her burden of showing that the trial court abused its discretion in denying her motion for reconsideration, the trial court's ruling should be affirmed.

C. The Trial Court did not Err by Imposing Terms.

RCW 4.84.185 authorizes trial courts to award to the prevailing party "the reasonable expenses, including fees of attorneys, incurred in

opposing a frivolous action.”¹¹ The statute is designed to discourage abuses of the legal system by providing for an award of expenses and legal fees to any party forced to defend against meritless claims advanced for harassment, delay, nuisance, or spite. *Suarez v. Newquist*, 70 Wn. App. 827, 832-33, 855 P.2d 1200 (1993).

The appropriate standard of review regarding sanctions under RCW 4.84.185 is abuse of discretion. *Kearney v. Kearney*, 95 Wn. App. 405, 416, 974 P.2d 872 (1999); *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998); *Tiger Oil Corp. v. Department of Licensing*, 88 Wn. App. 925, 937-39, 946 P.2d 1235 (1997); *Fluke Capital & Management Servs. Co. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986). Plaintiff bears the “heavy burden” of demonstrating that the trial abused its discretion in imposing sanctions under RCW 4.84.185. *See State v. Robinson*, 38 Wn. App. 871, 881, 691 P.2d 213 (1984) (showing required to establish abuse of discretion is a “heavy burden”). Discretion

¹¹ The statute provides:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action ... was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action.... This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

is abused if it is exercised on untenable grounds or for untenable reasons. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

A lawsuit is frivolous under RCW 4.84.185 when it cannot be supported by any rational argument on the law or facts. *Smith v. Okanogan County*, 100 Wn. App. 7, 24, 994 P.2d 857 (2000). Where all claims raised in the plaintiff's complaint are dismissed and no claim survives for trial, and the trial court makes specific findings that the lawsuit is frivolous and advanced without reasonable cause, the trial court acts within its discretion in imposing terms under RCW 4.84.185. *Verharen*, 136 Wn.2d at 905.

Here, Ms. Thomas has not made any showing that would reasonably suggest that the trial court based its decision on untenable grounds or for untenable reasons. The trial court dismissed all Plaintiff's claims on summary judgment. CP 37 ("All of Plaintiff's claims against Defendants in this matter are dismissed, with prejudice.") As required by RCW 4.84.185, the trial court made a written finding that Plaintiff's lawsuit was frivolous and without merit. CP 36-37, 106-109, 111-112. The trial court properly assessed terms in the amount of \$1,500 against Plaintiff in favor of Defendants under RCW 4.84.185 (authorizing trial court, upon required finding, to "require the nonprevailing party to pay

the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action”) (emphasis added).

The one authority cited by Plaintiff is not to the contrary. In *Jeckle v. Crotty*, 120 Wn. App. 374, 85 P.3d 931 (2004), Division III of the Court of Appeals reversed the trial court’s imposition of sanctions against the plaintiff under RCW 4.84.185, where the Court found that one of the plaintiff’s claims raised an issue of first impression in Washington and was supported in part by out-of-jurisdiction authority. *Crotty*, 120 Wn. App. at 387-388. Here, there is no basis for concluding that any of Plaintiff’s dismissed claims, insofar as they can be identified and characterized, raise an issue of first impression. Neither has Plaintiff offered any authority whatsoever, whether controlling or persuasive, in support of her claims. As such, *Crotty* is inapposite.

The terms in favor of the trial court were also properly imposed. CR 11 authorized the trial court, “upon motion **or upon its own initiative**,” to impose an appropriate sanction upon an unrepresented party who has signed and dated a complaint that lacks a factual or legal basis. CR 11 (emphasis added). A trial court’s imposition of CR 11 sanctions is reviewed for an abuse of discretion. *Trohimovich v. State*, 90 Wn. App. 554, 558, 952 P.2d 192 (1998); *In re Guardianship of Lasky*, 54 Wn. App.

841, 852, 776 P.2d 695 (1989); *Cooper v. Viking Ventures*, 53 Wn. App. 739, 742, 770 P.2d 659 (1989).

A trial court does not abuse its discretion in imposing sanctions against an unrepresented party for filing a frivolous action under CR 11, when its factual findings establish that the complaint is not well-grounded in fact and not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. *Tromivich*, 90 Wn. App. at 558. Again, Plaintiff has made no showing that the trial court abused its discretion.

V. CONCLUSION

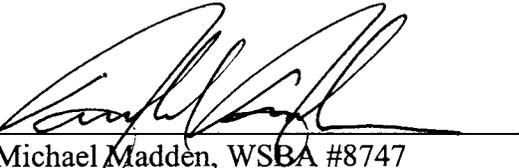
From the inception of her lawsuit, Ms. Thomas has made allegations without any factual support and without any cognizable legal basis. She continues to do so in this appeal. She failed to timely respond to Defendants' motion for summary judgment, despite receiving notice of the motion beyond that required by CR 56 and despite a letter explaining to her that the motion may be granted should she fail to file a response. She has conceded that at the time of the December 5, 2008 summary judgment hearing, she was unprepared to argue the motion and had not filed any additional documents with the trial court. She had also refused numerous opportunities to voluntarily dismiss her frivolous action without terms or costs prior to the filing of Defendants' motion for

summary judgment. On these facts, the trial court properly granted Defendants' motion for summary judgment, and acted within its discretion both in imposing sanctions and in denying Plaintiff's motion for reconsideration. For these same reasons, Respondents respectfully request that the Court affirm the trial court's rulings in all respects.

Respectfully submitted this 28th day of September 2009.

BENNETT BIGELOW & LEEDOM, P.S.

By:



Michael Madden, WSBA #8747
Timothy E. Allen, WSBA #35337
Special Assistant Attorneys General
for Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the foregoing **RESPONDENTS' BRIEF** to be delivered via First Class Mail as follows:

Minnie Thomas
22416 88th Ave South #B-206
Kent, WA 98031

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

SIGNED at Seattle, Washington this 28th day of September 2009.



Nancy D. Stocum

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