No. 86838-1-I

COURT OF APPEALS

DIVISION I

OF THE STATE OF WASHINGTON

MARCI PETERHANS individually and MARCI PETERHANS as GUARDIAN FOR COLIN PETERHANS,

Appellant,

v.

UNIVERSITY OF WASHINGTON, a WASHINGTON STATE AGENCY, and THE STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

STATUTES

CASES

IDENTITY OF PETITIONERS

The Petitioner is Marci Peterhans, the Appellant.

COURT OF APPEALS DECISION

Petitioner seeks review of the attached decision of the Court of Appeals dated June 30th, 2025, affirming Summary Judgment of Dismissal.

INTRODUCTION

This may be the first case examining "bad faith" and "gross negligence" in the context of **discharge decisions** covered by the Involuntary Treatment Act, RCW 71.05. Under the ITA, the decision of "whether to...discharge" a patient cannot result in tort liability absent a showing of "gross negligence" or "bad faith". RCW 71.05.120. This case concerns both.

Colin Peterhans ("Colin") was released from involuntary treatment at the Respondent's facility **a week**

early, and taxied home to his fifth-floor apartment. Within a few hours, he leaped out the window. He survived but suffered catastrophic orthopedic and brain injuries.

In fact, when considered in the light most favorable to Colin, the evidence shows that he had not been "released" from care so much as he had been **evicted.**

Respondent's own discharge summary indicates that Colin was released, not because he was no longer at risk for harm "to himself or others", but because:

> Two days before discharge **he seriously assaulted a male staff member who did not choose to press legal charges**. He remained in seclusion following this event **as he was unable to say that he wouldn't assault again**. It was believed that he wasn't benefitting from hospitalization, so discharge was planned. (emphasis added)

Colin's release was by agreed Order. There was only a week to go on his 90-day commitment anyway.

But his attending physician wouldn't wait, let alone use the remaining seven days to try to stabilize him for

discharge or even more, request **additional involuntary treatment** as the ITA specifically authorizes if a patient commits an act of violence while in treatment.

The ITA judge who signed the agreed Order was not made aware of the "serious assault" that had occurred less than 48 hours earlier. Nor was he made aware that the releasing physician was **still concerned enough that Colin might attempt suicide by overdosing on his medication** (the reason he was placed into involuntary treatment in the first place), that she reduced his discharge supply of meds from 30 days to one week. Nor was he made aware that Colin's mother, Appellant Marci Peterhans ("Peterhans") had "pleaded" with his attending physician that Colin's release be delayed at least a day or two, that she may travel there to meet him upon discharge —which was an obvious option since he was being released by agreed order, and this with a week still remaining in his original commitment.

The Court of Appeals' published opinion states that Appellate made "no meaningful effort" to establish that Colin's release had been in "bad faith", overlooking the recitation of these and other largely undisputed facts in Appellant's Brief.

Appellant asks this Court to hold that the failure to make an ITA judge aware of material facts bearing upon the patient's fitness for discharge, **standing alone,** supports an inference of "bad faith", upon which liability can be predicated, and to further hold more generally that "bad faith" may be proven primarily if not indeed exclusively by circumstantial evidence.

On the issue of "gross negligence", Appellant produced expert testimony reciting that "the decision" to release Colin was "significantly" below the standard of care, "substantially" below the standard of care and "gross negligence as defined by the Washington pattern jury instructions." Appellant's expert specifically stated:

> "...with a longstanding diagnosis of a Psychotic Disorder, Colin was the **exact type of patient who would be likely to benefit from inpatient psychiatric treatment. The standard of care was to keep him involuntarily committed until he was stable for discharge, i.e., clearly not a danger to himself or others.**" (emphasis added)

Appellant's expert also testified that he had reviewed the detailed expert declarations supporting Respondent's Summary Judgment Motion and **disagreed** with them, saying:

> "I have reviewed the Declarations of David Clark, PhD and Douglas Jacobs, M.D., which were submitted in support of Defendant's Motion for Summary Judgement. **Neither Declaration changes my opinion as set forth in my Declarations. Suffice to say that I disagree with their opinions that discharging Colin was within the standard of care, and/or did not contribute to his catastrophic injuries.**" (emphasis added)

The Court of Appeals held that Appellant's expert Declarations were insufficient to establish "gross negligence" because they didn't say what "should have

been done, besides delay discharge", thereby overlooking the inference that, since Colin was "the exact type of patient who would be likely to benefit from inpatient psychiatric treatment", what "should have been done" was continued "**inpatient psychiatric treatment**" until he was "stable for discharge".

The Court of Appeals also found the Declarations insufficient because they didn't "address the actions [Respondent] *did* take leading to discharge", thereby overlooking Appellant's expert's testimony that he had reviewed the Respondent's experts' declaration, which **recited these very "actions" as the basis for their opinions that discharge was "reasonable"** and **specifically disagreed with them.**

This Court is asked to hold that, where a **qualified expert** has stated his/her opinion on the **ultimate issue** (here, "gross negligence") and provided the factual basis for that opinion, "slight care" can't be established as a

matter of law by referring to the **moving party's** preferred facts.

Also, Appellant's expert specifically testified that the applicable standard of care required that Colin continue in involuntary treatment until he was no longer a "danger to himself or **others**". This opinion mirrors the definition of "serious harm" in the ITA itself, RCW 71.05.020:

> (37) "Likelihood of serious harm" means:
>
> (a) A substantial risk that: (i) Physical harm will be inflicted by a person upon **his or her own person**, as evidenced by threats or attempts to commit suicide or inflict physical harm on oneself; (ii) physical harm will be inflicted by a person **upon another as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm...** (emphasis added)

Neither Colin's attending physician, nor the Respondent's experts, nor the Respondent's counsel, nor

the trial Court, nor the Court of Appeals ever explained how even "slight care" justified the determination that **at the time of his discharge**, Colin was not a danger to **"others".** In **that** regard, Appellant's expert testimony that Respondent breached the applicable standard of care stands literally unchallenged, and undisputed. The Court is asked to establish that, where discharge was "gross negligence", at least in part because the patient was a danger to "**others**", the releasing provider is liable for all damages proximately caused by his harming **himself**.

Finally, the Court is asked to establish that a CR 41 (a) (1) (B) Voluntary Dismissal is mandatory if sought after oral argument of a Motion for Summary Judgment but before the trial judge rules, where the judge has adjourned the hearing and gone off the bench.

ISSUES PRESENTED FOR REVIEW

It is respectfully requested that this Court accept review of the following issues related to tort claims governed by RCW 71.05.120:

(1) Can "bad faith" be inferred from the releasing physician's failure to make the ITA Judge aware of material facts bearing directly upon the patient's fitness for release?

(2) Can "bad faith" be established primarily or even exclusively by circumstantial evidence?

(3) Where a plaintiff offers **expert testimony** reciting that "**the decision**" to discharge a patient was "gross negligence" and giving his/her specific factual basis as to what was done **wrong**, can a defendant obtain summary judgment of "slight care" by pointing to isolated instances of what the physician supposedly did **right?**

(4) Where a patient's release is "gross negligence", because he still presents a danger to "others", are damages recoverable for his subsequent harm to **himself**?

(5) Where the judge leaves the bench after oral argument of a summary judgment motion

without making a ruling, may a plaintiff take a CR 41 (a) (1) (B) voluntary dismissal?

STATEMENT OF THE CASE

Colin Peterhans, age 37, DOB 11/05/1987, has an "extensive psychiatric history", including a history of suicide attempts. CP 47-50. By Order dated July 6th, 2020, he was placed on a 90-day "less restrictive alternative" Plan ("LRA"), in lieu of involuntary in-patient treatment under the Involuntary Treatment Act, RCW 71.05. CP 266. The form Order creating the LRA "checked the box" indicating that Colin:

> "is failing to adhere to the terms and conditions of a conditional release of less restrictive treatment order",
>
> "is demonstrating a substantial deterioration of functioning",
>
> "is showing evidence of substantial decompensation with a reasonable probability that the decompensation can be reversed by further inpatient treatment", and "poses a **likelihood of serious harm**". (emphasis added)

On August 12th, 2020, Colin was admitted to Harborview's involuntary treatment facility, after overdosing on his lithium medication. CP 262-304. He had a number of risk factors for suicide, including his "psychiatric diagnoses, psychotic symptoms, history of substance abuse, recent psych hospitalization within the past year, and recent suicide attempt. Id.

A hearing to consider revocation of his LRA was scheduled, but "continued" several times as Colin "stabilized". CP 915-918. Eventually the revocation hearing was set for September 28th, about a week before his original 90-day LRA would expire anyway. (Under RCW 71.05.590 (5)(d), a failed LRA plan results in involuntary commitment for the remainder of the original term; thus, absent a request that he be held longer, "revocation" of the LRA plan on the 28th would mean simply another week at Harborview.)

Colin was evaluated daily while in treatment and for each of the last seven days before his discharge his treating physicians certified that:

> "I have evaluated this patient and have determined that he/she may not be released from involuntary commitment to accept treatment on a voluntary basis or to be discharged from the hospital to accept voluntary outpatient upon referral."

CP 262-304, Ex. 4.

A new attending physician, Dr. Sharon Romm, rotated in beginning Monday, September 21st, 2020. That day, and each day for the rest of the week, Dr. Romm likewise "certified" that Colin "may not be released from involuntary commitment". Id.

On Saturday, September 26, while Dr. Romm was off for the weekend, Colin "seriously assaulted" a staff person who decided "not to press legal charges". CP 262-304, Ex. 3. The next day, Sunday, the 27th, the weekend

hospitalist certified, again, that Colin "may not be released from involuntary commitment." CP 262-304, Ex. 4.

Dr. Romm learned of the "serious assault" when she returned Monday, September 28th. She decided to release Colin immediately, though by now there was only a week remaining on his course of involuntary treatment. CP 262-304 Ex. 2. She made the decision entirely herself, consulting no one else. Id.

Colin's mother, Appellant Marci Peterhans ("Peterhans"), learned of his pending discharge that day, from a social worker named Molly McNamara. CP 305-307. Peterhans was in Hawaii with her husband, where they had retired years earlier. Id. She had been working for about 4 months to secure a spot for Colin at "Earth House", a residential psychiatric facility in New Jersey. Id. Peterhans advised McNamara that she would receive a decision from Earth House that Friday, October 2nd, and was directed to Dr. Romm; Peterhans "pleaded with her to

keep Colin there at Harborview until [she] could get a plane and fly back to be there for him at discharge". Id. Dr. Romm referred her back to McNamara who told her:

> "We're not your babysitter so you can have garage sales so you can send Colin to Earth House."
>
> Id.

In any event, though there was still a week left on Colin's involuntary commitment, Dr. Romm cleared him for discharge that day.

The Form Order releasing Colin "checked the boxes" that:

> "The matter came before the Court for "a hearing on the petition for 90 days of involuntary treatment, and was resolved by "Agreed Order".
>
> CP 262-304 Ex.2.

There is no evidence in the record that the ITA Judge, Judge Steiner, was aware of the "serious assault"

that weekend when he signed the agreed order dismissing Colin.

Respondent's chart documents that, even as she took steps to effectuate Colin's discharge, Dr. Romm was "concerned" that he might again overdose on lithium, so she changed his 30-day discharge prescription to a one-week supply. CP 262-304 Ex. 6. The process of getting the medication issue "sorted out" took time and led to the cancellation of Colin's follow-up appointment with his Program of Assertive Community Treatment ("PACT") team that had been set for that afternoon. Id. He was instead taxied home, arriving alone. Id.

Within a few hours, he jumped from his fifth-story apartment's window. CR CR 7-50. He suffered catastrophic orthopedic and brain injuries.

On behalf of herself and as Colin's guardian ad litem, Peterhans sued the Respondent, alleging that Colin had been wrongfully discharged.

Respondent's original counsel brought a "Motion to Dismiss, or in the Alternative, for Summary Judgement", claiming that Appellant lacked expert testimony to support a case CP 13-30.

In response, Appellants submitted the Declaration of William Newman, M.D. CP. Due to its importance, it is appended hereto (Appendix 1) and will be quoted at length:

> **[Colin's} suicide attempt was clearly foreseeable under the circumstances and clearly preventable by not discharging him at that time.**
>
> Further, as amply documented in Defendant's own chart, **the decision to discharge him fell significantly below the standard of care for reasonably prudent psychiatrists under the circumstances, in the state of Washington or any other state.**
>
> Colin was admitted to the Defendant's psychiatric ward in the first place on August 12th, 2020, following an apparent suicide attempt, i.e., an overdose of lithium. His extensive psychiatric history was significant for past episodes of self-harm, including another recent overdose of lithium and a cut

on his neck with a knife. Upon admission he was "frankly psychotic". **He made little if any discernable progress.**

At one point during the stay he harmed himself with a cut to his hand, and refused a wound consult that had been offered him.

Two days before discharge he "seriously assaulted" a male staff member and was placed in seclusion. The discharge summary clearly states that "it was believed that he wasn't benefiting from hospitalization" and discharge was therefore planned. **In fact, with a longstanding diagnosis of a Psychotic Disorder, Colin was the exact type of patient who would be likely to benefit from inpatient psychiatric treatment. The standard of care was to keep him involuntarily committed until he was stable for discharge, i.e., clearly not a danger to himself or others.**

Up to literally the day before discharge, Colin's Attending Physicians continuously certified in his records that he "may not be released from involuntary commitment to accept treatment on a voluntary basis, or to be discharged from the hospital to accept voluntary outpatient treatment upon referral.

Indeed, three days before discharge, Dr. Sharon Romm had certified that he "may not be released from involuntary

commitment to accept treatment on a voluntary basis". **Yet, three days later---- after his assault on the staff member---Dr. Romm personally saw to his discharge.**

In fact, records indicate that Dr. Romm **was "concerned about the patient's risk of OD (overdose)" even as he was discharged, and therefore had authorized only a one-week supply of medications as he left.**

It's well known that psychiatric patients such as Colin are at increased risk of suicide immediately following discharge from an inpatient facility. Colin was discharged into his own care, though his mother was in contact with the facility, and though out of town, was asking them to at least delay discharge until she could be there to see Colin. **Even had discharge been appropriate, which it wasn't, discharging Colin into his own care was an additional breach of the standard of care**". (emphasis added)

The Motion was denied. CP 86-88.

Shortly before trial, new counsel substituted in for Respondents. CP 93-95. The trial date was continued. CP 107-109. New counsel brought another Summary Judgement Motion, now alleging that Appellant couldn't

prove "gross negligence" or "bad faith". This Motion was supported by Declarations from two experts (CP 147-149; CP 170-191) and from Dr. Romm. CP 110-146.

None of the three declarations purported to explain why it was "reasonable" or even "slight care' to determine that Colin presented no danger "**to others**" at the time of his release; each focused entirely on why it was, supposedly, reasonable to conclude that he wasn't a danger to **himself**.

In response, Appellant submitted a Supplemental Declaration from Dr. Newman, which is likewise appended (Appendix 2), and which will likewise be quoted at length:

> "In my January 23, 2024 Declaration, I specifically said, at paragraph 6, that the decision to discharge Colin Peterhans on September 28th, 2020 "fell significantly below the standard of care for reasonably prudent psychiatrists under the circumstances, in the State of Washington, or any other state."

I went on to add in my January 23rd, 2024 Declaration, in paragraph 13, that "Even had discharge been appropriate, which it wasn't, discharging Colin into his own care was an additional breach of the standard of care."

I have reviewed Washington's "pattern jury instruction" number 10.07, which defines "gross negligence". In my mind there is no difference between my January 23, 2024 Declaration's statement that Colin's discharge fell "significantly below the standard of care and saying that it fell "substantially" below the standard of care.

In any event, **for the reasons set forth in my original Declaration, in my opinion, to a reasonable degree of medical certainty, the decision to discharge Colin at all, let alone to his own care, was "gross negligence" as defined by the Washington pattern jury instruction.**

I have reviewed the Declarations of David Clark, PhD and Douglas Jacobs, M.D., which were submitted in support of Defendant's Motion for Summary Judgement. **Neither Declaration changes my opinion as set forth in my Declarations. Suffice to say that I disagree with their opinions that discharging Colin was within the standard of care, and/or did not contribute to his catastrophic injuries."** (emphasis added)

Oral argument of the second Motion for Summary Judgement was by Zoom. At the conclusion of the argument, the Court decided to take the matter under advisement, indicating that she'd issue her ruling later that afternoon. The following then occurred, on the record:

> MR. WILLIAMS: Your Honor, can I add one sentence? If you look at the Declaration of Dr. Newman, you see him opining Colin was the exact type of patient who would likely benefit from inpatient psychiatric treatment.
>
> THE COURT: Um-hum.
>
> MR. WILLIAMS: They're allowed to keep him for six months. It's not like six weeks is some big sojourn.
>
> THE COURT: Understood. And certainly, there are a lot of folks---**I'll say that, having served as an ITA---the lead ITA judge in 2023**, there are thousands and thousands of folks out there that would benefit from inpatient psychiatric care. But the statute is written in a very specific manner, and that's why the burdens are different in a case such as this. So that's why I've asked questions in the manner that I have because there are lots of folks who would benefit, it would be

> helpful, it would improve their quality of life, it potentially could extend the length of their life, but that's now how the law works. And unfortunately, that binds the providers in some ways, and it also binds the courts."

Immediately after the Judge left the bench, Appellant's counsel emailed the Court and Respondent's counsel, moving for Voluntary Dismissal "under CR 41". Respondent's counsel made no response whatsoever, and the formal Order was entered about half an hour later. CP 334-336.

The following Monday, Appellant refiled the case.

Two days later, Respondent brought a "Motion to Reconsider" the heretofore **unopposed** Voluntary Dismissal. CP 339-349. The Court granted the Motion to Reconsider (CP 403-406) and thereafter, on June 20th, 2024, granted the Motion for Summary Judgement. CP 407-410. [1]

[1] Interestingly, the Court Order recites that it was "prepared" on the day of the original hearing--May 31st.

The Trial Court characterized Dr. Newman's opinions as "legal conclusions" that "cannot form the basis for this Court to conclude that there remains an issue of material fact for a jury to determine". The court characterized Appellant's contentions as to "bad faith" as "pure argument", noting that "no witness even suggests this to be true".

The Court of Appeals affirmed by published opinion dated June 30, 2025, holding that Dr. Newman's declarations were "insufficient" to establish "gross negligence", and stating that Appellant had made "no meaningful effort" to establish "bad faith".

ARGUMENT

Review is appropriate on the issue of whether "bad faith" can be inferred from a lack of candor with the ITA judge.

In Spencer v. King County, 39 Wn. App. 201, 207-208, 692 P.2d 874 (1984) the Court of Appeals said:

> "The Washington courts have not defined the term "bad faith" but most other jurisdictions recognize that bad faith implies acting with tainted or fraudulent motives. For example, the court in Ramos v. Board of Selectmen of Nantucket, 16 Mass. App. 308, 450 N.E.2.d 1125, 1129 (1983) stated that bad faith imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of interest or ill will. It partakes of the nature of fraud."

The legislature's stated intent for the ITA is to:

> "Protect the health and safety of persons suffering from behavioral health disorders and to protect public safety through use of the parens patriae and police powers of the state". (emphasis added)
>
> RCW 71.05.010.

In the context of discharge decisions, the person "on the ground", charged with the protection of the patient **and** "public safety", is the ITA judge and to do so, he/she **must** be given the appropriate information.

To be sure, Appellant does **not** contend that Respondent's counsel (an assistant King County Prosecutor) knowingly misled the Court. There's no evidence in the record that the prosecutor knew of the assault. **But Dr. Romm certainly knew**, and in fact that assault is what triggered Colin's discharge with a week remaining in his involuntary commitment.

Review is appropriate on the issue of whether "bad faith" can be proven by circumstantial evidence

Juries in civil and criminal cases are routinely instructed that "the law does not distinguish between direct and circumstantial evidence, in terms of their weight or value in finding the facts." WPI 1.03; WPIC 5.01

The Court of Appeals' opinion states that Appellant "failed to meaningfully address" the issue of Respondent's "bad faith". Appellant respectfully but quite firmly

disagrees and in fact detailed the abundant **circumstantial** evidence of bad faith in her brief, pp 36-37:

> Colin was originally admitted with several risk factors for suicide;
>
> He did not meaningfully progress over the next several weeks;
>
> Dr. Romm had continuously certified her to be in need of further care his last week, up to the Friday before his discharge;
>
> Over the weekend, he "seriously assaulted" a staff member;
>
> The weekend hospitalist unsurprisingly certified that he was in need of further care;
>
> His 90-day plan would expire October 5th, 2020, meaning he could be released in another week;
>
> But Dr. Romm wouldn't wait the week, and had him discharged the following Monday morning, by agreed order, without informing the judge of the assault.
>
> (emphasis in original)

All these facts were emphasized in Appellant's response to Respondent's motion in the

trial court as well.

No, Dr. Romm didn't admit that she "released" Colin to be rid of a troublesome and potentially dangerous patient, but in the context of **summary judgment** the circumstantial evidence to that effect is compelling. That "no witness even suggests this to be true", as both the trial court and the Court of Appeals emphasized, may or may not be effective jury argument, but has literally no significance for purposes of Summary Judgment. Again:

> The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case.

WPI 1.03.

In fact, circumstantial evidence is often the most compelling, if indeed not the **only** evidence of a particular actor's **state of mind**, even in civil cases where there is no right to remain silent. See generally Scrivener v. Clark College, 181 Wn.2d 439, 445, 334 P.3d 541 (2014)

(Summary judgment to an employer in discrimination cases is "seldom appropriate" because of the "difficulty of proving a discriminatory motivation".)

The trial court called Appellant's reliance on circumstantial evidence "pure argument" and the Court of Appeals approved that characterization. **Of course it was "argument". All circumstantial evidence is "argument".**

> The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

WPI 1.03. In any trial involving circumstantial evidence, both sides routinely "argue" the correct inferences to be drawn.

The issue isn't whether Appellant's contention of "bad faith" based on circumstantial evidence is "argument"; the issue is whether a reasonable jury could **accept** those arguments.

Review is appropriate on the sufficiency of Dr. Newman's Declaration Testimony

The Court of Appeals, citing Reyes v. Yakima Health District, 191 Wn.2d 79, 419 P.3rd 819 (2018), held Dr. Newman's Declarations to be insufficient, partly because "there is no indication what a reasonable physician should have done other than delay Colin's discharge". Respectfully, on the contrary, Dr. Newman specifically said that

> "..with a longstanding diagnosis of a Psychotic Disorder, **Colin was the exact type of patient who would be likely to benefit from *inpatient psychiatric treatment.*"**
>
> (emphasis added).

In the next sentence of his Declaration, Dr. Newman said:

> The standard of care was to **keep him involuntarily committed until he was**

> **stable for discharge, i.e., clearly not a danger to himself or others.**

Is there any real doubt that Dr. Newman believes (and said) that what "should have been done" was **continued inpatient treatment** until Colin was stable for discharge?

Should that not certainly be a "reasonable inference" from his Declaration, in the context of Summary Judgment?

Furthermore, another reasonable inference from Dr. Newman's Declaration is that, at the very least, Colin should have remained in involuntary care **until his mother arrived from out of town**, so that he would not be alone at discharge. He basically said just that:

> It's well known that psychiatric patients such as Colin are at increased risk of suicide immediately following discharge from an inpatient facility. Colin was discharged into his own care, though his mother was in contact with the facility, and though out of town, was asking them to at least delay discharge until she could be there to see

> Colin. **Even had discharge been appropriate, which it wasn't, discharging Colin into his own care was an additional breach of the standard of care".**

The Court of Appeals found it "troubling" that Dr. Newman's declaration didn't address the "statutory overlay", i.e. the ITA's stated goals. In that regard the Court incompletely quoted RCW 71.05.010 (a) to exclude its reference to "protect public safety". But Dr. Newman's Declaration doesn't conflict with **any** of these goals; yes, eventually the "clock runs out" on involuntary treatment, but that date was at least a week away, **and up to six months out,** had Respondent sought additional involuntary treatment based upon the "serious assault" Colin had committed less than 48 hours earlier.

In fact, Dr. Newman's declaration is in perfect harmony with the IPA; until indeed the "clock runs out", the patient must not be released unless he is **stable for discharge**, i.e. "clearly not a danger to himself or others.

Second, according to the Court of Appeals, Dr. Newman "does not address" the "actions Defendants *did* take leading to discharge". (emphasis in original). But these "actions" were described in the Defense experts' Declaration as the basis for their conclusion that Colin's discharge was reasonable, and Dr. Newman **specifically said he had read those declarations and disagreed with them.** At most, this is the classic "battle of experts", which the Court of Appeals inadvertently resolved in favor of the **moving party**.

In Harper v. State, 192 Wn.2d 328, 343, 429 P.3rd 1071 (2018) this Court held that in assessing gross negligence;

> "...the court must determine whether the plaintiff presented substantial evidence that the defendant failed to exercise slight care **under the circumstances presented,** considering both the relevant failure and, **if applicable**, any relevant actions that the defendant did take." (emphasis added)

Is there any legitimate doubt from Dr. Newman's Declarations that he believes that under all the circumstances, including those mentioned in the Court of Appeals' opinion, Colin's release was "gross negligence"?

Furthermore, Harper did not involve expert testimony. The issue was whether certain undisputed facts established "slight care" as a matter of law.

Respectfully, Harper's admonition that the "whole picture" must be viewed in analyzing the issue of "gross negligence" should not be seen as an invitation for what amounts to "strict scrutiny" of **expert** declarations.

CONCLUSION

Petitioner requests review.

I declare this brief to have 4,852 words.

By: */s/ David A. Williams*
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CERTIFICATE OF SERVICE

I, Kelsey M. Coleman, certify that on this 30th day of July, 2025, I caused a true and correct copy of the foregoing Appellant's Petition for Review to be served on the following parties via email as indicated below:

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

DATED at Seattle, Washington on this 12th day of June, 2025.

/s/ Kelsey M. Coleman
Kelsey M. Coleman
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COURT OF APPEALS OPINION

FILED
6/30/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARCI PETERHANS, individually and AS GUARDIAN FOR COLIN PETERHANS, Appellant, v. UNIVERSITY OF WASHINGTON, a Washington State Agency, and THE STATE OF WASHINGTON, Respondent.	No. 86838-1-I DIVISION ONE PUBLISHED OPINION

FELDMAN, J. — Marci Peterhans, individually and as Colin Peterhans' guardian, alleges that Colin was negligently discharged from Harborview Medical Center's psychiatric department following involuntary treatment under the Involuntary Treatment Act (ITA), RCW 71.05, which requires proof of bad faith or gross negligence.[1] Finding insufficient evidence to establish such a claim, the trial court dismissed it on summary judgment. Peterhans appeals that ruling as well as the trial court's earlier ruling granting reconsideration of an order dismissing Peterhans' complaint under CR 41(a). We affirm.

[1] Because this matter involves both Colin and Marci Peterhans, we refer to Colin by his first name to avoid confusion. And, given her role as plaintiff, we refer to Marci Peterhans as "Peterhans." Also, as used herein, "Defendants" refers to the University of Washington and the State of Washington as set forth in Peterhans' complaint and discussed in section I of this opinion.

I

Because the principal issue in this appeal is whether the trial court erred in granting Defendants' motion for summary judgment, the facts herein are set forth in the light most favorable to Peterhans, the non-moving party, based on the evidence submitted on summary judgment. *Harper v. State*, 192 Wn.2d 328, 340, 429 P.3d 1071 (2018).

On August 12, 2020, Colin was admitted to Harborview for involuntary treatment under the ITA after overdosing on lithium medication. Colin has an "extensive psychiatric history," which includes a history of suicide attempts. At the time he was admitted, Colin had a number of risk factors for suicide, including his "psychiatric diagnoses, psychotic symptoms, history of substance use, recent psych hospitalizations within the past year, and recent suicide attempt." Six weeks later, on September 26, Colin "seriously assaulted" a Harborview staff member and was placed in seclusion. He remained in seclusion following this event as he was unable to say he would not assault again. Around this same time, Colin also engaged in self-harm—he cut his hand—and refused treatment.

Harborview psychiatrist Dr. Sharon Romm discharged Colin from Harborview on September 28. According to the discharge summary, "[i]t was believed that he wasn't benefitting from hospitalization so discharge was planned." The discharge summary also indicates Colin "denied [suicidal ideation] at time of discharge." When Peterhans learned Colin would be discharged, she contacted Dr. Romm and asked her "to keep Colin there at Harborview until [she] could get a plane and fly back to be there for him." Peterhans testified she "spoke to two

providers that day, one of whom told [her] something to the effect that 'they would no longer be Colin's babysitter.'"

Colin left Harborview at approximately 4 p.m. He was given one week of medication (so limited due to previous overdose attempts) and agreed to continue taking the medication following discharge. A taxi transported Colin to his apartment, where he discovered that someone had stolen his belongings. Following that discovery, Colin jumped from his fifth-floor apartment window. He arrived at Harborview's emergency department just after midnight on September 29, having suffered a permanent brain injury leaving him in a coma-like state.

In April 2023, Peterhans, individually and as guardian for Colin, sued the University of Washington and the State of Washington, asserting that Dr. Romm—their employee at Harborview—caused Colin's injuries by negligently discharging him from Harborview's psychiatric facility. Although Defendants filed an answer largely denying Peterhans' allegations, they do not dispute, as Peterhans' complaint alleges, that the University manages the hospital and that employees of Harborview, including Dr. Romm, are State employees.

On May 3, 2024, Defendants filed a motion for summary judgment arguing that Peterhans could not establish liability. The trial court heard oral argument on the motion on May 31, 2024. At the conclusion of the hearing, the court informed the parties it intended to issue a written ruling later that day. Shortly after the hearing, Peterhans' counsel e-mailed the court and Defendants' counsel indicating Peterhans would immediately seek voluntary dismissal under CR 41. Approximately 20 minutes later, Peterhans submitted a formal motion for voluntary

dismissal, and the trial court promptly entered an order dismissing the case without prejudice.

The next court day, June 3, Peterhans refiled her complaint, which was assigned to a different judge. Defendants then filed a motion for reconsideration of the previous dismissal order, arguing Peterhans could not voluntarily dismiss the case after it had been submitted to the court for a decision on summary judgment. The court granted the motion for reconsideration and vacated the voluntary dismissal order. The court then turned again to Defendants' summary judgment motion and granted it. Peterhans appeals.

II

A

Peterhans argues the trial court erred when it granted Defendants' motion for reconsideration regarding the court's previous dismissal order. We disagree.

CR 41(a) addresses "voluntary dismissal" and distinguishes between "mandatory" and "permissive" dismissal. Only mandatory dismissal is relevant here. Addressing that issue, CR 41(a)(1)(B) provides in relevant part, "any action shall be dismissed by the court . . . [u]pon motion of the plaintiff at any time before plaintiff rests at the conclusion of plaintiff's opening case." The trial court's application of CR 41(a)(1)(B) is a question of law, which we review de novo. *League of Women Voters of Wash. v. King County Records, Elections & Licensing Servs. Div.*, 133 Wn. App. 374, 378, 135 P.3d 985 (2006) ("Where we are required to review the application of a court rule to the facts . . . our review is . . . de novo.").

In the context of a summary judgment proceeding, a plaintiff has a right to voluntary dismissal until the summary judgment motion has been submitted to the

court for determination. *Paulson v. Wahl*, 10 Wn. App. 53, 57, 516 P.2d 514 (1973). Where a motion for voluntary dismissal has been filed before the hearing on summary judgment has begun, the motion must be granted as a matter of right. *Greenlaw v. Renn*, 64 Wn. App. 499, 503, 824 P.2d 1263 (1992). But once the trial court has announced its oral decision, a plaintiff has no right to voluntary dismissal. *Beritich v. Starlet Corp.*, 69 Wn.2d 454, 458-59, 418 P.2d 762 (1966).

The facts of this case lie between those in *Greenlaw* and *Beritich*. The summary judgment hearing had begun and the parties had concluded their oral arguments, but the trial court had not yet announced its decision. We hold that, under these circumstances, the motion for summary judgment had been submitted to the court for determination for purposes of applying the above legal principles, notwithstanding the fact that the court had not yet rendered a decision. Absent such a rule, claimants could unilaterally dismiss an action whenever the court expresses skepticism regarding the party's claims at a summary judgment hearing, which would allow improper judge shopping and waste both private and judicial resources. Applying this rule here, Peterhans was not entitled to voluntary dismissal under CR 41(a)(1)(B).

Nor did Defendants waive this argument, as Peterhans claims, by failing to object to Peterhans' dismissal motion during the short interval between the time Peterhans filed the motion and the time the trial court granted it. "[T]he purpose of the error preservation requirement is to allow the trial court an opportunity to correct the error by bringing it to the court's attention." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671 n.2, 230 P.3d 583 (2010). Here, Defendants appropriately brought the asserted error to the trial court's attention by filing a timely motion for

reconsideration of the previous dismissal order, thereby allowing the trial court to correct the asserted error, which it did. Peterhans' waiver argument therefore fails.

B

Peterhans next argues the trial court erred when it granted Defendants' motion for summary judgment dismissing her claims. We again disagree.

Because Colin received treatment under the ITA, Peterhans cannot hold Defendants liable for professional negligence in the same way she could in an ordinary medical setting. Addressing that issue, the ITA states:

> 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 . . . designated crisis responder, nor the state . . . 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*.

RCW 71.05.120(1) (emphasis added). Thus, Defendants cannot be liable under the ITA for Dr. Romm's discharge decision unless Peterhans establishes *either* gross negligence *or* bad faith.

Starting with bad faith, Peterhans failed to meaningfully address this issue in response to Defendants' summary judgment motion. As the trial court correctly concluded: "No evidence whatsoever has been provided to show action in bad faith." The court then added,

> The Court cannot take counsel's argument as an established fact, despite the framing as a "circumstantial" fact. It is pure argument the patient discharge was somehow motivated by some sort of retribution due to an incident a few days before discharge, when Mr. Peterhans pushed a staff member. No witness even suggests this to be true.

The record supports that determination. We therefore focus, as did the trial court below, on Peterhans' attempt to establish gross negligence.

Our Supreme Court summarized Washington law regarding proof of "gross negligence" in *Harper*. Citing its earlier opinion in *Nist v. Tudor*, 67 Wn.2d 322, 407 P.2d 798 (1965), the court explained:

> In *Nist*, the foundational case on the issue, we expanded on the "frequently expressed statement that gross negligence means the failure to exercise slight care." 67 Wash.2d at 324, 407 P.2d 798 (citing *Crowley v. Barto*, 59 Wash.2d 280, 367 P.2d 828 (1962); *Eichner v. Dorsten*, 59 Wash.2d 728, 370 P.2d 592 (1962)). In doing so, we described "gross negligence" as "negligence substantially and appreciably greater than ordinary negligence." *Id.* at 331, 407 P.2d 798. The failure to exercise slight care, we continued, does not mean "the total absence of care but care substantially or appreciably less than the quantum of care inhering in ordinary negligence." *Id.*

Harper, 192 Wn.2d at 342. Summarizing these various legal standards, the court stated: "To survive summary judgment in a gross negligence case, a plaintiff must provide substantial evidence of *serious negligence*." *Id.* at 345-46 (emphasis added).[2]

Applying these definitions, the court in *Harper* explained that the first step when analyzing a claim of gross negligence on a motion for summary judgment is to "specifically identify the relevant failure alleged by the plaintiff." *Id.* at 343. The second step is to "determine whether the plaintiff presented substantial evidence that the defendant failed to exercise slight care under the circumstances

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[2] In this respect, *Harper* is consistent with the Third Restatement of Torts, which succinctly states that gross negligence "simply means negligence that is especially bad." RESTATEMENT (THIRD) OF TORTS § 2 (AM. LAW INST. 2010). In *Swank v. Valley Christian School*, 188 Wn.2d 663, 398 P.3d 1108 (2017), our Supreme Court similarly explained, "Stated more fully, [gross negligence] is the 'failure to exercise slight care, *mean[ing] not the total absence of care but care substantially or appreciably less than the quantum of care inhering in ordinary negligence*.'" *Id.* at 684 (emphasis added) (quoting *Nist*, 67 Wn.2d at 331). Thus, the "absence of slight care" formulation is ultimately encompassed within the "serious negligence" standard.

presented, considering both the relevant failure and, if applicable, any relevant actions that the defendant did take." *Id.* Importantly, *Harper* also states, "Although breach is generally a question left for the trier of fact, the court may determine the issue as a matter of law 'if reasonable minds could not differ.'" *Id.* at 341 (quoting *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)). We review the trial court's decision regarding this issue de novo and, like the trial court, "we consider 'facts and reasonable inferences from the facts . . . in the light most favorable to the nonmoving party.'" *Id.* at 340 (quoting *Hertog*, 138 Wn.2d at 275).

The trial court's summary judgment ruling does not comprehensively state the applicable legal standard as set forth in *Harper*. It instead focuses solely on the slight care standard as follows:

> [T]o prevail on this motion, Plaintiff must show that Dr. Romm's behavior showed a lack of even slight care.
>
> . . . .
>
> [T]he Court finds that reasonable minds could not differ about the fact that UW Defendants certainly exercised at least slight care, which is all that is necessary to overcome an allegation of gross negligence in a motion for summary judgment . . . . [T]he demonstration of slight care is all that is required to maintain that immunity [under the ITA].

At no point did the trial court acknowledge that "[t]he failure to exercise slight care," as our Supreme Court "expanded on" in *Nist*, "does not mean 'the total absence of care but care substantially or appreciably less than the quantum of care inhering in ordinary negligence.'" *Harper*, 192 Wn.2d at 342 (quoting *Nist*, 67 Wn.2d at 331). Nor did the trial court acknowledge or apply the *Harper* court's holding, "To survive summary judgment in a gross negligence case, a plaintiff must provide substantial evidence of serious negligence." *Id.* at 345-46. Without a more precise

statement of the applicable legal standard, we cannot determine whether the trial court improperly curtailed its analysis.

Regardless, we may affirm on any grounds supported by the record,[3] and we do so here. At bottom, the fatal flaw in Peterhans' response to Defendants' summary judgment motion is that it is not adequately supported by expert testimony. Because Peterhans alleges medical negligence, establishing whether reasonable minds could differ with regard to gross negligence requires expert testimony stating the applicable standard of care, explaining how the care given to Colin fell substantially short of that standard, and establishing causation. *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 446, 448, 177 P.3d 1152 (2008). Critical here, "The expert's opinion must be based on fact and cannot simply be a conclusion or based on an assumption if it is to survive summary judgment." *Volk v. DeMeerleer*, 187 Wn.2d 241, 277, 386 P.3d 254 (2016).

Reyes v. Yakima Health District, 191 Wn.2d 79, 87, 419 P.3d 819 (2018), draws "[a] useful contrast . . . between two similar cases to demonstrate what is required for a medical expert's testimony to create a genuine issue." It begins with *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015), where the plaintiff's expert testified as follows:

> "The surgeons performed multiple operations without really addressing the problem of non-union and infection within the standard of care. ...
>
> ...With regards to referring Ms. Keck for follow up care, the records establish that the surgeons were sending Ms. Keck to a general dentist as opposed to an oral surgeon or even a plastic surgeon or

[3] *In the Matter of Gilbert Miller Testamentary Credit Shelter Tr. & Estate of Miller*, 13 Wn. App. 2d 99, 107, 462 P.3d 878 (2020) (citing *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App 449, 453, 266 P.3d 881 (2011)).

> an Ear, Nose and Throat doctor. Again, this did not meet the standard of care as the general dentist would not have had sufficient training or knowledge to deal with Ms. Keck's non-union and the developing infection/osteomyelitis."

Reyes, 191 Wn.2d at 87 (quoting *Keck*, 184 Wn.2d at 371). Based on that testimony, the Supreme Court held "a jury could conclude that a reasonable doctor would have referred Keck to another qualified doctor for treatment—standard of care—and that the Doctors did not treat her issues or make an appropriate referral—breach." *Keck*, 184 Wn.2d at 372.

Next, the court in *Reyes* discusses *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 851 P.2d 689 (1993), where the plaintiff's expert testified:

> "Mrs. Guile suffered an unusual amount of post-operative pain, developed a painful perineal abscess, and was then unable to engage in coitus because her vagina was closed too tight. All of this was caused by faulty technique on the part of the first surgeon, Dr. Crealock. In my opinion he failed to exercise that degree of care, skill, and learning expected of a reasonably prudent surgeon at that time in the State of Washington, acting in the same or similar circumstances."

Reyes, 191 Wn.2d at 87 (quoting *Guile*, 70 Wn. App.at 26). Unlike the expert testimony in *Keck*, the testimony in *Guile* was determined to be "insufficient" because it was "merely a summarization of Guile's postsurgical complications, coupled with the unsupported conclusion that the complications were caused by Crealock's 'faulty technique.'" *Guile*, 70 Wn. App.at 26.

Having described these two comparators, the court in *Reyes* turned to the expert testimony at issue in the appeal. The expert there submitted two affidavits. In the first affidavit, the expert testified:

> (a) Jose Reyes did not have tuberculosis when he presented at Yakima Health District and Dr. Spitters, stated with reasonable medical certainty;

> (b) Jose Reyes did suffer from chronic liver disease, and was at risk for catastrophic liver failure if he were treated with medicines contraindicated for liver disease, stated with reasonable medical certainty;
>
> (c) Jose Reyes presented to Yakima Health District and Dr. Spitters with clinical symptoms of liver failure that should have been easily diagnosed by observation of the patient, stated with reasonable medical certainty;
>
> (d) The failure of Yakima Health District and Dr. Spitters to accurately diagnose Jose Reyes' liver disease and liver deterioration due to prescribed medications to treat tuberculosis that were contraindicated for Jose Reyes were direct and proximate causes of Mr. Reyes' liver failure and death, stated with reasonable medical certainty.

191 Wn.2d at 88. And in a second affidavit, the expert stated: "[a]n alternate drug should have been introduced for Mr. Reyes if the defendants chose to treat Mr. Reyes empirically for tuberculosis." *Id.*

Comparing this expert testimony to that in *Keck* and *Guile*, the court held it was insufficient to create a genuine issue of material fact. The court summarized its holding as follows:

> There is no indication of what a reasonable physician should have done other than diagnose liver failure by observation of the patient. This circular conclusion is akin to the deficient expert witness testimony in *Guile*, where an allegation that a reasonable doctor would not have acted negligently was found insufficient to create a genuine issue of material fact. 70 Wash.App. at 26, 851 P.2d 689.
>
> Nor can negligence be inferred from the factual allegations relating to Mr. Reyes' tragic death. *See Watson v. Hockett*, 107 Wash.2d 158, 161, 727 P.2d 669 (1986) ("[A] doctor will not normally be held liable under a fault based system simply because the patient suffered a bad result."). Allegations amounting to an assertion that the standard of care was to correctly diagnose or treat the patient are insufficient. Instead, the affiant must state specific facts showing what the applicable standard of care was and how the defendant violated it. Dr. Martinez failed to do so.

191 Wn.2d at 89. Lastly, the court added, "In affirming the court of appeals, we do not require affiants to aver talismanic magic words, but allegations must amount to more than conclusions of misdiagnosis, with a basis in admissible evidence that can support a claim." *Id.* (citing *Keck*, 184 Wn.2d at 370).

Here, in response to Defendants' summary judgment motion, Peterhans relied on the testimony of William Newman, M.D., a board certified psychiatrist who testified he is familiar with "[t]he standard of care for reasonably prudent inpatient treatment and discharge decisions pertaining to patients in danger of harming themselves." In his initial declaration, Dr. Newman testified as follows:

> 4. I have reviewed substantial records pertaining to Colin's stay at the Defendant Harborview's Psychiatric floor in August and September of 2020.
>
> 5. Colin was discharged from the floor on September 28th, 2020. A matter of hours later he attempted suicide by jumping out his apartment window, sustaining catastrophic injuries.
>
> 6. This suicide attempt was clearly foreseeable under the circumstances and clearly preventable by not discharging him at that time. Further, as amply documented in Defendant's own chart, the decision to discharge him fell significantly below the standard of care for reasonably prudent psychiatrists under the circumstances, in the state of Washington or any other state.
>
> 7. Colin was admitted to the Defendant's psychiatric ward in the first place on August 12th, 2020 following an apparent suicide attempt, i.e., an overdose of lithium. His extensive psychiatric history was significant for past episodes of self-harm, including another recent overdose of lithium and a cut on his neck with a knife. Upon admission he was "frankly psychotic." He made little if any discernable progress.
>
> 8. At one point during the stay he harmed himself with a cut to his hand, and refused a wound consult that had been offered him.
>
> 9. Two days before discharge, he "seriously assaulted" a male staff member and was placed in seclusion. The discharge summary clearly states that "it was believed that he wasn't benefiting

> from hospitalization" and discharge was therefore planned. In fact, with a longstanding diagnosis of a Psychotic Disorder, Colin was the exact type of patient who would be likely to benefit from inpatient psychiatric treatment. The standard of care was to keep him involuntarily committed until he was stable for discharge, i.e., clearly not a danger to himself or others.
>
> 10. Up to literally the day before discharge, Colin's Attending Physicians continuously certified in his records that he "may not be released from involuntary commitment to accept treatment on a voluntary basis, or to be discharged from the hospital to accept voluntary outpatient treatment upon referral."
>
> 11. Indeed, three days before discharge, Dr. Sharon Romm had certified that he "may not be released from involuntary commitment to accept treatment on a voluntary basis." Yet, three days later----after his assault on the staff member----Dr. Romm personally saw to his discharge.
>
> 12. In fact, records indicate that Dr. Romm was "concerned about the patient's risk of OD (overdose)" even as he was discharged, and therefore had authorized only a one-week supply of medications as he left.
>
> 13. It's well known that psychiatric patients such as Colin are at increased risk of suicide immediately following discharge from an inpatient facility. Colin was discharged into his own care, though his mother was in contact with the facility, and though out of town, was asking them to at least delay discharge until she could be there to see to Colin. Even had discharge been appropriate, which it wasn't, discharging Colin into his own care was an additional breach of the standard of care.
>
> 14. The above is an overview of my opinions, namely (1) Colin's discharge was below the standard of care for reasonably prudent inpatient psychiatrists in the situation presented, at the relevant time in the State of Washington and (2) keeping him hospitalized and under reasonably prudent care would have prevented his suicide attempt immediately following discharge.

Then, in a supplemental declaration, Dr. Newman cited the pattern jury instruction regarding gross negligence and opined: "In my opinion, to a reasonable degree of

medical certainty, the decision to discharge Colin at all, let alone to his own care was 'gross negligence' as defined by the Washington pattern jury instruction."[4]

Applying the above legal principles regarding the meaning of "gross negligence" and the sufficiency of expert testimony in cases alleging medical negligence to Dr. Newman's declarations, there are at least two overarching flaws in his testimony. First, similar to the expert testimony in *Reyes* and *Guile*, there is no indication what a reasonable physician should have done other than delay Colin's discharge. As the court observed in *Reyes*, this is "akin to the deficient expert witness testimony in *Guile*, where an allegation that a reasonable doctor would not have acted negligently was found insufficient to create a genuine issue of material fact." *Reyes*, 191 Wn.2d at 89 (citing *Guile*, 70 Wn. App. at 26). This deficiency is especially troubling here because Colin was receiving involuntary treatment under the ITA, which allows the State to detain a person for evaluation and treatment only when certain statutory criteria are satisfied. Relevant here, the stated intent of the statute includes: "[t]o protect the health and safety of persons suffering from behavioral health disorders"; "[t]o prevent inappropriate, indefinite commitment of persons living with behavioral health disorders"; "[t]o safeguard individual rights"; and "[t]o encourage, whenever appropriate, that services be provided within the community" RCW 71.05.010(a), (b), (d), and (g). Dr. Newman's declaration does not address this statutory overlay. Like the expert

[4] The pattern jury instruction cited by Dr. Newman states: "Gross negligence is the failure to exercise slight care. It is negligence that is substantially greater than ordinary negligence. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care." 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 10.07 (6th ed. 2012). While the instruction begins with the "slight care" formulation, it defines that legal standard by comparing it to ordinary care, which, as discussed in the text above, is consistent with controlling case law.

testimony in *Reyes* and *Guile*, Dr. Newman's bald assertion that a reasonable doctor would not have discharged Colin when and as Defendants did is insufficient to create a genuine issue of material fact on summary judgment.

Second, notwithstanding the court's holding in *Harper* that the applicable analysis encompasses "both the relevant failure and, if applicable, any relevant actions that the defendant did take," 192 Wn.2d at 343, Dr. Newman does not address the actions Defendants *did* take leading to discharge. The summary judgment record shows that Dr. Romm and others at Harborview regularly monitored Peterhans for suicide risk with multiple providers documenting that his risk was low in the days just prior to discharge, that Dr. Romm evaluated Colin's treatment history and assessed his condition before discharge, and that Colin was discharged under an outpatient care plan which included Colin's agreement to take his medications. Dr. Newman does not address these actions. Nor does he explain how Defendants' failure to take certain actions—short of simply denying discharge—caused Colin's injuries. Dr. Newman thus fails to fully engage in the required analysis under *Harper*.

While Dr. Newman discusses some of the circumstantial facts associated with discharge, he again fails to engage in the required analysis. For example, Dr. Newman claims that, three days prior to discharge, Dr. Romm certified that Colin "may not be released from involuntary commitment to accept treatment on a voluntary basis" and then questions how that could no longer be true on the day of discharge. This merely shows that Colin was not ready for discharge until Dr. Romm and others reevaluated their prior determination—which clearly had to occur at some point—and concluded they could no longer lawfully detain Colin for

involuntary treatment. Dr. Newman does not explain how this iterative certification process fell substantially short of the applicable standard of care. Dr. Newman also states that Colin's mother was or would soon be en route to Harborview and then opines, "Even had discharge been appropriate, which it wasn't, discharging Colin into his own care was an additional breach of the standard of care." But there is no testimony substantiating this purported standard of care, which, broadly applied, would require continuing to detain patients for involuntary treatment until a family member arrived for discharge. The ITA contains no such proviso.

On this record, the trial court did not err in granting summary judgment dismissing Peterhans' cause of action for gross negligence. We affirm.

Feldman, J.

WE CONCUR:

Birk, J.

Coburn, J.

APPENDIX 1

The Honorable Andrea Robertson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

MARCI PETERHANS, individually and MARCI PEREHANNS AS GUARDIAN FOR COLIN PETERHANS,

Plaintiff,

vs.

UNIVERSITY OF WASHINGTON, a WASHINGTON STATE AGENCY, and THE STATE OF WASHINGTON,

Defendant.

NO. 23-2-11528-7 SEA

DECLARATION OF WILLIAM NEWMAN, M.D.

William Newman, M.D., declares the following to be true under penalty of perjury under the laws of the State of Washington:

1. I am over the age of 18 and competent to testify to the matters below.

2. I am a board-certified psychiatrist with substantial experience in inpatient psychiatric treatment. My resume is attached and incorporated herein.

3. The standard of care for reasonably prudent inpatient treatment and discharge decisions

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pertaining to patients in danger of harming themselves and\or others is a national standard. I am quite familiar with that standard, generally, and specifically pertaining to patients with Colin Peterhans' presentation and hospital course at the times pertinent to this lawsuit.

4. I have reviewed substantial records pertaining to Colin's stay at the Defendant Harborview's Psychiatric floor in August and September of 2020.

5. Colin was discharged from the floor on September 28th, 2020. A matter of hours later he attempted suicide by jumping out his apartment window, sustaining catastrophic injuries.

6. This suicide attempt was clearly foreseeable under the circumstances and clearly preventable by not discharging him at that time. Further, as amply documented in Defendant's own chart, the decision to discharge him fell significantly below the standard of care for reasonably prudent psychiatrists under the circumstances, in the state of Washington or any other state.

7. Colin was admitted to the Defendant's psychiatric ward in the first place on August 12th, 2020 following an apparent suicide attempt, i.e., an overdose of lithium. His extensive psychiatric history was significant for past episodes of self-harm, including another recent overdose of lithium and a cut on his neck with a knife. Upon admission he was "frankly psychotic." He made little if any discernable progress.

8. At one point during the stay he harmed himself with a cut to his hand, and refused a wound consult that had been offered him.

9. Two days before discharge, he "seriously assaulted" a male staff member and was placed in seclusion. The discharge summary clearly states that "it was believed that he wasn't benefiting from hospitalization" and discharge was therefore planned. In fact, with a longstanding diagnosis of a Psychotic Disorder, Colin was the exact type of patient who would be likely to benefit from inpatient psychiatric treatment. The standard of care was to keep him involuntarily committed until he was stable for discharge, i.e., clearly not a danger to himself or others.

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10. Up to literally the day before discharge, Colin's Attending Physicians continuously certified in his records that he "may not be released from involuntary commitment to accept treatment on a voluntary basis, or to be discharged from the hospital to accept voluntary outpatient treatment upon referral."

11. Indeed, three days before discharge, Dr. Sharon Romm had certified that he "may not be released from involuntary commitment to accept treatment on a voluntary basis." Yet, three days later----after his assault on the staff member----Dr. Romm personally saw to his discharge.

12. In fact, records indicate that Dr. Romm was "concerned about the patient's risk of OD (overdose)" even as he was discharged, and therefore had authorized only a one-week supply of medications as he left.

13. It's well known that psychiatric patients such as Colin are at increased risk of suicide immediately following discharge from an inpatient facility. Colin was discharged into his own care, though his mother was in contact with the facility, and though out of town, was asking them to at least delay discharge until she could be there to see to Colin. Even had discharge been appropriate, which it wasn't, discharging Colin into his own care was an additional breach of the standard of care.

14. The above is an overview of my opinions, namely (1) Colin's discharge was below the standard of care for reasonably prudent inpatient psychiatrists in the situation presented, at the relevant time in the State of Washington, and (2) keeping him hospitalized and under reasonably prudent care would have prevented his suicide attempt immediately following discharge.

I declare the foregoing to be true under penalty of perjury.

DATED this 23rd day of January, 2024.

Wm Newman MD

William Newman, M.D.

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CERTIFICATE OF SERVICE

I, Kelsey M. Coleman, certify under penalty of perjury under the laws of the State of Washington that on the date below I served a true and correct copy of the foregoing document via King County E-filing application and via email to the following parties:

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DATED this 23rd day of January, 2024.

/s/ Kelsey M. Coleman
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APPENDIX 2

The Honorable Andrea Robertson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

MARCI PETERHANS, individually and MARCI PEREHANNS AS GUARDIAN FOR COLIN PETERHANS,

Plaintiff,

vs.

UNIVERSITY OF WASHINGTON, a WASHINGTON STATE AGENCY, and THE STATE OF WASHINGTON,

Defendant.

NO. 23-2-11528-7 SEA

SUPPLEMENTAL DECLARATION OF WILLIAM NEWMAN, M.D.

William Newman, M.D., declares the following to be true under penalty of perjury under the laws of the State of Washington:

1. I am over the age of 18 and competent to testify to the matters below.

2. I previously executed a Declaration in this matter on January 23, 2024, which is attached, and which continues to reflect my opinions on this matter.

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3. In my January 23, 2024 Declaration, I specifically said, at paragraph 6, that the decision to discharge Colin Peterhans on September 28, 2020 "fell **significantly** below the standard of care for reasonable prudent psychiatrists under the circumstances, in the State of Washington or any other state."

4. I went on to add in my January 23, 2024 Declaration, in paragraph 13, that "Even had discharge been appropriate, which it wasn't, discharging Colin into his own care was an **additional** breach of the standard of care."

5. I have reviewed Washington's "pattern jury instruction" number 10.07, which defines "gross negligence." In my mind there is no difference between my January 23, 2024 Declaration's statement that Colin's discharge fell "significantly" below the standard of care and saying that it fell "substantially" below the standard of care.

6. In any event, for the reasons set forth in my original Declaration, in my opinion, to a reasonable degree of medical certainty, the decision to discharge Colin at all, let alone to his own care was "gross negligence" as defined by the Washington pattern jury instruction.

7. I have reviewed the Declarations of David Clark, Ph.D. and Douglas Jacobs, M.D., which were submitted in support of Defendant's Motion for Summary Judgement. Neither Declaration changes my opinion as set forth in my Declarations. Suffice to say that I disagree with their opinions that discharging Colin was within the standard of care, and/or did not contribute to his catastrophic injuries.

I declare the foregoing to be true under penalty of perjury.

DATED this 14th day of May, 2024.

Wm. Newman, MD

William Newman, M.D.

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