IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PATRICIA HAHN, individually and as Personal Representative of the Estate of GREG BOWMAN, Deceased,	)	**No. 27656-2-III**
Appellants,	)	
v.	)	
CHELAN-DOUGLAS BEHAVIORAL HEALTH CLINIC, KENT R. NAGEL and JANE DOE NAGEL, Individually and as an agent of CHELAN-DOUGLAS BEHAVIORAL HEALTH CLINIC,	)	**Division Three**
Respondents,	)	
CENTRAL WASHINGTON HEALTH SERVICES ASSOCIATION aka CENTRAL WASHINGTON HOSPITAL,	)	
Defendant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Greg Bowman committed suicide hours after authorities declined to order him committed for mental health treatment. His mother, as personal representative

of his estate, sued the mental health clinic and the community designated mental health professional (CDMHP)[1] who made the decision. The trial court dismissed the case on summary judgment after concluding that the respondents were immune from suit. We agree that appellants have not established that an exception to the statutory immunity exists in this case. We affirm.

FACTS

Patricia Hahn, Mr. Bowman's mother, became concerned on February 7, 2005, about him behaving abnormally. He did not follow his normal routine and was forgetful, staring blankly at the wall. She took him to the emergency room at Central Washington Hospital the following day. After being evaluated, Mr. Bowman was told to see his regular physician the next day.

The physician saw him February 9, 2005, and scheduled Mr. Bowman for a CAT scan the next afternoon, as well as an appointment for him at Chelan-Douglas Behavioral Health Clinic (Clinic). Mr. Bowman saw "Jeff" at the Clinic on February 10 and was given an appointment to see a psychiatrist at the Clinic the following morning. Later that day, Mr. Bowman's behavior worsened and paramedics were called to his home. He told

[1] The Legislature amended the statutory definition and now calls a CDMHP "Designated Mental Health Professional." Laws of 2005, ch. 504, § 104. That change was not extended to the immunity statute, RCW 71.05.120. Because these events occurred prior to the amendment, we will continue to use CDMHP.

them that he wanted to be left alone and die. The paramedics strapped him down and took him to the emergency room on a gurney.

Kent Nagel, a CDMHP, was called in to evaluate Mr. Bowman's mental health. He contacted the on-duty nurse and physician, as well as Ms. Hahn, Mr. Bowman's sister, and his niece. Mr. Bowman told Mr. Nagel that he did not see a future. He also told him that he had swallowed half a bottle of his anxiety medication, Hydroxin, in an effort to stop his heart. A doctor advised Nagel that the dosage would not be fatal.

Apparently believing that Mr. Bowman's behavior would improve after he recovered from the overdose, Mr. Nagel decided not to commit Mr. Bowman to the Clinic. Ms. Hahn begged Nagel to do so, but he refused to admit Mr. Bowman. Ms. Hahn drove her son home. In the car, Mr. Bowman told her that he wanted to go back to the hospital. She told him that the hospital would not accept him.

About 10:30 p.m. that night Mr. Bowman left the house and jumped off the Wenatchee pedestrian bridge into the Columbia River. His body was recovered about three months later.

Ms. Hahn filed a complaint for wrongful death on the basis of professional negligence, malpractice, and common law negligence. The suit named the Clinic and Mr. Nagel, alleging that they failed to adequately evaluate, intervene, and timely treat Mr.

Bowman.[2]

The defendants moved for a judgment on the pleadings and summary judgment on the basis that they were immune from suit since there was no allegation of bad faith or gross negligence. Ms. Hahn moved to amend the pleadings to add a gross negligence claim. In response to the summary judgment motion, she filed an unsigned affidavit from her expert witness, Dr. Michael Allen of Colorado. The defendants moved to strike the unsworn document.

The trial court denied the motion for judgment on the pleadings and the motion to strike Dr. Allen's unsworn affidavit. The court granted the motion for summary judgment and denied the motion to amend the complaint since it was moot. The trial court ruled that summary judgment was proper because the defendants were immune from suit under RCW 71.05.120 and the statement of Dr. Allen did not establish specific facts showing the standard of care or that Mr. Nagel's conduct was grossly negligent.

The estate then timely appealed to this court.

ANALYSIS

The estate contends that the trial court erred in finding that the immunity provisions of RCW 71.05.120(1) apply to cases of suicide and that, if the statute is

[2] The suit also named Central Washington Hospital, but the parties later stipulated to dismiss the hospital from the action.

applicable, there was sufficient evidence of gross negligence to go to the jury. Issues of statutory construction are reviewed *de novo*. *Cosmopolitan Eng'g Group*, *Inc. v. Ondeo Degremont*, *Inc.*, 159 Wn.2d 292, 298, 149 P.3d 666 (2006) ("Statutory interpretation is a question of law, subject to de novo review."). Statutes that are clear and unambiguous do not need interpretation. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Equally well settled are the standards governing review of summary judgment rulings. A reviewing court also considers those matters *de novo*, considering the same evidence presented to the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id*. If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id*.

Interpretation of the Immunity Statute

RCW 71.05.120 states:

> (1) 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.

(2) This section does not relieve a person from giving the required notices under RCW 71.05.330(2) or 71.05.340(1)(b), or the duty to warn or take reasonable precautions to provide protection from violent behavior where the patient has communicated an actual threat of physical violence against a reasonably identifiable victim or victims. The duty to warn or to take reasonable precautions to provide protection from violent behavior is discharged if reasonable efforts are made to communicate the threat to the victim or victims and to law enforcement personnel.

Appellants contend that this statute does not apply to cases of suicide, arguing that the warning requirement of subsection (2) would be absurd in cases of suicide. However, if the immunity statute does apply, then the respondents did not take reasonable precautions required by that subsection. Respondents argue that the plain language of subsection (1) precludes any liability for the admission decision. In their view, subsection (2) only applies to a duty to warn third parties. We agree with respondents.

Subsection (1) could not be clearer. As relevant here, no CDMHP or "treatment facility shall be civilly . . . liable . . . with regard to the decision of whether to admit" a patient. Nothing in that language suggests that the immunity is inapplicable to cases of suicide. If the Legislature intended to exclude suicide, it would have said so. Instead, the legislation expressly says that no person shall be liable over an admissions decision. There is no express exemption for suicide and there is no language to imply such an exception.

The existence of subsection (2) does not aid the appellants. It simply says that the

immunity granted by subsection (1) does not relieve health care providers of the obligation to warn third parties imposed by statute or the common law. *See Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) (adopting *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334 (1976) (duty to warn identifiable third parties of credible threats of harm made to therapist)). This subsection does not create a duty to warn; it tells health care providers who fail to live up to the duty to warn that they will not receive the benefit of the immunity statute.

Since subsection (2) creates no new duty, appellants cannot claim that the respondents breached a duty to warn. Additionally, appellants did not allege failure to warn as a cause of action in either the original or proposed amended complaint. That new theory is not a basis for relief. *E.g.*, *Berge v. Gorton*, 88 Wn.2d 756, 762-763, 567 P.2d 187 (1977).

The trial court correctly concluded that the immunity statute was applicable to this case.

Summary Judgment

The remaining issue is whether the evidence suggested that Mr. Nagle was grossly negligent in his decision to deny admission and, hence, within the exception to the immunity statute. We agree with the trial court that appellants did not establish the

relevant standard of care or factually show that the decision to deny admission was grossly negligent.[3]

In order to maintain a medical negligence action, a plaintiff must establish that a health care provider failed to exercise the degree of skill expected of a reasonably prudent health care provider and that the failure was a proximate cause of injury. RCW 7.70.040. This requires the plaintiff to present expert testimony to establish both the standard of care expected of a Washington health care provider and to explain how the care given the plaintiff fell short of that standard. *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 448-449, 663 P.2d 113 (1983); *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 446, 177 P.3d 1152 (2008).

The statement of Dr. Allen fell far short of meeting these standards. It did not establish the standard of care for a CDMHP facing a commitment decision. Dr. Allen stated that he was familiar with the standard of care and opined that Mr. Nagle did not live up to the standard. However, the standard of care was never articulated. Would a reasonably prudent CDMHP commit anyone who had threatened at some time to commit suicide? Had done so within 24 hours? Had actually taken steps to kill himself? The answers to these, or other questions that might define the standard of care, are

[3] We do not reach respondents' other arguments, including the claim that the trial court erred by considering Dr. Allen's unsworn statement.

unanswered.

There are also no facts articulated by Dr. Allen that would show Mr. Nagle performed in a grossly negligent manner. A health care provider acts negligently when he or she fails to comply with the relevant standard of care. *Shea v. City of Spokane*, 17 Wn. App. 236, 244-245, 562 P.2d 264 (1977), *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978). Gross negligence, in turn, is "negligence substantially and appreciably greater than ordinary negligence." *Nist v. Tudor*, 67 Wn.2d 322, 331, 407 P.2d 798 (1965). To defeat summary judgment here, the appellants had to set forth facts that would show that the decision not to admit Mr. Bowman was substantially at odds with the standard of care.

Appellants have not met that showing. There is no factual discussion by Dr. Allen about what Mr. Nagle allegedly did wrong, let alone that it was so far wrong to amount to gross negligence. Instead, the statement from Dr. Allen simply claims that Mr. Nagle acted with gross negligence. A conclusory statement is not evidence; a factual statement of the wrongful acts allegedly performed by Mr. Nagle or of actions he failed to take was in order. There are minimal allegations in this regard. The statement simply does not provide a factual basis for taking a gross negligence claim to a jury.

With the benefit of hindsight, we know that Mr. Bowman should have been admitted to the Clinic. What we do not have in this record is evidence of the standard of

care for a CDMHP and how Mr. Nagle's actions complied with or deviated from that standard. In the absence of evidence that the decision not to admit him was substantially negligent, we cannot say that the legislative immunity for mental health care decisions has been overcome. The trial court did not err in granting summary judgment.

The judgment is affirmed.

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

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Korsmo, J.

WE CONCUR:

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Schultheis, C.J.

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Sweeney, J.