NO. 93397-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BETTYJEAN TRIPLETT and KEVIN SMITH as Personal Representatives of the Estate of Kathleen Gail Smith; BETTYJEAN TRIPLETT, individually; and KEVIN SMITH, individually,

Respondents,

vs.

WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES; WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES DIVISION OF DEVELOPMENTAL DISABILITIES; WASHIGNTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES AGING AND DISABILITY SERVICES ADMINISTRATION; LAKELAND VILLAGE; WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES SECRETARY ROBIN ARNOLD-WILLIAMS; WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES DIRECTOR LINDA ROLFE; MICHAEL NOLAND, an individual,

Petitioners.

MEMORANDUM OF *AMICUS CURIAE* WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS SUPPORTING PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals refused qualified immunity to three state officials because, in its view, "it was clearly established before March 2006 that a deprivation of life with the requisite fault would subject an individual defendant to liability under § 1983." *Triplett v. DSHS*, 193 Wn. App. 497, 505-04, 373 P.3d 279 (2016). The United States Supreme Court has repeatedly "chastised" federal appellate courts for employing this very analysis; namely conflating the elements of liability with the qualified immunity equation. *See Hamby v. Hammond*, 821 F.3d 1085, 1090 (9th Cir. 2016) (citing *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775-76, 191 L. Ed. 2d 856 (2015)). As the Court reaffirmed again, just last year, what matters is not whether the evidence permits a jury to find the requisite level of fault, but instead, whether existing "precedent on the books" established "beyond debate" that the *specific conduct* in which the defendant is alleged to have engaged *amounts to that requisite fault*. *Taylor v. Barkes*, 135 S. Ct. 2042, 2044, 192 L. Ed. 2d 78 (2015) (per curiam). That is a purely legal conclusion that must be decided by the court—not the jury. Given that this flawed analysis now finds itself in Washington's Appellate Reports, this Court should grant review and reverse.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

WSAMA is a non-profit organization of municipal attorneys in Washington State. *See* http://www.wsama.org. WSAMA members represent the 281 municipalities throughout the state as both in-house

counsel and as private, outside legal counsel. Frequently, WSAMA members are asked to defend municipal officials in civil rights suits, which often involve issues of qualified immunity, given the Supreme Court's mandate that immunity is to be considered "'the norm'" in claims seeking liability under 42 U.S.C. § 1983. *Malley v. Briggs*, 457 U.S. 335, 340, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

III. STATEMENT OF THE CASE

WSAMA adopts the factual discussion as presented by the Court of Appeals. *Triplett*, 193 Wn. App. at 504-06.

IV. ISSUE PRESENTED

Whether a reasonable official could understand existing precedent on the books, as of March 2006, to hold that a disabled person's substantive due process rights are not implicated when a caregiver fails to comply with an individual habilitation plan requiring visual supervision during a bath.

V. ARGUMENT

In addition to all of the reasons advanced by the State, review is warranted here under RAP 13.4(b)(3) ("a significant question of law under the Constitution of the State of Washington or of the United States is involved") and RAP 13.4(b)(4) ("the petition involves an issue of substantial public interest that should be determined by the Supreme Court"). The United States Supreme Court recently reaffirmed "the importance of qualified immunity 'to society as a whole,'" and noted that

"the Court often corrects lower courts when they wrongly subject individual officers to liability." *Sheehan*, 135 S. Ct. at 1774 n.3 (quoting *Harlow*, 457 U.S. at 814). Given the Supreme Court's recognition of qualified immunity's value, there can be little debate that this petition "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Moreover, the doctrine of qualified immunity inevitably calls upon the Court to identify the precise contours of a constitutional right, *e.g., Reichle v. Howards*, 132 S. Ct. 2088, 2093, 182 L. Ed. 2d 985 (2012). This case is no different. The Court is being asked to define the constitutional obligations and limitations of a state actor entrusted to supervise a disabled person.[1] This independently justifies review under RAP 13.4(b)(3).

Under either RAP 13.4(b)(3) or RAP 13.4(b)(4), review is warranted in this case.

[1] The Court of Appeals concluded that discretionary review was improvidently granted as to the trial court's apparent approval of a CR 56(f) request by the plaintiffs to conduct further discovery as to the two other individual defendants, former DSHS Secretary Robin Arnold-Williams and the Director of Developmental Disabilities Linda Rolfe. *Triplett*, 193 Wn. App. at 531-33. DSHS does not appear to be challenging the Court of Appeals' action in that regard, even though there is precedent for permitting interlocutory review of trial court orders refusing to consider qualified immunity until all discovery is completed. *E.g., Summers v. Leis*, 368 F.3d 881, 887 (6th Cir. 2004) (a "district court's refusal to address the merits of the defendant's motion asserting qualified immunity constitutes a conclusive determination for the purposes of allowing an interlocutory appeal" even when such a refusal reflects a "belief that any decision regarding qualified immunity [is] premature and should await the close of discovery"). However, because all parties correctly agree that both Ms. Arnold-Williams and Ms. Rolfe are entitled to qualified immunity if Michael Noland is immune, the Court need not and should not consider the propriety of the trial court's continuance under CR 56(f).

A. Qualified Immunity Does Not Exist For Its Own Sake, But To Ensure That Good People Will Not Be Deterred From Public Service

WSAMA fully acknowledges the need to hold certain public officials accountable. Those who are "plainly incompetent or... knowingly violate the law" are not entitled to qualified immunity, *Ashcroft v. al-Kidd*, 563 U.S. 731, 743, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011), nor should they be. However, everyone else, according to the Supreme Court, is entitled to immunity. *Id.* This is for good reason; the social costs of lawsuits against public officials are significant:

> [T]he expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office... there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.

Crawford-El v. Britton, 523 U.S. 574, 591 n.12, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) (citations and internal quotation marks omitted).

The qualified immunity doctrine, in this respect, strikes the proper "balance[] [between] two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Reasonable mistakes of law, fact, or a combination of the two immunizes the individual. *See id.*

The issue is whether the law was "clearly established" at the time of the conduct alleged to be unconstitutional. *Brosseau v. Haugen*, 543

U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (per curiam). "'To be clearly established, a right must be sufficiently clear that *every*[2] reasonable official would have understood that what he is doing violates that right.'" *Taylor*, 135 S. Ct. at 2044 (quoting *Reichle*, 132 S. Ct. 2093) (emphasis added). Properly defining the right at issue is critical. *Id.* This requires specificity, not a broad proposition. *Reichle*, 132 S. Ct. at 2094.[3] Although a "case not directly on point" is not necessarily required, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. The Supreme Court has clarified "what is necessary" to cross the threshold of clearly establishing the law is either "controlling authority" or "a robust 'consensus of cases of persuasive authority.'" *Id.* at 742 (quoting *Wilson v. Layne*, 526 U.S. 603, 617, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)).

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[2] The Court of Appeals below seemed to question the genesis of the word "every," noting that the Court *Anderson* used the singular "a reasonable official," assuming that it was a "test in less demanding terms." *Triplett*, 193 Wn. App. at 527 n.9. In truth, the Court's adoption of the word "every" in *al-Kidd*, 563 U.S. at 741, adheres to the doctrine's origins. The issue *Anderson* actually decided was "whether a federal law enforcement officer who participates in a search that violates the Fourth Amendment may be held personally liable for money damages if *a* reasonable officer could have believed that the search *comported* with the Fourth Amendment." *Anderson v. Creighton*, 483 U.S. 635, 636-37, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (emphasis added). In other words, the law has always afforded immunity if *a* reasonable officer believed the conduct to be *lawful*, rather than stripping immunity away if *a* reasonable official would believe the conduct to be *un*lawful. So much is clear from *Malley*, on which *Anderson* relied. There, the Court expounded on "the *Harlow* standard," stating that immunity would be lost "if, on an objective basis, it is *obvious* that *no* reasonably competent officer" would believe the defendant's conduct was lawful; conversely, "if *officers of reasonable competence could disagree* on this issue, *immunity should be recognized.*" *Malley*, 475 U.S. at 341 (emphasis added).

[3] This makes sense as a practical matter. Reducing the immunity analysis to simply asking whether reasonable officials "know that 'unreasonable searches are unconstitutional'" would not only render the qualified immunity standard meaningless, but dealing in legal standards—untethered from the facts of the case—would de facto hold all public employees to the standard of a constitutional scholar.

Contrary to the view adopted by the Court of Appeals below, qualified immunity is meant to be an "exacting" standard, as the Court recently emphasized. *Sheehan*, 135 S. Ct. at 1774. And rightly so: "If judges disagree on a constitutional question, it is unfair to subject police [or any public official[4]] to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618.

B. The Court of Appeals' Errant Application Of The Qualified Immunity Doctrine Warrants Review

Plainly stated, the Court of Appeals misapplied the doctrine. It disregarded the above-principles, and instead found all debate over the contours of due process sufficiently eliminated by (1) two cases from east of the Mississippi River and (2) a treatise authored eight years *after* the events at issue in this case. *Triplett*, 193 Wn. App. at 529-30 (citing and discussing *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990), *Ziccardi v. City of Philadelphia*, 288 F.3d 57 (3d Cir. 2002), and MARTIN A. SCHWARTZ, FED. JUDICIAL CTR., SECTION 1983 LITIGATION 41 (3d ed. 2014)). This is a sympathetic case, to be sure. But, in such cases, disciplined adherence to legal principles is needed more than ever.

First and foremost, *Ross* and *Ziccardi* do not—and cannot—clearly establish the unconstitutionality of Mr. Noland's alleged conduct in Washington. *Ross* involved a claim alleging that deputy sheriff actively

[4] "[Q]ualified immunity reflects a balance that has been struck 'across the board.'" *Anderson*, 483 U.S. at 642 (quoting *Harlow*, 457 U.S. at 821 (Brennan, J., concurring)). Consequently, the doctrine's protections do not "turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated." *Id.* at 643.

prevented first responders from attempting to save a drowning boy. *Ross*, 910 F.2d at 1424-25. *Ross*, in addition to being non-binding on Washington public officials, was described by the Ninth Circuit (which does produce binding precedent here) as "an unusual case" with "egregious facts and 'stunning abuse of governmental power.'" *Estate of Amos v. City of Page*, 257 F.3d 1086, 1092 (9th Cir. 2001) (quoting *Ross*, 910 F.2d at 1424). And *Ziccardi* involved the actions of two paramedics who found the plaintiff, suffering from the effects of a severe fall, and proceeded to actively "yank[] him up," which caused the plaintiff's neck to "snap," ultimately leading to quadriplegia. *Ziccardi*, 288 F.3d at 59-60. Neither involved, as here, an alleged omission, nor the administration of a healthcare plan. What is more, the Third Circuit, later, specifically held that *Ziccardi did not* clearly establish a substantive due process violation under different facts. *Estate of Smith v. Marasco*, 430 F.3d 140, 154-55 (3d Cir. 2005). In essence, neither case clearly establishes the law beyond debate for a worker tending to a disabled resident in a care facility.

More fundamentally, even if *Ross* and *Ziccardi* were directly on point—which they are not—they certainly do not form a "robust consensus of cases of persuasive authority." *See al-Kidd*, 563 U.S. at 742 (quoting *Wilson*, 526 U.S. at 617). It is unlikely that a trained civil rights attorney could, in a given moment, draw the same parallel from these Third and Seventh Circuit rulings in the well of a Spokane Superior Court courtroom. Holding a lay counselor working in a Medical Lake treatment facility to that standard is, on its face, unreasonable.

The United States Supreme Court's recent per curiam decisions in *Stanton v. Sims*, 134 S. Ct. 3, 187 L. Ed. 2d 341 (2013) (per curiam) and *Taylor*, 135 S. Ct. 2042, bear out the Court of Appeals' error. In *Stanton* a police officer broke a fence gate while in hot pursuit of a misdemeanant, which inadvertently injured the homeowner. 134 S. Ct. at 4. The Ninth Circuit tried to define the issue as a police officer's authority to enter curtilage because of a suspected misdemeanor, but the Supreme Court disagreed. It added to the inquiry that the officer was actually in "hot pursuit," emphasizing that no case cited by the Ninth Circuit denied immunity in the context of "hot pursuit." *Id.* at 6. The officer was therefore entitled to qualified immunity. *Id.* at 7.

Taylor is even closer to our facts. There, the plaintiff alleged a Section 1983 claim against a jail supervisor for failing to prevent a pretrial detainee's suicide. *Taylor*, 135 S. Ct. at 2043. Importantly—just as the trial court and Court of Appeals did here—the lower courts had rejected qualified immunity because it believed "there remain[ed] a genuine dispute of material fact over whether [the officials] *displayed deliberate indifference*." *Barkes v. First Corr. Med., Inc.*, 766 F.3d 307, 325 (3d Cir. 2014) (emphasis added), *rev'd sub nom.*, *Taylor*, 135 S. Ct. at 2045. The Supreme Court summarily reversed. Examining the two intra-circuit cases the Third Circuit found to clearly establish the law, the high court rejected the attempted merger of the standard of fault and qualified immunity:

> The first [case] ... said that if officials "know or should know of the particular vulnerability to suicide of an

> inmate," they have an obligation "not to act with reckless indifference to that vulnerability." ... The decision did not say, however, that detention facilities must implement procedures to identify such vulnerable inmates, *let alone specify what procedures would suffice.* And the Third Circuit later acknowledged that [its precedent's] use of the phrase "or should know"—which might seem to nod toward a screening requirement of some kind—was erroneous in light of *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994), which held that Eighth Amendment liability requires actual awareness of risk....
>
> Nor would [the other case] have put petitioners on notice of any possible constitutional violation. [That later case] reiterated that officials who know of an inmate's particular vulnerability to suicide must not be recklessly indifferent to that vulnerability.... *But it did not identify any minimum screening procedures or prevention protocols that facilities must use.*

Taylor, 135 S. Ct. at 2045 (emphasis added).

Indeed, just this month, the Ninth Circuit found the evidence sufficient to demonstrate that a public employee's deliberate indifference caused another's death, but still concluded that the law was not "clearly established," such that the individuals were entitled to qualified immunity. *Pauluk v. Savage*, No. 14-15027, slip op. at 17-20 (9th Cir. Sept. 8, 2016).

To summarize, the law must establish beyond debate not only (a) the essential elements of the claim, but also—and more importantly—(b) that the conduct at issue amounts to a constitutional violation.

In the case at hand, Division III erred in the same way. It, too, defined the conduct by reference to the fault standard, *i.e.*, "the right at issue in this case is the right to be free of life endangering conduct by a

reckless state actor." *Triplett*, 193 Wn. App. at 529. This is nothing more than a general statement of the law—and a version of the qualified immunity analysis that has been consistently rejected. *See, e.g.*, *Reichle*, 132 S. Ct. at 2094 ("the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause."). Indeed, it would be difficult to find another area in which the United States Supreme Court has been more consistently engaged over the last five years—repeatedly reversing appellate courts that define the qualified immunity right too broadly or resort to general legal tests, *see Sheehan*, 135 S. Ct. at 1775-76; *Wood v. Moss*, 134 S. Ct. 2056, 2068, 188 L. Ed. 2d 1039 (2014); *Reichle*, 132 S. Ct. at 2094; *al-Kidd*, 131 S. Ct. at 2083-85, or rely on distinguishable precedent, *e.g. Taylor*, 135 S. Ct. at 2044-45; *Carroll v. Carman*, 135 S. Ct. 348, 350-52, 190 L. Ed. 2d 311 (2014) (per curiam); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022-24, 188 L. Ed. 2d 1056 (2014); *Stanton*, 134 S. Ct. 3, 5-6 (2014) (per curiam).

This trend can be best summarized by the Court's admonition that if the constitutional question is arguable, immunity should be recognized. *See, e.g., Carroll*, 135 S. Ct. at 351; *Malley*, 475 U.S. at 341. The Court of Appeals misapplied these principles, thereby warranting reversal.

VI. CONCLUSION

For the reasons above and for the reasons advanced by the State, this Court should grant review and reverse.

RESPECTFULLY SUBMITTED on September 12, 2016.

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CERTIFICATE OF SERVICE

I certify that on the date referenced below, I served via U.S. mail, first class, postage prepaid, a copy of the foregoing document to each and every attorney of record herein, as identified below:

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Dear Mr. Carpenter:

Attached for filing please find the following:

- Motion for Leave to File Memorandum as *Amicus Curiae* by Washington State Association of Municipal Attorneys in Support of Petition for Review
- Memorandum of *Amicus Curiae* by Washington State Association of Municipal Attorneys Supporting Petition for Review

Case Name: *Triplett v. Dep't of Soc. & Health Servs.*
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