Supreme Court No. 93397-9
Court of Appeals No. 32121-5-III

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,

Plaintiffs-Respondents,

vs.

WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES; WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES DIVISION OF DEVELOPMENTAL DISABILITIES; WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES AGING & 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,

Defendants-Petitioners.

RESPONDENTS' ANSWER TO AMICUS CURIAE MEMORANDUM OF WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

George M. Ahrend
Ahrend Law Firm PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000

Mark D. Kamitomo
Collin M. Harper
Markam Group, Inc., P.S.
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201-0406
(509) 747-0902

Co-Attorneys for Plaintiffs-Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Plaintiffs-Respondents Bettyjean Triplett and Kevin Smith, individually and as co-personal representatives of the Estate of Kathleen Gail Smith (collectively "Triplett"), submit the following answer to the Amicus Curiae Memorandum ("ACM") in support of review submitted by the Washington State Association of Municipal Attorneys ("WSAMA").

I. In arguing that the Court of Appeals' decision conflicts with case law from the U.S. Court of Appeals for the Ninth Circuit, WSAMA misapprehends the criteria for review under RAP 13.4(b) as well as the authority of federal courts of appeals.

WSAMA argues that the Court of Appeals erred based in part on Ninth Circuit case law, and further criticizes the court's reliance on cases from other federal circuit courts of appeals on grounds that the Ninth Circuit "does produce binding precedent here." WSAMA ACM, at 7. The Court of Appeals did not err in this case. *See infra.* However, even if WSAMA were correct, conflict with federal case law does not satisfy any of the criteria for review under RAP 13.4(b).

Just as importantly, WSAMA's argument seems to misunderstand the allocation of authority between our state and federal courts. "Although the federal district courts in the Ninth Circuit may be bound to follow Ninth Circuit precedent pursuant to

the doctrine of *stare decisis*, this court is not obligated to follow Ninth Circuit precedent," even with respect to issues of qualified immunity under federal law. *Feis v. King County Sheriff,* 165 Wn. App. 525, 547, 267 P.3d 1022 (2011), *rev. denied*, 173 Wn. 2d 1036 (2012). Furthermore, Washington state courts "have never held that an opinion from the Ninth Circuit is more or less persuasive authority than, for example, the Second, Sixth, Seventh, Eighth, or Tenth Circuits." *In re Personal Restraint of Markel*, 154 Wn. 2d 262, 271 n.4, 111 P.3d 249 (2005).

II. WSAMA's argument that the Court of Appeals erred in applying qualified immunity to the facts of this case does not satisfy the criteria for review in RAP 13.4(b)(3) or (4).

WSAMA argues primarily that the Court of Appeals "misapplied the doctrine" of qualified immunity and that the decision below involves an "errant application" of the doctrine. WSAMA ACM, at 6; *accord id.* at 9-10 (stating the court "erred" and "misapplied" principles of qualified immunity). The Court of Appeals did not err in this case, but even so, error is not a basis for review under RAP 13.4(b).

WSAMA also contends that the Court of Appeals decision warrants review under RAP 13.4(b)(3), which provides for review "[i]f a significant question of law under the Constitution of the State

of Washington or of the United States is involved," and/or RAP 13.4(b)(4), which provides for review "[i]f the petition involves an issue of substantial public interest that should be determined by this Supreme Court." (Brackets added); *see* WSAMA ACM, at 2. However, neither criterion for review is satisfied here.

A. There is no significant question of law under the state or federal constitutions as required for review under RAP 13.4(b)(3) because qualified immunity is a matter of federal common law.

While qualified immunity involves consideration of whether the complaint alleges violation of a clearly established constitutional right, the constitutional right at issue here is well-settled and not reasonably susceptible to dispute: "there can be no question that an interest protected by the text of the [Fourteenth Amendment Due Process Clause] is implicated" when "the actions of the State were part of a causal chain resulting in the undoubted loss of life." *County of Sacramento v. Lewis,* 523 U.S. 833, 856 (1998) (Kennedy, J., concurring; brackets added). WSAMA does not dispute that this constitutional right exists, only whether it is sufficiently clear to overcome qualified immunity.

However, the determination of whether a constitutional right is clearly established is not itself an issue of constitutional

magnitude. It merely involves application of federal common law to the facts of this case.[1] WSAMA does not acknowledge that qualified immunity is a matter of federal common law, rather than an issue of state or federal constitutional law. This should foreclose further review under RAP 13.4(b)(3).

B. There is no issue of substantial public interest that should be determined by this Court as required for review under RAP 13.4(b)(4) because the analysis of qualified immunity is (a) fact-dependent—meaning a decision in this case will provide little guidance in future cases; and (b) governed by federal law—meaning that this Court does not have the last word and the precedential effect of a decision will be limited.

While every case against state actors can be said to involve an element of public interest, the interest must be "substantial" and the issue must be one that "should be decided by" this Court to warrant review under RAP 13.4(b). The issue of qualified immunity in this case is not substantial because it involves application of settled law to the particular facts, and further review will provide little guidance to other courts in future cases. Moreover, the issue

---

[1] *See Petcu v. State*, 121 Wn. App. 36, 63, 86 P.3d 1234 (stating "[f]ederal law defines the scope of qualified immunity from 42 U.S.C § 1983 claims"; brackets added, citing *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980)), *rev. denied*, 152 Wn. 2d 1033 (2004); *see also Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009) (stating "qualified immunity is a doctrine of *federal* common law"; emphasis in original); *Woodson v. City of Richmond*, 88 F. Supp. 3d 551, 577 (E.D. Va. 2015) (describing qualified immunity as "a federal common law precept applicable in Section 1983 cases").

does not need to be decided by this Court because it is a matter of federal law, on which it does not have the last word, and the precedential effect of any decision will be limited.[2]

In arguing that the issue presented by this case is of substantial public interest, WSAMA contends that qualified immunity is important to society, emphasizing the function that it serves in protecting public officials from liability, while simultaneously minimizing the countervailing societal interests in vindicating constitutional rights and holding public officials accountable. *See, e.g.,* WSAMA ACM, at 2-3. Such broad invocations of public policy are insufficient by themselves to warrant review by this Court. Otherwise, every minor tort case would be review-worthy, based on the importance of the analogous public policies in favor of deterring negligence and compensating injured people. *See, e.g., Mohr v. Grantham,* 172 Wn. 2d 844, 851-52, 262 P.3d 490 (2011) (discussing the deterrence and compensatory functions of tort law). This is clearly an over-inclusive approach to the grounds for review under RAP 13.4(b)(4).

[2] The plenitude of recent U.S. Supreme Court decisions regarding qualified immunity cited by WSAMA demonstrates that Court's interest in the issue, over which it has final authority, and counsels against review by this Court.

III. In arguing that the Court of Appeals erred, WSAMA does not acknowledge that the level of specificity required for a constitutional right to be deemed clearly established depends upon the nature of the right involved, the need to balance competing interests, and the presence of exigent circumstances.

While acknowledging that a constitutional right can be clearly established even in the absence of a case that is directly on point, WSAMA seems to criticize the Court of Appeals for finding qualified immunity inapplicable in the absence of a case involving "the administration of a healthcare plan" or "a worker tending to a disabled resident in a care facility." WSAMA ACM, at 7. In leveling this criticism, WSAMA does not provide any explanation of how much detail is sufficient, or even how to distinguish material from immaterial detail. One could be forgiven for surmising that WSAMA seeks an infinite regression of detail, where too much is never enough to overcome qualified immunity.

WSAMA does not address the Court of Appeals' discussion of the level of specificity required for a constitutional right to be deemed clearly established. The court notes that the requisite level of detail may vary depending on the nature of the right at issue, the need to balance competing interests, and exigent circumstances. *See Triplett v. Washington State Dep't of Social & Health Servs.,*

193 Wn. App. 497, 527-29, 373 P.3d 279 (2016). The court quoted *Hope v. Pelzer,* 536 U.S. 730, 741 (2002), for the proposition that "'general statements of the law are not inherently incapable of giving fair and clear warning, and in [some] instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.'" 193 Wn. App. at 528 (brackets in original). It is "clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope,* 536 U.S. at 741.

The cases on which WSAMA relies do not overrule or alter the reasoning of *Hope,* and two of them cite *Hope* with approval.[3] The cases on which WSAMA relies are also distinguishable on multiple levels:

---

[3] *See Brosseau v. Haugen,* 543 U.S. 194, 199 (2004) (per curiam) (citing *Hope* with approval for the proposition that constitutional "standards can 'clearly establish' the answer, even without a body of relevant case law"); *Pearson v. Callahan,* 555 U.S. 223, 244 (2009) (citing *Hope* with approval); *see also Safford Unified Sch. Dist. No. 1 v. Redding,* 557 U.S. 364, 377-78 (2009) (quoting *Hope* with approval for the proposition that "officials can still be on notice that their conduct violates established law ... in novel factual circumstances"; ellipses in original).

First, WSAMA's cases involve different constitutional rights.[4] Many of these rights are less clear in operation than the right to life guaranteed by the Due Process Clause of the Fourteenth Amendment. For example, most of the cases on which WSAMA relies involve the Fourth Amendment, which prohibits "unreasonable" searches and seizures. In a case *not* cited by WSAMA, the U.S. Supreme Court stated:

> specificity is especially important in the Fourth Amendment context, where the Court has recognized that "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts."

Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (quoting *Saucier v. Katz,* 533 U.S. 194, 205 (2001); brackets in original). There is no such ambiguity with respect to the right to life.

---

[4] *See Taylor v. Barkes,* 135 S. Ct. 2042 (2015) (per curiam) (involving ***Eighth Amendment*** claim for failure to implement suicide prevention measures in prison); *City & County of San Francisco v. Sheehan,* 135 S. Ct. 1765 (2015) (involving ***Fourth Amendment*** claim arising from warrantless entry into private room); *Carroll v. Carman,* 135 S. Ct. 348 (2014) (per curiam) (involving ***Fourth Amendment*** claim arising from warrantless entry into backyard and deck); *Wood v. Moss,* 134 S. Ct. 2056 (2014) (involving ***First Amendment*** claim arising from secret service positioning of protestors); *Plumhoff v. Rickard,* 134 S. Ct. 2012 (2014) (involving ***Fourth*** and ***Fourteenth Amendment*** claim arising from claim of excessive force); *Stanton v. Sims,* 134 S. Ct. 3 (2013) (per curiam) (involving ***Fourth Amendment*** claim arising from warrantless entry into fenced yard in hot pursuit of misdemeanant); *Reichle v. Howards,* 132 S. Ct. 2088 (2012) (involving ***First Amendment*** claim for retaliatory arrest); *Ashcroft v. Al-Kidd,* 563 U.S. 731 (2011) (involving ***Fourth Amendment*** claim for unreasonable seizure); *Pearson,* 555 U.S. at 227-28 (involving ***Fourth Amendment*** claim for unreasonable search); *Brosseau,* 543 U.S. at 194 (involving ***Fourth Amendment*** claim for excessive force).

Second, WSAMA's cases involve the need to balance competing interests, such the safety of the public and the rights of the accused.[5] Here, there is no competing interest that would militate against following Kathleen Smith's habilitation plan and providing arm's length supervision while she was bathing to prevent her from drowning when she suffered a seizure. *See Triplett,* 193 Wn. App. at 527-28 (stating "[f]ederal law is less likely to be clearly established when it depends on an ad hoc balancing of competing interests between the state and the individual").

Third, WSAMA's cases typically involve "hot pursuits" by police or similar types of exigent circumstances. *See Sheehan,*

---

[5] *See Taylor,* 135 S. Ct. at 2045 (involving implicit balance to establish procedures to identify vulnerable inmates and prevent suicides in prison); *Sheehan,* 135 S. Ct. at 1770-71 (involving balance of officer and public safety against right to privacy in room); *Carroll,* 135 S. Ct. at 349 (involving balance of interest in law enforcement against rights of property owner); *Wood,* 134 S. Ct. at 2067 (involving balance of "overwhelming" interest in protecting the President against free speech rights of protestors); *Plumhoff,* 134 S. Ct. at 2023-24 (involving of balance of protecting officers and civilians from lengthy, high-speed chase against rights of fugitive); *Stanton,* 134 S. Ct. at 3 (involving balance of enforcement of criminal law against right to privacy in curtilage of home); *Reichle,* 132 S. Ct. at 2096 (involving balance of arrest supported by probable cause against claim that arrest was motivated by retaliation for speech); *Ashcroft,* 563 U.S. at (involving balance of arrest on material-witness warrant to secure testimony at trial against claim that there was no probable cause to detain as suspected criminal); *Pearson,* 555 U.S. at 227-30 (involving balance of enforcement of drug laws against privacy in one's home); *Brosseau,* 543 U.S. at 200 (involving balance of safety of other persons against safety of fleeing felon).

WSAMA places particular emphasis on *Taylor*. *See* WSAMA ACM, at 8-9. However, *Taylor* involved a claim that a prison failed to implement unspecified procedures or protocols to prevent inmate suicides, whereas this case involves a claim that state actors failed to comply with Kathleen Smith's habilitation plan, *which had already been put in place* as a measure deemed necessary to protect her from death by drowning when she suffered a seizure.

Wood, Plumhoff, Reichle, Stanton, Brosseau, supra. Here, there are no exigent circumstances that made it difficult or impossible to with Ms. Smith's habilitation plan. *See Triplett,* at 529 (stating "[t]he present context is not one requiring split second decisions of the sort that can delay consensus on the proper standard of fault on which to impose liability").

WSAMA agrees that a constitutional right is clearly established if a reasonable official would have understood that what he is doing violates that right. *See* WSAMA ACM, at 5.[6] A reasonable official should understand that leaving a profoundly mentally disabled woman with a seizure disorder alone in a bath jeopardizes her right to life, especially where such conduct is in violation of a written habilitation plan that recognized arm's length visual supervision was necessary to prevent her from drowning after suffering a seizure. No reasonable official could think otherwise. The Court of Appeals correctly held qualified immunity is unavailable under these circumstances.

Respectfully submitted this 10th day of October, 2016.

---

[6] WASMA quibbles with the Court of Appeals use of "a" rather than "every" reasonable official. *See* WSAMA ACM, at 5 n.2. The Court of Appeals simply acknowledged that the U.S. Supreme Court has used differing language. *See Triplett,* 193 Wn. App. at 527 n.9. The court used the word "every" in the text of its opinion. *See id.* at 527. The difference is immaterial because "reasonable official" is an objective standard.

s/George M. Ahrend
George M. Ahrend
Ahrend Law Firm PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000

s/Mark D. Kamitomo
Mark D. Kamitomo
Collin M. Harper
Markam Group, Inc., P.S.
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201-0406
(509) 747-0902

Co-Attorneys for Plaintiffs-Respondents

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

Jarold Phillip Cartwright
Carl Perry Warring
Attorney General's Office Tort Division
1116 West Riverside Avenue Suite 100
Spokane, WA 99201-9106
Email: JerryC@atg.wa.gov
Email: CarlW@atg.wa.gov

Daniel G. Lloyd
Vancouver City Attorney's Office
P.O. Box 1995
Vancouver, WA 98668-1995
Email: dan.lloyd@cityofvancouver.us

Adam Rosenberg
William Kastner & Gibbs, PLLC
601 Union St., Ste. 4100
Seattle, WA 98101-2380
Email: arosenberg@williamskastner.com

Milton G. Rowland
Foster Pepper PLLC
618 W. Riverside Ave., Ste. 300
Spokane, WA 99201
Email: milt.rowland@foster.com

and via email to co-counsel for Plaintiffs/Respondents pursuant to prior agreement to:

Mark Kamitomo at mark@markamgrp.com
Collin Harper at collin@markamgrp.com

Signed at Moses Lake Washington on October 10, 2016.

s/George M. Ahrend