NO. 321215

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BETTYJEAN TRIPLETT, et al.,

Respondents.

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al.,

Petitioners.

RESPONDENTS' RESPONSE TO APPELLANT'S BRIEF

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I. INTRODUCTION

Contrary to Petitioner's claim, the issue before this Court is whether a severely mentally disabled individual with a known seizure disorder had a 14th Amendment right to reasonable safety or bodily security when she drowned in a bathtub from a seizure after being left alone for as long as 40 minutes contrary to a specific bathing directive mandating "arm's length" supervision at all times during the bath. Respondents respectfully submit that this constitutional right to reasonable safety exists and that Petitioners violated Plaintiff's constitutional right despite fair warning that leaving Plaintiff alone in the bathtub without visual supervision could result in her death as a result of a seizure disorder, thereby violating her constitutional right to bodily security or reasonable safety.

On March 21, 2006, Petitioner's employee, Michael Noland ("Mr. Noland") was Kathleen Smith's ("Kathleen") attendant counselor at Lakeland Village ("Lakeland") where Kathleen had been a patient since she was 14.[1] Her care was administered pursuant to an Individual Habilitation Plan ("IHP") which was designed to insure her safety and welfare. That IHP included a specific bathing directive requiring that she be visually supervised

[1] At the time of her death, Ms. Smith was 52 years of age.

at arm's length at all times while taking a bath. This was prompted by Ms. Smith's longstanding and well-known seizure disorder.

On March 21, 2006, despite knowledge of Kathleen's bathing directive and seizure disorder, Mr. Noland left her unattended twice, each time for as long as 20 minutes. The second time resulted in Kathleen's death by drowning due to a seizure. It is indisputable that had Mr. Noland provided arm's length supervision of Kathleen she would not have died from drowning.

Petitioners attempt to minimize their gross negligence by characterizing Mr. Noland's actions as merely "walking away from the bathroom instead of visually supervising Ms. Smith at arm's length as she ended her bath." Notwithstanding the fact that there will be a dispute as to when Ms. Smith was abandoned during her bath, it is irrelevant to the fact that a specific bathing directive that Mr. Noland was not free to disregard, was violated and was a proximate cause of Kathleen's demise. Petitioner throughout has and continues to downplay and ignore this critical fact. Further, Petitioner has consistently argued that Kathleen's death was caused by her preexisting seizure disorder which was not created or made worse by Mr. Noland abandoning her while she bathed. This argument ignores the fact that had Mr. Noland been within arm's length of Kathleen when she had her seizure, he could have prevented her from drowning. When the facts are applied to the

applicable and controlling legal authority, it is clear that Petitioner placed Kathleen in a dangerous situation which was severely worsened by Mr. Noland abandoning her, thus violating her constitutional right to reasonable safety or bodily security.

Further, unlike the facts in Campbell v. State of Washington Dep't. of Social and Health Svcs., 671 F.3d 837 (2011) relied upon by Petitioner, Lakeland had the authority to take the following actions without a patient's permission:

- Implement a resident's Individual Habilitation Plan ("IHP") without the consent of the patient or the patient's guardian. An IHP is designed to provide for the health, welfare and safety of the patient;
- Lakeland could physically restrain its patients without a court order;
- Lakeland could transfer patients against their wishes both within the facility and to other facilities;
- Lakeland could detain patients up to 48 hours without a court order despite a request for discharge by the patient or patient's guardian;
- Lakeland's superintendent had the authority to deny patient's requests to leave Lakeland;
- Lakeland patients were not permitted to leave the institution without permission. If a patient left,

he/she was physically shadowed by a Lakeland employee until such time that law enforcement could take the patient into custody;

- Lakeland patients were under 24 hour supervision with direct care staff required to check on patients every 15 minutes during waking hours and every hour while asleep; and,
- Lakeland patients were required to wear caretaker bracelets which are GPS bracelets designed to monitor their location. The bracelets were locked on the patients' wrists.

Thus, contrary to Petitioner's claim, Kathleen's voluntary commitment at Lakeland was in effect a de facto involuntary commitment. As such, a special relationship existed which conferred upon Kathleen a 14th Amendment constitutional right to reasonable safety or bodily security.

The trial court correctly recognized that issues of material fact exist as to whether Defendants created the danger which resulted in Ms. Smith's death and/or whether a special relationship existed between Ms. Smith and Petitioners given the involuntary nature of Ms. Smith's confinement. The trial court also correctly recognized that well-settled authority preexisted Ms. Smith's death

establishing a constitutional right of reasonable safety or protection from bodily injury which provided Ms. Smith with a 14th Amendment constitutional claim under either a special relationship or zone of danger exception. Finally, the trial court did not abuse its discretion in failing to dismiss Petitioners Robin Arnold-Williams and Linda Rolff as well as permitting discovery because there is a question of fact as to whether they were aware of or knew that Ms. Smith's constitutional right to reasonable safety or bodily security was being violated and failed to address the problem.

For the reasons set forth herein, Respondents respectfully request that this Court affirm the rulings of the trial court.

II. PERTINENT HISTORY

Kathleen Smith ("Kathleen") was born September 10, 1953. Her mother, Betty Jean Triplett ("Mrs. Triplett") and her sibling Kevin Smith ("Mr. Smith") are co-personal representatives of the Ms. Smith's estate in the instant lawsuit. **CP** at 46. Kathleen was born significantly developmentally disabled. **CP** at 55. Even though she was 52 years old at the time of her death, she had been assessed as functioning at the mental age of a five (5) to seven (7) year old. **CP** at 56.

Kathleen was a lifelong patient at Lakeland having resided there for 39 years from the age of 14. **CP** at 55. She was given a

DSM IV AXIS II diagnosis for profound mental retardation as well as an AXIS III diagnosis of mental retardation associated with a seizure disorder and a developmental level of a 5-6 year old. **Id.** While at Lakeland, Mrs. Triplett and Mr. Smith were frequent/routine visitors despite having to travel from Seattle to see Kathleen. Shortly before her death, she was transferred from one side of her housing cottage to the other as a result of another patient at Lakeland's needs and problems. **CP** at 110, 115.

Due to Kathleen's significant mental limitations as well as her seizure disorder, Lakeland developed and implemented an Individual Habilitation Plan ("IHP"), which was designed to provide for her daily health and welfare as well as to ensure Kathleen's safety. **CP** at 91. In order to monitor implementation of the IHP, Lakeland developed Direct Care Flow Sheets ("DCFS"), which documented the mental and physical limitations as well as special needs of Kathleen. **CP** at 92. Further, the DCFS detailed specific duties of staff to ensure Kathleen's safety. **Id.** Staff were required to carry out the orders set forth in the DCFS. **CP** at 93. This included a non-discretionary mandate that staff be within arm's length and visually supervise Kathleen at all times while she bathed. **CP** at 93-94. This duty arose from Kathleen's seizure disorder and Lakeland's obligation to look after her health and safety based upon federal and state law. **CP** at 95-96. Notably, on June 20, 2005, approximately 9

months before her death, an Interdisciplinary Team for Apple Cottage, where Kathleen resided, reviewed nursing care plans and the DCFS to determine the supervision needs of patients residing at Apple Cottage with controlled and uncontrolled seizures. **CP** at 97. At that meeting, the team again confirmed that direct care staff at Apple Cottage caring for Kathleen were required to provide arm's length, visual supervision at all times while she was bathing because of her seizure history. **CP** at 100.

Despite the explicit bathing directive designed to insure Kathleen's safety, Mr. Noland, who was Kathleen's attendant counselor in Apple Cottage on March 26, 2006, placed Kathleen in the bathtub and then left her unattended on 2 separate occasions. **CP** at 101, 111. Each time he left her unattended for approximately 15-20 minutes. **Id**. The second absence resulted in Kathleen's death by drowning due to a seizure. **Id**. She was discovered unresponsive in the bathtub when a nurse heard running water and checked the bathroom. **CP** at 102. Mr. Noland first learned of Kathleen's drowning when he heard the nurse announce the need for a STAT response. **CP** at 101. This was not the first time a patient at Lakeland had died from drowning in a bathtub. **CP** at 103. It is undisputed that Mr. Noland knew he was required to provide arm's length, visual supervision of Kathleen when she bathed,

demonstrated by his signature on the June 20, 2005 bathing directive for Lakeland patients with seizure disorders. **CP** at 104-05.

A subsequent review by Dr. Barry Smith, conducted on June 20, 2006, confirmed Kathleen's drowning was due to her having a seizure. **CP** at 106-16. Following an investigation, Mr. Noland was charged with manslaughter in the second degree and to the best information, knowledge and belief of Plaintiffs, discharged from Lakeland. An investigation by the Department of Health and Human Services ("DHHS") resulted in a summary statement of deficiencies which, among other things, verified that Ms. Smith had been left unsupervised by Mr. Noland in violation of her IHP. **CP** at 117-25. The DHHS investigation also revealed that administrators at Lakeland had not investigated reports by Lakeland staff of past inadequate care by Mr. Noland. **Id**. The statement of deficiencies further concluded that Lakeland did not have an adequate system for ensuring care plans were implemented as written and failed to adequately investigate Kathleen's death in order to prevent other accidents. **Id**. Finally, the statement of deficiencies concluded that Lakeland had failed to investigate concerns that there was insufficient direct care staff to implement the care plans and fulfill proper and safe care pursuant to IHP directives or orders at Kathleen's residence (Apple Cottage). **Id.**

III. ADDITIONAL FACTUAL BACKGROUND OF LAKELAND VILLAGE ESTABLISHING SPECIAL RELATIONSHIP AND STATE CREATED DANGER

Lakeland is an intermediate care facility whose mission, "... supports the Department's, DSHS, philosophy and the division's, DDD, purposes and policies in compliance with applicable federal, state, and local laws, regulations and codes pertaining to health, safety and sanitation." **CP** at 126. Lakeland Village has a duty to maintain the health and safety of the patients it has accepted responsibility for, based upon state and federal law. **CP** at 127. The legislature has outlined what residential habilitation center should globally do in RCW 71A 20.010. RCW 71A.20.010 SCOPE OF CHAPTER states, "The purposes of this chapter are: To provide for those persons who are exceptional in their needs for care, treatment, and education by reason of developmental disabilities, residential care designed to develop their individual capacities to their optimum; to provide for admittance, withdrawal and discharge from state residential habilitation centers upon application; and to insure a comprehensive program for the education, guidance, care, treatment, and rehabilitation of all persons admitted to residential habilitation centers.

As part of its duty, Lakeland has the authority to take the following actions without a patient's permission:

- Lakeland may implement each resident's IHP without the

consent of the patient or patient's guardian. **CP** at 128-29. Further, although the patient and/ or guardian are asked to give input, Lakeland is not required to follow that input and may still implement a patient's IHP. **CP** at 130. Finally, IHPs are reviewed quarterly without input from the patient or patient's guardian. **CP** at 131.

- Lakeland Village can physically restrain its patients in order to protect the patient or others without seeking a court order. **CP** at 132-33.

- Patients can be transferred against their wishes, both within the facility and to other facilities. **CP** at 134-40.

- Lakeland may detain a patient up to 48 hours without a court order should the patient or patient's guardian request their discharge from Lakeland. **CP** at 141-42.

- The superintendent at Lakeland has the authority to deny a patient's request to leave Lakeland and stay with their guardian or other family member. **CP** at 143-47.

- Lakeland patients are not permitted to leave and if a patient attempts to leave without permission, the patient is physically shadowed by a Lakeland employee and law enforcement is called to take the patient into custody. **CP** at 148-49.

- Lakeland patients are under 24-hour supervision. Direct care staff are required to check on patients every fifteen minutes during waking hours and every hour when the patient is asleep. **CP** at 150.

- Lakeland patients wear "Caretracker Bracelets" which are GPS bracelets designed to monitor their location. The bracelets are locked on the patient's wrists. **CP** at 151.

These undisputed facts in addition to those referenced in the "pertinent history" section of this brief are in stark contrast to the facts set forth in Campbell v. State Department of Social and Health Services, 671 F.3d 837 (9th Cir. 2011) which Petitioner alleges

involves material facts that are "almost the same as the facts in the instant case". *See Petitioner's brief at p. 10.* In addition to the numerous factual differences referenced above, perhaps the most significant difference is that unlike Ms. Campbell, Kathleen had a specific bathing directive that had been affirmed nine months prior which required arm's length supervision at all times while she bathed due to her seizure disorder which continued to remain a concern. As will be addressed further, Campbell is factually dissimilar and further, does not stand for the legal proposition consistently argued by Petitioner.[2]

IV. ARGUMENT

A. STANDARD OF REVIEW

Summary Judgment is only appropriate where the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, demonstrate that there are no genuine issues as to any material facts and that the moving party is entitled to judgment as a matter of law. Washington CR 56(c). "A material

[2] Petitioner has consistently argued throughout the course of this litigation that Campbell stands for the proposition that a special relationship can never arise in a voluntary commitment. To the contrary, the court in Campbell, *supra*, recognized that a voluntary commitment may over time take on the character of an involuntary one and commitments formerly labeled as a voluntary may arguably amount to de facto deprivations of liberty from their inception. Campbell, 671 F.3d at 843 *citing* Torisky v. Schweiker, 446 F.3d 438, 446 (3rd Cir. 2006). Further, that affirmative acts taken by a state against an individual's will can amount to involuntary custody. Campbell, 671 F.3d at 845, *citing* Deshaney v. Winnebago Cnty. Dep't. of Soc. Servs., 489 U.S. 189.

fact is one upon which the outcome of the litigation depends in whole or in part." Hash v. The Children's Orthopedic Hosp., 110 Wn.2d 912, 915, 757 P.2d 507 (1988)(*citing* Barrie v. Hosts of America, Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980)). The moving party is held to a strict standard and must overcome the burden of demonstrating that there are no issues of material fact. Atherton Condo Ass'n v. Blume Dev. Company, 115 Wn.2d 506, 516, 798 P.2d 250 (1990). All facts presented and any inferences drawn from those facts are viewed in a light most favorable to the non-moving party and any uncertainties regarding genuine issues of material facts are resolved against the moving party. Id.

B. SUMMARY JUDGMENT WAS APPROPRIATELY DENIED BECAUSE THE DISPUTED FACTS DEMONSTRATE THAT APPELLANTS VIOLATED MS. SMITH'S 14TH AMENDMENT RIGHT TO REASONABLE SAFETY OR BODILY SECURITY.

To establish a 42 U.S.C. §1983 claim, an individual must demonstrate that (1) the conduct complained was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a constitutional right. L.W. v. Grubbs, 974 F.2d 119, 120 (9th Cir. 1992) *citing* Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). Courts should "liberally and beneficently" construe the rights protected by §1983. Dennis v. Higgins, 498 U.S. 439, 443, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991); *Citing* Monell v. City of New York Dept.. of Social Services, 436

U.S. 658, 684, 98 S.Ct. 2018, 2032, 56 L.Ed.2d 611 (1978). It is well established that a state's failure to protect a person's constitutional right of reasonable safety or bodily security violates the 14th Amendment where (1) a special relationship exists between the state and the person; and/or (2) where the state created the danger to which the person succumbed. *Cf.*, DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189, 200, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). Whether a special relationship exists or the state created a danger is a highly fact dependent analysis. Patel v. Kent Sch. Dist., 648 F.3d 965, 975 (9th Cir. 2011); *See also* Youngberg v. Romeo, 457 U.S. 307, 319 n.25, 102 S,Ct. 2452, 73 L.Ed. 28 (1982); *Cf.* Campbell v. State Dep't of Soc. & Health Srvcs., 671 F.3d 837, 839 (9th Cir. 2011)(*stating* the facts regarding the decedent's life and circumstances of her death are relevant to the court's analysis). In the instant case, the facts demonstrate that Petitioners created the danger which resulted in Kathleen's death and further, that special relationship existed based upon the involuntary nature of her commitment to Lakeland.

1. The trial court correctly concluded that material issues of fact exist as to whether Petitioners violated Kathleen's right to reasonable safety or bodily security by creating the danger resulting in Ms. Smith's death.

Petitioners created the danger which resulted in Kathleen's death by leaving her unattended while bathing with a known seizure disorder in direct violation of a specific bathing directive mandating

arm's length visual supervision at all times. The gravamen of a "danger creation" claim is affirmative conduct by a defendant that places a plaintiff in danger with deliberate indifference to the plaintiff's safety. Penilla v. City of Huntington Park, 115 F.3d 707, 709 (1997); *Citing* L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992) *and* Wood v. Ostrander, 879 F.2d 583, 588-90 (9th Cir. 1989), *cert. denied,* 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990)). **A state creates the danger where a state official leaves a person in a situation that was more dangerous than the one they found the person in.** Kennedy v. City of Ridgefield, 439 F.3d 1055, 1062 (2006) (emphasis added). The critical issue in a state created danger analysis is not the distinction between danger creation and whether a state actor generated or enhanced the danger but rather whether state action or inaction placed an individual at risk. Penilla, 115 F.3d at 710.

In the instant case, leaving Kathleen unattended while bathing with her known seizure disorder left her in a situation that was more dangerous than had Mr. Noland remained by her side while she bathed as mandated. *See*, Kennedy v. City of Ridgefield, 439 F3d at 1062. This deliberate indifference to her safety placed her at greater risk of drowning due to her seizure disorder. Penilla v. City of Huntington Park, 115 F.3d at 710. Petitioners rely upon Campbell, *supra*, for the proposition that they cannot be held liable

for violating Kathleen's right to bodily security because she had a seizure disorder. In so arguing, Petitioners make the same mistake as the appellants in Penilla, *supra*, by construing Kathleen's seizure disorder as the key issue in this analysis rather than whether or not leaving her `unattended/unsupervised twice, for as much as forty minutes in total with a known seizure disorder, placed Ms. Smith at greater risk than she would have been in had Mr. Noland adhered to the bathing directive and visually supervised her within arm's length as required. In short, Petitioners argue that because they didn't make Kathleen's seizure disorder worse, they can't be held liable. This rationale is frankly illogical and ignores the prevailing legal authority. Petitioner's reliance upon Campbell, *supra*, does not change the analysis. That court reached its decision based upon dissimilar facts finding that the facts more closely resembled those in the previous cases Patel, *supra* and Johnson v. City of Seattle, 474 F.3d 634 (9th Cir. 2007) where the courts had not found facts sufficient to impose a state-created danger exception. Campbell, 671 F.3d at 845. In Patel, the defendant had no knowledge of an immediate risk to the plaintiff and was in fact "fairly active" in protecting the plaintiff rather than ignoring a known risk. Patel, 648 F.3d at 975-76. Similarly, in Johnson, the court found that police decision to change a plan to protect individuals at a Mardi Gras parade from an aggressive operation to a passive one placed the

plaintiffs in no worse position than they were in had there been no plan at all. Johnson, 474 F.3d at 641; *See also* DeShaney 489 U.S. at 203 (*explaining* that at most, it could be said that the state actors failed to act under suspicious circumstances). Again, the decision was fact specific and dissimilar to Kathleen's case. By contrast, the facts in her case closely resemble the facts in Penilla, Wood, and Kennedy, *supra.* In Wood, the court found a danger-creation exception existed where a police officer arrested the intoxicated operator of an automobile but left the female passenger of the vehicle stranded at 2:30 a.m. in an area with a known, very high aggravated crime rate and the female passenger was assaulted. *See generally,* Wood, 879 F.2d 583. The court in Wood explained that leaving the female passenger on the side of the road at night in a high crime area indicated deliberate indifference for the passenger's safety. Id, at 588. In Kennedy, a police officer promised to warn the plaintiffs before he informed the plaintiffs' neighbors of allegations against them and provide additional patrols but did neither despite knowing the plaintiffs' feared violent retaliation from their neighbors. *See generally*, Kennedy, 439 F.3d 1055. The police officer acted with deliberate indifference because he knew of the danger faced by the plaintiffs but failed to take the actions he had promised to undertake to mitigate this danger. Id, at 1065.

In Penilla, *supra*, the court found a danger-creation exception where police officers examined an individual and found him to be in serious medical need yet canceled a call to the paramedics and moved the individual from his porch, where he was in view of his neighbors, to the inside of his house, where no one could see him. Penilla, 115 F.3d at 710. The officer's actions were held to be affirmative actions which placed the individual in a more dangerous position than he was in prior to the officers' involvement. Id. This holding is consistent with the 9th Circuit's interpretation of Deshaney, *supra*, "that if affirmative conduct on the part of a state actor places a plaintiff in danger, and the officer acts in deliberate indifference to that plaintiff's safety, a claim arises under §1983." Id.

Mr. Noland's actions on March 26, 2006 give rise to a State created danger exception. He placed Kathleen in the bathtub and twice left her unattended for as much as forty minutes, despite knowledge that he was required to visually supervise her within arm's length at all times due to Kathleen's seizure disorder. His actions constitute an affirmative action with deliberate indifference to a known danger that Kathleen could drown if she suffered a seizure while left unattended. This in fact occurred and gives rise to a §1983 claim. **CP** at 101, 111. Contrary to the Petitioner's claim, the factual differences between Kathleen's case and Campbell,

supra, are precisely those facts which give rise to the danger-creation exception in this case. Unlike the plaintiff in Campbell, *supra*, Kathleen's IHP included a bathing directive that required staff provide visual supervision, within arm's reach, of Kathleen at all times while she bathed **CP** at 93-94. Lakeland staff were required to follow Ms. Smith's bathing directive, which was put in place to protect her health and safety as a result of her seizure disorder. **CP** at 91-92, 95-96. The staff were trained to provide the care outlined in the IHP and were required to document compliance each day with a patient's bathing directive. **CP** at 92. Petitioners concede that Mr. Noland knew of Kathleen's bathing directive and its purpose of protecting her safety because she had a history of seizures when he placed her in the bathtub and left her unattended. **CP** at 104-05. This is indicated by Mr. Noland's signature on the June 20, 2005 bathing directive for Lakeland patients with seizure disorders. **CP** at 104-05.

In Campbell, *supra*, unlike the instant case, the defendant adhered to Ms. Campbell's bathing plan which was not considered a mandatory directive. Specifically, at one time Ms. Campbell's Personal Support Plan ("PSP") included a bath specific protocol which could be construed as a directive that required Ms. Campbell to be monitored closely including via a baby monitor while she was in the bathtub. Campbell, 671 F.3d at 840. However, at the time of

her injury, her PSP no longer included the bath specific protocol but instead contained a general instruction that only required Ms. Campbell's caregivers to check on her regularly for safety reasons. Id. The undisputed facts demonstrated that defendant, consistent with the general instruction, checked on Ms. Campbell approximately four times in twenty minutes. Campbell, 671 F.3d at 841. Unfortunately, on the fourth time Ms. Campbell was found unresponsive in the bathtub. Id. Ms. Campbell passed away a week later with the cause of death determined as "anoxic-ischemic encephalopathy due to near drowning". Id. These facts stand in stark contrast to the instant case where Kathleen died by drowning as a result of a seizure when Mr. Noland left her alone for as long as 40 minutes in direct contravention of a specific bathing directive mandating arm's length visual supervision at all times. Like the facts in Penilla, Wood and Kennedy, *supra*, Mr. Noland's actions created the danger that Kathleen would drown from a seizure disorder by leaving her alone in the bathtub. This placed Kathleen in a worse position than she would have been had Mr. Noland been at her side when her seizure occurred. Mr. Noland acted with deliberate indifference because he knew of the danger Kathleen faced of drowning due to a seizure yet he failed to mitigate the danger by remaining at her side while she bathed. *See*, Penilla v. City of Huntington Park, 115 F.3d 707 (1997) (police officers examined and

found individual in serious need yet canceled call to paramedics and moved individual into his house where no one could see him); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) (female passenger left on side of road at night by police in a high crime area known to have high aggravated crime rate and female passenger assaulted); *see* Kennedy v. City of Ridgefield, 439 F.3d 1055 (2006) (police officer failed to warn plaintiffs about informing neighbors of allegations against them and provide additional patrols despite promising to do so with respect to plaintiff's fear of violent retaliation from neighbors).

Petitioners or, more specifically, Mr. Noland placed Kathleen in a bathtub and walked away from her despite knowledge of her seizure disorder and a mandatory directive requiring him to stay within arm's length visual supervision of Kathleen due to a concern that she might drown from her known seizure disorder. Mr. Noland's actions placed Kathleen in a worse position than she had been if he had stayed by her side. This deliberate indifference led to her death and provides the basis for a danger created exception giving rise to a §1983 claim.

2. The trial court correctly concluded that material issues of fact exist as to whether there was a "special relationship" between the defendants and Ms. Smith as a result of the restrictions on Ms. Smith's freedom to act for herself.

A special relationship existed between Petitioners and Kathleen because the State had affirmatively restricted Ms. Smith's

liberty to act on her own behalf and state actors took affirmative action with deliberate indifference to Ms. Smith's safety, resulting in her death. When a state affirmatively restricts a person's liberty to act on their own behalf, "through incarceration, institutionalization, *or other similar restraint of personal liberty*," a "special relationship" results giving rise to Due Process Clause protections. DeShaney, 489 U.S. at 200 [emphasis added]; *See also* Campbell, 671 F.3d at 842. The state has a duty to protect a person's bodily security when a "special relationship" exists arising from, "the limitation that state has imposed on the person's freedom to act for himself." Campbell, 671 F.3d at 843; *citing* Deshaney, 489 U.S. at 200; *See also* Clark v. Donahue, 885 F. Supp. 1159, 1161 (1995). A commitment that was initially voluntary may become involuntary and some commitments labeled "voluntary" may in reality be involuntary commitments. Campbell, 671 F.3d at 843; *citing* Torisky v. Schweiker, 446 F.3d 438, 441 (3d Cir. 2006); *see also* Clark, 885 F. Supp. at 1162 (1995). The relevant inquiry for determining whether a special relationship exists is determined by the specific circumstances of a plaintiff's confinement rather than merely whether the plaintiff was voluntarily committed. Youngberg, 457 U.S. at 319 n.25; *C.f.* Campbell, 671 F.3d at 839; *See also* Clark, 885 F. Supp. at 1162. Petitioners incorrectly assert that there can be no special relationship because Ms. Smith was not involuntarily

committed to Lakeland. The existence of a special relationship does not turn on the labeling of a person's commitment but rather whether the circumstances of his/her confinement at the time in question amount to a restraint of their personal liberty. Campbell, Toriskey, Clark, *supra*. A special relationship had arisen between Kathleen and the Petitioners because Lakeland had assumed all control of Ms. Smith's behavior, treatment, provision of care and living conditions, could and did make changes to her care and living conditions without permission, and further failed to provide the level of care promised when Ms. Smith came under Lakeland's control.

Clark v. Donohue, 855 F.Supp. 1159 (1995) involves facts where the court concluded the voluntary commitment had in fact become involuntary as a result of the state's action. In Clark, the plaintiffs had been voluntarily committed to a state run mental health facility by their guardians at ages 14 and 15, respectively and had resided in the facility for approximately 21 and 35 years, respectively. Clark, 885 F.Supp. at 1160. Both plaintiffs were injured as a result of affirmative mistreatment by state actors and filed suit alleging that defendants were deliberately indifferent in the form of severe medical and physical mistreatment. As with the instant case, the defendants in Clark argued that no special relationship existed because plaintiffs' confinement was voluntary. Id. In rejecting defendant's claim, the court first noted that in cases

where an individual is harmed by the affirmative action (deliberate indifference) of state actors, an analysis under DeShaney v. Winnebago Department of Social Services, 489 U.S. at 200 becomes moot because, "the state action element of the plaintiff's claim is clearly established". Clark at 1162. The court further explained that its ruling was consistent with DeShaney, *supra*, because the specific circumstances of plaintiff's confinement and not the fact that the plaintiff was once voluntarily committed was determinative of the existence of a special relationship. Id. In concluding its analysis, the Clark court held that the plaintiffs' constitutional claims could not simply be dismissed because plaintiffs' guardians signed voluntary commitment papers. Id; *see also,* Estate of Cassara v. Illinois, 853 F.Supp. 273, 279 (N.D. Ill. 1994); United States v. Pennsylvania, 832 F.Supp. 122, 124-25 (E.D. Pa. 1993).

As in Clark, *supra*, Kathleen's confinement at Lakeland, although initially voluntary, had become a "special relationship" because of the extent to which Lakeland had restricted her freedom to care for herself.

Kathleen was profoundly mentally handicapped and had the self-care and developmental capabilities of a five to seven year old. **CP** at 56. Lakeland had absolute control over Kathleen's IHP which set forth the day to day care she received. **CP** at 128-31. The orders set forth in the IHP were based on Lakeland's duty to provide for

Kathleen's safety and well-being. **CP** at 127. Additionally, Lakeland had the right to transfer Kathleen within the facility without a court order or her guardian's input and had in fact transferred her to a new cottage shortly before her death. **CP** at 110, 115, 134-40. Kathleen could be restrained without her guardian's permission and without a court order. **CP** at 132-33. Further, Lakeland could detain Kathleen for 48 hours without a court order if she tried to leave the facility. (**CP** at 141-42) Lakeland also had the right to deny visitation rights between Kathleen and her family or guardians (**CP** at 143-47). If Kathleen attempted to leave Lakeland and refused to return, she would be shadowed by an employee until law enforcement took her into custody. **CP** at 148-49. Finally, Lakeland had the right without patient approval or a court order to place a "caretracker" bracelet on patients, including Kathleen, to monitor their whereabouts if the patient was a flight risk. **CP** at 151. Petitioner acknowledged these limitations created a duty on the Petitioner to provide for the safety and well-being of Lakeland residents. **CP** at 126-27.

These facts demonstrate that Lakeland had sufficiently restricted Kathleen's freedom to the extent a "special relationship" existed between her and Petitioners. It is inconsequential whether Kathleen's guardian signed paper's indicating her residence at Lakeland was voluntary, as commitments labeled voluntary may in

reality be involuntary. *See* Clark, 885 F. Supp. at 1162. Lakeland had assumed absolute control over Kathleen's daily activities and care. **CP** at 128-31. She was not free to leave Lakeland, either under her own accord or by request of her guardian, without Lakeland's permission. **CP** at 141-49. Moreover, she was required to be monitored 24 hours a day, every 15 minutes while awake and every hour while asleep. **CP** at 150.

The breadth of Kathleen's confinement at Lakeland established a "special relationship" at the time of her death. Even if her commitment had at one time been voluntary, it certainly was not on the night she died. Lakeland acknowledged it had a duty to provide for Kathleen's care and protect her safety. **CP** at 126-27. Yet Lakeland was understaffed and had no procedures in place to guarantee that a patient's IHP and thus, his/her safety, was being followed. **CP** at 117-25. Further, Lakeland prior to Kathleen's death failed to investigate claims that Mr. Noland was not performing his required duties. **Id.** Finally, on the night she died, Mr. Noland, with deliberate indifference to Kathleen's safety and well-being, took the affirmative action of placing her in the bathtub and abandoning her. **CP** at 101, 111. This was a deliberate violation not only of Ms. Smith's need to protect her from drowning due to a seizure, but further, of the general health and safety requirement that she be checked upon every fifteen minutes. It is absurd to suggest that

Kathleen's voluntary commitment to Lakeland 39 years earlier deprived her of a right to reasonable safety or bodily security on the night she drowned. Thus, Petitioners are liable for violating Kathleen's Due Process rights.

C. SUMMARY JUDGMENT WAS APPROPRIATELY DENIED BECAUSE THE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Contrary to Petitioner's claims, they are not not entitled to qualified immunity. Qualified immunity protects government officials **engaged in discretionary functions** from liability where a constitutional right is not clearly established. Jones v. State, Dep't of Health, 170 Wn.2d 338, 355, 242 P.3d 825, (2010) [emphasis added]. The government official has the burden of proving they were engaged in a discretionary function. Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1264 (11th Cir. 2004)(*citing* Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). Once the defendant has demonstrated they were engaged in a discretionary function, the burden shifts to the plaintiff to prove (1) the state conduct violated established constitutional right and (2) the right was clearly established. Pearson v. Callahan, 555 U.S. 223, 231-32, 129 S.Ct. 808, 815-16, 172 L.Ed.2d 565 (2009). Qualified immunity balances the competing interests of holding government officials responsible when they exercise power carelessly with the need to protect government

officials' ability to perform their duties in a responsible manner. Id. In the instant case, Petitioners were not engaged in discretionary functions.

1. Mr. Noland was not engaged in a discretionary function when he left Kathleen alone in the bathtub in violation of her bathing directive.

Although the 9th Circuit has not yet considered when a government official is engaged in a discretionary function, the 11th Circuit has addressed this issue in depth. In order to claim qualified immunity, a government official must be performing a discretionary function when the injury occurred. Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1263 (11th Cir.2004). The burden is on the official to demonstrate they were performing a discretionary function; only then must a plaintiff prove the official is not entitled to qualified immunity. Id, at 1263-64. An official must satisfy both parts of the discretionary function test, which is, (1) was the official engaged in a legitimate, job related function, and (2) was the official executing the function in an authorized manner, in order to be eligible for qualified immunity. Id, at 1266. "The primary purpose of the qualified immunity doctrine is to allow government employees to enjoy a degree of protection only when exercising powers that legitimately form a part of their jobs." Id, at 1266-67.

In the instant case, Mr. Noland was neither engaged in legitimate, job related functions, nor was he executing these

functions in an authorized way when Kathleen died. Staff at Lakeland were required to carry out the requirements of patients' IHPs and were trained to do so. **CP** at 92. Mr. Noland knew he was required to provide arms-length, visual supervision, at all times while Kathleen bathed. **CP** at 104-05. Lakeland has offered no valid explanation as to why Mr. Noland left Kathleen alone in the bathtub, nor does the record provide such information. **CP** at 101, 111. The second time Mr. Noland left Kathleen alone he claims he was speaking with his supervisor but again, nothing in the record confirms this. **Id**. Moreover, the bathing directive did not authorize Mr. Noland to exercise discretion and leave Kathleen unattended. **CP** at 92, 104-05. His duty to visually supervise Kathleen within arm's length was not a discretionary function and Lakeland concedes as much. **CP** 91-96. The directive to supervise was clear, unequivocal and contained no exceptions. As such, Mr. Noland's actions were clearly non-discretionary and outside the reasonable limits of his job duties. Thus, Mr. Noland is not entitled to qualified immunity.

2. Assuming arguendo that Lakeland was engaged in a discretionary function, it is not entitled to qualified immunity because a reasonable person would know his/her conduct violated Ms. Smith's constitutional rights.

State officials are only entitled to qualified immunity where a reasonable person would not have known their conduct violated

established constitutional rights. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396, (1982). Two points must be shown. First, that the state conduct at issue violated an established constitutional right and second that the right was clearly established. Pearson, 555 U.S. at 231. All that is required is that preexisting law give fair warning that such conduct violates a person's rights. Schwenk v. Hartford, 204 F.3d 1187, 1195-96 (9th Cir. 2000). The facts of different cases need not be "materially similar" for an official to have fair warning. Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1136-37 (9th Cir. 2003). The plainly incompetent and those who knowingly violate the law are not entitled to qualified immunity. Anderson v. Creighton, 483 U.S. 635, 638-39, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987)(*citing* Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986)). Evaluating qualified immunity according to the test set forth in Pearson v. Callahan, *supra*, balances the interests of plaintiffs harmed by government officials' conduct with the need to protect government officials from unwarranted legal action. Pearson v. Callahan, 555 U.S. at 231. As already demonstrated herein, Lakeland violated Kathleen's constitutional rights under the zone of danger and special relationship exceptions. Additionally, the facts establish that Lakeland knew of the rights and had fair warning that Lakeland's conduct would violate those rights.

It has been clearly established in Washington, and other 9th Circuit states, that state officials who expose individuals to dangers they would not have otherwise faced are liable for constitutional violations. *See* Kennedy v. City of Ridgefield, 439 F.3d 1055, 1062 (2006); Penilla v. City of Huntington Park, 115 F.3d 707; L.W. v. Grubbs, 974 F.2d 119. Further, that liability accrues where the State has curtailed a person's liberty sufficiently to require the State to assume responsibility for a person's well-being and safety. DeShaney, 489 U.S. 189. In multiple other cases prior to Kathleen's death, government actors have been held liable for violating the constitutional rights of mentally handicapped individuals where the government actor took affirmative action that injured the individual. *See*, Estate of Cassara v. Illinois, 853 F.Supp. 273, 279 (N.D.Ill. 1994) (government actors acted with deliberate indifference to a suicidal individual who voluntarily committed himself by failing to properly observe the individual and placing the individual in a restraint/ seclusion room without removing the items used to commit suicide and the individual committed suicide); United States v. Pennsylvania, 832 F.Supp. 122, 124–25 (E.D.Pa. 1993)(*where* defendants failed to protect voluntarily committed residents from abuse and neglect including lack of training, adequate medical care, safeguards, and record keeping); Clark v. Donohue, 885 F. Supp. 1159 (voluntarily admitted patients to a state hospital had

constitutional rights violated when they were injured as the result of affirmative mistreatment by state actors).

Lakeland's ongoing claim that Kathleen seeks to create a constitutional right to a supervised bath ignores and misconstrues the tests set forth in Harlow v. Fitzgerald, *supra,* and Anderson v. Creighton, *supra.* Further, it belittles the gravity of the harm suffered by Kathleen. The proper question is not whether she had a constitutional right to supervision while she bathed but rather, whether Lakeland knew or should have known that its conduct or, more specifically, leaving Kathleen unsupervised in the bathtub with a known seizure disorder in direct contravention of her bathing directive violated her right to reasonable safety or bodily security as guaranteed by the 14th Amendment. DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. at 189 and its progeny have clearly established that a state can be liable for violating an individual's constitutional right to reasonable safety or bodily security under either the special relationship or zone of danger exceptions. Since DeShaney, *supra*, the special relationship exception has been further developed to include individuals whose liberty has been sufficiently curtailed by the state such that the individual is no longer able to act on their own behalf. *See*, Clark v. Donohue, 855 F.Supp. 1159 (1995); Estate of Cassara v. Illinois, 853 F.Supp. 273, 279 (N.D. Ill. 1994); United States v. Pennsylvania, 832 F.Supp. 122, 124-25

(E.D. Pa. 1993). Additionally, the Ninth Circuit, in Wood, Penilla and Kennedy, *supra*, clearly hold that a government official is liable for violating the constitutional rights of an individual where the government's affirmative actions place the individual in danger with deliberate indifference to the consequences of doing so. Penilla v. City of Huntington Park, 115 F.3d 707 (1997); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989); Kennedy v. City of Ridgefield, 439 F.3d 1055 (2006); *See also*, Clark, 855 F.Supp. 1159; Estate of Cassara, 853 F.Supp. at 279; Pennsylvania, 832 F.Supp. at 124-25.

These cases establish that Kathleen's 14th Amendment right to reasonable safety or bodily security was sufficiently known such that Lakeland was on notice that violating Kathleen's bathing directive could result in a §1983 claim. In this regard, Lakeland concedes that it is not necessary that the facts of the existing cases or case law match those of the case at issue. *Brief of Appellant*, July 31, 2014, p. 21. All that is necessary is that a reasonable office be able to determine that his/her actions violate an existing right. *Id*; *See also* Anderson v. Creighton, 483 U.S. 635, 638 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

Lakeland's reliance upon Campbell v. State of Washington, 671 F.3d at 837 is misplaced. As already argued herein, that case does not stand for the proposition that a constitutional right to reasonable safety or bodily security can never arise where the

placement at issue was voluntary. The proper evaluation is whether the facts demonstrate that a voluntary placement has in effect become de facto involuntary. Campbell v. State of Washington, 671 F.3d at 837. Regardless, Lakeland can also be liable where, as in this case, they placed Kathleen in danger by abandoning her in the bathtub with a known seizure disorder in violation of her bathing directive. Under these circumstances and the case law addressed herein, Petitioners are not entitled to qualified immunity.

D. SUMMARY JUDGMENT WAS APPROPRIATELY DENIED BECAUSE ALL OF THE PETITIONERS ARE SUBJECT TO RESPONDENTS' §1983 CLAIM AND IT WAS PROPER TO ALLOW FOR MORE DISCOVERY PRIOR TO DISMISSING ANY OF THE PETITIONERS

Although DSHS Secretary Robin Arnold-Williams ("Ms. Arnold-Williams") and Director Linda Rolfe ("Ms. Rolfe") are state officials, nevertheless they are liable for the constitutional violations arising out of Kathleen's death. A trial court may defer ruling on a motion for summary judgment if a party demonstrates a need for more discovery. Winston v. State/Dep't of Corr., 130 Wn. App. 61, 64-65, 121 P.3d 1201, 1203 (2005). Such a decision by the trial court is reviewed for abuse of discretion; the decision must be based on tenable grounds. Id. State officials who personally participate in the violation of a person's constitutional rights are liable for §1983 claims arising from their actions, even though the state and its

agencies are not. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor is liable for the constitutional violations of their subordinates if, "the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them. Id. Lakeland attempts to circumvent the legal authority by arguing only those persons directly involved in the violation of an individual's rights may be held liable under §1983. This is incorrect. *See*, Taylor v. List, 880 F.2d at 1045.

The investigation subsequent to Kathleen's death revealed several issues implicating Ms. Arnold-Williams and Ms. Rolfe. Lakeland did not have an adequate system in place for ensuring direct care staff implemented the IHPs as they were written. **CP** at 106-16. Lakeland failed to adequately investigate Mr. Noland's on the job performance after co-workers alleged he was not performing the duties of the direct care staff. **Id.** Finally, the investigation also revealed that Lakeland had failed to investigate concerns that there were not enough direct care staff on duty at a given time to implement each resident's IHP, a clear violation of federal and state law and the duties Lakeland owed its residents. **Id.**

Ms. Arnold-Williams and Ms. Rolfe had responsibility to take action to correct the deficiencies at Lakeland and in failing to do so were complicit in Ms. Smith's death. Petitioners are not entitled to summary judgment with regards to the §1983 claims

against Ms. Rolfe and Ms. Arnold-Williams because there is a genuine issue of material fact as to whether they knew Lakeland was understaffed and not carrying out IHPs. Further, that Lakeland failed to investigate concerts that Mr. Noland was not providing proper direct care to patients and that other staff were not carrying out their required duties. Failing to address these concerning areas is a matter of dispute and further discovery is necessary to know the extent of Ms. Arnold-Williams' and Ms. Rolfe's complicity in the outcome.

V. CONCLUSION

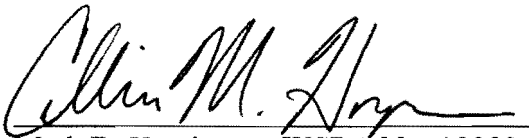
There appears to be no law in Washington State allowing for involuntary placement in an institution such as Lakeland. Rather the DSHS's Division of Developmental Disabilities uses a professional medical screening process to allow parents/guardians to obtain access for their wards to the institution. As a consequence, each patient is always a voluntary placement with virtually all care granted to the State. Kathleen's case and others similarly situated demonstrate that these patients may be "residents" for the rest of their lives through no fault of their own. As a consequence the only care they can and will receive is through the State.

A person such as Kathleen with a State qualified developmental disability is vulnerable and most often helpless. In some cases, such as with Kathleen, even the normally routine chore

of bathing becomes so risky and life threatening that a medical directive is necessary to protect her in the event of a seizure. If Kathleen does not qualify for the protections offered by the 14th Amendment to reasonable safety or bodily security then there are no safeguards in place to insure residents will be safely cared for. This would not be a reasonable interpretation of the case law nor consistent with public policy addressing the care and safety of the developmentally disabled. Lakeland concedes it knew of Kathleen's bathing directive and its purpose. Had Mr. Noland followed her bathing directive, Kathleen would not have died from drowning. Petitioner's affirmative mistreatment of Kathleen as outlined herein creates a constitutional right actionable under 42 USC §1983 that was violated and led to Kathleen's death. For the reasons set forth herein, Respondents respectfully request that the Court affirm the trial court's rulings.

RESPECTFULLY SUBMITTED this 29 day of September, 2014.

THE MARKAM GROUP, INC., P.S.
Attorneys for Respondent



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DECLARATION OF SERVICE

I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Jarold P. Cartwright
Office of the Attorney General
1116 West Riverside Avenue
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[ ] First Class Mail
[ ] Fax
[ ] Overnight Delivery
[X] Messenger Delivery

I further caused to be filed an original and one (1) copies of the foregoing document with the following:

Court of Appeals, Division III
500 North Cedar Street
Spokane, WA 99201

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

Dated September 30th, 2014, at Spokane, Washington.

Mary Rua