Supreme Court No. _____
Court of Appeals No. 49123-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION TWO

THE ESTATE OF JAMES CRAMPTON ROGERS, by and through PAUL CULLEN, Personal Representative of the Estate, et.al, Plaintiff/Appellant,

v.

STATE OF WASHINGTON, and RUSSELL SANDERS, in his capacity as a Washington state trooper, and as an individual, Defendants-Appellants.

APPEAL FROM THE JEFFERSON COUNTY SUPERIOR COURT
The Honorable Keith C. Harper, Trial Judge

PLAINTIFF-APPELLANT'S PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

NOTES

NOTES

A. IDENTITIY OF PETITIONER

The Estate of Jim Rogers[1] (hereinafter "the Estate") asks this Court to accept review of the Court of Appeals opinion designated below

B. COURT OF APPEALS DECISION

The Estate seeks review of the Court of Appeals decision affirming the trial court's summary judgment, filed October 10, 2017, 2017 Wash.App.Lexis 2370 (Division Two, 2017).[2] This Court should grant review, reverse the appellate panel, and remand for trial.

C. ISSUES PRESENTED FOR REVIEW

1. Is RCW 46.61.140(1) violated by a motorist who merely drives "onto the centerline" of a highway?

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[1] Mr. Rogers passed away on March 13, 2012, after this lawsuit was filed. We have his sworn testimony about the incident given at his formal Department of Licensing administrative hearing, wherein he prevailed.

[2] A copy of the slip opinion is reproduced in the Appendix, Appendix pages A-1 to A-11.

2. Is RCW 46.61.100(1) violated by a motorist who merely drives "onto the centerline" of a highway but does not drive on the left half of the highway?

3. Does the Court of Appeals decision on the legality of the traffic stop conflict with *State v. Prado*, 145 Wash. App. 646, 186 P.3d 1186 (2008) and *State v. Jones*, 186 Wash.App. 786, 347 P. 3d 483 (2015)?

4. Does evidence which conflicts with the trooper's claim of probable cause to arrest create a genuine issue of material fact on summary judgment?

5. Is prior sworn testimony, given at a DOL hearing where probable cause to arrest is an issue, admissible on summary judgment where probable cause is also at issue?

D. STATEMENT OF THE CASE

Mr. Rogers' Estate seeks compensation for violations of Jim Rogers' Fourth Amendment rights under Title 42, United States Code, §1983 and state tort law. CP 1-11. The State defendants' summary judgment motion was granted. CP 167-168, 232-235. The Estate's motion for reconsideration, CP 169-175, was denied. CP 231, 232-235. This appeal followed. CP 227-230, 236-241.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **Issues One and Three: RCW 46.61.140(1) is not violated by a motorist who merely drives "onto the centerline" of a highway. The panel's decision conflicts with *Prado* and *Jones*.**

An officer who stops a motorist without having observed a traffic violation violates the Fourth Amendment's prohibition against unreasonable seizures. *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 946 (9th Cir. 2003).

In its motion, the state claimed that the trooper could stop Mr. Rogers "for "failing to maintain lane travel", citing RCW 46.61.100 and RCW 46.61.140(1). CP 62. On this record, the trier of fact could conclude that the trooper did not observe a traffic violation.

The trooper claimed that Mr. Rogers drove "onto the centerline" twice and drifted to the right. He does not claim that Mr. Rogers crossed the centerline. He does not claim that Mr. Rogers' tires ever touched the left side of the roadway.

On its face, this does not violate the statute. RCW 46.61.140(1) provides:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:
>
> > (1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

RCW 46.61.140(1).

The language requiring a driver to remain exclusively in a single lane "as nearly as practicable" indicates "an express legislative intent to avoid penalizing brief, momentary, and minor deviations of lane lines." *State v. Prado*, 145 Wash. App. 646; 186 P.3d 1186 (2008). In *Prado*, the driver went beyond driving onto the center line—he crossed the center line by approximately two tire widths. 145 Wash. App. at 647. The Court held that the stop was unlawful:

> We believe the legislature's use of the language "as nearly as practicable" demonstrates a recognition that brief incursions over the lane lines will happen. . . . A vehicle crossing over the line for one second by two tire widths on

> an exit lane does not justify a belief that the vehicle was operated unlawfully. This stop was unlawful, and thus we need not undertake a review of whether the search was reasonable. This is particularly so as the officer testified that there was no other traffic present and no danger posed to other vehicles.

State v. Prado, 145 Wash.App. at 649.

In *State v. Jones*, 186 Wash. App. 786, 347 P.3d 483 (2015) the driver passed over the fog line three times, each time correcting his position with a slow drift. There were no other vehicles on the road. The Court held that *Prado* applied to the multiple line crossings, and that the traffic stop was not lawful under RCW 46.61.140(1):

> But our *Prado* decision did not depend on the fact that the driver crossed the lane line only once. Rather, we used a totality of the circumstances analysis that included factors such as other traffic present and the danger posed to other vehicles. This represents a more sophisticated analysis than a simple tally of the number of times a tire crossed a line. The out-of-state cases we found persuasive included factual scenarios involving more than one incursion, which courts still found insufficient to justify a stop under statutes similar to Washington's. We likewise held that

> "brief incursions"—not necessarily a single incursion—"will happen" and do not violate the lane travel statute.
>
> . . . Because the stop of Jones's vehicle was not lawful under RCW 46.61.140(1) and *Prado*, the trial court erred by not suppressing the evidence of the firearm [seized after the stop took place]. We reverse and remand.

State v. Jones, 186 Wash.App. at 791-791, 794 (footnotes omitted).

Here, the trier of fact could conclude that there was no violation of RCW 46.61.140(1). Mr. Rogers did not cross the center line. The stop was unlawful under the Fourth Amendment.

The appellate panel's description of the driving ("problems maintaining a direct line of travel, driving on the centerline twice, and drifting and jerking from right to left", *Opinion*, page 9) does not show a violation of the statute. Some of the terms used are nebulous. The decision here expands the scope of motorist liability beyond that authorized by the Legislature. It conflicts with *Prado* and *Jones*. Review of this issue should be granted. RAP 13.4(b)(2) and (b)(4).

2. Issue Two: RCW 46.61.100(1) is not violated by a motorist who merely drives "onto the centerline" of a highway, but does not drive on the left half of the highway.

The other statute suggested by the State to justify the stop is RCW 46.61.100(1). That statute plainly does not apply here. It provides in pertinent part: "Upon all roadways of sufficient width a vehicle shall be driven *upon the right half of the roadway*, except as follows: (listing exceptions). . ." (Italics added). The statute does not refer to "the center line" in the prohibitory language.

The Court is to give effect to the plain meaning of the language used. The Court reads the statute as a whole to give effect to all language used. Here, there appears to be no claim by the trooper that Mr. Rogers drove on the *left half* of the highway.

The exceptions listed in RCW 46.61.100(1) show that the legislature was concerned about regulating driving on the left half of the highway. *See, e.g.*, subsection (1)(a)(exception for passing on the left); subsection (1)(b) (exception where "an obstruction exists making it necessary to drive to the left of the center of the highway").

The plain language of the statute does not prohibit driving "onto the center line", etc. Mr. Rogers did not drive on the *left half* of the highway. Here, the trier of fact could conclude that the trooper did not observe a violation of RCW 46.61.100(1). The stop was unlawful under the Fourth Amendment.

The appellate panel's description of the driving does not show a violation of the statute. The decision here expands the scope of motorist liability under RCW 46.61.100(1) beyond that authorized by the Legislature. Review of this issue should be granted. RAP 13.4(b)(4).

3. Issue Four: The Estate's evidence conflicts with the trooper's claim of probable cause to arrest. Viewed in the light most favorable to Mr. Rogers, it creates a genuine issue of material fact on summary judgment.

Mr. Rogers was arrested without probable cause. An arrest without probable cause violates the Fourth Amendment and is actionable under §1983. *See Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996); *Beier v. City of Lewiston*, 354 F.3d 1058 (9th Cir. 2004). "[A] mistake about the law cannot justify a stop, let alone an arrest, under the Fourth Amendment." *Beier*, 354 F.3d at 1065.

There are genuine issues of material fact regarding

probable cause for Mr. Rogers' arrest. A reasonable jury could infer the following:

(1) The trooper's claim that he smelled alcohol is not accurate. There was no alcohol in Mr. Rogers' truck. Mr. Rogers had two low breath test readings, consistent with his testimony that he only shared part of a quart of beer in Seattle some time earlier in the evening, which would not create an odor in the truck later in Jefferson County.

(2) The trooper's claim that he smelled marijuana is not accurate. There was no marijuana in the cab of Mr. Rogers' truck. Mr. Rogers smoked tobacco and showed his hand-rolled cigarette to the trooper. After the arrest, only a very small amount of green vegetable matter, apparently never tested, was found in a gym bag in the back under the canopy, which the trooper would not have been able to smell at the driver's side door.

(3) Mr. Rogers' statement that he passed the field tests deserves credence because (a) he was not intoxicated per the breath tests, and (b) because the trooper made inaccurate assertions about the incident. The trooper cited Mr. Rogers for carrying an open container of alcohol even though, according to the discovery produced by the State, there was no alcohol in the truck.

In short, a reasonable jury could find that Mr.

Rogers was arrested without probable cause. The jury is entitled to disregard the trooper's claims.

In the recent case of *Cruz v. Anaheim*, police claimed that they saw Mr. Cruz reach for his waistband, so they opened fire and killed him. Reversing summary judgment, the Ninth Circuit noted:

> In this case, there's circumstantial evidence that could give a reasonable jury pause. Most obvious is the fact that Cruz didn't have a gun on him, so why would he have reached for his waistband?. . . [T]he jury could also reasonably conclude that the officers lied.

Cruz v. Anaheim, 765 F.3d 1076, 1079-1080 (9th Cir. 2014).

Here, the panel seems to have taken the trooper's claims as a given. Factual disputes seemingly were resolved in favor of the State.

The facts and reasonable inferences therefrom should have been viewed in the light most favorable to Mr. Rogers' Estate. The State did not meet its burden of proving that there is no issue of material fact. *See Kim v. Lakeside Adult Family Home,* 185 Wash.2d. 532, 547, 374 P. 3d 121 (2016). Summary judgment on Mr. Rogers' arrest without probable cause claim under §1983 should be reversed.[3]

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[3] Under the Estate's facts, the traffic stop and the arrest

Review of this issue should be granted under RAP 13.4(b)(4).

5. Issue Five: Prior sworn testimony, given at a formal DOL hearing where probable cause to arrest is an issue, is admissible on summary judgment where probable cause is also at issue.

At Mr. Rogers' DOL license suspension hearing, one of the statutory issues was whether the trooper had probable cause to arrest for driving under the influence. RCW

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of Mr. Rogers were invalid. If so, then the State is liable in trespass and negligence for the resulting seizure of Mr. Rogers. The trooper had a duty not to stop Mr. Rogers without observing a traffic violation. The trooper had a duty to Mr. Rogers not to arrest him without probable cause. Under plaintiff's facts, the trooper breached those duties. The State is liable under the doctrine of *respondeat superior*. *See* RCW 4.92.090; s*ee LaPlant v. Snohomish County,* 162 Wash.App. 476, 479, 271 P.3d 254 (Division One, 2011)(deputy negligence, respondeat superior); s*ee also Brutsche v. City of Kent*, 164 Wash.2d 664, 673-676, 1933 P.3d 110 (2008) (an unreasonable seizure by police is actionable in trespass).

The state is also liable for conversion for the impound of Mr. Rogers' truck. *See, e.g., Potter v. Washington State Patrol*, 165 Wash.2d 67, 196 P.3d 691 (2008)(State liability for conversion for unlawful impound). Summary judgment on these claims should likewise be reversed.

46.20.308(7). At the hearing, Mr. Rogers, through retained counsel Paul Cullen, filed a motion to dismiss challenging the unlawful stop and a challenge to probable cause to take blood. DOL Hearing Transcript, pp 4-5.

Mr. Rogers testified at the hearing that he shared a quart of microbrew with a friend before taking the ferry from Seattle. He had nothing else to drink. He testified that he felt he passed the sobriety test given by the trooper. He testified he was driving safely. In effect, he testified that he was not under the influence. See DOL hearing transcript, pp.13-16. This important testimony would have created genuine issues of material fact as to the legality of the traffic stop and probable cause to arrest, had the DOL Hearing Transcript been admitted for purposes of the summary judgment proceeding.

The appellate panel denied admission, claiming that Mr. Rogers did not challenge the stop or the arrest at the DOL hearing. That is incorrect. The record demonstrates just the opposite. The same issues were present at both the DOL hearing and in the summary judgment proceeding. There was a similar motive to develop the testimony through examination of Mr. Rogers. ER 804(b)(1). Mr. Rogers' prior sworn testimony should have been admitted as evidence in the summary judgment proceeding.

This case gives the Court the opportunity to hold that prior sworn testimony in DOL license suspension hearings is admissible under ER 804(b)(1). This is an important and recurring issue in many cases, civil and criminal. Review should be granted under RAP 13.4(b)(4).

F. CONCLUSION

Review by this Court should be granted. Important issues are presented. The appellate panel was incorrect in its decision. This case should be reversed and remanded to the Superior Court for further proceedings.

DATED this the 9th day of November, 2017.

Respectfully submitted,
MUENSTER & KOENIG

By: S/ John R. Muenster
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Of Attorneys for the Estate of James Rogers

CERTIFICATE OF SERVICE

I certify that on or about the 9th day of November, 2017, I caused a true and correct copy of this document to be served on counsel of record via email and first class mail.
Dated this the 9th day of November, 2017.

S/ John R. Muenster
Attorney at Law

Appendix

Filed
Washington State
Court of Appeals
Division Two

October 10, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ESTATE OF JAMES CRAMPTON ROGERS, by and through PAUL CULLEN, Personal Representative of the ESTATE, Appellant, v. THE STATE OF WASHINGTON and RUSSELL SANDERS, in his capacity as a Washington State Trooper, and as an individual, Respondent.	No. 49123-1-II UNPUBLISHED OPINION

LEE, J. —James Crampton Rogers was pulled over by a Washington State Patrol trooper and arrested. After Rogers was arraigned, he agreed to a pretrial diversion agreement and order. Rogers agreed to waive his rights to challenge the evidence against him and that probable cause existed to believe he committed the crimes of driving under the influence, possession of marijuana, and possession of drug paraphernalia. Rogers later sued the State, the trooper, and the towing company that impounded his vehicle. Rogers's civil suit alleged 42 U.S.C. § 1983 liability, trespass, and negligence, for his traffic stop and arrest, and conversion for impounding his vehicle. Rogers later died, and his estate (the Estate) continued the prosecution of his claims. The superior court granted summary judgment against the Estate and dismissed the suit.

On appeal, the Estate argues the superior court erred in failing to consider Rogers's testimony during a Department of Licensing administrative hearing challenging the Department's revocation of Rogers's driver's license, and erred in dismissing the § 1983, trespass, negligence, and conversion claims against the State and the trooper on summary judgment and in denying the Estate's motion for reconsideration. We hold that the superior court did not err in declining to consider Rogers's testimony from the Department of Licensing hearing, did not err in granting summary judgment, and did not err in denying reconsideration. Therefore, we affirm.

FACTS

A. INCIDENT AND CRIMINAL PROCEEDINGS

On June 24, 2008, Washington State Patrol Trooper Russell Sanders received information from the Washington State Patrol's dispatcher that "a small blue pick up [sic] with a top[p]er," along with the vehicle license plate number, was heading west from the Hood Canal Bridge and was having problems maintaining lane travel. Clerk's Papers (CP) at 38. Trooper Sanders found the truck and observed it "drive on to [sic] the centerline" twice, and "drift[] to the right and quickly jerk[] the vehicle to the left." CP at 38. Trooper Sanders initiated a traffic stop of the pickup. Rogers was driving the pickup.

Upon making contact with Rogers, Trooper Sanders observed "[a]n odor of alcohol emitting from [Rogers's] vehicle, as well as the odor of alcohol and marijuana emitting from Rogers'[s] person." CP at 95. Rogers also had "[b]loodshot, droopy, dilated and watery eyes; he had slurred speech and unnecessarily repeated himself." CP at 95. Rogers "attempted to hide marijuana and drug paraphernalia from [Trooper Sanders]." CP at 95. After Rogers admitted that

he had a drink earlier in the night, Trooper Sanders conducted field sobriety tests, which Rogers failed.

Trooper Sanders became a commissioned Washington State Patrol Trooper in August 2007, and has received Standard Field Sobriety Tests training. Based on his interactions with Rogers, he determined that Rogers's conduct "was consistent with someone under the influence of intoxicants." CP at 95. Trooper Sanders placed Rogers under arrest for suspicion of driving under the influence, and possession of marijuana and paraphernalia. Rogers was transported to jail, while his vehicle was impounded. CP at 95.

Michael Armstrong from the towing company impounded Rogers's truck. In securing Rogers's truck to tow, "a duffel bag fell out of the rear of the truck" and a "small can fell out of a side pocket of the duffel bag." CP at 52. Inside the can was "a pipe and what appeared to be marijuana." CP at 52. Armstrong could also smell marijuana at the rear of the truck. CP at 57.

Rogers was charged with driving under the influence, possession of marijuana and drug paraphernalia, and driving with an open container of alcohol. Subsequently, Rogers entered into a pretrial diversion program pursuant to a pretrial diversion agreement and order.

Under the pretrial diversion agreement and order, Rogers waived his right to challenge the admissibility of his statements, as well as his right to challenge physical, oral, or identification evidence against him. The pretrial diversion agreement and order "ORDERED that probable cause exists to believe that the Defendant committed the offense(s) charged herein," and that Rogers entered into the Pretrial Diversion Agreement and Order "freely, voluntarily and knowingly." CP at 93. The offenses that Rogers was charged with in the pretrial diversion agreement and order were (1) driving under the influence, (2) possession of marijuana, and (3) possession of drug

paraphernalia. The pretrial diversion agreement and order was filed on January 21, 2009, and has not been reversed or otherwise invalidated. Rogers completed his diversion conditions and the charges were dismissed.

B. ADMINISTRATIVE HEARING

On October 30, 2008, Rogers challenged the Department of Licensing's (DOL) revocation of his driving privileges in an administrative hearing. The hearing was conducted telephonically with a DOL hearing officer, Rogers, and Rogers's attorney participating. The DOL hearing officer filed an order on December 8, 2008, dismissing the proposed revocation, and finding that "Rogers expressed confusion regarding the blood test after submitting to a BAC test" and "[t]hat confusion was not clarified." CP at 180.

C. CIVIL SUIT

In April 2011, more than two years after entering into the pretrial diversion and agreement order, Rogers filed a civil suit against Trooper Sanders, individually and in his capacity as a Washington State Trooper, the State of Washington, and the towing company. The complaint alleged (1) a Fourth Amendment violation as a result of the traffic stop, (2) a Fourth Amendment violation as a result of the arrest, (3) 42 U.S.C. § 1983 liability as a result of the unlawful stop and arrest, (4) trespass and conversion, (5) negligence, and (6) malicious prosecution.

Rogers died on March 13, 2012, before the suit was resolved. His estate pursued the claims. The towing company was dismissed from the suit on summary judgment in 2014.[1]

[1] Rogers has not appealed the dismissal of the towing company.

The State and Trooper Sanders (collectively the State) moved for summary judgment in February 2016. In its response, the Estate cited portions of what it claimed was part of the transcript of the DOL administrative hearing. The Estate also voluntarily dismissed its claims for municipal liability and malicious prosecution. The superior court granted the State's motion for summary judgment, dismissing all claims with prejudice.

The Estate moved for reconsideration. In its motion to reconsider, the Estate alleged that the superior court refused to consider the alleged partial transcript of the DOL administrative hearing because it was not certified by a court reporter and the State was not a party to the proceeding.[2] Attached to the motion to reconsider was a transcript from the hearing, transcribed by a certified court reporter. The superior court denied the motion for reconsideration.

The Estate appeals the summary judgment order and the order denying reconsideration.

ANALYSIS

The Estate assigns error to the superior court's exclusion of the transcript from the DOL administrative hearing, the superior court's order for summary judgment in favor of the State and Trooper Sanders, and the superior court's denial of the Estate's motion for reconsideration of the summary judgment order. We hold that the superior court did not err in not considering the transcript from the DOL hearing, and did not err in granting summary judgment or in denying the motion for reconsideration.

[2] The record before us does not include any rulings made by the superior court regarding the admissibility of the alleged transcript.

A. STANDARD OF REVIEW

When reviewing a denial of summary judgment, we engage in the same inquiry as the trial court. *Robb v. City of Seattle*, 176 Wn.2d 427, 432, 295 P.3d 212 (2013). We conduct a de novo review of the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Id.* at 432–33. We also review issues of law de novo. *Id.* at 433.

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). "An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Id.* "If reasonable minds can reach only one conclusion on an issue of fact, that issue may be determined on summary judgment." *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 865, 324 P.3d 763 (2014).

B. ROGERS'S TESTIMONY BEFORE THE DOL WAS NOT ADMISSIBLE

The Estate argues that the transcript of Rogers's testimony at the DOL administrative hearing was admissible in the summary judgment proceeding under ER 804(b)(1). We disagree.

"We review the admissibility of evidence in summary judgment proceedings de novo." *Parks v. Fink*, 173 Wn. App. 366, 375, 293 P.3d 1275, *review denied*, 177 Wn.2d 1025 (2013). ER 804 provides exceptions to the rule against hearsay[3] when the declarant is unavailable. One of those exceptions is for "Former Testimony" by the declarant. ER 804(b)(1). The rule provides:

[3] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible unless specifically provided for by the rules of evidence, other court rules, or by statute. ER 802.

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

ER 804(b)(1).

Here, the testimony offered does not satisfy the exception to hearsay under ER 804(b)(1) because Rogers was not subject to cross-examination by a party with similar motives to develop his testimony. At issue in the DOL hearing was whether Rogers's driving privileges should be reinstated. Rogers's contention at the DOL hearing was that he was confused about the blood test. Therefore, a party opposing Rogers in the DOL hearing would have needed to cross-examine Rogers on his assertions that he was confused by the instructions regarding his blood test, which occurred after his arrest.

In contrast, here, the issue is whether the State had reasonable suspicion to stop, and probable cause to arrest, Rogers. Thus, a party opposing Rogers in the present suit would be concerned with cross-examining Rogers on facts leading up to the arrest, not what occurred after the arrest. Therefore, the superior court properly excluded the testimony from the DOL hearing because the testimony offered does not satisfy the exception to hearsay under ER 804(b)(1).

Even if the testimony was admissible under a different rule or statute, nothing in the testimony created an issue of material fact that would allow this case to survive summary judgment. As explained, the testimony from the DOL hearing developed facts that occurred *after* Rogers's arrest. The only facts relevant to the present summary judgment proceeding are those that explain the circumstances leading up to the stop and the arrest. Thus, even if Rogers's

testimony at the DOL hearing was otherwise admissible, nothing within the testimony created an issue of material fact that would allow this case to survive summary judgment.

C. 42 U.S.C. § 1983 CLAIMS

The Estate argues that the superior court erred in dismissing the Estate's 42 U.S.C. § 1983 claims, which were premised on Trooper Sanders's traffic stop and arrest of Rogers, and which the Estate alleges violated Rogers's Fourth Amendment rights. We hold that the superior court properly dismissed the Estate's § 1983 claims because the stop and the arrest were proper.

1. Legal Principles

a. 42 U.S.C. § 1983

42 U.S.C. § 1983 provides a cause of action to citizens who have been deprived of their rights under the constitution and laws by someone acting under the color of state law. It states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. Washington courts have concurrent jurisdiction with the federal courts to hear these claims. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 11, 829 P.2d 765, *cert. denied, sub nom., Robinson v. City of Seattle*, 506 U.S. 1028 (1992); *Haywood v. Drown*, 556 U.S. 729, 734-35, 129 S. Ct. 2108, 173 L. Ed. 2d 920 (2009).

"The constitutionality of a warrantless stop is a question of law we review de novo." *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). A warrantless traffic stop is a

constitutional investigative stop if it is based upon at least a reasonable articulable suspicion of either criminal activity or a traffic infraction. *State v. Chacon Arreola*, 176 Wn.2d 284, 292–93, 290 P.3d 983 (2012). A warrantless arrest is constitutional if it is based on probable cause. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). "Probable cause exists when the arresting officer is aware of facts or circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed." *Id.* (emphasis omitted).

Here, the Estate's § 1983 challenge fails on the merits as a matter of law. First, the traffic stop was based on a reasonable articulable suspicion that Rogers had committed a traffic infraction. Specifically, others had reported Rogers "having problems [maintaining] lane travel," and Trooper Sanders's corroborating observations of Rogers having problems maintaining a direct line of travel, driving on the centerline twice, and drifting and jerking from right to left. CP at 38.

Second, the arrest was based on probable cause that Rogers had committed a crime. Specifically, Trooper Sanders observed: erratic driving before the stop; "a mild odor of alcohol emitting from [Rogers's] vehicle"; "the odor of alcohol and marijuana emitting from Rogers'[s] person"; Rogers had "[b]lood shot, droopy, dilated and watery eyes"; Rogers "had slurred speech and unnecessarily repeated him self [sic]"; Rogers "attempted to hide marijuana and drug paraphernalia from [Trooper Sanders]"; Rogers "failed the field sobriety tests"; and Rogers stated that he had a drink earlier in that night. CP at 39, 95.

On the facts of this case, Trooper Sanders's warrantless stop and arrest of Rogers were constitutionally justified as a matter of law. Therefore, the Estate's § 1983 challenge to the constitutionality of the stop and arrest fails on the merits.

D. TRESPASS, NEGLIGENCE, AND CONVERSION CLAIMS

The Estate argues that, because the traffic stop and arrest were "invalid," the State is liable for trespass and negligence claims under the doctrine of *respondeat superior* for Trooper Sanders's actions. Br. of Appellant at 21. Because the traffic stop, the arrest, and the impoundment of Rogers's truck were lawful, we disagree.

First, as explained above, Trooper Sanders's actions in stopping and subsequently arresting Rogers were constitutional because they were supported by a reasonable articulable suspicion and probable cause, respectively. *See*, Section C, *supra*. Thus, we hold that the State is not liable for trespass or negligence under a theory of *respondeat superior* for the traffic stop and arrest.

Second, impoundment of Rogers's truck after his arrest was lawful. RCW 46.55.113(2)(d) provides that "a police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety under any of the following circumstances: . . . Whenever the driver of a vehicle is arrested and taken into custody by a police officer." Here, Rogers was driving his truck before he was arrested and taken into custody by a police officer, Trooper Sanders. Trooper Sanders was, therefore, authorized under RCW 46.55.113(2)(d) to take custody of Rogers's truck. Thus, the State is not liable for conversion because Trooper Sanders's impoundment was lawful.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Johanson, J.

Maxa, A.C.J.

MUENSTER & KOENIG

November 09, 2017 - 8:33 AM

Transmittal Information

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