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COURT OF APPEALS, DIVISION III,  
OF THE STATE OF WASHINGTON

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Deborah Phifer, Personal Representative of the estate of Mr. Phifer,

Appellant/Plaintiff,

v.

State of Washington Department of Labor and Industries,

Respondent/Defendant.

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APPELLANT'S PETITION FOR DISCRETINARY REVIEW

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Favian Valencia, WSBA# 43802  
Counsel for Appellant  
Sunlight Law, PLLC  
402 E Yakima Avenue, Suite 730  
Yakima, WA 98901  
(509) 388-0231

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## **I. IDENTITY OF PETITIONER**

Petitioner is Deborah Phifer, personal representative of the estate of Mr. Fred Phifer (“Mr. Phifer” or “Appellant”) who was the aggrieved person.

## **II. COURT OF APPEALS DECISION**

Petitioner seeks review of the Court of Appeals’ unpublished opinion *Phifer v. Dep’t of Labor & Indus.*, 36572-7-III, 2020 WL 1028087 (Wash. Ct. App. Mar. 3, 2020) filed March 3, 2020. The Court of Appeal’s decided that the State of Washington Department of Labor and Industries (“Respondent” “Department”) did not owe a duty and did not breach any duty to Appellant. The Appellate Court decision disregards the Supreme Court’s precedent in making its decision on the issues of duty and breach of duty. A copy of the opinion is attached as Appendix 1.

## **III. ISSUES PRESENTED FOR REVIEW**

1. Whether a state agency owes a duty of care to act as a reasonable state agency in handling an insured’s request for benefits in a reasonable manner.
2. Whether a state agency’s internal policy is evidence of its standard of care.
3. Whether a state agency that has an insurer/insured business

relationship with plaintiff owes heightened duty of care to an insured handling an insured's request for benefits in a reasonable manner.

4. Whether the Appellate Court committed reversible error in failing to consider arguments that were made by Appellant at summary judgment at the trial level and were properly appealed and presented to the Appellate Court.

#### **IV. STATEMENT OF THE CASE AND PROCEDURES**

1. On July 1, 2008, Mr. Phifer filed a workers' compensation claim with Mr. Phifer for an on-the-job injury of his back and hands while working as a grinder. CP 71.

2. The claim was assigned to Annabea Alvarado, who was a workers' compensation claim adjudicator employed by The Department. CP 12.

3. Ms. Alvarado's responsibilities as a claims manager for The Department included: "review reports of accidents, make sure criteria is met for allowance of a claim, review for time-loss benefits, for loss of earning power benefits..." CP 388.

4. From the time that Mr. Phifer filed his claim, he was being treated by Dr. Lefors for his work place injuries and for depression. CP 455-464.

5. In the days prior to August 4, 2008, Mr. Phifer called Ms. Alvarado to find out why he was not getting time loss benefits and left several voicemails for Ms. Alvarado to call him back. CP 12-13.

6. On August 4, 2008, while Mr. Phifer was sharpening his wife's knives in his home kitchen, Ms. Alvarado called Mr. Phifer back and Mr. Phifer answered the call. *Id.*

7. The contents of the conversation are in dispute. Mr. Phifer alleges that: Ms. Alvarado was angry and lectured him as to why he was calling her so many times and that he wasn't her only client and to stop calling her so much. *Id.* Ms. Alvarado then asked "what do you do all day, lay around and watch TV all day?" *Id.* Although this irritated Mr. Phifer, he responded that he did what his doctor ordered, which was to move around for a while and then rest and then move again. *Id.* Ms. Alvarado then asked what he was doing, and he responded that he was sharpening his wife's knives because his profession was being a grinder and he was good at sharpening knives. *Id.* Ms. Alvarado then put him on hold and Mr. Phifer waited for about 5-10 minutes on hold. *Id.* When Ms. Alvarado came back on the line, she informed Mr. Phifer that she was going to issue partial payments for time loss and asked Mr. Phifer not to call so much. *Id.* Mr. Phifer never said that he was suicidal or anything that would have made anyone believe that he was suicidal. CP 14-15; 416-18. Mr. Phifer was going to explain why he was sharpening knives, but was not given the opportunity because Ms. Alvarado put him on hold. CP 416-18.

8. Ms. Alvarado's note that she wrote on the day of the phone call states:

“[rtc] to status not happy the way things were going, was having very bad thoughts, he felt like a loser, feels like he has hit a brick wall and feels like ending it all. [S]ays supervisor at magic metals caused his mental health issue. says that he is about to lose his house. cm advised would pay provisional until we get things sorted out. Stated has been seeing dr. lefors since 05/22/08. has always had back problems has 7 messed up discs. in the past has gone thru dvr was trained for real estate did that for 14 years...asked iw if he wanted cm to contact mental health or authorities to pay him a visit to discuss his bad thgouths stated no, he would like to speak w/dr. wms...per protocol cm notified yakima police dept.

CREATE DATE: 08/04/08”

CP 194.

9. According to Ms. Alvarado, despite Mr. Phifer stating that he did not want mental health or authorities to pay him a visit, Ms. Alvarado still called the Yakima Police Department to report that Mr. Phifer was suicidal. CP 389-90.

10. The Department's policy in place for handling injured workers that threatened suicide, in relevant part, was as follows:

“To: All Claims Staff

From: Jody Moran, Program Manager Claims Administration

Subject: When an Injured Worker Threatens Suicide

*This is an update to my December 11, 2001 memo when it was brought to my attention that we had not been handling workers' threats of suicide consistently. In order to make our process more uniform and to improve the timeliness of our response, the following instructions are being provided:*

When an injured worker tells you that he/she is threatening to commit suicide, you need to contact the appropriate County Law Enforcement Agency in the county where the worker lives. The list of County 'Suicide and Crisis Phone Numbers' is attached. Although we are not asking you to also contact the 'Crisis/Mental Health Agency,' that agency is listed for your information as well. As a courtesy, you should also contact the worker's attending physician, and in particular, the worker's psychiatrist if one is providing care under the claim.

*NEW INFORMATION—if you receive the worker's call before 8 a.m. or after 5p.m., first call WSP (902-6367) to let them know you will be calling 911; and then call 911, and ask to be transferred to the appropriate county to report the worker's suicide threat.*

Please DO NOT complete an internal L&I Incident Report UNLESS the worker threatens you (or other department staff) with bodily harm, or you receive threats of destructions of agency property.

Your immediate attention in following this protocol is appreciated. Thank you." CP 396 (emphasis in original).

11. The Department routinely got callers that were stressed with the way their claims are going and it was not uncommon to have callers express actual threats of suicide. CP 395; 404-406.
12. This was the Departments only and official policy on what to do when an injured workers threatened to commit suicide. CP 407-408.



13. The Department did not provide any trainings to its claims managers on how to apply this policy. *Id.*
14. On the date of the phone call, Ms. Alvarado had Mr. Phifer's attending physician's, Dr. Lefors contact information, but she did not call him. CP 391-92.
15. If Mr. Phifer's attending physician, Dr. Lefors, had been contacted and agreed to respond, Dr. Lefors could have evaluated Mr. Phifer at his home. CP 438.
16. Ms. Alvarado reported to the police department that Mr. Phifer threatened to end his life that that he had weapons (knives), which caused the police officers to approach Mr. Phifer with their "guard up." CP 439-41.
17. Minutes after Mr. Phifer hung up the phone with Ms. Alvarado, he had three police officers at his front door who handcuffed him and stated that The Department's claims manager had called them to report that Mr. Phifer was suicidal and threatening to commit suicide and that had knives out. CP 13-14.
18. The police officers handcuffed Mr. Phifer and had him wait in his house until an evaluator came to check on him. *Id.*; CP 18-20. The police officers inquired about whether Mr. Phifer had guns in his house and proceeded to search his house and take his guns out of his safe. *Id.*

19. The police officers then took Mr. Phifer to the police station to keep waiting on the evaluator. *Id.* At the police station, Mr. Phifer was held in a room and hand cuffed to a pipe that ran across the wall. *Id.* The evaluator finally arrived and evaluated Mr. Phifer and determined that he was not suicidal and had him released. *Id.*

20. Mr. Phifer was detained in handcuffs by the police at his house for about 30 minutes and held in handcuffs at the police station for about 45 minutes. CP 420-21.

21. Being detained police officers and taken and held in handcuffs at the police station caused Mr. Phifer a flare up of his dormant post traumatic stress disorder (“PTSD”) that had been dormant since he was beaten almost to death by police officers at Toppenish police station in the 19070s. *Id.*; CP 19-39; 266-67; 273-79; 420-21; 431-32.

22. Before being detained on August 4, 2008, despite symptoms of depression, Mr. Phifer’s physician, Dr. Lefors opined that Mr. Phifer was not suicidal. CP 266-67; 431-432.

23. After the August 4, 2008 incident, Mr. Phifer was diagnosed with PTSD and The Department accepted this medical condition as part of Mr. Phifer’s work injury claim. CP 23-39; 69-70; 269-79.

24. During the time that Ms. Alvarado worked as a claims manager for The Department, injured workers complained against her for being rude on the phone on a daily basis. CP 393.

25. During the time of the incident, Ms. Alvarado was consistently absent and late to work, which made it so that she had to play catch-up in returning calls to the injured workers' claims that she managed. CP 409-411. The ideal number of claims for a claims manager to handle was 200-220 at a time. *Id.* During the time of the incident, Ms. Alvarado was handling about 300 claims. *Id.*

26. Another claims manager for The Department, Mary Garza, shared an instance when she handled a call from an injured worker that suggested that he was suicidal: Ms. Garza informed him that she would have to call the authorities and the injured worker responded by stating "nevermind, I'm fine" and Ms. Garza did not have to call the police. CP 404-06. Ms. Garza stated that she just had to show the injured worker that she was listening and that she would have to call the authorities if the injured worker did mean that he was suicidal, which allowed the injured worker to clarify that he was not actually suicidal. *Id.*

#### **RELEVANT PROCEDURES**

27. The Appellate Court concluded that Appellant did not advance an argument that Respondent had a heightened duty of care due to its special

relationship of insurer-insured at the trial level, and that these arguments were not included in the pleadings identified in the trial court's summary judgment order. *Phifer*, 36572-7-III, 2020 WL 1028087 at \*4.

28. Appellant did advance the argument that Respondent owed a heightened duty of care to Mr. Phifer and Respondent responded to this argument. These arguments were made in the pleadings identified in the trial court's summary judgment order. CP 80-81, 203-204, 332-33, 368 and 444.

## V. ARGUMENT

### A. STANDARD OF REVIEW

A petition for review will be accepted by this Court:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
  - (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
  - (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
  - (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.
- RAP 13.4(b).

This Court should accept review because, as shown below, the Court of Appeals' ruling is in conflict with the Supreme Court's interpretation of RCW 4.92.090; that States and its agents are held to a standard of reasonable care. *Joyce v. State, Dep't of Corr.*, 155 Wn.2d 306, 309, 119 P.3d 825, 827 (2005) *superseded on other grounds*; *See also*,

*Washington State Dep't of Transp. v. Mullen Trucking 2005, Ltd.*, 194 Wn.2d 526, 531, 451 P.3d 312, 315 (2019).

Furthermore, the Court of Appeals' expressly abrogated a generally accepted standard that the violation a department policy may be evidence of negligence. RCW 5.40.050; *Joyce*, 155 Wn.2d 306, 324, 119 P.3d 825, 827 (2005) *superseded on other grounds*; *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 893, 1 P.3d 587, 592 (2000).

The Appellate Court's ruling failed to acknowledge the Supreme Court's precedent in *Hutchins v. 1001 Fourth Ave. Associates* regarding whether there exists a heightened standard of care between a business owner-client—insurer-insured—relationship. 116 Wn.2d 217, 227-28, 802 P.2d 1360, 1363 (1991).

The Appellate Court also failed to consider arguments that were made at the trial level and that were properly presented to it in a certified transcript and listed in the signed summary judgment order, which goes against this Court's precedent in *Am. Universal Ins. Co. v. Ranson*, 59 Wn.2d 811, 816, 370 P.2d 867, 870 (1962). Each of these issues individually merit a review by this Honorable Court.

**B. The Appellate Court's Ruling Failed To Hold Department To A Reasonable Care Standard in Performing Its Duties**

Washington State waived sovereign immunity through RCW 4.92.090. “Implicitly, this waiver functions as a promise that the State and its agents will use reasonable care while performing its duties at the risk of incurring liability.” *Joyce v. State, Dep't of Corr.*, 155 Wn.2d 306, 309, 119 P.3d 825, 827 (2005) *superseded on other grounds*. “Internal directives, department policies, and the like may provide evidence of the standard of care and therefore be evidence of negligence.” *Id.* at 324. The Appellate Court failed to apply this standard to all the duties of Respondent in handling Appellant’s Claim by focusing only on Respondent’s phone call to the police and ignoring the rest of the Respondent’s actions and inactions that caused Appellant’s damages.

The Respondent is responsible for the negligent acts of its employees as long as the employee is engaged at the time in the furtherance of the employer's interest. *Rahman v. State*, 170 Wn.2d 810, 816, 246 P.3d 182, 184 (2011). Ms. Alvarado owed a duty to Mr. Phifer to respond to Mr. Phifer’s request for benefits in good faith, to listen and to ask follow up questions to determine the best way to handle his call.

When viewing the facts in the light most favorable to Mr. Phifer, Ms. Alvarado breached this duty by failing to listen to Mr. Phifer’s concerns and comments. Mr. Phifer’s testimony is that he never said anything about

hurting himself or wanting to commit suicide. A reasonable claims manager in the same or similar circumstances would not have reported that Plaintiff was suicidal to the police unless he actually threatened suicide. A reasonable person acting as a claims manager would have asked follow up questions to ascertain whether Mr. Plaintiff was just upset having just suffered an injury and not receiving any workman's compensation benefits or if he in fact was threatening suicide. When viewing the facts in the light most favorable to Plaintiff, Ms. Alvarado should not have called the police because Plaintiff did not threaten to hurt himself or to commit suicide.

Mr. Phifer also testified that Ms. Alvarado put him on hold when he mentioned that he was sharpening his wife's knives and did not give him the opportunity to explain why he was sharpening knives. Mr. Phifer testifies that if he would have not been put on hold, he would have explained that he was sharpening knives so that his wife could cut tomatoes without squishing. If Ms. Alvarado would have simply listened to Mr. Phifer to explain why he was sharpening knives, she would have known that Mr. Phifer was not threatening to commit suicide and would not have called the police on Mr. Phifer. A reasonable claims manager would have asked follow up questions and acted accordingly. This is a breach of Ms. Alvarado's duty.

Ms. Alvarado's own testimony admits that she asked Mr. Phifer whether he wanted her to "contact mental health or authorities to pay him a visit to discuss his bad thoughts[, he] stated no, he would like to speak with Dr. [Williams]." Cp 389-90. Ms. Alvarado still called the police. *Id.* A reasonable claims manager would not have called the police considering that the injured worker indicated that he would follow up with his doctor.

Ms. Alvarado also breached her duty by failing to call Mr. Phifer's attending physician. Ms. Alvarado admits that she had Mr. Phifer's attending provider's phone number on hand, but decided not to call him even though this was instructed in the Respondent's policy.

Ms. Garza gave an example of what a reasonable person would have done in the same or similar circumstances when she was a claims manager and handled a call from an injured worker that suggested that he was suicidal: Ms. Garza informed him that she would have to call the authorities and the injured worker responded by stating "nevermind, I'm fine" and Ms. Garza did not have to call the police. *Id.* at Ex. B, 21:22-24:17. Ms. Garza states that she just had to show the injured worker that she was listening and that she would have to call the authorities if the injured worker did mean that he was suicidal, which allowed the injured worker to clarify that he was not actually suicidal. *Id.*



This is the opposite of what Ms. Alvarado did with Mr. Phifer; she put him on hold and called the authorities even after Mr. Phifer said that he was fine. A reasonable person that was concerned about whether somebody was in danger of committing suicide would have taken every precaution and would have also called the person's doctor who could have intervened and cleared up the misunderstanding. Viewing this evidence in the light most favorable to Plaintiff, it is evident that Ms. Alvarado did not exercise ordinary care by not listening to Mr. Phifer when he requested that she not call the mental health or the authorities, but she still called the police and then failed to call his attending provider, Dr. Lefors.

Mr. Phifer's aggravation of his PTSD happened when he was taken into a holding cell at the police station and held there for about forty-five minutes to an hour. One of the arresting officers, Officer Gonzalez, testified that the suicide evaluation could have happened at Mr. Phifer's home if his counselor would have been called. CP 438. Ms. Alvarado testified that she had Dr. Lefors' phone number on hand and could have called him, but chose not to. Mr. Phifer was expecting to be evaluated as to whether he was suicidal or not at his home, and once he was held at holding cell at the jail, "everything came back to me where I was beat up down in Toppenish [...] and they tried to kill me down there and I, I didn't know but what these guys would try to hurt me too." *Id.* at Ex. C at 69:13–

70:10. Dr. Lefors also testified that Mr. Phifer’s PTSD was reawakened by being put in “some kind of holding area.” *Id.* at D 72:23-73:3. Viewing the facts in the light most favorable to Mr. Phifer, if Ms. Alvarado would have called Dr. Lefors, his PTSD symptoms would have been avoided because he would have more likely than not been able to be interviewed at his home and avoid being taken into a jail cell where he was beaten in 1975.

**C. The Appellate Court’s Ruling Failed To Find That The Department’s Internal Memorandums Are Evidence of Negligence**

WPI 60.03 states that a violation of a statute or internal

governmental policy is not necessarily negligence, but may be considered by the jury as evidence in determining negligence. RCW 5.40.050.

“[D]epartment [...] may provide evidence of the standard of care and therefore be evidence of negligence.” *Joyce*, 155 Wn.2d 306, 324, 119 P.3d 825, 827 (2005) *superseded on other grounds*. The Department’s internal policy on how to handle phone calls from injured workers should have been used as the proper standard of care. The Appellate Court’s ruling failed to do this.

**D. Appellant Properly Appealed And Argued That The Insurer-Insured Special Relationship Between The Department and Mr. Phifer Created A Heightened Standard of Care—The Appellate Court’s Ruling Failed to Address This Legal Theory**

The Appellate Court decided not to consider whether there was a heightened standard or care pursuant to *Hutchins* because it concluded that

this argument was not made by Appellant at the trial level. 116 Wn.2d 217, 227-28, 802 P.2d 1360, 1363. This is inaccurate, Appellant made this argument and supported it with evidence and the Respondent fully argued against it. CP 80-81, 203-204, 332-33, 368 and 444. This, by itself, is sufficient to merit review because it goes against *Am. Universal Ins. Co.*, which holds that an appellate court should consider matters that are properly argued at the trial level and appealed. 59 Wn.2d 811, 816, 370 P.2d 867, 870.

**E. This Court Has Already Established That There Are Certain Situations That Create A Special Relationship Between The Plaintiff And Defendant**

This Court has established that certain relationships create a heightened standard of care: “carrier to its passenger, from an employer to an employee, from a hospital to a patient, and from a business establishment to a customer.” *Hutchins*, 116 Wn.2d 217, 28. The business-client relationship between the Department and Mr. Phifer is founded on the fact that the Department is endowed by our Legislature with the power and responsibility to act as an insurer for our State’s workforce. The Department does not use taxpayers money to pay out benefits to workers that are injured. “The department shall formulate and adopt rules governing the method of premium calculation and collection.” RCW 51.16.035. The Board that is appointed to oversee the Department’s

actions is titled “Board of Industrial *Insurance Appeals*.” RCW 51.52, *et seq.* (emphasis added).

The Department is in the business of insuring our State’s workers for injuries that are suffered at work. RCW 48.30.015 provides that insurers have a duty to promptly fairly and in good faith investigate its insured’s claims and provide the benefits that the insured is entitled to. Our State has exercised its police power in creating the Department as an agency to act as an insurer for workplace injuries. RCW 51.04.010.

With great power comes great responsibility. The Department is required to:

“supervise the providing of prompt and efficient care and treatment, including care provided by physician assistants[,] chiropractic care, and including care provided by licensed advanced registered nurse practitioners, to workers injured during the course of their employment at the least cost consistent with promptness and efficiency, without discrimination or favoritism[...] PROVIDED FURTHER, That the department may recommend to an injured worker particular health care services and providers where specialized treatment is indicated or where cost effective payment levels or rates are obtained by the department: AND PROVIDED FURTHER, That the department may enter into contracts for goods and services including, but not limited to, durable medical equipment so long as statewide access to quality service is maintained for injured workers. [...] [The Department] shall make a record of the commencement of every disability and the termination thereof and, when bills are rendered for the care and treatment of injured workers, shall approve and pay those which conform to the adopted rules, regulations, established fee schedules, and practices of the director and

may reject any bill or item thereof incurred in violation of the principles laid down in this section or the rules, regulations.” RCW 51.04.030.

The Department even has authority to require treating physicians to undergo continuing medical education courses and to sanction physicians that provide medical treatment under this statute to injured workers. *Washington State Dept. of Labor and Industries v. Kantor*, 94 Wash.App. 764, 973 P.2d 30 (1999) review denied 139 Wash.2d 1002, 989 P.2d 1139. The Department has complete authority over injured workers’ medical treatment and wage loss benefits. This is exactly the type of protective relationship that establishes a special duty between a business establishment and its customer as described in *Hutchins*, 116 Wn.2d 217, 227-28 (Citing Restatement (Second) of Torts § 315 (1965)). This relationship establishes a heightened duty on the Department than that of an ordinary person because the Department is placed in a position of trust. This is akin to the special relationship between a jailer and an inmate that requires the jailer to ensure health welfare and safety. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924, 927 (2010). Just as a jailer has complete control over an inmate’s room and board, the Department has complete control over injured workers’ financial well being (through time loss) and healthcare.

This Court should grant discretionary review to establish the proper heightened duty of the Department to act in good faith in handling Mr. Phifer's requests for the financial and healthcare benefits that he was entitled to. The duty should include hiring enough claims managers to handle the appropriate number of claims so that the claims managers can give appropriate attention to each claim. The duty should also include establishing appropriate policies and training for claims managers to handle injured workers' comments regarding thoughts of sadness, frustration and thoughts of being suicidal, and how to distinguish between these.

It is logical that injured workers calling the Department for their benefits are inherently in a stressful situation having been injured at work and having their financial and healthcare destiny in the hands of the Department. The Department should be held to a heightened standard to provide proper services to its clients.

**F. Conclusion**

This Supreme Court should grant discretionary review because the decision of the Court of Appeals is in conflict with this Court's precedent.

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Respectfully submitted this 30th day of March, 2020.

/s/ Favian Valencia  
Favian Valencia, WSBA#43802  
Attorney for Appellant  
Sunlight Law, PLLC.  
402 E. Yakima Ave, Ste 730  
Yakima, WA 98901  
(509) 388-0231

APPENDIX: Copy of Court of Appeals Decision



**FILED**  
**MARCH 3, 2020**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

DEBORAH PHIFER, Personal	)	No. 36572-7-III
Representative of the Estate of	)	
Fred Phifer,	)	
	)	
Appellant,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
STATE OF WASHINGTON	)	
DEPARTMENT OF LABOR AND	)	
INDUSTRIES; CITY OF YAKIMA, a	)	
municipal corporation,	)	
	)	
Respondents.	)	

LAWRENCE-BERREY, C.J. — Deborah Phifer, personal representative of the estate of Fred Phifer (Estate), appeals the trial court’s order summarily dismissing the Estate’s negligence claim against the Washington State Department of Labor and Industries (Department). The Estate contends the trial court erred because the Department either owed or breached certain duties to Mr. Phifer. We conclude the Department did not owe or breach any of the duties articulated by the Estate and affirm.

## FACTS

Consistent with our standard of review, we set forth the facts in the light most favorable to the Estate. *See Herring v. Texaco, Inc.*, 161 Wn.2d 189, 194, 165 P.3d 4 (2007).

In July 2008, Mr. Phifer filed a workers' compensation claim with the Department for an on-the-job injury. The Department assigned Mr. Phifer a case manager, Annabea Alvarado. One month later, Mr. Phifer called Ms. Alvarado repeatedly. Ms. Alvarado eventually returned the call. Ms. Alvarado began lecturing Mr. Phifer, telling him not to call so often and asked questions such as, ““What do you do all day, lay around and watch TV all day?”” Clerk's Papers (CP) at 13.<sup>1</sup> Mr. Phifer told her that he was doing what his

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<sup>1</sup> In July 2013, Mr. Phifer signed and filed a declaration that sets forth his version of events. In April 2018, the Department brought the motion that is the subject of our review. The Estate's summary judgment response did not cite Mr. Phifer's 2013 declaration, but it did assert facts contained in that declaration. Probably for this reason, the summary judgment order does not list the 2013 declaration as being considered by the trial court.

On appeal, we consider only evidence and arguments called to the attention of the trial court. RAP 9.12. To facilitate a proper review, all pleadings considered by the trial court are required to be listed in the summary judgment order. *Id.* Normally, evidence considered by the trial court but not listed in the order is required to be listed in a supplemental order. *Id.*

On appeal, the Estate repeatedly cites Mr. Phifer's 2013 declaration. The Department does not object—a tacit acknowledgment that the trial court considered the evidence contained in the 2013 declaration. For these reasons, we too consider that declaration, and waive compliance with RAP 9.12. *See* RAP 1.2(a).

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doctor ordered, intermittently resting followed by activity. Ms. Alvarado then asked what he was doing right at that moment, to which Mr. Phifer replied he was sharpening his wife's knives. Ms. Alvarado put Mr. Phifer on hold for 5 to 10 minutes. When she got back on the line, she told him the Department would send some partial payments and told him not to call so much.

After hanging up the telephone, Mr. Phifer went back to sharpening his wife's knives. Ms. Alvarado, meanwhile, called the police and informed them Mr. Phifer was suicidal and had knives. After a few minutes, Yakima police arrived at Mr. Phifer's house. They asked to come in and Mr. Phifer consented.

Once inside, the officers interviewed Mr. Phifer. Mr. Phifer said he was depressed, but not suicidal. He also made a reference to going to heaven, but then said he did not mean anything by it. The officers then put Mr. Phifer in handcuffs. Officers told Mr. Phifer he could not leave until an evaluator arrived. After about 30 minutes, the evaluator still had not arrived. The officers had other duties and could not wait idly any longer. They handcuffed Mr. Phifer, and drove him to the police station where they cuffed him to a pipe. He spent 45 minutes cuffed to a pipe before being released.

After her call with Mr. Phifer, Ms. Alvarado filed a report with the Department.

The report reads:

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rtc to status not happy the way things were going, was having very bad thoughts, he felt like a loser, feels like he has hit a brick wall and feels like ending it all. [S]ays supervisor at magic metals caused his mental health issue. [S]ays that he is about to lose his house. cm advised would pay provisional until we get things sorted out, stated has been seeing [D]r. [L]efors since 05/22/08. [H]as always had back problems has 7 messed up discs. [I]n the past has gone thru dvr was trained for real estate did that for 14 years . . . . asked iw if he wanted cm to contact mental health or authorities to pay him a visit to discuss his bad thoughts stated no, he would like to speak w/dr. wms . . . . per protocol [sic] cm notified yakima polide [sic] dept.

CP at 194.

At the time of this incident, an internal policy of the Department provided:

When an injured worker tells you that he/she is threatening to commit suicide, you need to contact the appropriate County Law Enforcement Agency in the county where the worker lives. The list of County "Suicide and Crisis Phone Numbers," is attached. Although we are not asking you to also contact the "Crisis/Mental Health Agency," that agency is listed for your information as well. As a courtesy, you should also contact the worker's attending physician, and in particular, the worker's psychiatrist if one is providing care under the claim.

CP at 396.

Being arrested, cuffed, and taken to the police station lit up Mr. Phifer's dormant posttraumatic stress disorder (PTSD), originally caused by being beaten almost to death by police officers in the 1970s.

In September 2011, Mr. Phifer and his wife, Deborah Phifer, filed a complaint against the Department and the city of Yakima. The complaint brought several causes of

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action, including negligence, outrage, negligent training, loss of consortium, and violation of 42 U.S.C. § 1983.

Sometime before June 2012, the city of Yakima filed a motion for partial summary judgment on the 42 U.S.C. § 1983 claim. The Department joined the motion. The trial court granted the motion and dismissed that claim.

In July 2012, the Department and the city filed motions for summary judgment on all their other claims. The parties stipulated that the outrage and the loss of consortium claims should be dismissed. The trial court granted the city's motion, but denied the Department's motion with respect to the negligence and the negligent training claims.

In July 2013, the Department filed another motion for summary judgment. The trial court denied the motion as to the negligence claim, but granted it on the negligent training claim.

In April 2018, the Department filed its final motion for summary judgment. By then, Mr. Phifer had passed away, and the Estate had substituted as party-plaintiff. The trial court originally denied the Department's motion. On November 20, 2018, it reconsidered its order sua sponte, and entered the following order:

The court will grant Defendant's motion for summary [sic] on Dec [sic] 4, 2018, if Plaintiff has not filed additional briefing on the issue of special relationship that convinces the court not to grant summary judgment.

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CP at 371.

The Estate filed several pleadings on December 4, 2018. Two days later, the trial court entered the order that granted the Department's motion. The pretyped order listed the pleadings considered by the trial court, and the trial court hand-wrote four additional pleadings onto the typed list. Neither the typed nor the handwritten list included the December 4, 2018 pleadings filed by the Estate.<sup>2</sup>

The Estate timely filed this appeal.

#### ANALYSIS

This court reviews summary judgment orders de novo and views the evidence in the light most favorable to the nonmoving party. *Herring*, 161 Wn.2d at 194. We perform the same inquiry as the trial court. *Keck v. Collins*, 181 Wn. App. 67, 78, 325 P.3d 306 (2014), *aff'd*, 184 Wn.2d 358, 357 P.3d 1080 (2015). Summary judgment is only appropriate when there is no genuine issue as to any material fact, and the pleadings show the moving party is entitled to judgment as a matter of law. *Id.* at 78-79. For example, summary judgment is appropriate when the responding party fails to make a showing sufficient to establish the existence of an element essential to that party's case,

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<sup>2</sup> We doubt the trial court considered the late pleadings. Had it considered them, it would have added the December 4, 2018 filings to its handwritten list.

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and on which that party will bear the burden of proof at trial. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Here, the trial court dismissed the Estate's negligence claim against the Department. A negligence claim requires a plaintiff to prove four elements: (1) there existed a duty owed by the defendant to the plaintiff, (2) the defendant breached that duty, (3) damage resulted, and (4) the damage was proximately caused by the defendant's breach. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). In addition, an employer is liable for the negligent acts of its employees occurring within the scope of their employment. *Rahman v. State*, 170 Wn.2d 810, 815, 246 P.3d 182 (2011). The trial court dismissed the Estate's negligence claim because it bore the burden of establishing the Department owed and breached a duty, and it failed to articulate any duty owed or breached.

The Estate argues the trial court erred. Specifically, the Estate argues the Department is vicariously liable for Ms. Alvarado's actions, and Ms. Alvarado had the following duties: (1) to listen and ask appropriate questions to determine how to respond to Mr. Phifer, (2) to empathize and listen, in accordance with RCW 43.70.445, (3) to act consistent with the Department's internal memo, and (4) a heightened and special duty to properly respond to injured workers asserting claims. Most of the Estate's arguments

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complain that Ms. Alvarado should have more closely listened to Mr. Phifer and, instead of calling the police, she should have called his doctor.

THE ESTATE FAILED TO ARTICULATE A DUTY OWED

When determining if a defendant owes a duty to a plaintiff, this court considers many factors, including “logic, common sense, justice, policy, and precedent, as applied to the facts of the case.” *Centurion Props. III, LLC v. Chi. Title Ins. Co.*, 186 Wn.2d 58, 65, 375 P.3d 651 (2016).

A person is not tortiously liable for reporting a matter of concern to law enforcement, or for the actions taken by law enforcement following the report. In *Parker v. Murphy*, 47 Wash. 558, 560, 92 P. 371 (1907), a shop owner called the police on a former employee after the former employee kept harassing the owner at his shop. *Id.* at 559. Police officers came and arrested the former employee without the owner’s request or knowledge. *Id.* The court held that the owner could not be liable for an action of false imprisonment when he had simply called the police and the officers had acted on their own initiative. *Id.* at 560.

Here, Ms. Alvarado did nothing other than what the shop owner did in *Parker*. Ms. Alvarado called the police and related her concerns. She did not ask the officers to



arrest Mr. Phifer nor did she suggest they do so. The officers, who are trained to assess suicide risk, arrived on the scene and acted on their own initiative.

Reporting a potentially suicidal person does not create an appreciable risk of harm to that person. Not reporting a potentially suicidal person does create an appreciable risk. Logic, common sense, policy, and precedent do not support imposing liability on persons for reporting suicidal people.

We now comment on the Estate's more specific arguments.

*1. RCW 5.40.050 does not apply here*

The Estate first argues that Ms. Alvarado violated the Department's internal policy and, in doing so, she was negligent. In support of its argument, the Estate cites RCW 5.40.050. That statute generally makes violation of a statute, ordinance, or administrative rule evidence of negligence. We reject the Estate's first argument.

RCW 5.40.050 has no application here, to an internal agency policy. Also, Ms. Alvarado did not violate the internal policy. The internal policy read "[w]hen an injured worker tells you that he/she is threatening to commit suicide, you need to contact the appropriate County Law Enforcement Agency in the county where the worker lives." CP at 396. This policy did not direct case managers *not* to contact authorities if they

suspected callers were suicidal. For this reason, Ms. Alvarado did not violate the Department's internal policy.

2. *RCW 43.70.445 does not impose liability on a Department case manager*

The Estate next argues that Ms. Alvarado failed to act in accordance with RCW 43.70.445. In 2017, RCW 43.70.445(1)(a) was amended to add that it creates a "suicide-safer homes task force." The charge of the task force is to develop trainings and messaging to enhance suicide prevention and to train various groups. Those groups do not include Department employees.

The applicable version of RCW 43.70.445(1)(a) was not effective until nearly one decade after Ms. Alvarado's phone call with Mr. Phifer and does not impose duties on Department claims managers. The Estate fails to adequately explain how this statute results in a 2008 duty of care from Ms. Alvarado to Mr. Phifer.

3. *We do not review the Estate's heightened-duty claim*

The Estate finally contends that the Department owed a heightened duty to act in good faith toward Mr. Phifer, due to the nature of their special relationship. Specifically, the Estate argues the Department owed Mr. Phifer a duty of good faith as an insurer.

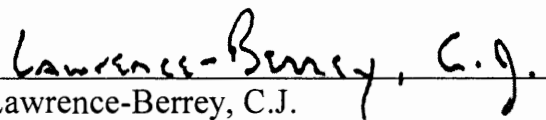
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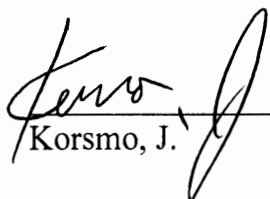
As previously noted, our review of a summary judgment order is typically limited to the evidence and arguments considered by the trial court. Here, the trial court did not consider this argument. Neither will we.


Affirmed.

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

  
Lawrence-Berrey, C.J.

WE CONCUR:

  
Korsmo, J.

  
Pennell, J.

**CERTIFICATE OF SERVICE**

The undersigned makes the following declaration certified to be true under penalty of perjury pursuant to RCW 9A.72.085:

On the date given below, I hereby certify that the attached document hereto was served on the following in the manner indicated:

<b>Derek Thomas Taylor</b> <b>1116 W Riverside Ave, Ste 100</b> <b>Spokane, WA 99201-1113</b> <b>derekt@atg.wa.gov</b>	<input type="checkbox"/> Electronic mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input type="checkbox"/> U.S. mail <input checked="" type="checkbox"/> Other: via Court Website
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<b>The Court of Appeals of the State of Washington Division III</b> <b>500 N Cedar St</b> <b>Spokane, WA 99201-1905</b> <b>Fax (509)456-4288</b>	<input type="checkbox"/> Electronic mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input type="checkbox"/> U.S. first class mail <input checked="" type="checkbox"/> Other: Court website
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Executed this 30th day of March, 2020, at Yakima, Washington.

/S/ Favian Valencia  
Favian Valencia

**SUNLIGHT LAW, PLLC**

**March 30, 2020 - 4:34 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
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**Appellate Court Case Title:** Deborah Phifer v. Department of Labor & Industries, et al  
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