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No. 66061-6-I

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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SYDNEY ALLRUD, Administrator of the  
Estate of Tracey Kirsten Allrud,

Appellant,

v.

CITY OF EDMONDS, A municipal corporation; SOUTHWEST  
SNOHOMISH COUNTY PUBLIC SAFETY COMMUNICATIONS  
AGENCY, dba SNOCOM; JOHN DOES I and II,

Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable David A. Kurtz, Judge

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**REPLY BRIEF OF APPELLANT**

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ORIGINAL

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**A. INTRODUCTION**

The trial court committed reversible error when it evaluated the Appellant's expert declarations and other evidence as if it were the trier of fact. Each one of Appellants' two expert witnesses supplied the trial court with admissible evidence sufficient to raise a material question of fact. Although a simple inference is sufficient to create an issue of material fact, Plaintiff submitted direct, unequivocal expert and lay testimony to establish that Defendants breached the standard of care that led to the death of Tracey Allrud. Overall, the trial court erred by granting summary judgment despite substantial evidence of gross negligence and bad faith.

In their appellate brief, the Defendants attempt to have their cake and eat it too. On the one hand, the Defendants assert that the public duty doctrine bars this lawsuit, but they are forced to concede that RCW 71.05.120 expressly provides for municipal liability in cases of gross negligence or bad faith. At the same time, the Defendants spend most of their forty-eight page brief by attacking and trying to undermine Appellant's set of facts contained in its opening brief. Further, the Defendants spend the last six pages of their brief seeking to exclude evidence that they previously insisted was irrelevant and unpersuasive. As this Court knows well on de novo appellate review, issues of credibility are always reserved for the trier of fact and are not appropriate for

resolution on summary judgment.

**B. REPLY STATEMENT OF FACTS**

In an attempt to clarify some of the facts that Defendants continue to dispute at the appellate level, the Estate provides this additional statement of facts on reply. These additional facts are intended as a brief response to Defendants' disputed version of the events of February 16, 2006 and the death of Ms. Allrud.

After Officer Falk arrived at Ms. Allrud's residence in the afternoon of February 16<sup>th</sup>, Mr. Faltisco wanted to call 911 a second time to ask for emergency medical response. CP 112. However, Mr. Faltisco believed that he would be prohibited from doing so by Officer Falk and that he could potentially be held criminally responsible if he tried to call 911. CP 112. Mr. Faltisco's belief was substantiated by the incident statements of Fire Department personnel Shchleicher and Jardin who arrived at the scene later in the day when Mr. Faltisco in fact called 911. In particular, Edmonds Firefighter Jardin stated: "Faltisco twice mentioned that he had tried to initiate a welfare check on the patient this afternoon but was **prevented** from doing so by the police department." CP 160.

Later in that evening Officer Falk briefed the graveyard shift about the events earlier in the day and told the crew they might be called back up

to the Allrud house for another welfare check. “He said that the ex told him he would call the Fire Department if Officer Falk refused to enter. Officer Falk said that it was his position that if he didn’t have legal jurisdiction to make a warrantless entry then the Fire Department wouldn’t either and he said that he would stop the Fire Department from entering if it come to that.” CP 232. This is consistent with Officer Falk’s call to 911 wanting to know “if aid gets dispatched to this address for any reason.” CP 272.

In their appellate brief, the Defendants continually attack Mr. Faltisco for not making his children check on their dying mother while Officer Falk was present. However, the Defendants failed to cite to the record whereby Mr. Faltisco made the common sense decision that he did not want to subject his children to the tragedy that he believed awaited them if the children were forced to enter their mother’s home unaccompanied. CP 110. Mr. Faltisco was forced to make his best parental judgment because Officer Falk refused to enter the home with Mr. Faltisco. CP 111. Essentially, Officer Falk was attempting to force Mr. Faltisco’s children to do Officer Falk’s job under the Involuntary Commitment Statute.

Nevertheless, Mr. Faltisco told Officer Falk that he had the children’s key and they could open the door for him to enter permissively.

CP 110. Once again, Officer Falk refused and continued his obstinacy.

In their brief, the Defendants also dispute that Officer Falk intimidated or implied in any way that Mr. Faltisco would be subject to criminal jeopardy if he entered Ms. Allrud's home. However, the record shows that Officer Falk openly questioned Mr. Faltisco's right to go into the Allrud home. CP 111. Further, Officer Falk told Mr. Faltisco that he did not have the right to enter the home unless he was invited. CP 138.

Incredibly, Defendants also attempt to paint the picture that Officer Falk was unaware of the dire circumstances that Ms. Allrud was facing. This, of course, is nothing but revisionist history. CP 209-215; and CP 319-325. Further, Ms. Kaplan repeatedly told Officer Falk about her serious concerns for the safety of Ms. Allrud. Ms. Kaplan explained that Ms. Allrud was not eating or drinking again and they discussed the need to increase food and fluids. CP 69. Ms. Kaplan observed she was in acute distress when she saw her. CP 70. Overall, Ms. Kaplan called 911 for a welfare check. Ms. Kaplan believed this to be a life or death situation and articulated these opinions and impressions to Officer Falk. CP 71-73.

Ms. Kaplan told the Edmonds Police Department's Internal Affairs Division that she was told that the Edmonds Police Department would not respond unless a medical doctor called. CP 210. Officer Falk's supervisor substantiated this when Corporal Miller advised Officer Falk that unless a

medical doctor requested action by EPD, they were not going to enter Ms. Allrud's home to check on her condition. CP 236. Officer Falk was told by Ms. Kaplan, a psychiatric advanced registered nurse practitioner, that she recommended that Allrud be taken to Stevens Memorial Hospital for an evaluation. CP 235. Also, Mr. Faltisco, a licensed mental health counselor and emergency room mental health professional, agreed with Ms. Kaplan's assessment that Ms. Allrud needed to be involuntary committed for her own welfare and safety. CP 109. Despite all of this professional mental health information and expertise, Officer Falk not only refused to do his job, but he also was grossly unaware of the proper protocol under the Involuntary Commitment Statute and his Department's own policies.

Finally, Officer Falk failed to follow his own Edmonds Police Department policy manual policy directive 33.2.1B(3), which states that upon the request of a mental health professional, an Edmonds Police Officer will take the person into custody and transport them to Stevens Health Center emergency room. CP 267. The Edmonds Policy Manual further states under section 13.1.1, which is titled Standards of Conduct: "Officers shall perform their basic duties - ... protect life and property... in accordance with the directives of this manual." CP 266.

C. **ARGUMENT**

1. **RCW 71.05.120 Directly Contradicts Defendants' Assertions under the Public Duty Doctrine.**

RCW 71.05.120 expressly states that police officers can be held liable under the Involuntary Commitment Statute if the officer acts in bad faith or commits gross negligence. Defendants do not directly dispute this plain reading of RCW 71.05.120, but instead try to ignore it.

Almost reflexively, the Defendants go to great pains to argue that this case should be barred by the public duty doctrine. As this Court knows well, in almost every case that involves alleged tortious conduct by a municipality there is a near automatic assertion that the public duty doctrine applies. This is a bread-and-butter municipal defense litigation tactic. This case is certainly no different.

However, where this appeal is different is the blatant inconsistency of the Defendants' assertion that this case is barred by the public duty doctrine even though 71.05.120 unequivocally imposes liability for gross negligence or bad faith. Simply put, the Defendants' assertion that this case is barred by the public duty doctrine is statutorily and expressly false and internally inconsistent.

In this case, the Estate produced substantial evidence to the trial court that Officer Falk refused to check on Ms. Allrud in spite of overwhelming evidence that Ms. Allrud was facing a life or death emergency. Officer Falk was implored by Ms. Kaplan, a mental health registered nurse, to check on Ms. Allrud and transport her for an acute mental health evaluation. Officer Falk then used his law enforcement authority to intimidate and obstruct Mr. Faltisco from entering his ex-wife's home to save her from serious and life threatening danger. Officer Falk even went so far as to impress upon Mr. Faltisco that he should not try calling 911 back because he was in charge of the situation and would not allow the calls to go through. CP 112.

On summary judgment, all of these disputed facts and their credibility implications must be construed in the light most favorable to the Estate of Tracey Allrud. See *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). While Defendants' pay lip service to this black letter legal standard, their forty-eight page brief is littered with endless factual disputes, distortions and obfuscations to the contrary. Defendants, once again, are arguing the factual merits of their case before this Court. In short, the Estate has produced substantial evidence to establish that Officer Falk's actions and omissions, at a minimum, raised multiple inferences of gross negligence or bad faith.

Contrary to Defendants' implied assertions, the Estate is not required to "prove" gross negligence or bad faith as it implies many throughout their brief. See CR 56.

In this case, the Respondents are asking this Court to once again disregard black letter law governing summary judgment analysis. While it is true that gross negligence or bad faith is a higher standard than simple negligence, it is not true that just because a plaintiff has to prove this higher standard, ergo, the trial court therefore is permitted to weigh the evidence on summary judgment. Instead, the analysis is fundamentally the same. Summary judgment must be denied if the record shows even a "reasonable hypothesis" that would create a genuine issue of material fact. See *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980). It is certainly improper for the trial court to grant summary judgment based merely on the belief that the moving party is likely to prevail at trial. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 878-79, 431 P.2d 216 (1967). Defendants' overriding, albeit implicit, appellate theme is that the Defendants should prevail on appeal because the weight of the evidence supports Defendants' theory of the case. Essentially, Respondent's argument is akin to juror nullification – appellate style.

## 2. Expert Declarations

To satisfy its burden on summary judgment, the Estate also submitted the declarations of two law enforcement experts. See CP 245-264 (Libby); and CP 277-285 (Crow). As the Estate noted in its opening brief: “[A]n expert opinion on an ‘ultimate issue of *fact*’ is sufficient to defeat a motion for summary judgment.” *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 910, 223 P.3d 1230, 1240 (2009) (citing *Eriks v. Denver*, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992) (quoting *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979)) (emphasis in original). The declarations of Mr. Libby and Mr. Crow were sufficient, in and of themselves, to create a material issue of fact to entitle the Estate to survive summary judgment.

In response to this argument, Defendants assert that the declarations of Mr. Libby and Mr. Crow are inadmissible. However, the declarations of Mr. Libby and Mr. Crow both show the opinions contained in them are sufficiently competent and their qualifications as law enforcement experts are substantial. Their respective declarations provide more than adequate foundation to establish their qualifications to testify as law enforcement experts in this case.

Moreover, the Defendants moved to strike portions of the Estate’s declarations in the Defendants’ reply brief before the trial court. In

response to these motions, the trial court denied (by implication) Defendants' motion to strike. Under this scenario, the Defendants were obligated to file a cross-appeal to preserve their evidentiary objections, which they failed to do. See RAP 2.4(a). Defendants' failure to file a cross-appeal therefore results in waiver of contesting these evidentiary objections on appeal.

In short, Lee Libby's and Robert Crow's opinions were independently sufficient for the Estate to survive summary judgment. The Defendants' contentions that Mr. Libby's and Mr. Crow's opinions lack foundation were waived by Defendants' failure to file a cross-appeal with this Court, and are belied by the substance of these opinions themselves.

A. Washington Courts Have a Long History of Construing Discretionary Statutory Language as Mandatory in the Context of Law Enforcement.

The Respondents devote considerable effort to arguing that RCW 71.05.150 contains the word "may" (rather than "shall") and therefore the Defendants cannot be held liable under the Involuntary Commitment Statute. As discussed in the prior section, Defendants' arguments that they owed no duty to Ms. Allrud directly contradicts the plain language of RCW 71.05.120 and also *Spencer v. King County*, 39 Wn. App. 201, 205, 692 874, *rev. denied*, 103 Wn.2d 1035 (1985), *overruled on other grounds*

by *Frost v. City of Walla Walla*, 106 Wn.2d 669, 724 P.2d 1017 (1986)).

However, even if the Estate were to ignore the plain language of RCW 71.05.120 (for purposes of this argument only), the language of RCW 71.05.150(4) also establishes Officer Falk's legal duty under the Involuntary Commitment Statute. While the Defendants argue that the community caretaking function codified in RCW 71.05.150(4) is "discretionary", that argument runs directly contrary to *State v. Gocken*, which states that an officer would be **"derelict by not acting promptly to ascertain if someone needed help."** *State v. Gocken*, 71 Wn. App. 267, 276, 857 P.2d 1074 (1993). There is no indication that with RCW 71.05.150(4) the Legislature intended to eradicate the community caretaking function with regard to mentally disabled individuals. A more reasonable interpretation of the word "may," given the Legislative intent and the language of RCW 71.05.150(4)(b), would be that an officer is required to perform a community caretaking check when a person with a mental disorder is reported to be in imminent danger of being gravely disabled so that the officer can determine if the mentally disabled person is in need of further assistance. Without a mandatory duty to complete a check when all statutory conditions are met, the purpose of the check is

undercut and the protection offered by RCW 71.05.150 is nullified.<sup>1</sup>

Our courts have interpreted “may” to mean “must” or “shall” under several considerations. The court *In re Ellis*, 113 Wash. 484, 489, 203, P.2d 957 (1922) provides:

1. “As a general rule the words of a statute will be construed in their ordinary sense and with the meaning commonly attributed to them, unless such construction will defeat the manifest intent of the Legislature, . . .” 25 R. C. L. 988.

And this is applicable to the word “may” unless there are very persuasive, or, we might better say, compelling reasons for holding “may” to mean “must” or “shall.” 26 Cyc. 1590.

2. . . . the general rule announced Chancellor Kent in *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274, as follows:

“ . . . the word “may” means “must” or “shall” only in cases where the public interest and rights are concerned, and where the public or third persons have a claim, de jure, that the power should be exercised.’ ”

It would appear that the *Ellis* court acknowledged both the de jure right and a private right to attribute may to mean “must” when *State Ex Nicomen Co. v. N.S. Etc. Co.*, 55 Wash. 1, 103 P.2d 426 (1909) was quoted for a decision of private rights:

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<sup>1</sup> To reach this conclusion, the Court does not need to determine whether an officer who performs a community caretaking check but then decides not to take a mentally disabled person into custody is in breach of his duty. The facts in this case do not raise such a question because Officer Falk never even completed a check. This is one of the more egregious omissions underlying the Estate’s case by virtue of Officer Falk’s refusal to follow through on a rudimentary safety check of an obviously incapacitated woman.

*State Ex Nicomen Co.* id. @ 9 stated:

Primarily the word should be taken in its ordinary meaning, and be regarded as permissive only. But, after all, its meaning is to be determined in each case from the apparent intent of the statute in which it is employed; so that in all remedial statutes or whenever the rights of the public or of third persons depend on the exercise of the power of a court or public officer, or the performance of a duty, and a claim de jure that the power may be exercised exists, it should be construed to mean 'shall.' The authorities upon this subject are collected in 5 Words and Phrases, pp. 4420-4447. Reference may, however, be made to a few that seem to us to bear directly upon the instant case.

In *Rock Island Co. Supervisors v. United States*, 71 U.S. 435, 18 L.Ed. 419, the Supreme Court of the United States said:

'The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us or in equivalent language, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the Legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty.' "

The trial court's orders granting summary judgment and denying reconsideration essentially eliminate a critical police function that has been recognized and supported by Washington law for decades, which is that police officers have a duty to check on mentally disabled persons who

cannot care for themselves. This is exactly the type of case the legislature provided for civil liability where a police officer ignored the pleas for assistance for someone who was completely incapable of caring for herself. In enacting the Involuntary Commitment Statute, the legislature was clearly stating its intent to help our citizens who are in dire need of mental health treatment. The trial court's ruling directly contradicts the stated legislative intent of RCW 71.05.150.

3. **Plaintiff's Response to Defendants' Admissibility Objections.**

From page forty-one through forty-six of their' appellate brief, the Defendants complain that the Estate submitted inadmissible evidence below to the trial court on summary judgment.<sup>2</sup> The Estate disputes Defendants' assertions and representations, which were partially addressed above in the Estate's Reply Statement of Facts.

Overall, the Defendants' evidentiary objections were waived when they failed to file a cross-appeal with this Court. Even if they were properly preserved (which the Estate contests), the Defendants' objections cannot survive appellate scrutiny just as they failed to survive the scrutiny of the trial court. There are numerous hearsay exceptions and other evidentiary alternatives to introduce the substantive facts upon which the

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<sup>2</sup> The Defendants also complain that the Estate did not provide proper citation in its appellate opening brief. The Estate already addressed this complaint in Section B of this brief, which is titled Reply Statement of Facts.

Estate is entitled to reversal on appeal. Furthermore, if the Defendants had properly preserved this issue on appeal (which the Estate again contests), the appropriate standard review is onerous: A trial court's evidentiary rulings are review under "a manifest abuse of discretion standard." *State v. Markle*, 118, Wn.2d 424, 438, 823 P.2d 1101 (1992).

With that aside, however, the record shows that the Estate submitted sufficient evidence to establish that Officer Falk committed gross negligence or bad faith by refusing to help Ms. Allrud. No matter how much the Respondents want to spin the facts, distort the evidence, and obfuscate the real issues in this case, the admissible evidence produced in response to Defendants' summary judgment clearly establishes Officer Falk obstructed any and all attempts to save Mrs. Allrud's life. No amount of objections or spin can alter this factual reality.

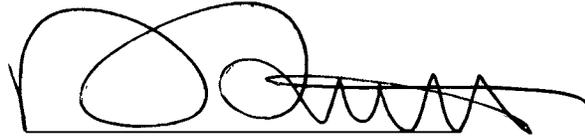
**D. CONCLUSION**

This case must be remanded back to the trial court because the trial court erred by weighing the evidence as if it were the trier of fact. While the Estate's burden of establishing gross negligence or bad faith is a higher standard than simple negligence, the Estate submitted overwhelming evidence that Defendants' committed bad faith or gross negligence in failing to help Tracey Allrud in an obvious life or death situation. Our

legislature intended for lawsuits to go forward against law enforcement officers who blatantly refuse to help those who cannot help themselves.

Dated this 16th day of March 2011.

Respectfully submitted,

A handwritten signature in black ink, consisting of several large, overlapping loops followed by a series of smaller, repetitive, wavy strokes that trail off to the right.

RUSS JUCKETT, WSBA 5220  
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