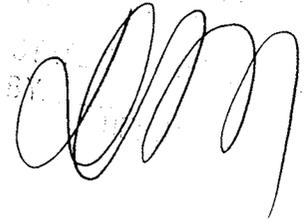


No. 36349-6-II



COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DAVID A. HANNUM and CYNTHIA L. HANNUM, *Appellants*,

v.

WASHINGTON STATE DEPARTMENT OF LICENSING, a
department of the State of Washington, LIZ LUCE, Director of the
Washington State Department of Licensing, JOHN DOE, and JANE
DOE, *Respondents*,

REPLY BRIEF OF APPELLANTS

HART LAW OFFICE
Shawn Hart, WSBA No. 25917
5000 – 22nd Ave NE, Suite 410
Seattle, WA 98105
(206) 524-4482

Attorney for Appellants
David A. Hannum and
Cynthia L. Hannum

TABLE OF CONTENTS

I. Reply to Response Facts 1

A. The Department of Licensing characterizes the notation regarding Mr. Hannum in the Facts Section as “an administrative error” but it keeps no records of who placed the notation and why it was placed, and they waited four years to inform Mr. Hannum of the notation, so this characterization is a guess at best by the Department of Licensing. 1

1. The Department is demonstrating unfettered discretion when it states it “typically” informs drivers when it has determined a driver is mentally ill and reserves the right not to inform a driver of an order with the conditional statement, “When the form is provided to the driver...” . . . 2

2. The Department of Licensing is the only entity which still maintains that Mr. Hannum was fired from Master Lee Hanford for performance deficiencies and based on an allegation he broke into the office of Fluor Hanford Vice President Dave Van Leuven. 2

3. The Department of Licensing’s notation helped to prejudice Officer French against Mr. Hannum and Officer French later communicated with Mr. Hannum’s son’s school and this helped destroy Mr. Hannum’s relationship with the administration of his son’s school. 3

4. The Department of Licensing admits the notation was accessed four times and that a police officer accessed the notation. 4

5. The Pasco School bus supervisor does not deny telling Mr. Hannum to leave and not come back to the bus driving course immediately after the supervisor demanded to know from Mr. Hannum what had prevented him from getting his commercial driver’s license during the preceding three weeks. 4

II. Reply To Response Argument 6

A. The Department of Licensing makes several misleading comments in their standards of review section. 6

1. De novo review applies to the granting and denial of a motion for summary judgment and the Departments' suggestion that this Court should consider facts not considered by the trial court should be ignored where they fail to identify the facts they are referring to. 6

2. The Department of Licensing argues the state trial court denied the motion to amend because the federal trial court denied the motion, but in fact, the Federal District Court stated that the same motion containing the new claim could be brought in state court. 6

B. The Department of Licensing argues no duty was owed under the applicable statute and no admissible evidence was submitted but they fail to discuss the language of the applicable statute and they argue the evidence which shows there is a question of material fact without citing any authority or argument challenging the admissibility. 7

1. The Department of Licensing does not quote the relevant language of the statute which controls under the Legislative Exception. 7

2. The Department of Licensing attempts to suggest there are no specifics in the statute and they quote a general policy statement from the chapter of the Revised Code which set up the Department of Licensing. 9

3. The Department of Licensing argues the Hannums presented no admissible evidence supporting their claims, but it fails to discuss much of the evidence presented but the evidence presented was admissible and there is sufficient evidence to award Mr. Hannum a summary judgment on liability and remand for a one day trial on damages. 10

a.	The Department does not challenge Mr. Hannum's emotional distress damages.	10
b.	The Department does not challenge Mr. Hannum's reputation damages.	11
c.	The Department does not challenge the Hannums' loss of consortium claims and Mrs. Hannum's emotional distress claims.	11
d.	The Department denies the notation caused the loss of the right to compete for a job when it prevented Mr. Hannum from getting a CDL and he was immediately ejected from the bus driving course when the supervisor asked Mr. Hannum why he could not get a CDL, creating a question of material fact which defeats summary judgment.	12
e.	The Department is attempting to introduce an intent element to a prima facie case of negligence with the word "inadvertent" acts but negligence has never been an intentional tort and a Department employee placed the notation.	12
C.	The Department attempts to shift attention from the merits of the Hannums' Constitutional claims by suggesting that the five pages of briefing is not detailed and by stating the Hannums requested damages under their State Constitutional claims, but they did not make this argument.	13
1.	The Department Claims the Hannums' Constitutional claims are not sufficiently briefed, but the Hannums presented five pages of argument and the State's second most voluminous argument is against money damages under a state Constitutional claim, but the Hannums don't make that argument.	14

2. The Hannums were denied due process because they were not informed of the notation until four years after it was placed on Mr. Hannum's driver's record, no records were kept of who placed the notation or why it was placed, and the burden was placed on the Hannums to investigate the State's records. 14

a. The Department's argument that R.C.W. § 46.20.041 is constitutional on its face should not be adopted because there is no notice required contemporaneously with the determination, it causes damages, the burden is on the driver to discover the problems with the Department's records, and no records are kept. 14

b. The Department ignores the argument that R.C.W. § 46.20.041 was unconstitutional as applied when the Department placed the notation with no due process and no records were kept. 15

3. The Department requests that no injunction be issued arguing there is nothing it can do to make the statute more constitutional, but this Court should issue an injunction ordering records be kept of who places the notations and why they are placed, and the Court should order the Department to inform a driver within 30 days of the State's determination that a person is mentally ill. 16

D. The Federal District Court made no substantive ruling on the Motion to Amend, specifically stated it could be raised before the state court upon remand, and it was timely because it occurred within weeks of obtaining discovery provided from the Department of Licensing after they removed the case to Federal Court. 17

1. Res Judicata does not bar a motion to amend where a federal district court specifically states the same motion for the new claim can be renewed in state court after the case is remanded to state court. 18

2. The Department claims the identity of the former director could have been known at the time of the filing of the Complaint, but the Department does not recognize the basis for the amendment is the discovery produced by the State after the filing of the Complaint. 19

3. The Department of Licensing ignores the Hannums' claims against Stephens in his individual capacity under negligence and 42 U.S.C. § 1983. 20

E. Attorneys fees should be awarded under R.C.W. § 4.84.350, because the notation was kept secret for four years, the Department placed the burden on Mr. Hannum to discover the errors in the Department's records, it never presented Mr. Hannum with an appealable order, and its employees were evasive during approximately a dozen telephone calls and referred to documents which appear to have disappeared. 23

F. If the Court reverses the Hannums' Motion to Amend, the Court should grant attorneys fees under 42 U.S.C. § 1988 and RAP 18.1(i) because the threat of continued litigation will force the State to establish a procedure and keep records. 25

III. Conclusion 25

TABLE OF AUTHORITIES

Table of Cases

Alger v. Mukilteo, 107 Wn.2d 541, 730 P.2d 1333 (1987) 22

Biggs v. Vail, 119 Wn.2d 129, 830 P.2d 350 (1992) 8

City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004) 8, 25

Cobra Roofing v. Dept. of Labor & Indus., 157 Wn.2d 90, 135 P.3d 913 (2006) 23

Estate of Kerr, 134 Wn.2d 328, 949 P.2d 810 (1998) 9

<i>Gausvik v. Perez</i> , 239 F.Supp.2d 1067 (E.D. Wash. 2002), reversed in part, 345 F.3d 813 (9 th Cir. 2003)	20
<i>Hafer v. Melo</i> , 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991)	20
<i>Halvorson v. Dahl</i> , 89 Wn.2d 673, 574 P.2d 1190 (1978)	8
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)	21
<i>Hensley v. Eckerhart</i> , 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)	25
<i>Herron v. Tribune Publishing Co.</i> , 108 Wn.2d 162, 736 P.2d 249 (1987)	6
<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004)	18,19
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)	15,21
<i>Oberg v. Department of Natural Resources</i> , 114 Wn.2d 278, 787 P.2d 918 (1990)	7
<i>Rains v. State</i> , 100 Wn.2d 660, 674 P.2d 165 (1983)	18
Constitutional Provisions	
Washington State Constitution, art. I, § 3	15
U.S. Const., amend. XIV	20
Statutes	
R.C.W. § 4.84.350	23,24
R.C.W. § 34.05.534(3)	24
R.C.W. § 34.05.542(3)	23

R.C.W. § 46.20.041	7,8,9,14,15,16
R.C.W. § 46.20.334	16,24
42 U.S.C. § 1983	21,22,23,25
42 U.S.C. § 1988	25

Regulations and Rules

C.R. 56	11,12
R. App. P. 18.1	25
E.R. 701	11,12
E.R. 702	11

I. REPLY TO RESPONSE FACTS

A. The Department of Licensing characterizes the notation regarding Mr. Hannum in the Facts Section as “an administrative error” but it keeps no records of who placed the notation and why it was placed, and they waited four years to inform Mr. Hannum of the notation, so this characterization is a guess at best by the Department of Licensing.

The Department of Licensing and Respondents (“Department”) characterize the determination by the Department that Mr. Hannum was mentally ill as an “administrative error” but since the Department keeps no records of who placed the notation or why it was placed, and the Department does not require the driver to be notified in a timely manner of the determination, the Department is making a guess about the events that occurred in 2001. Response Brief of Respondents, p. 4 (“BR-4”). The Department also waited four years to inform Mr. Hannum of the notation and put the burden on Mr. Hannum to investigate the facts surrounding the notation and presented no order to him, so the characterization of an “administrative error” is at best a guess.

The Department attempts to justify the notation later in their brief with descriptions of Mr. Hannum’s reaction in 2001 to the retaliation he was subjected to by Fluor Hanford, and they repeat allegations that Fluor Hanford made in 2001 when the notation was

entered but Fluor Hanford has withdrawn the anonymous allegation he broke into an office and they now claim he was laid off.

1. The Department is demonstrating unfettered discretion when it states it “typically” informs drivers when it has determined a driver is mentally ill and reserves the right not to give a driver a copy of the order with the conditional statement, “When the form is provided to the driver...”.

The Department states that it “typically” informs drivers that it has determined that they are mentally ill and argues that it is not a violation of the driver’s rights by not informing the driver of the notation. BR-5, line 1.

2. The Department of Licensing is the only entity which still maintains that Mr. Hannum was fired from Master Lee Hanford for performance deficiencies and based on an allegation he broke into the office of Fluor Hanford Vice President Dave Van Leuven.

In Section III (A)(2), the Department attempts to discredit Mr. Hannum by arguing he was fired from “the Hanford nuclear power facility” for performance deficiencies, “erratic behaviors”, calling a senior employee, showing up at a senior employee’s home and attempting to gain access to the office of the president of the company. BR-6. The Department repeats the allegations of Maser-Lee Hanford and Fluor Hanford’s attorney, who was not a member of the Washington State Bar when he made the

allegations in 2001 despite acting as Fluor Hanford's counsel. He has since become a member of the Washington State Bar Association and he states he no longer maintains the break-in allegation, and he alleged Mr. Hannum was laid off. The attorney has also admitted in a deposition that he informed approximately 100 people and governmental organizations in 2001 of the allegations he has since abandoned.

What is problematic about the Department's highlighting of these facts – apart from the attempt to discredit Mr. Hannum - is the fact that it is consistent with the Department of Licensing placing the notation in 2001 – a time when Mr. Hannum was complaining about inadequate nuclear material safety and security procedures. Protection of whistleblowers is another reason for this Court to order the Department of Licensing to keep adequate records and inform drivers of the Department's actions in a timely manner.

3. The Department of Licensing's notation helped to prejudice Officer French against Mr. Hannum and Officer French later communicated with Mr. Hannum's son's school and this helped destroy Mr. Hannum's relationship with the administration of his son's school.

The statements of Officer French demonstrate that the notation played a role in distracting Officer French from the purpose of Mr. Hannum's visit: to report a person who committed road rage

against Mr. Hannum. Officer French admits to seeing the notation and admits to seeing the word "mental". BR-8,9. This fact is also consistent with records that a Department of Olympia employee read to Mr. Hannum over the telephone which contained the word "mental" but which later disappeared after this civil action was filed.

4. The Department of Licensing admits the notation was accessed four times and that a police officer accessed the notation.

When a police officer accesses the databases in which the Department of Licensing's notation is placed while doing his or her job, the police officer can not take the time to hold a hearing in the field to determine the validity of the Department of Licensing's determination. Therefore, a driver will lose the right to have a driving record that is free of notations which classify the person as a person with mental problems. In a situation where a person's credibility is critical to receiving assistance from the police, this violation of an individual's rights can be substantial.

5. The Pasco School bus supervisor does not deny telling Mr. Hannum to leave and not come back to the bus driving course immediately after the supervisor demanded to know from Mr. Hannum what had prevented him from getting his commercial driver's license during the preceding three weeks.

The key issue on Mr. Hannum's claim the notation denied

him the right to compete for a job rests on the Pasco School bus supervisor's action in calling Mr. Hannum out of class, asking him why he had not been able to get his commercial driver's license and when Mr. Hannum stated that the Department of Licensing's notation is what was preventing him from getting his CDL, the supervisor immediately told him to leave the class and not come back. The Pasco school bus supervisor does not deny he asked Mr. Hannum why he could not get his CDL, and he told him to leave the class and not come back when he stated the Department of Licensing's notation was preventing him from getting a CDL.

Rather than deny the key facts which establish Mr. Hannum's causes of action, the supervisor attempts to shift the blame to Hanford. He states (on the Declaration submitted by the Department of Licensing) that Mr. Hannum could have applied again – even though he did not deny telling Mr. Hannum to “leave and not come back.” The timing and words used clearly indicated Mr. Hannum was being expelled from the bus driving course – which was required to get a bus driving job at the Pasco School District. The Department of Licensing has also referenced in various pleadings that different bus drivers work different hours, but this is a damages issue, which can be handled upon remand.

II. REPLY TO RESPONSE ARGUMENT

A. The Department of Licensing makes several misleading comments in their standards of review section.

1. De novo review applies to the granting and denial of a motion for summary judgment and the Respondents' suggestion that this Court should consider facts not considered by the trial court should be ignored where they fail to identify the facts they are referring to.

The Department of Licensing agrees that the standard of review for the granting of the Department of Licensing's motion for summary judgment and the denial of the Hannums' motion for summary judgment is de novo. BR-13, Brief of Appellant ("BA-21").

2. The Department of Licensing argues the state trial court denied the motion to amend because the federal trial court denied the motion, but in fact, the Federal District Court stated that the motion containing the new claim could be brought in state court.

The Department of Licensing agrees that the standard of review for a denial of a motion to amend is manifest abuse of discretion. BA-39, *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987).

The Department then suggests that the District Court made a substantive ruling on the motion to amend, when in fact, the District Court specifically stated that the Hannums could bring the motion in state court. BR-36. The Federal District Court made no

substantive ruling on the claim against Stephens in his individual capacity. There was also no prejudice because the Hannums filed their motion to amend in federal court a couple weeks after the Department removed the case and provided discovery which showed there was a claim against Stephens. After the Hannums obtained a remand, they re-filed the same motion the Federal Court stated in its order that the Hannums could re-file in state court.

B. The Department of Licensing argues no duty was owed under the applicable statute and no admissible evidence was submitted but they fail to discuss the language of the applicable statute and they argue the evidence which shows there is a question of material fact without citing any authority or argument challenging the admissibility.

The Department of Licensing agrees that the Legislative Exception is a valid exception to the Public Duty Doctrine. BR-15.

1. The Department of Licensing does not quote the relevant language of the statute which controls under the Legislative Exception.

The Department of Licensing states, "There is no specific language anywhere in Chapter 46.20 that shows an intent to protect individual drivers." BR-20. The Department fails to address the following section of R.C.W.§46.20.041 which identifies specific language for the protection of persons of a specific class. BA-22, *Oberg v. Department of Natural Resources*, 114 Wn.2d 278,284,

787 P.2d 918 (1990), *Halvorson v. Dahl*, 89 Wn.2d 673,676, 574 P.2d 1190 (1978).

The statute provides in relevant part:

“(1) If the department has reason to believe that a person is suffering from a physical or mental disability or disease that may affect that person's ability to drive a motor vehicle, the department must evaluate whether the person is able to safely drive a motor vehicle. As part of the evaluation:

(a) The department shall permit the person to demonstrate personally that notwithstanding the disability or disease he or she is able to safely drive a motor vehicle.

(b) The department may require the person to obtain a statement signed by a licensed physician or other proper authority designated by the department certifying the person's condition. ... ” BA-24, R.C.W. § 46.20.041 (emphasis added), CP at 617,618.

Decisions regarding statutory construction are reviewed de novo. *City of Redmond v. Moore*, 151 Wn.2d 664,668, 91 P.3d 875 (2004). If the statutory meaning is clear from plain and unambiguous language, that meaning must be accepted by the court. *Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992). Clearly the language of R.C.W. § 46.20.041(1) identifies the group of persons the Department of Licensing has reason to believe are suffering from a physical or mental disability that may affect the person's ability to drive. R.C.W. § 46.20.041(1).

2. The Department of Licensing attempts to suggest there are no specifics in the statute and they quote a general policy statement from the chapter of the Revised Code which set up the Department of Licensing.

After ignoring the specific language of R.C.W. Chapter 46.20 and R.C.W. § 46.20.041, the Department of Licensing attempts to shift focus to a different chapter: R.C.W. Chapter 46.01. BR-20. This is a general chapter which establishes the Department of Licensing. *Id.* Since the Legislative Exception is already established under R.C.W. § 46.20.041, this Court does not have to resort to a more general statute.

The arguments of the Department also violate the rules of statutory construction when statutes purportedly conflict. When interpreting a statutory scheme, courts are obliged to construe the enactment as a whole, and to give effect to all language used. *Estate of Kerr*, 134 Wn.2d 328,335, 949 P.2d 810 (1998). Every provision must be viewed in relation to other provisions and harmonized if at all possible. *Id.* Preference is given a more specific statute if the two statutes deal with the same subject matter and conflict to such an extent that they cannot be harmonized. *Id.*

The Department of Licensing also cites a case which refers to a different statute which requires notice to be given by certified

mail, but no notice was given here for four years and when Mr. Hannum discovered the notation was a mistake, he was told it was his problem and it was only after the notation caused damages that the Department of Licensing agreed it was a mistake. Ironically, the Hannums' attorney mentioned the statute in passing during the oral argument and requested that the trial court require notice be given to drivers by certified mail similar to other statutes.

3. The Department argues the Hannums presented no admissible evidence, but it fails to discuss much of the evidence presented but the evidence presented was admissible and there is sufficient evidence to award Mr. Hannum a summary judgment on liability and remand for a one day trial on damages.

a. The Department does not challenge Mr. Hannum's emotional distress claim.

Mr. Hannum testified by affidavit that he suffered emotional distress when the Department of Licensing told him he had a mental condition, when the Department of Licensing told Mr. Hannum the notation was his problem, when he had to make approximately a dozen calls to various Department of Licensing personnel throughout the state in an attempt to get the notation removed from his record, and when he had to explain to his bus driving course supervisor that he was not mentally ill as the Department alleged. BA-26, CP at 619. Testimony from a party is

admissible under C.R. 56(e) and E.R. 701. Mr. Hannum also submitted testimony from his medical health care provided supporting his claim he was suffering from emotional distress. BA-26, CP at 619,547. This testimony is admissible under C.R. 56(e), E.R. 701, and E.R. 702.

b. The Department does not challenge Mr. Hannum's reputation damages.

Mr. Hannum suffered damage to his reputation when he had to explain to the bus driving course supervisor that the Department had declared him mentally ill, it was keeping him from getting his CDL, and it was a mistake. BA-29, CP at 619. Mr. Hannum also suffered damage to his reputation when he had to explain this to his wife, and to a dozen Department of Licensing employees in an attempt to find out who placed the notation and why it was placed. Id. This testimony is admissible under C.R. 56(e) and E.R. 701.

c. The Department does not challenge the Hannums' loss of consortium claims and Mrs. Hannum's emotional distress claims.

Mr. and Mrs. Hannum suffered a loss of consortium, society and companionship when they learned that the Department had declared Mr. Hannum to be mentally ill. BA-24,26, CP at 619,620,748,749. Mrs. Hannum suffered further emotional distress

when the police station called Mrs. Hannum and made inquiries regarding the alleged mental condition. *Id.* This testimony is admissible under C.R. 56(e) and E.R. 701.

d. The Department denies the notation caused the loss of the right to compete for a job when it prevented Mr. Hannum from getting a CDL and he was immediately ejected from the bus driving course when the supervisor asked Mr. Hannum why he could not get a CDL, creating a question of material fact which defeats summary judgment.

The Department presents a sworn statement from the bus driving course supervisor, but the supervisor does not deny he pulled Mr. Hannum from the course, asked Mr. Hannum why he could not get his CDL, and when Mr. Hannum described the mental notation, he was told to leave and not come back. Instead, the supervisor suggests that he thought Hanford somehow told the Department to enter the notation or that Mr. Hannum could have ignored the order not to come back, neither of which prevent liability on the part of the Department. There are sufficient facts here for a partial summary judgment for Mr. Hannum on liability.

e. The Department is attempting to introduce an intent element to a prima facie case of negligence with the word "inadvertent" acts but negligence has never been an intentional tort and a Department employee placed the notation.

The Department is actively avoiding using the duty and

breach elements of a negligence cause of action. Instead, the phrase "inadvertent acts" is used. The elements of negligence are duty, breach, causation, and damages. There is no intent element, so inadvertence does not destroy a prima facie case of negligence.

Here the Department does not maintain any records regarding who is making determinations or why they are making the determinations. They did not inform Mr. Hannum of their determination for four years. When Mr. Hannum discovered that the Department had made this determination and it prevented him from getting a CDL for his bus driving course, many Department employees stated it was Mr. Hannum's burden to find out why the Department made the determination and that it was Mr. Hannum's burden to correct the mistake. During the three weeks he called various Department employees making approximately a dozen telephone calls. Employees stated that records existed related to the notation, but they have never been produced. The police officer who saw the notation also stated she saw electronic records which used the word "mental" but this record has never been produced.

C. The Department attempts to shift attention from the merits of the Hannums' Constitutional claims by suggesting that the five pages of briefing is not detailed and by stating the Hannums requested damages under their State Constitutional claims, but they did not make this argument.

1. The Department claims the Hannums' Constitutional claims are not sufficiently briefed, but the Hannums presented five pages of argument and the Department's second most voluminous argument is against money damages under a state Constitutional claim, but the Hannums don't make that argument.

The Hannums briefed the Constitutional claims with five pages of briefing. BA-30-35. The Department's claim that this Court can not review these issues should be ignored. The Department also argues damages are not available under a state constitutional claim, but this argument was not made.

2. The Hannums were denied due process because they were not informed of the notation until four years after it was placed on Mr. Hannum's driver's record, no records were kept of who placed the notation or why it was placed, and the burden was placed on the Hannums to investigate the Department's records.

a. The Department's argument that R.C.W. § 46.20.041 is constitutional on its face should not be adopted because there is no notice required contemporaneously with the determination, it causes damages, the burden is on the driver to discover the problems with the Department's records, and no records are kept.

The Department's arguments do not discuss the right of notice prior to the denial of a license or contemporaneous to the determination, and the lack of any record keeping requirements. BR-30-31. When there is no notice to an individual can not

challenge the determination until after it has caused damages. R.C.W. § 46.20.041 violates Article I Section 3 of the State Constitution because it does not require timely notification. Here there was a 4 year delay in notification and then a three week delay in the granting of a commercial drivers license, which caused the loss of the right to compete for a job. The Department also told Mr. Hannum that discovering the facts of the Department's notation was his problem. Finally, the statute requires no records.

The statute provided no records, notice, or opportunity for a hearing prior to damage. R.C.W. § 46.20.041(4) requires a hearing in only one circumstance at the discretion of the Department, but it does not cover many circumstances, such as the present one where the State waited 4 years to inform Mr. Hannum of the determination and by the time it was removed 3 weeks later, it had caused damages. By denying Mr. Hannum records, notice and a hearing until after the notation caused damages, it violated the protections of *Mathews*. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

b. The Department ignores the argument that R.C.W. § 46.20.041 was unconstitutional as applied when the Department placed the notation with no due process and no records were kept.

The Department ignores the Hannums' argument that R.C.W. § 46.20.041 was unconstitutional as applied when the Department made the determination that Mr. Hannum was mentally ill with no process, it kept no records, it placed the burden on Mr. Hannum to investigate the facts of the notation, and it did not remove the notation until after it had caused damages. Instead, the Department argues the statute was not unconstitutional as applied because the Department gave Mr. Hannum a form to fill out. BR-32. This ignores the arguments made by Mr. Hannum. BA-32-35.

3. The Department requests that no injunction be issued arguing there is nothing it can do to make the statute more constitutional, but this Court should issue an injunction ordering records be kept of who places the notations and why they are placed, and the Court should order the Department to inform a driver within 30 days of the State's determination that a person is mentally ill.

The Department argues the Hannums requested damages in the Brief of Appellants under their Washington State Constitutional claims, but they did not make this request.

The Department claims R.C.W. § 46.20.334 provides due process but this statute only allows for the appeal of the discretionary denial of a license. It does not allow for a challenge to the determination by the Department that a person is mentally ill. It also does not require any records to be kept of the determination.

Finally, it does not provide any process for challenging the determination of mental illness in state databases which are accessed by many agencies and which in this case caused the denial of the right to compete for a bus driving job. The Department has no procedure for placing the notation and they do not keep records of who placed the notation or why it was placed. These admissions support the issuance of an injunction which requires timely notice and records to be kept on these determinations.

D. The Federal District Court made no substantive ruling on the Motion to Amend, specifically stated it could be raised before the state court upon remand, and it was timely because it occurred within weeks of discovery provided by the Department of Licensing after they removed the case to Federal Court.

The Department characterizes the motion to amend as being filed on the “eve” of the summary judgment hearing, but the first motion was filed seven months before the summary judgment hearing after the Department removed the case to federal court and then provided discovery responses. The Hannums filed their motion to remove within weeks of learning the former Director of the Department agreed there was a problem with the procedure, recognized the need for rules, but then failed to make sure rules were enacted. After the remand, the Hannums filed a renewed

motion to amend the complaint seven days before the hearing.

1. Res Judicata does not bar a motion to amend where a federal district court specifically states the same motion for the new claim can be renewed in state court after the case is remanded to state court.

The Department quotes the Order of the District Court in which the District Court states that the same motion for the same claim can be renewed in state court after the case is remanded. BR-36. Despite this fact, the State argues res judicata bars the claim. BR-36,45. The party asserting the defense of res judicata bears the burden of proof. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004)(citation omitted). Res judicata applies to the points on which an opinion is pronounced. *Id.* However, **res judicata does not bar claims arising out of different causes of action**, or intend “to deny the litigant his or her day in court.” *Id.* The threshold requirement of res judicata is a final judgment on the merits in the prior suit. *Id.* Once that threshold is met, res judicata requires sameness of subject matter, cause of action, people and parties, and “the quality of the persons for or against whom the claim is made.” *Hisle*, 151 Wn.2d at 860 (quoting *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983)).

The Federal Court made no rulings on the claim against Mr.

Stephens in his individual capacity. In fact the Federal District Court stated that the Hannums could bring the motion in state court. Since the claim against Stephens was a different cause of action, res judicata does not apply. *Hisle*, 151 Wn.2d at 860.

After the Department removed the case to federal court it produced discovery responses in which the Department admitted that there was a need to keep records of administrative determinations that drivers were mentally ill, and a need for a procedure, but it failed to insure that rules were put into place. The Hannums then moved to amend the complaint, because the discovery was evidence of civil rights violations and negligence. These facts were in the motion to amend and the District Court stated that after the remand, the Hannums could bring the same motion to amend. Therefore, the Department's argument that the District Court did not mean what it wrote are without merit.

2. The Department claims the identity of the former director could have been known at the time of the filing of the Complaint, but the Department does not recognize the basis for the amendment is the discovery produced by the State after the filing of the Complaint.

The discovery produced by the Department after the Complaint was filed and after the Department removed the case to Federal Court proved that the former director knew there was a

need for records and procedure when the Department was declaring people to be mentally ill, but he did not make sure records were kept and he did not insure a procedure was in place to track who was placing mental illness determinations on drivers' records.

The State claims the former director should have been named regardless of any connection between him and any specific actions or rules or lack of rules which caused the deprivation of civil rights. It is ironic that the State is arguing for shotgun pleading - which state officials periodically complain about. In this case, as described in the motion to amend, the motion was based on the discovery responses obtained after the filing of the Complaint.

3. The Department of Licensing ignores the Hannums' claims against Stephens in his individual capacity under negligence and 42 U.S.C. § 1983.

State officers can be sued in their individual capacities under 42 U.S.C. § 1983 for violations of rights under the Fourteenth Amendment. U.S. Const., Amend. XIV, *Hafer v. Melo*, 502 U.S. 21,32, 112 S.Ct. 358,365, 116 L.Ed.2d 301 (1991), CP at 801. An official who has failed to prevent a constitutional violation by inadequately training, supervising or investigating his subordinates, or setting policies can be liable under 42 U.S.C. § 1983. *Gausvik v. Perez*, 239 F.Supp.2d 1067,1099-1100 (E.D. Wash. 2002),

reversed in part, 345 F.3d 813 (9th Cir. 2003). Culpability is established by showing the supervisor was deliberately indifferent to acts by others which the supervisor knows or reasonably should know would cause others to inflict the injury. CP at 802. These rules are independent of a respondeat superior claim which the Hannums did not make under their 42 U.S.C. § 1983 claim.

The Department agrees that a public official is liable under a 42 U.S.C. § 1983 cause of action when the official violated Constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800,818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), CP at 801. What the reasonable official would have known is determined at the time of the tortious conduct, and qualified immunity is determined objectively. *Id.*

First, the concepts of due process were well established in 2001 under the Fourteenth Amendment. *Mathews*, 424 U.S. at 335. Second, It is objectively reasonable that a person would know the act of declaring in a database accessed by many agencies that a person is mentally ill with no notice or opportunity for a hearing, without informing the person of the determination to allow it to be challenged, and without keeping any records of who made the determination and why it was made violates due process.

State officials can also be liable under negligence and negligent infliction of emotional distress causes of action which require duty, breach, causation, and damages. *Alger v. Mukilteo*, 107 Wn.2d 541, 545, 730 P.2d 1333 (1987), CP at 802. Discovery shows Stephens was negligent when he breached the duty of care owed to the Hannums by failing to supervise, train, and establish policies that would have prevented the placement and maintenance of false statements on Mr. Hannum's licensing record. The Luce answers to the Hannums' first interrogatories also indicate that there was no mandatory system to track who was making the notations and the basis for the notations. CP at 825, § (I)(B), ¶ 3. The policy states in relevant part: "A tracking system may be set up to best fit individual office operations." *Id.* The policy also does not require timely notice or records to be kept regarding who placed the determination and why the determination was made. CP at 801.

Without notice requirements or record keeping requirements, the notation stayed on for years and caused damages to Mr. Hannum including emotional distress, loss of consortium, damage to reputation, and loss of the right to compete for a job. Mrs. Hannum suffered emotional distress and loss of consortium.

Therefore, Stephens is liable in negligence and negligent

infliction of emotional distress, and 42 U.S.C. § 1983 for the failure to set up a process for timely notice and opportunity for a hearing prior to damages being suffered and for failing to require records.

E. Attorneys fees should be awarded under R.C.W. § 4.84.350, because the notation was kept secret for four years, the Department placed the burden on Mr. Hannum to discover the errors in the Department's records, it never presented Mr. Hannum with an appealable order, and its employees were evasive during approximately a dozen telephone calls and referred to documents which appear to have disappeared.

The Department argues that since no challenge to the Department of Licensing's annotation was made under the Administrative Procedures Act ("APA"), that attorneys fees are not available. BR-43. The APA requires that appeals of agency determinations be made within 30 days of the determination. R.C.W. § 34.05.542(3). In this case, the Department admits they made the determination in 2001 but failed to inform Mr. Hannum. An administrative appeal by Mr. Hannum of the 2001 determination would therefore have been approximately 4 years too late. When Mr. Hannum learned of the determination, the Department said it was his problem and they provided no order and had no records.

The State cites *Cobra Roofing v. Dept. of Labor & Indus.*, 157 Wn.2d 90,101, 135 P.3d 913 (2006) and R.C.W. § 46.20.334 for the position that no appeal was made but this statute only

applies to a denial of a license and it does not apply to correcting errant determinations that a person is mentally ill which are placed in state databases that are accessed by police and employers.

The actions of the Department also made an appeal impossible because the Department presented no order to be appealed and it stated the State's database entries were his problem. The Department had no records of who made the determination or why it was made. When Mr. Hannum made a dozen telephone calls to discover the facts, employees were either rude to Mr. Hannum or simply hung up on him.

Correcting the State's databases is not covered by the plain language of R.C.W. § 46.20.334. The APA states administrative remedies need not be exhausted if they are inadequate or futile or if delay can cause irreparable harm. R.C.W. § 34.05.534(3).

Therefore, since the Department failed to inform Mr. Hannum of the notation for almost four years, failed to provide him with an order which could be appealed, failed to keep records of who placed the notation and why, apparently lost records, and failed to cooperate and placed the burden on Mr. Hannum to discover the basis of the Department of Licensing's determination, he should receive attorneys fees under R.C.W. § 4.84.350.

F. If the Court reverses the Hannums' Motion to Amend, the Court should grant attorneys fees under 42 U.S.C. § 1988 and RAP 18.1(i) because the threat of continued litigation will force the State to establish a procedure and keep records.

The Department argues that if this Court reverses the Motion to Amend to add the 42 U.S.C. § 1983 claim then the Hannums will not be entitled to an award of attorneys fees under 42 U.S.C. § 1988 if the remand is successful. BR-44. The Department cites no cases for this position. The interpretation of 42 U.S.C. § 1988 is a question of law which is determined de novo. *City of Redmond*, 151 Wn.2d at 668. When there is a reversal which can act as a threat to further litigation if civil rights violations continue, then attorneys fees are authorized under 42 U.S.C. § 1988 for the work done on appeal. *Fletcher v. O'Donnell*, 729 F.Supp. 422,430 (E.D. Pa. 1990)(citing *Hensley*, 461 U.S. at 435-36, 103 S.Ct. at 1940-41).

III. CONCLUSION

The Hannums request this Court grant the relief requested in the Conclusion Section of the Brief of Appellant.

Respectfully submitted this 15th day of October, 2007.

HART LAW OFFICE



Shawn G. Hart, WSBA# 25917
Attorney for Appellants

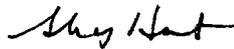
CERTIFICATE OF SERVICE

Shawn Hart, attorney for Appellants certifies:

On August 16, 2007, I served a copy of Reply Brief of Appellants on attorneys for Respondents by causing a copy of the Reply Brief to be delivered to Jennifer Meyer, Assistant Attorney General, Washington State Attorney General's Office, 629 Woodland Square Loop SE, Olympia, WA 98504-0126.

DATED this 15th day of October, 2007 at Seattle, Washington.

HART LAW OFFICE



Shawn G. Hart, WSBA# 25917
Attorney for Appellants

