

NO. 46322-9

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

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SUNSHINE HEIFERS, LLC, an Arizona limited liability company,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF AGRICULTURE; and  
DAN NEWHOUSE, in his capacity as Director for the WSDA,

Respondents.

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

The Washington State Department of Agriculture administers the State's Livestock Identification Act, chapter 16.57 RCW, which authorizes brand inspection of cattle before sale. Sunshine Heifers, LLC, alleges that conducting brand inspections makes the Department liable to Sunshine for losses Sunshine suffered when a third party leasing Sunshine's cattle sold those cattle and converted the proceeds.

Sunshine sued the third party, The Dana Group, LLC, alleging it converted proceeds from these sales to itself. Sunshine also sued the public livestock market at which Dana sold the cattle. In those suits, Sunshine blamed Dana and the market for its loss. Here, Sunshine blames only the Department for its loss.

The Department is not liable for Sunshine's loss. The Department is a regulatory agency administering the Livestock Identification Act, chapter 16.57 RCW, and the brand inspection statute for benefit of the public. As the public duty doctrine recognizes regarding such regulatory statutes, a duty to all is a duty to no one. The Department is not Sunshine's insurer and does not owe it any actionable duty in tort. If Sunshine lost the sale proceeds from cattle, its remedy is to recover those proceeds from the parties who converted them, Dana and/or the market. Summary judgment in favor of the Department should be affirmed.

## II. RESTATEMENT OF ISSUES

This appeal presents a single issue:

1. Pursuant to the Livestock Identification Act, chapter 16.57 RCW, the Washington State Department of Agriculture regulates the use of cattle brands in the state of Washington and conducts cattle brand inspections, including when cattle are sold. Does inspecting cattle pursuant to the brand inspection statute impose a duty of care on the Department to protect an individual cattle owner from losses it suffers when the third party leasing its cattle sells them at public market and converts the sale proceeds?

## III. RESTATEMENT OF FACTS

### A. The Department Administers Washington State's Livestock Identification Act.

The Washington State Department of Agriculture (the Department) administers the Livestock Identification Act, chapter 16.57 RCW (the Livestock Identification Act, the Act). The Act is “used primarily for theft prevention.” Laws of 2003, ch. 325, § 1 (explaining needs served by the Act, as part of comprehensive update of livestock identification laws).<sup>1</sup> The Act's regulatory framework supporting theft prevention includes:

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<sup>1</sup> The Act may additionally help satisfy other emerging requirements, including “new federal country of origin labeling requirements, long-term national strategies for monitoring and reporting animal diseases, and potential food safety requirements for homeland security.” Laws of 2003, ch. 325, § 1.

administering the State's brand registry, exercising broad enforcement powers to conduct identification inspections of livestock for satisfactory proof of ownership, and conducting identification inspections when livestock are sold or moved out of state.

First, the Department maintains a uniform brand registry and serves as the definitive and exclusive recorder of cattle brands in the state. RCW 16.57.020. The Department's brand registry contains approximately 6,200 stock brands. A "brand" is a permanent fire brand or any artificial mark that has been approved by the Department to be used in conjunction with a brand or by itself. RCW 16.57.010(1). A brand is the personal property of the owner of record. RCW 16.57.090. The Department regulates brand appearance, size, characteristics, and use. RCW 16.57.023-.153. A healed brand of record on livestock is *prima facie* evidence that the recorded owner of the brand has legal title to the livestock. RCW 16.57.100.

Second, the Department is vested with broad enforcement powers to conduct identification inspections of livestock for brands or other satisfactory proof of ownership. Identification inspections are colloquially referred to as "brand inspections." Being in possession of cattle marked with a recorded brand of another person is a gross misdemeanor, absent satisfactory proof of ownership. RCW 16.57.280. Proof may be in the

form of the possessor's own healed recorded brand on the cattle, or a certificate of permit from the brand owner, an inspection certificate, or other satisfactory proof of ownership. RCW 16.57.280. A "certificate of permit" is a Department form completed by the owner or owner's agent that documents ownership of livestock. RCW 16.57.010(2). An "inspection certificate" is a certificate issued by the Department documenting the ownership of an animal based on its inspection. RCW 16.57.010(8). The Department has designated other satisfactory proofs of ownership in rule. *See* WAC 16-610-018.

Cattle may not be moved within the state unless accompanied by satisfactory proof establishing that the person transporting them either is their owner or is authorized by their owner to do so. RCW 16.57.243(1). This proof of ownership is subject to Department or law enforcement inspection at any time. RCW 16.57.243(2). The Department may designate mandatory inspection points or stop vehicles carrying livestock to conduct such inspections. RCW 16.57.160, .245. The Department may enter public livestock markets and slaughterhouses to conduct inspections, and may obtain a search warrant if access is denied. RCW 16.57.170, .180. Owners and their agents must make livestock readily accessible for inspection and must cooperate with the Department to carry out inspections in a safe and expeditious manner. RCW 16.57.200.

Third, the Department conducts identification inspections when livestock are sold or moved out of state. It is unlawful to remove cattle from the state without an inspection certificate. RCW 16.57.260. All cattle must be inspected for brands or other proof of ownership before being moved out of state. WAC 16-610-035(1). However, cattle may be moved out of state to a public livestock market that is a designated out-of-state inspection point, where the identification inspection is then performed. WAC 16-610-035(2). Such cattle must be accompanied by a “certificate of permit” showing that they are destined for and are being transported directly to the public livestock market. WAC 16-610-035(2).

When cattle are presented for sale without satisfactory proof of ownership, if the Department suspects the cattle are stolen they are impounded and an investigation initiated. RCW 16.57.290. If cattle theft is not suspected, the cattle are sold “and the proceeds retained” by the Department—unless the sale occurs at a licensed public livestock market. RCW 16.57.290, .300. The proceeds are released when satisfactory proof of ownership is provided. RCW 16.57.290.

If the cattle are sold at a licensed public livestock market, the proceeds are held by the licensee (the market) for a “reasonable period not to exceed thirty days to permit the consignor to establish ownership or the right to sell” the cattle. RCW 16.57.300. The proceeds are released when

satisfactory proof of ownership is provided. If the consignor “fails to establish legal ownership or the right to sell” the cattle, the proceeds are then paid to the Department.<sup>2</sup> *Id.*

The Department *may* review or investigate any verified complaint involving disputed ownership that is filed with it. WAC 16-610-055.

The Department annually inspects an estimated 600,000 cattle for ownership documents and permanent identification such as a brand. The Department charges a fee for livestock identification inspections, as established in statute and rule. The fee is calculated either as a per-head charge or as time and mileage for the inspector to travel to the point of sale, whichever is greater. RCW 16.57.220. The Department uses collected fees to carry out the Livestock Inspection Act. RCW 16.57.370.

## **B. Facts Relating To Sunshine’s Claim**

### **1. Sunshine Leased Its Cattle To Dana**

Sunshine Heifers, LLC, (Sunshine) is an Arizona limited liability company. Clerk’s Papers (CP) at 5. Mr. Jeff Blevins is the principal of

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<sup>2</sup> Sunshine draws its description of how sale proceeds are disbursed not from statute or rule, but rather from the deposition testimony of a Department employee. Appellant’s Opening Br. at 11 (paragraph beginning “After the inspection, the WSDA inspector has the sole discretion. . . .”) (citing Deposition Transcript of Tom Groff (CP 312-314)).

Sunshine fails to mention the relevant clarifications Mr. Groff made later in that deposition. Moreover, legal conclusions regarding Department duties, if any, flowing from the brand inspection statute are issues for this Court, not fact witnesses, to determine. Finally, Mr. Groff is not a speaking agent for the Department. *See, infra*, Section V.C.2 for further discussion of these points.

Sunshine. In June 2008, Sunshine leased 500 dairy cows for 50 months to The Dana Group, LLC (Dana). CP at 6, 12-22. Gary Sytsma is the principal of Dana. Gary and Donna Sytsma personally guaranteed Dana's obligation on the lease. CP at 6, 12-22. Dana also executed a security agreement granting Sunshine a security interest in all of Dana's other cows, which secured Dana's obligations under the lease. CP at 23-27.

Under the terms of the lease, Dana is entitled to the proceeds from the sale of all milk produced by the leased cattle in exchange for monthly rent payments to Sunshine. CP at 12-22. Dana defaulted on the lease and remains in default. CP at 6. Sunshine claims that Dana owes it \$1,558,859 for all amounts due under the lease and security agreement. CP at 6.

The Department is not a part of the private contracts between Sunshine and Dana, and has no obligations under those contracts. Sunshine's complaint alleges that the Department should have but failed to prevent Dana from converting approximately \$60,000 in sale proceeds which Dana received from selling cattle either owned by Sunshine or in which Sunshine held a first priority security interest. CP at 7-9.

## **2. Dana Brought The Leased Cattle To Washington State, Then Began Selling Them**

In October 2008, Dana had the cattle it leased from Sunshine

hailed from Utah to Washington. CP at 155, ¶ 4.

In November 2008, Sunshine (Blevins) applied to the Department for a Washington brand certificate for the brand “SSH.” The Department approved the application in early December, after which Sytsma (as agent and lessee of Sunshine) was authorized to brand Sunshine’s cattle with the SSH brand. CP at 155, ¶ 5.

Almost immediately in November 2008, and before the Department had approved the SSH brand, Dana began transporting cattle to a licensed public livestock market in Oregon, the Northwestern Livestock Commission Company (NLC). Between November 2008 and February 2010, Dana brought approximately 180 cattle for inspection and sale at NLC. Dana did not have original brand inspection records. Dana consigned the cattle under its own name, purporting to be the legal owner. The proceeds were held by NLC unless the cattle were “no brand.” CP at 184, ¶ 10.

In March 2009, Dana purchased approximately 290 additional cattle from the Utah seller, which were shipped to Washington. Some of the cattle had the SSH brand on them and others did not. Dana began selling some of these cattle at NLC. The Oregon state brand inspector at NLC placed holds on the proceeds. CP at 155, ¶ 6.

In December 2009, Dana (the Sytsmas) applied to the Department for a new brand for Dana, “G hanging D,” which the Department approved in late January 2010. Sytsma told Department investigator Officer Dave Robinson that he began re-branding most all of the cattle with the “G hanging D” brand, including those that were leased from Sunshine and branded SSH. CP at 155, ¶ 7.

The Washington brand inspector at NLC is Tom Groff. When Inspector Groff inspected cattle at NLC he did so with the Oregon state brand inspector. In February 2010, Inspector Groff began placing holds on the proceeds for the Dana cattle brought to NLC for consignment. The Utah brand certificates provided to the Department show the owner to be Sunshine Heifers, LLC care of Jeff Blevins or The Dana Group, LLS (sic). CP at 181, ¶ 2; 184, ¶ 11).

Mr. Sytsma called Inspector Groff to complain about proceeds being held. Groff told Sytsma that the proceeds would be held until he could provide original Utah brand inspection certificates. Sytsma provided copies but not originals. Sytsma told Groff that he (Dana) owned the cattle and was entitled by the lease to sell them. Groff told Sytsma to re-brand the cattle only if he owned them, then bring them to market after the new brands had “healed and peeled.” CP at 184-85, ¶ 11.

Ms. Sytsma then brought freshly branded cattle to NLC for consignment. The proceeds were again held. Mr. Sytsma appeared at NLC that same day to complain about the hold. Inspector Groff told Sytsma that the brands had to be healed and peeled before he brought them to market. Sytsma told Groff that he owned the cattle and was entitled to the proceeds from the sales. CP at 185, ¶ 12.

### **3. In 2010, The Department Investigated Dana And The Sytsmas**

On April 30, 2010, the Department placed a quarantine on the Dana dairy because of animal import health issues. Based on the investigation of Department animal health investigator Rick Daugherty, the Department concluded that many of the cattle Dana imported from Utah did not have adequate animal health or vaccination records. At the time, Daugherty accounted for approximately 670 cattle at the Dana dairy property. CP at 170-71, ¶¶ 3, 4.

That day, Investigator Daugherty called Blevins (Sunshine) and asked Blevins to provide the records for the cattle he leased to Dana. Blevins told Daugherty that he had no paperwork and that Sytsma was “responsible for that.” CP at 171, ¶ 4.

In mid-May, Investigator Daugherty noticed that cattle at the Dana dairy had been branded with the same brand on both hips and some had

existing brands that had been branded over with the “G hanging D” brand. CP at 171, ¶ 5. It is a gross misdemeanor to remove or alter a brand of record without first securing the written permission of the Department. RCW 16.57.120. Department investigator Officer Dave Robinson began to investigate the brand alteration for potential criminal prosecution. In late May, Department field veterinarians, brand inspection staff, and investigators inspected the Dana dairy. The Department found 463 cattle on the property, 207 less than Daugherty had observed one month earlier. CP at 155-56, ¶ 8.

Also in May, other matters came to a head for Dana. A Uniform Commercial Code lien was filed against Dana by the Utah cattle seller from whom Dana had purchased cattle. At the end of May, the owner of the property on which the Dana dairy was operating initiated eviction proceedings against Dana. CP at 156, ¶ 9.

On June 1, 2010, Officer Robinson spoke to Blevins by telephone. Blevins told Robinson he was aware of what was going on in Washington and he could not understand “what the big deal was.” Blevins also told Robinson that he “was in regular contact with Sytsma” and he was “not overly concerned about the situation.” CP at 156, ¶ 10.

The next day, Officer Robinson interviewed Gary Sytsma, advising him of his Miranda rights. Sytsma told Robinson about the leased cattle

brought to Washington from Utah. Sytsma said that he believed that under the lease terms he was entitled to cull cattle from the herd and replace them. Sytsma said that he was branding cattle with his brand in order to avoid having the proceeds held by NLC. Sytsma admitted that his employees had branded over the top of existing brands. CP at 156, ¶ 11.

On July 5, Dana obtained a Certificate of Veterinary Inspection to move 451 cattle to Boardman, Oregon. CP at 156, ¶ 13. Investigator Daugherty visited the Dana dairy on July 8 and found no living cattle. The next day Daugherty visited a dairy in Boardman, Oregon, and observed the Dana cattle on the property. CP at 171, ¶ 6.

On July 20, Officer Robinson spoke by telephone to Mr. Sytsma, who said he moved the cattle to Boardman because he had been evicted from the Washington property. Sytsma also admitted that he did not have a brand inspection done before removing the cattle from the state. On or about July 31, all the remaining Dana cattle in Boardman were inspected by the Oregon brand inspector and transported to Woodland, Washington for slaughter. CP at 157, ¶ 14.

The Department conducted one criminal and one non-criminal investigation of Dana. The Department forwarded the criminal investigation on “over-branding” to the Yakima County prosecutor. CP 159-62. A charge was filed and Mr. Sytsma did not contest the charge.

As a result, a finding of guilty was entered and Sytsma forfeited the \$500 penalty. A second charge was filed for removing cattle from Washington to Oregon without a certificate of inspection. Sytsma did not contest the charge, was found guilty, and forfeited the \$1,050 penalty. CP at 157, ¶ 15.

Dana did not pay the cattle truckers for the cattle transport costs. Dana did not pay the Utah seller for the cattle it purchased there. Dana did not pay Sunshine according to the terms of the lease. CP at 157, ¶ 15.

### **C. Sunshine's Claims And Procedural History**

In August 2010, Sunshine filed a tort action against Dana and the Systmas, claiming they were liable to Sunshine for conversion and other torts and seeking approximately \$1.56 million dollars for all amounts due under the lease and security agreement. CP at 135-42 (*Sunshine Heifers, LLC v. Dana Group et al.*; Yakima County Cause No. 10-2-02762-8). The Sytsmas and Dana filed bankruptcies.<sup>3</sup> Sunshine's action against them was dismissed with prejudice in July 2013.<sup>4</sup>

In November 2011, Sunshine filed this tort action against the Department and its then Director Dan Newhouse, asserting negligence and

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<sup>3</sup> *In re Garrett John Sytsma and Donna R Sytsma*, No. 11-05404 (Bankr. E.D. Wash. 2013) (Final Decree issued Feb. 8, 2013); *In re The Dana Group, LLC*, No. 13-03202 (Bankr. E.D. Wash. 2013) (Final Decree issued Nov. 6, 2013).

<sup>4</sup> Order of Dismissal with Prejudice, *Sunshine Heifers, LLC v. Dana Group et al.*; Yakima County Cause No. 10-2-02762-8 (Dkt. 129, Jul. 25, 2013).

breach of fiduciary duty.<sup>5</sup> CP at 5. Sunshine claimed that the Department should have, but failed to, prevent Dana from converting the proceeds from approximately \$60,000 worth of Sunshine's cattle. CP at 7-9. Sunshine's complaint alleges that from January 2009 to February 2010, at the public livestock market NLC, Dana sold \$27,383.22 worth of cattle that were owned by and branded to Sunshine. CP at 7-8. Sunshine also alleges that from April 2009 to April 2010, Dana sold at NLC \$32,763.65 worth of cattle that were not owned by Sunshine, but in which Sunshine had a perfected first position security interest. CP at 8-9. Sunshine's total claimed loss is therefore \$60,146.87.

In March 2014, the Department moved for summary judgment asking that the complaint be dismissed in its entirety because the two causes of action lacked any legal basis. With respect to negligence, under the public duty doctrine the Department owed no duty to Sunshine that could form the basis for a claim. With respect to breach of fiduciary duty, the Department had no fiduciary relation to Sunshine by contract or otherwise that could support that claim. CP at 115. Sunshine cross-moved for partial summary judgment solely on the issue of whether the

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<sup>5</sup> In December 2011, Sunshine filed a tort action against the Northwest Livestock Commission, claiming it was liable to Sunshine for conversion and other torts and seeking not less than \$150,000. CP at 143-53 (*Sunshine Heifers, LLC v. Northwestern Livestock Comm. Co.*; Umatilla County (Oregon) No. CV-11-1486).

Department owed it a duty when conducting brand inspections at the NLC. CP at 187.

On May 2, 2014, the trial court granted the Department's motion. CP at 377-78. Sunshine timely appealed. CP at 379-80.

#### **IV. SUMMARY OF ARGUMENT**

Regulatory statutes like the Livestock Identification Act and the brand inspection statute within it are appropriately analyzed under the public duty doctrine. This doctrine recognizes that regulatory statutes impose a duty on public officials that is owed to the public as a whole, not an actionable duty that is owed to any particular individual. The purposes served by the brand inspection statute, including theft prevention and other public purposes, establish its regulatory nature.

Sunshine does not argue that any of the four recognized exceptions to the public duty doctrine—legislative intent, failure to enforce, special relationship, or volunteer rescue—apply. Nor could it. Instead, Sunshine makes a single argument—that brand inspection is a proprietary, not a governmental, function. However, the brand inspection statute is plainly governmental in nature, having nothing in common with activity normally performed by private enterprise. Sunshine's argument fails.

Finally, Sunshine's negligent inspection claim is really a claim for negligent investigation, which is not cognizable.

Just as the police cannot be sued by crime victims for failing to prevent crime, the Department is not liable to Sunshine. Brand inspection is done for the benefit of the public as a whole.

## V. ARGUMENT

### A. Standard Of Review

When reviewing a grant of summary judgment, the appellate court makes the same inquiry as the trial court, *i.e.*, summary judgment is proper where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999). The facts and reasonable inferences from the facts are considered in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Questions of law are reviewed de novo. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). This Court may affirm on any ground finding support in the record. RAP 2.5(a).

### B. Dismissal Of Sunshine's Negligence Claim Should Be Affirmed Because The Department Owes Sunshine No Actionable Duty

Whether a duty of care is owed by the defendant to the plaintiff is the threshold determination in any negligence action. *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). This is always a question of law to be determined by the court. *Webstad v. Stortini*, 83 Wn.

App. 857, 865, 924 P.2d 940 (1996). If the defendant does not owe a duty, the plaintiff's action fails. *E.g.*, *Stenger v. State*, 104 Wn. App. 393, 399, 16 P.3d 655 (2001); *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). Here, the sole issue on appeal is whether the Department owed a duty to Sunshine. Because it did not, summary judgment in favor of the Department should be affirmed.

**1. The Public Duty Doctrine Provides That Regulatory Statutes Such As The Brand Inspection Statute Do Not Give Rise To Tort Liability**

The existence of a duty may be based in common law principles or upon statutory provisions. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996).

“Under the common law, a person ha[s] no duty to prevent a third party from causing physical injury to another.” *Petersen v. State*, 100 Wn.2d 421, 426, 671 P.2d 230 (1983). Nor does a person have a duty to protect another person from the tortious conduct of a third party, unless there is special relation. *Id.* Sunshine does not claim that a common law cause of action for negligent inspection of cattle exists, nor could it. *See Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988) (in negligence action against state cattle inspection program, finding no common law cause of action, applying public duty doctrine, and holding state's failure

to enforce regulations designed to control spread of diseased cattle did not give private individuals a cause of action for negligence).

As for any potential statute-based duty, regulatory statutes such as the Livestock Identification Act are appropriately analyzed under the public duty doctrine. “The public duty doctrine provides that regulatory statutes impose a duty on public officials which is owed to the public as a whole, and that such a statute does not impose any actionable duty that is owed to a particular individual.” *Honcoop*, 111 Wn.2d at 188 (holding chapter 16.36 RCW, creating the Animal Health Control quarantine program, is for the benefit of the public and creates no actionable tort duty).

“The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.” *Taylor*, 111 Wn.2d at 170; *see also Donohoe v. State*, 135 Wn. App. 824, 834, 142 P.3d 654 (2006). The essence of the public duty doctrine is that statutes relating to the regulatory and police functions of government create duties to protect the welfare of the public generally, but do not create duties to protect individual citizens from harms that these governmental functions seek to ameliorate.

In negligence actions against a government entity, Washington courts follow the rule that, with respect to a regulatory mandate of a government agency, a duty to all is a duty to no one.

[T]o be actionable, the duty must be one owed to the injured plaintiff, and not owed to the public in general. This basic principle of negligence law is expressed in the “public duty doctrine.” Under the public duty doctrine, no liability may be imposed for a public official’s negligent conduct unless it is shown that “the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.*, a duty to all is a duty to no one).”

*Cummins v. Lewis County*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006) (quoting *Taylor*, 111 Wn.2d at 163 (omitting citations to *J & B Dev. Co. v. King County*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983))).

The traditional rule that a regulatory statute imposes a duty owed generally to the public, not specifically to a particular individual (which might thereby support a negligence action) “is almost universally accepted regardless of the exact nature of the statute relied upon by the plaintiff.”<sup>6</sup> *Baerlein v. State*, 92 Wn.2d 229, 231, 595 P.2d 930 (1979) (State

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<sup>6</sup> Sunshine errs when it contends, without authority, that the “critical inquiry in determining whether the ‘public duty doctrine’ applies is an analysis of (a) the actual duties that are performed and the actions of the governmental agency; and (b) the effect it has to the public at large, if any, and the private citizen involved.” Appellant’s Opening Br. at 26.

Agencies are creatures of statute, whose legal duties are determined by the Legislature, not by their employees. *Murphy v. State*, 115 Wn. App. 297, 315, 62 P.3d 533 (2003). Thus, whether the public duty doctrine applies to brand inspection is not, as Sunshine contends, a “fact driven inquiry.” Appellant’s Opening Br. at 26. Rather, the critical inquiry is a question of law focused on the brand inspection statute itself.

Securities Act). *See also Honcoop*, 111 Wn.2d at 188 (livestock inspection program); *Taylor*, 111 Wn.2d at 166 (building codes); *Donohoe*, 135 Wn. App. at 833 (nursing homes).

The Department’s brand inspection statute, and the broader Livestock Identification Act of which it is a part, are classic examples of regulatory statutes. The general purpose of the brand inspection statute, as with the overall Act, is to protect the public peace, health, and safety. RCW 16.57.902.<sup>7</sup>

The brand inspection statute, and other Act components, are the regulatory framework through which the Department advances the Act’s “theft prevention” purpose.<sup>8</sup> Laws of 2003, ch. 325, § 1. Through brand inspection and other Act components, the Department polices the movement and sale of Washington cattle, ensuring the state’s cattle economy operates in an orderly, well regulated fashion.

In addition, the Legislature recognized during its comprehensive 2003 update of the livestock identification laws that the Act may satisfy other public peace, health, and safety purposes. These include potentially fulfilling “new requirements for federal country of origin labeling of

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<sup>7</sup> “This act is necessary for the immediate preservation of the public peace, health, safety, or support of the state government and its existing public institutions. . . .” RCW 16.57.902.

<sup>8</sup> Other components include the State’s brand registry and broad enforcement powers to conduct identification inspections of livestock throughout the state. *See, supra*, Section III.A.

livestock products, long-term national strategies for monitoring and reporting animal diseases, and potential food safety requirements for homeland security.”<sup>9</sup> Laws of 2003, ch. 325, § 1.

These purposes demonstrate that the brand inspection statute protects the welfare of the public generally, not particular citizens and their interests in private property (livestock) individually. The nature of this duty—a duty to all—establishes the regulatory nature of the brand inspection statute. Accordingly, the public duty doctrine applies.

Certainly, the purpose of the brand inspection statute is not to ensure the absolute security of individual cattle owners in their every private property transaction. The Department, through conducting brand inspections, does not take on the duty of ensuring that no conversion of cattle or cattle sale proceeds will occur in public livestock markets. When the Department brand inspector enters a public livestock market to inspect livestock the Department does not thereby become the guarantor that the cattle brought for sale are in fact the property of the consignor or seller

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<sup>9</sup> The legislature finds that new requirements for federal country of origin labeling of livestock products, long-term national strategies for monitoring and reporting animal diseases, and potential food safety requirements for homeland security need to be evaluated. The legislature finds that while livestock identification laws used primarily for theft prevention are being updated, the affected industry with assistance from the department of agriculture should consider whether the current livestock identification system will help to satisfy these emerging requirements or needs to be adapted.

Laws of 2003, ch. 325, § 1.

who presents them. That would make the State a de facto guarantor for every transaction. There is no indication in the Livestock Identification Act that the Legislature intended to make the State the insurer of last resort for every cattle owner.

Under Sunshine's theory, however, by virtue of conducting brand inspections, the State becomes a guarantor for every sale of cattle moved through Washington State. This was never the purpose of the Livestock Inspection Act, nor could the State reasonably assume such a duty given the approximately 600,000 brand inspections the Department conducts annually. Sunshine leased its cattle to Dana, and Sunshine—not the State—was responsible for protecting and insuring those cattle against conversion.

Sunshine's complaint alleges the Department is liable to it because "inaccurate inspections resulted in certain proceeds from auction sales being paid to parties other than the cattle's owner, Sunshine." CP at 7. In other words, Sunshine has sued the Department based on claims that a third party, Dana, over-branded cattle or misrepresented that it (Dana) was the lawful owner of the stock, in order to convert the sale proceeds for its own purposes. Dana may have sold Sunshine's cattle and converted the sale proceeds to itself. But the Department had no duty in tort to prevent that conversion.

The Department is not liable to Sunshine because Dana converted sale proceeds from Sunshine's stock for its own gain.

**2. The Brand Inspection Program Does Not Fall Within Any Exception To The Public Duty Doctrine**

There are four recognized exceptions to the public duty doctrine: (1) legislative intent, (2) failure to enforce, (3) special relationship, and (4) volunteer rescue. *Donohoe*, 135 Wn. App. at 834. Given the regulatory nature of the brand inspection statute, liability here is precluded unless an exception applies. However, Sunshine does not argue on appeal—nor did it argue below—that any exception applies. Nor could it, as none do. However, by way of fleshing out the analytical paradigm, the legislative intent and failure to enforce exceptions are briefly discussed.

First, the legislative intent exception requires that the “terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons.” *Donohoe*, 135 Wn. App. at 844 (quoting *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987)). Where a comprehensive regulatory scheme is at issue, a cause of action must be explicitly provided in legislation and not merely implied. *See Taylor*, 111 Wn.2d at 166; *Baerlein*, 92 Wn.2d at 231; *Donohoe*, 135 Wn. App. at 833. Where the statute's purpose is focused on public peace, health, and safety, rather than carving out a particular and circumscribed

class of persons for express protection, the legislative intent exception is not satisfied. *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 562-63, 104 P.3d 677 (2004). The Livestock Identification Act and the brand inspection statute comprise a comprehensive regulatory scheme focused on public peace, health, and safety. These statutes demonstrate no legislative intent to protect a narrow and circumscribed class. The legislative intent exception does not apply.

Second, the failure to enforce exception applies where a statute creates a mandatory duty to take specific action to correct a known statutory violation, a government actor with actual knowledge of the violation failed to act in accordance with that statutory duty, and the plaintiff is in the class of persons protected by the statute. *Bailey*, 108 Wn.2d at 268; *Donohoe*, 135 Wn. App. at 848-49. Courts construe the exception narrowly. *Atherton Condo Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990).

This exception is not applicable because, as a threshold matter, the brand inspection statute does not create a mandatory duty for the Department to take specific action to correct a statutory violation. The Department's authority to inspect is discretionary. RCW 16.57.170 (Department "may enter" a "public livestock market to inspect livestock. . . for brands or other means of identification"). At pre-sale

inspection, cattle “shall be impounded” if not accompanied by satisfactory documentation, but only if cattle theft is suspected. RCW 16.57.290. “If [cattle] theft is not suspected, the animal shall be sold and the proceeds retained[.]” *Id.* And when the sale occurs at a licensed public livestock market, the proceeds are retained by the licensee (the market). RCW 16.57.300. Here, the Department’s brand inspector at NLC had no reason to suspect cattle theft when cattle bearing Sunshine’s brand were consigned by Sunshine’s lessee and agent, Dana (the Sytmas) (Appellant’s Opening Br. at 13-15), much less when the Sytmas consigned cattle *not* bearing Sunshine’s brand (Appellant’s Opening Br. at 15-18). So the cattle were duly sold. And because the sales occurred at the licensed public livestock market, NLC, any statutory duty to retain sale proceeds fell to NLC. As there was no mandatory duty for the Department to take action to correct any statutory violation, the failure to enforce exception does not apply.<sup>10</sup>

Accordingly, the public duty doctrine governs the brand inspection statute and precludes liability in this case. As a matter of law, the

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<sup>10</sup> The special relationship and volunteer rescue exceptions warrant little mention. Neither of the two types of special relationships exists here. *Donohue*, 135 Wn. App. at 835. The Department made no express assurance to Sunshine on which it could have relied and there is no custodial or supervisory special relationship between the Department and Dana or the market. Nor was there any rescue presented on these facts. *Folsom v. Burger King*, 135 Wn.2d 658, 667, 958 P.2d 301 (1998).

Department owes no duty of care to Sunshine and Sunshine's negligence action fails.

**C. Brand Inspection Is A Governmental, Not A Proprietary, Function—The Public Duty Doctrine Applies**

Sunshine does not contest the applicability of the public duty doctrine to the brand inspection statute based on one of the doctrine's established exceptions. Instead, Sunshine makes a single argument—that brand inspection is a proprietary, not a governmental, function. Appellant's Opening Br. at 22-39. However, because brand inspection is plainly governmental in nature, Sunshine's argument fails.

Washington courts have held that “the public duty doctrine does not apply when the government is performing a proprietary function.” *Fabre v. Town of Ruston*, 180 Wn. App. 150, 159, 321 P.3d 1208 (2014) (citing *Bailey*, 108 Wn.2d at 268). “The principal test in distinguishing governmental functions from proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity.” *Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003) (citing *Lakoduk v. Cruger*, 47 Wn.2d 286, 288-89, 287 P.2d 338 (1955) (citing *Hagerman v. City of Seattle*, 189 Wn. 694, 701, 66 P.2d 1152 (1937))).

“A government acts in a proprietary capacity when it engages in a business-like venture as contrasted with a governmental function.” *Moore v. Wayman*, 85 Wn. App. 710, 715-16, 934 P.2d 707 (1997) (quoting *Hoffer v. State*, 110 Wn.2d 415, 422, 755 P.2d 781 (1988)). Proprietary functions involve “engag[ing] in businesslike activities that are normally performed by private enterprise.” *Fabre*, 180 Wn. App. at 159 (quoting *Stiefel v. City of Kent*, 132 Wn. App. 523, 529, 132 P.3d 1111 (2006)). Examples of proprietary functions include providing medical and psychiatric care and operating a utility. *See, e.g., Petersen*, 100 Wn.2d 421 (patient care); *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 694, 743 P.2d 793 (1987) (electric utility); *but see Okeson*, 150 Wn.2d at 550 (providing electricity to customers is proprietary function, but providing streetlights is governmental function).

By contrast, “[g]overnmental functions tend to involve activities ensuring compliance with state law; issuing permits; or performing activities for the public health, safety, and welfare.” *Fabre*, 180 Wn. App. at 159. Governmental functions involve “noncommercial and uniquely governmental duties.” *Hoffer*, 110 Wn.2d at 422. They “are those generally performed exclusively by governmental entities.” *Stiefel*, 132 Wn. App. at 529 (listing as examples *Taylor*, 111 Wn.2d at 164-65

(building permits and inspections) and *Hoffer*, 110 Wn.2d at 422 (auditing public offices and registration of securities)).

Brand inspection involves uniquely governmental duties performed exclusively by the Department for the common good of all. It is not a business-like venture for the special benefit of an individual or the profit of a corporation. As such, it is a governmental function to which the public duty doctrine applies.

**1. The Characteristics Of Brand Inspection Demonstrate It Is A Governmental, Not A Proprietary, Function**

Livestock identification and brand inspection are performed for the common good of all, not for the special benefit or profit of a corporate entity such as Sunshine. The primary purpose of the brand inspection statute is to deter theft of livestock, a uniquely governmental exercise of the police power of state government. Under the Act, the Department has the power to inspect, to seek search warrants, to charge inspection fees, to impound livestock, and adopt rules necessary to enforce the Act. RCW 16.57.170, .180, .210, .220, .300, .350. In addition, the Department is the official recorder of brands. RCW 16.57.020 (the Department “shall be the recorder of livestock brands and such brands shall not be recorded elsewhere in this state.”). No private person or commercial enterprise has comparable powers.

The Act is “necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing institutions. . . .” RCW 16.57.902. In this simple statement, the Legislature recognized that brand inspection protects the “common good of all,” rather than the “special benefit or profit of a corporate entity.”

The Legislature also recognized that the Act may serve other public purposes, such as fulfilling requirements for federal country of origin labeling of livestock products, long-term national strategies for monitoring and reporting animal diseases, and potential food safety requirements for homeland security. Laws of 2003, ch. 325, § 1. In all these ways brand inspection benefits the public at large, contrary to Sunshine’s contention. Appellant’s Opening Br. at 30 (arguing Department “inspectors provide no benefit to the public at large.”)

Brand inspection is also “performed exclusively” by the Department, which evidences its governmental, rather than proprietary, nature. *Fabre*, 180 Wn. App. at 159 (quoting *Stiefel*, 132 Wn. App. at 529). Sunshine has not provided a single example of a private enterprise or agency that performs this function.<sup>11</sup>

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<sup>11</sup> The Department may certify Washington state licensed and accredited veterinarians to perform livestock inspections. RCW 16.57.025. In such cases, these veterinarians perform the governmental function of livestock inspection as agents of the Department.

Sunshine contends that brand inspection is a proprietary function because “determinations by [the Department brand inspector] ha[d] a direct and substantial impact” on it as a private entity. Appellant’s Opening Br. at 31. But merely having an impact on a private entity does not transform a governmental function into a proprietary one.

Consider the building permit and inspection process. The permitting and inspection of a particular building may have a direct and substantial impact on that particular building’s owner. But despite the possibility of an inspection-specific impact, the *function* of building permitting and inspection remains is a governmental function. *See Stiefel*, 132 Wn. App. at 529 (listing *Taylor*, 111 Wn.2d at 164-65, as example of governmental function). This is likewise true with the function of brand inspection—it remains a governmental function notwithstanding the possibility that a particular brand inspection may have an impact on the interests of a particular individual. Moreover, in this case any direct and substantial impact on Sunshine was due to the unlawful conversion of sale proceeds by third parties, not the determinations of the Department’s brand inspector.

Consider, too, laws prohibiting the possession of stolen property. Enforcement of such laws may collaterally benefit victims of theft if private property is recovered. But the purpose of such laws is to deter

theft generally, not to protect any individual citizen from having his or her private property stolen in the first instance. Likewise, being in possession of cattle without satisfactory proof of ownership is a crime. RCW 16.57.280. And similarly, the purpose of brand inspection is to deter theft in general, not to specifically protect individual cattle owners from unlawful activities.

Just like building inspectors and law enforcement officers, brand inspectors perform a governmental function.

**2. Sunshine’s Contentions About The Authority Of Brand Inspectors Are Unsupported But, Even If Correct, Support Its Governmental Nature**

Sunshine contends that brand inspection is proprietary, but does not argue or cite any authority supporting the claim that brand inspection is “*for the special benefit or profit of a corporate entity.*” *Okeson*, 150 Wn.2d at 550 (emphasis added).

Instead, Sunshine insistently argues that Department inspectors have “absolute and sole authority and discretion to determine not only whether cattle can be sold but when and to whom the sales proceeds are disbursed.” Appellant’s Opening Br. at 23; *see also* Appellant’s Opening Br. at 2-3 (“inspector, in his sole discretion, determines”); at 11 (inspector’s “absolute authority and discretion”); at 28-30 (inspector’s determinations amount to “absolute control over the property of third

parties”); at 38-39 (Department has “full and absolute control over” inspection process, ownership of livestock, and distribution of sales proceeds).

First, the Department denies that these statements, which Sunshine appears to derive from the testimony of a Department employee, accurately express the law regarding brand inspection. Second, the statements (even if they were correct) do not support Sunshine’s argument that brand inspection is a proprietary function. In fact, the statements further support the Department’s position that brand inspection is governmental in nature.

**a. Sunshine’s Reliance On The Testimony Of Department Employee Tom Groff For Legal Conclusions Is Misplaced**

Sunshine apparently derives its contention regarding the “absolute and sole authority” exercised by the Department through brand inspection from the deposition testimony of brand inspector Tom Groff. This derivation is most clearly apparent in Appellant’s Opening Brief, where Sunshine first claims that Inspector Groff “admitted that his inspections control (1) whether the livestock will be sold; and (2) if sold, whether the sales proceeds get disbursed or impounded”, and then immediately announces what the Department “admitted” regarding brand inspection. Appellant’s Opening Br. at 23.

Sunshine's contention is flawed for at least three reasons. Legal conclusions regarding Department duties, if any, arising from the brand inspection statute are for the court, not a fact witness, to determine. Sunshine fails to mention the relevant clarifications Groff made later in his deposition. Finally, Mr. Groff is not a speaking agent for the Department.

First, agencies are creatures of statute, whose legal duties are determined by the Legislature, not by their employees. *Murphy v. State*, 115 Wn. App. 297, 315, 62 P.3d 533 (2003). Sunshine does not argue or cite any actual authority supporting that its contentions regarding brand inspection accurately characterize the legal authority inherent in, or duties flowing from, brand inspection. To the extent Mr. Groff's description of the brand inspection and sale proceeds disbursement process could be read to be in conflict with applicable statute and regulations, the latter control.

Second, Sunshine fails to note that Inspector Groff clarified the testimony on which Sunshine relies. At the end of his deposition, Groff testified in response to a question by defense counsel:

Q. Mr. Groff, a couple of questions for you. For the record, my name is Mark Jobson. I'm the assistant attorney general representing the Department of Agriculture in this case. And I just want to go back to the beginning of your deposition a couple of hours ago and ask you a follow-up question about a question that Josh asked of you.

I'm going to ask the court reporter to go back to the transcript and pull up the question in which Mr. Busey

asked you about your duty to determine ownership of cattle.

MR. JOBSON: Could you do that for me, Rene?

(COURT REPORTER REPLIED)

MR. JOBSON: Thank you.

(COURT REPORTER READ BACK THE FOLLOWING:  
Q. OKAY. SO IS IT YOUR ULTIMATE DUTY TO DETERMINE OWNERSHIP OF THE COW YOU'RE INSPECTING?)

MR. JOBSON: All right.

Q. (By Mr. Jobson) So I just want to follow up with that. When you answered that question for Mr. Busey, did you intend to state a legal conclusion?

A. No.

Q. Did you intend to state that it is your legal duty to determine who the legal owner is of a particular cow?

A. No.

CP at 320-25 (Decl. of Jobson, Ex. 1; Dep. of Tom Groff, pp. 89-90). Inspector Groff did not intend to admit a legal conclusion about his employer's duty, nor did he.

Third, Sunshine submits no foundation for the argument that the Department is bound by the statements of this employee. An agency or corporation is not bound by the statement of its employee who is not a

speaking agent.<sup>12</sup> *Ensley v. Mollmann*, 155 Wn. App. 744, 752-53, 230 P.3d 599 (2010). Sunshine submits no foundation for the argument that the Department is bound by the statements of Groff. Groff is not a speaking agent for the Department.

**b. Any Exclusive Control Exercised By Brand Inspectors Supports Brand Inspection Being A Governmental Function**

Sunshine’s assertions about brand inspection (even if they were correct) do not support its argument that brand inspection is a proprietary

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<sup>12</sup> In *Ensley v. Mollman*, the Court explained that a statement is not an admission by party-opponent where no evidence appears in the record that an employee was expressly authorized to speak on behalf of the employer:

¶10 [U]nder ER 801(d)(2) a statement of admission by party-opponent is nonhearsay, “[if] offered against a party and is . . . (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party’s agent or servant acting within the scope of the authority to make the statement for the party. . .” But “[i]n order for a statement to satisfy these requirements, *the declarant must be authorized to make the particular statement at issue, or statements concerning the subject matter, on behalf of the party.*”

*Ensley v. Mollmann*, 155 Wn. App. 744, 752, 230 P.3d 599 (2010) (second quote, *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 262, 744 P.2d 605 (1987)) (emphasis added). The *Ensley* Court illustrated, saying:

¶11 The Supreme Court addressed a nearly identical issue in *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 618 P.2d 96 (1980). There, a bar patron crashed his car and died after drinking at a hotel bar. [*Id.* at 641.] The decedent’s estate sued Hosts of America, alleging negligence for serving Barrie while he was obviously intoxicated. [*Id.*] The estate argued that a bar manager’s statement that Barrie was “smashed” was admissible under ER 801(d)(2)(iii) because she was the hotel’s authorized speaking agent. *Barrie*, [94 Wash.2d at 643–44]. The court disagreed and held that because “[n]o evidence of such authorization [was] present in the . . . record” the statement did not satisfy ER 801(d)(2)(iii). *Barrie*, [94 Wn.2d at 645].

*Ensley*, 155 Wn. App. at 752-53.

function. In fact, the arguments further support the Department's position that brand inspection is governmental in nature. Governmental functions are characterized as being "generally performed exclusively by governmental entities" (*Fabre*, 180 Wn. App. at 159 (quoting *Stiefel*, 132 Wn. App. at 529)) or involving "noncommercial and uniquely governmental duties" (*Hoffer*, 110 Wn.2d at 422).

For example, the Department of Licensing is the only person or agency allowed to register and record title to motor vehicles. RCW 46.08.010. No person may transfer title to a motor vehicle without complying with the Motor Vehicle Title statute. RCW 46.12.520. When a person transfers title he must submit an application for transfer of title and pay all fees and taxes due. RCW 46.12.555. Just like the livestock identification and brand inspection statute, the motor vehicle licensing scheme is a classic regulatory and police function of the state. No one would argue that Department of Licensing performs a proprietary function when it registers and records title to motor vehicles. So, too, with other governmental functions. *See, e.g., Taylor*, 111 Wn.2d at 164-65 (building permits and inspections); *Hoffer v. State*, 110 Wn.2d 415, 422, 755 P.2d 781 (1988) (auditing public offices and registration of securities).

Brand inspection is not a proprietary function. Proprietary functions involve "engag[ing] in businesslike activities that are normally

performed by private enterprise.’” *Fabre*, 180 Wn. App. at 159 (quoting *Stiefel*, 132 Wn. App. at 529). Monitoring and maintaining records of the sale of private property is not a businesslike activity normally performed by private enterprise. When exercised, that type of control is wielded by government.

**3. The Fact That The Consignor Pays A Fee For The Brand Inspection Is Irrelevant**

Sunshine argues that because the Department collects a fee for inspecting livestock, that this somehow makes the function “proprietary.” Appellant’s Opening Br. at 32-34. There is no legal authority or support for this argument. Just as Department of Licensing may charge a fee for recording title to a motor vehicle, the Department may and does charge a fee for performing a regulatory function. Likewise, a local building department may charge an inspection fee without converting the function from governmental to proprietary. *See Taylor*, 111 Wn.2d 159 (holding that building inspection is a governmental function that does not create an individual duty owed to the inspected person).

**D. Sunshine’s Claim Additionally Fails Because It Amounts To A Claim Of Negligent Investigation, Which Is Not Cognizable**

Sunshine’s fundamental claim is that the Department was negligent in conducting brand inspections of cattle which Sunshine either owned or in which it held an interest. But even cursory review of Sunshine’s

negligent inspection claim reveals that it is really a claim for negligent investigation. As such, it fails because Washington courts do not recognize a general cause of action for negligent investigation.

Sunshine specifically alleges that “the [Department] negligently performed the inspection” of cattle consigned by Dana, failing to “properly determin[e] that the Sytsmas had no authority to sell [Sunshine’s] cattle.” Appellant’s Opening Br. at 30-31. This, Sunshine alleges, “had the direct consequence of depriving [Sunshine] of its property.” Appellant’s Opening Br. at 31.

But Sunshine does not identify deficiencies in the Department’s *inspection* of cattle—the actual physical examination of the animals. Rather, Sunshine alleges the Department was negligent in determining (1) whether the consignors of the cattle, Dana (the Sytsmas), had the legal authority to sell the cattle they had consigned, and (2) to whom the proceeds from any sale should be disbursed. Appellant’s Opening Br. at 30-31. Such determinations could be made only through investigation, not merely through inspection.

As discussed above, the Department denies the accuracy of Sunshine’s contentions regarding the nature and purpose of brand inspection. However, accepting Sunshine’s contentions for the sake of

argument, Sunshine plainly portrays the Department's brand inspection function as involving investigation, not inspection.

Washington courts "have not recognized a general tort claim for negligent investigation." *M.W. v. Dep't of Soc. & Health Servs*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003). In *M.W.* below, Judge Morgan, in dissent, surveyed decisions affirming this principle:

Thus, a person charged with a crime may not sue the police, even after he has been acquitted or dismissed, for negligently investigating his conduct; a person suspected of a crime may not sue the police, even after another person has been charged and convicted, for negligently questioning him; a person victimized by domestic violence may not sue the police for negligently failing to investigate her complaint; a child care worker suspected of child abuse may not sue DSHS for negligently investigating her conduct; a teacher fired for possessing sexually explicit drawings may not sue the school-district/employer for negligently investigating his conduct; an employee fired after a sexual harassment complaint may not sue the employer for negligently investigating the complaint; and a real estate developer may not sue the State Department of Fish and Wildlife for negligently investigating the sight of an eagle nest.

*M.W. v. Dep't of Soc. & Health Servs*, 110 Wn. App. 233, 247-48, 39 P.3d 993 (2002) (Morgan, J., dissenting) (internal footnote citations omitted), *discussed with approval*, *M.W.*, 149 Wn.2d 589. And while Washington courts have recognized a limited exception against the Department of Social and Health Services in the area of child abuse investigations, it is a

“narrow exception that is based on, and limited to, the statutory duty” that establishes it. *M.W.*, 149 Wn.2d at 601.

As discussed above, the brand inspection statute does not impose a mandatory duty on the Department to protect the personal property interests of individual cattle owners. Accordingly, there can be no basis on which to find a cause of action for negligent investigation. Sunshine’s claim against the Department fails.

## VI. CONCLUSION

For the reasons stated above, the Department’s inspection of cattle pursuant to its brand inspection program does not impose a duty of care to protect Sunshine from losses it suffered when the third party leasing its cattle sold them at public market and converted the sale proceeds. Summary judgment in favor of the Department should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of October, 2014.

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**CERTIFICATE OF SERVICE**

I certify that I caused service of a copy of this document on all parties or their counsel of record on the date below as follows:

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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.

DATED this 22nd day of October, 2014, at Tumwater,  
Washington.

*/s/ Jodi Elliott*  
\_\_\_\_\_  
JODI ELLIOTT

**WASHINGTON STATE ATTORNEY GENERAL**

**October 22, 2014 - 9:28 AM**

**Transmittal Letter**

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Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

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