

No. 49123-1-II

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

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

v.

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

APPEAL FROM THE JEFFERSON COUNTY
SUPERIOR COURT

The Honorable Keith C. Harper, Trial Judge

PLAINTIFF-APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Estate of Jim Rogers¹ seeks compensation for damages arising from Mr. Rogers' unlawful traffic stop, arrest without probable cause, and impoundment of his truck. The trier of fact could find that the trooper's claims about the incident are false. Genuine issues of material fact preclude summary judgment. We seek reversal of the summary judgment order and order denying the motion to reconsider

II. ASSIGNMENTS OF ERROR:

(1) *Assignment of Error No. 1:* The trial court erred by granting summary judgment to defendants.

Issues Pertaining to the Assignment of Error #1:

(a) *Fourth Amendment unreasonable seizure claim under 42 U.S.C. §1983:* Under plaintiff's facts and the reasonable inferences therefrom, could the trier of fact find that the trooper did not observe a traffic violation before he

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

pulled Mr. Rogers over?

(b) *Fourth Amendment arrest without probable cause claim under 42 U.S.C. §1983:* The State admits that the trooper's claim that alcohol and marijuana were in Mr. Rogers' truck is false. Mr. Rogers testified that he passed the field tests. Under the facts and the reasonable inferences therefrom, could the trier of fact find that Mr. Rogers was arrested without probable cause?

(c) *State law tort claims for negligence, trespass and conversion:* Under plaintiff's facts and the reasonable inferences therefrom, could the trier of fact find the State liable in conversion, trespass, and negligence for the seizure of Mr. Rogers and his truck by the trooper under the doctrine of *respondeat superior*?

(d) Did the State meet its burden of proving there is no issue of material fact?

(2) *Assignment of Error No.2:* The trial court erred by denying plaintiff's motion for reconsideration.

Issue Pertaining to the Assignment of Error #2:

May the transcript of Mr. Rogers' sworn testimony given in a formal hearing before a state Department of Licensing Hearing Officer be considered on summary

judgment?

III. STATEMENT OF THE CASE

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

IV. SUMMARY OF THE FACTUAL RECORD

The material facts are disputed. To assist the Court, the factual record will be summarized separately by issue.

A. Factual Record re the Initial Traffic Stop

1. Trooper Sanders Declaration

In its motion for summary judgment, the State provided a short declaration by the trooper. Paragraph 4 states:

On State Route 19, near milepost 5 on the Hood Canal Bridge, at approximately 10:00pm

I observed James C. Rogers' [sic] commit multiple traffic infractions. Specifically, Mr. Rogers failed to maintain his lane of travel by driving onto the centerline twice, drifting to the right, and quickly jerking back to the left of his lane of travel.

Declaration of Russell Sanders, dated February 6, 2016, CP 96.

Contrary to Trooper Sanders, State Route 19 does not traverse the Hood Canal Bridge. It terminates on Highway 305, west of the bridge.

2. Trooper Sanders "Narrative Case Report"

Regarding the initial stop, the report states:

I [Trooper Sanders] was S/B S/R 19 MP 5 when I observed the reported vehicle pass me N/B S/R 19 MP 5. In my drivers side mirror I observed the vehicle drive on to the centerline.

I turned around and caught up to the vehicle and observed it drive on to the center line a second time. The vehicle from there drifted to the right and quickly jerked the vehicle to the left.

I activated my emergency light and

stopped the vehicle N/B S/R 19
MP 5.

Trooper Sanders' "Narrative Case Report", pp.1-2,
Exhibit 2, *Declaration of Elaine Pascua* (tow company
counsel), CP 38-39.²

3. Police Radio Tape

Plaintiff received a disc from the State containing
the police radio transmissions re the stop and arrest of
Mr. Rogers. CP 160-161.

Trooper Sanders tells dispatch that he is behind Mr.
Rogers' truck at milepost 5 on State Highway 19. The
dispatcher appears to give the time as "21:48" (9:48 pm).
Approximately 15 seconds later, the trooper says he is
stopping the vehicle at milepost 5, "5814". The
dispatcher appears to again give the time as "21:48".
Later on in the tape, the trooper calls in to get the time of
the stop. The dispatcher tells him it was at "21:48".³

² The exhibits to Ms. Pascua's declaration, previously
filed in this case, were incorporated by reference by the
State in its motion. We cite the relevant excerpts here.

³ See *Declaration of John Muenster with Documents in
Support of Plaintiff's Response to Defense Summary
Judgment Motion*, ¶4, CP 118.

4. WSP “Incident Recall” Printout

The printout includes the following entries:

(a) “21:48 Stat SP/931 (Sanders) AR
Loc: W104 Hood Canal Bridge”;

(b) “21:49 Stat SP/931 TS Loc: W104
Hood Canal Bridge”;

(c) “21:49 STOPPING MP5 (SR19)”.⁴

These appear to correspond with the verbal announcements on the police radio tape that Sanders began following Mr. Rogers at 21:48 hours and stopped him at 21:48 hours.

5. Jim Rogers’ DOL hearing testimony

On the date of the stop, Mr. Rogers saw his doctor in Fremont. Afterwards, he shared a quart of microbrew with a fellow traveler, and then caught the ferry to return to home to Port Townsend, where he had resided for twenty-four years. CP 124.

⁴ Incident Recall Printout, page 000001, Exhibit 2, *Declaration of Elaine Pascua*, CP 44; reproduced as Exhibit A to the *Declaration of John Muenster*, CP 121.

B. Factual Record re the Arrest of Jim Rogers.

1. The trooper's "odor of alcohol" claim

In his declaration, paragraph 5, the trooper claims that he observed “[a]n odor of alcohol emitting from [Mr. Rogers’] vehicle, as well as the odor of alcohol and marijuana emitting from Rogers’ person.” The trooper cited Mr. Rogers for driving with an open container of alcohol. *Sanders Declaration*, ¶10, CP 97. However, there is no record of any open container of alcohol being in Mr. Rogers’ truck.⁵

In his “narrative case report”, the trooper states: “I could smell a mild odor of alcohol emitting form [sic] the vehicle.”⁶

Mr. Rogers told the trooper that he had a drink earlier in the evening in Seattle. He shared a quart of microbrew with a fellow traveler before taking the ferry to return to Port Townsend.⁷ His two valid breath test

⁵ See *Declaration of John Muenster*, paragraph 5(a), CP118.

⁶ Trooper Sanders’ “Narrative Case Report”, p.2, Exhibit 2, *Declaration of Elaine Pascua*, CP 39.

⁷ See *Excerpts from the transcript of the James Rogers*

readings were .023 and .020, well below the legal limit of .08.⁸ These readings support and confirm Mr. Rogers' DOL testimony.

The trier of fact could find that the trooper's statement that he smelled an odor of alcohol before arresting Mr. Rogers is not accurate.

2. The trooper's "odor of marijuana" claim

As noted above, the trooper claims that he smelled an odor of marijuana "emitting" from Mr. Rogers' person. No marijuana was observed. According to his "narrative case report", after he arrested Mr. Rogers, he collected a small amount of green vegetable matter from the floorboard and from "off the dashboard in front of the drives [sic] seat." Although the trooper claims that later this green vegetable matter was field tested, we have not located any documentation in the discovery to support this.⁹

DOL Administrative Hearing, attached as exhibit B to the *Declaration of John Muenster*, p. 5, 7, CP 124-125.

⁸ *Sanders Declaration*, page 2, ¶8, CP 96.

⁹ Trooper Sanders' "Narrative Case Report", p.2-3, Exhibit 2, *Declaration of Elaine Pascua*, CP39-40; *see Declaration of John Muenster*, ¶5(c), CP 118-119.

Prior to his arrest, when asked, Mr. Rogers reached down to the floorboard and picked up a rolled cigarette. He said “it’s just a cigarette”. There is no documentation that the cigarette was taken or preserved in evidence by Trooper Sanders.¹⁰

After the truck was impounded, it was towed to Port Townsend. The truck has an enclosed canopy and a covered compartment in the canopy floorboard where Mr. Rogers’ gym bag was located.¹¹ The tow driver says he could smell marijuana at the rear of the truck. He allegedly found a small can in a side pouch of a “jim bag”. He opened the can and found a pipe and what Trooper Ryan described as a “very small amount” of green vegetable matter inside. We have not located any documentation that the “very small amount” was tested to determine its identity.¹²

¹⁰ Trooper Sanders’ “Narrative Case Report”, p.2-3, Exhibit 2, *Declaration of Elaine Pascua*, CP 39-40.

¹¹ Seven pictures of the truck, taken after the incident but before Mr. Rogers’ death, are attached as Exhibit D to the *Declaration of John Muenster*, see CP 116-132.

¹² See Exhibit 2, *Declaration of Elaine Pascua*, filed herein, containing: (a) Trooper Sanders’ “Narrative Case Report”, p.2-3, CP 39-40; (b) Armstrong (tow driver)

The trier of fact could find that the trooper's statement that he smelled an odor of marijuana at the drivers' side door before arresting Mr. Rogers is not accurate. The trier of fact could also find that the trooper's claim in his declaration that Mr. Rogers "attempted to hide marijuana and drug paraphernalia" is not accurate.

3. Mr. Rogers passed the field tests.

In his declaration, the trooper claims that Mr. Rogers failed the field sobriety test. By contrast, Mr. Rogers testified at the DOL hearing that he performed the test to the best of his ability, and felt that he passed it.¹³

4. Other matters

The trooper agrees that when asked, Mr. Rogers provided the trooper with his license, registration, and proof of insurance. At the time of the stop, Mr. Rogers

statement, 6-25-2008, CP 33; and (c) Trooper Ryan supplemental report, CP 32.

¹³ *Sanders Declaration*, page 2, ¶5(d), CP 96; *see Excerpts from the transcript of the James Rogers DOL Administrative Hearing*, attached as exhibit B to the *Declaration of John Muenster*, p. 8, CP 126.

was represented by counsel in civil matters. He asked for a lawyer several times at the scene.¹⁴

V. SUMMARY JUDGMENT STANDARD

A court may grant summary judgment when, on the basis of the facts before it, a reasonable fact finder could reach only one conclusion. *See SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014). This court reviews orders for summary judgment de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). An appellate court considers all of the evidence presented to the trial court and “engages in the same inquiry as the trial court.” *Id.* Summary judgment is appropriate only “when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.* The moving party bears the burden of demonstrating there is no issue of material fact, and all facts and reasonable inferences therefrom must be viewed in the light most

¹⁴ See Exhibit 2, *Declaration of Elaine Pascua*, , containing: Trooper Sanders’ “Narrative Case Report”, p.2, CP 39; *see Excerpts from the transcript of the James Rogers DOL Administrative Hearing*, attached as exhibit B to the *Declaration of John Muenster*, p. 9, CP 127.

favorable to the nonmoving party. *See SentinelC3*, 181 Wn.2d at 140; *Folsom*, 135 Wn.2d at 663.

Kim v. Lakeside Adult Family Home, 185 Wash.2d 532, 547, 374 P.3d 121, 2016 Wash. LEXIS 585 (2016)

VI. GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING THE VALIDITY OF THE TRAFFIC STOP.

The first cause of action in our complaint alleges that Mr. Rogers was subjected to an unreasonable seizure in violation of the Fourth Amendment. The trooper pulled Mr. Rogers over without observing a traffic violation. This establishes liability under Title 42, United States Code, §1983.

An officer who stops a motorist without having observed a traffic violation violates the Fourth Amendment's prohibition against unreasonable seizures:

Under settled Fourth Amendment law, a traffic stop constitutes a seizure, and an officer must have reasonable suspicion before detaining a motorist. *See, e.g., Whren v. United States*, 517 U.S. 806, 809-10, 135 L.

Ed. 2d 89, 116 S. Ct. 1769 (1996) (stating that the "temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]" and therefore must not be unreasonable); *United States v. Colin*, 314 F.3d 439, 442 (9th Cir. 2002) (stating that an investigatory traffic stop requires reasonable suspicion). If, as Bingham alleges, Schreiber pulled him over without having observed any traffic violation, Schreiber's conduct did violate a constitutional right.

Bingham v. City of Manhattan Beach, 341 F.3d 939, 946 (9th Cir. 2003).

A. Taking the trooper's account at face value, the trier of fact could find that he did not observe a traffic violation.

In its motion, the state claims that the trooper could stop Mr. Rogers "for "failing to maintain lane travel", citing RCW 46.61.100 and RCW 46.61.140(1). State's motion, p. 3, CP 62. On this record, the trier of fact could conclude that the trooper did not observe a traffic violation.

1. **No violation of RCW 46.61.140(1).**

The trooper says Mr. Rogers drove “onto the centerline” twice and drifted to the right. He does not claim that Mr. Rogers crossed the centerline. He does not claim that Mr. Rogers’ tires ever touched the left side of the roadway.

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

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

(1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

RCW 46.61.140(1).

The language requiring a driver to remain exclusively in a single lane “as nearly as practicable” indicates “an express legislative intent to avoid penalizing brief, momentary, and minor deviations of

lane lines.” *State v. Prado*, 145 Wash. App. 646; 186 P.3d 1186 (2008). In *Prado*, the driver went beyond driving onto the center line—he crossed the center line by approximately two tire widths. 145 Wash. App. at 647. The Court held that the stop was unlawful:

We believe the legislature's use of the language “as nearly as practicable” demonstrates a recognition that brief incursions over the lane lines will happen. . . . A vehicle crossing over the line for one second by two tire widths on an exit lane does not justify a belief that the vehicle was operated unlawfully. This stop was unlawful, and thus we need not undertake a review of whether the search was reasonable. This is particularly so as the officer testified that there was no other traffic present and no danger posed to other vehicles.

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

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

But our *Prado* decision did not

depend on the fact that the driver crossed the lane line only once. Rather, we used a totality of the circumstances analysis that included factors such as other traffic present and the danger posed to other vehicles. This represents a more sophisticated analysis than a simple tally of the number of times a tire crossed a line. The out-of-state cases we found persuasive included factual scenarios involving more than one incursion, which courts still found insufficient to justify a stop under statutes similar to Washington's. We likewise held that “brief incursions”—not necessarily a single incursion—“will happen” and do not violate the lane travel statute.

. . . Because the stop of Jones's vehicle was not lawful under RCW 46.61.140(1) and *Prado*, the trial court erred by not suppressing the evidence of the firearm [seized after the stop took place]. We reverse and remand.

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

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

2. No violation of RCW 46.61.100(1).

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

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

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

The plain language of the statute does not prohibit driving “onto the center line.” Mr. Rogers did not drive on the left half of the highway. Here, the trier of fact could conclude that the trooper did not observe a

violation of RCW 46.61.100(1). The stop was unlawful under the Fourth Amendment.

B. On this record, the trier of fact could infer that the trooper pulled Mr. Rogers over within seconds of getting behind him, without observing any driving of significance.

In deciding the State's summary judgment motion, the Court views all facts and reasonable inferences therefrom in the light most favorable to Mr. Rogers, the non-moving party. From the record, the trier of fact could infer that the trooper pulled behind Mr. Rogers and stopped him at 21:48 hours at milepost 5 on State Highway 19, all within seconds. The trier of fact can infer that the trooper did not observe any driving by Mr. Rogers to speak of before he pulled him over.

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

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

reasonably conclude that the officers lied.

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

The jury is not required to take the trooper at face value. The record suggests the trooper's stop at milepost 5 was immediate, made without observing any driving by Mr. Rogers. The jurors could infer he made the driving assertions up. *See Cruz v. Anaheim, supra*. This inference is supported by the fact that other assertions by the trooper about the arrest, discussed above, appear to be inaccurate.

Regarding the traffic stop, the State has not met its burden of proving that there is no issue of material fact. *See Kim v. Lakeside Adult Family Home, supra*. Summary judgment on Mr. Rogers' unreasonable seizure cause of action should be reversed.

VII. GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING PROBABLE CAUSE TO ARREST.

The second cause of action in our complaint is that Mr. Rogers was arrested without probable cause. An

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

There are genuine issues of material fact regarding probable cause for Mr. Rogers’ arrest. A reasonable jury could infer the following:

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

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

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

In short, a reasonable jury could find that Mr. Rogers was arrested without probable cause. The State has not met its burden of proving that there is no issue of material fact. *See Kim v. Lakeside Adult Family Home, supra.* Summary judgment on Mr. Rogers' arrest without probable cause claim under §1983 should be reversed.

**VIII. GENUINE ISSUES OF MATERIAL FACT
EXIST REGARDING THE TRESPASS,
NEGLIGENCE AND CONVERSION CLAIMS
AGAINST THE STATE.**

Under plaintiff's facts, the traffic stop and the arrest of Mr. Rogers were invalid. If so, then the State is liable in trespass and negligence for the resulting seizure of Mr. Rogers. The trooper had a duty not to stop Mr. Rogers

without observing a traffic violation. The trooper had a duty to Mr. Rogers not to arrest him without probable cause. Under plaintiff's facts, the trooper breached those duties. The State is liable under the doctrine of *respondeat superior*. See RCW 4.92.090; see *LaPlant v. Snohomish County*, 162 Wash.App. 476, 479, 271 P.3d 254 (Division One, 2011)(deputy negligence, respondeat superior); see also *Brutsche v. City of Kent*, 164 Wash.2d 664, 673-676, 193 P.3d 110 (2008) (an unreasonable seizure by police is actionable in trespass).

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

IX. THE TRANSCRIPT OF MR. ROGERS' SWORN TESTIMONY GIVEN IN A FORMAL HEARING BEFORE A STATE DEPARTMENT OF LICENSING HEARING OFFICER SHOULD BE CONSIDERED ON SUMMARY JUDGMENT.

After the trial court granted summary judgment,

Plaintiff moved to reconsider pursuant to CR 59(a)(7) and (9). CP 169-175, 176-225. We challenged the trial court's oral decision to disregard the transcript of Mr. Rogers' sworn testimony about this incident given in a formal hearing before a state Department of Licensing Hearing Officer. Reconsideration was denied. CP 231, 232-235.

A. **Operative Facts.** The following facts should be considered¹⁵:

(1) The director of the Department of Licensing, Liz Luce, appointed Jennifer West to represent her as the authorized Hearing Officer in the matter of James C. Rogers, Petitioner, v. State of Washington/Department of Licensing, Respondent. See Rogers v. State, Order of Dismissal, attached as Exhibit A to the *Declaration of John R. Muenster in support of Motion for Reconsideration*, CP 180.

(2) Ms West conducted the hearing regarding

¹⁵ Facts recited in this motion are based on information and documents submitted in the *Declaration of John R. Muenster with documents in support of Plaintiff's response to the defense summary judgment motion*, CP 116-132, and the *Declaration of John R. Muenster with documents in support of Plaintiff's motion for reconsideration*, CP 176-225.

Mr. Rogers on October 30, 2008. Ibid.

(3) Mr. Rogers was administered the oath by Ms. West. *Hearing transcript*, page three, CP 190. He testified at the hearing. CP 193ff.

(4) As the representative of the Director of the State Department of Licensing, Ms. West had the opportunity to develop testimony from Mr. Rogers. CP 178, 214.

(5) At the hearing the State/Department of Licensing was the Respondent. CP 180. At the hearing, the State submitted Exhibit 1, the DUI Arrest report. CP 186.

(6) The State/Department of Licensing is represented by the Attorney General's office. That office represents the Department in challenges to license suspensions in the courts. The Attorney General's office had the opportunity to attend the hearing, introduce live testimony and develop testimony by cross-examining Mr. Rogers if it so chose. CP 178.

(7) In this civil action, the recording of the DOL hearing was obtained by plaintiff. It was duly transcribed. The transcript was provided by plaintiff to the State in discovery on or about October 12, 2015. The Attorney General's office, as counsel for the Department

of Licensing, had the opportunity to obtain the same recording from its client. CP 178.

(8) Undersigned counsel submitted the transcript under oath as a true copy of excerpts from the transcript of the hearing. See Exhibit B, Declaration of John Muenster with documents in support of plaintiff's response to defense summary judgment motion, CP 178.

(9) To the best of the undersigned's recollection, the State did not object to the form or content of the DOL hearing transcript we provided until the State filed its reply memorandum in support of its summary judgment motion, on or about May 25, 2016. CP 179.

(10) The DOL hearing has been transcribed by a court reporter. A copy is attached as Exhibit C to the *Declaration of John R. Muenster in support of the motion for reconsideration*, CP 183-225.

B. Legal Argument

At the summary judgment hearing, the Court stated that the DOL hearing transcript would not be considered because it was not certified by a court reporter. The Court also opined that the State was not a party to the DOL proceeding. We respectfully disagree with the

Court on both counts.

(1) **The former testimony rule.** Former testimony is an exception to the hearsay rule. The rule reads:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, *if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.*

ER 804(b)(1)(italics supplied).

(2) **No court reporter certification requirement.** The rule simply refers to “testimony” given by a witness at another hearing. We submitted a transcript of a hearing in which Mr. Rogers testified under oath before a duly-appointed State Hearing

Officer. Undersigned counsel certified under oath that the transcript excerpt attached to my declaration was a true copy. ¶3(b), CP 117.

Nothing in the rule requires more. There is no requirement that a court reporter certify the transcript of an administrative hearing. A LEXIS Washington search by undersigned counsel did not turn up any case which imposes such a requirement.

(3) **The state was a party.** The Department of Licensing is a part of the State government. It is clear from the DOL dismissal order, as well as Washington law and practice, that the State was a party to the DOL proceeding. It is also clear that the State was a “predecessor in interest” with the meaning of ER 804(b)(1).

(4) **The motive to develop testimony was similar.** Probable cause is an issue in the DOL hearing and also here. The Hearing Officer (an officer of the State)—and the attorney general’s office if it chose to send someone—had the opportunity to ask questions of Mr. Rogers, and a similar motive. His testimony covered the stop and ensuing arrest. “ ‘[S]imilar motive’ does not mean ‘identical motive.’ ” *United States v. Salerno*, 505 U.S. 317, 326, 112 S. Ct. 2503, 120 L. Ed. 2d 255 (1992) (Blackmun,

J., concurring), *cited in State v. DeSantiago*. 149 Wn.2d 402, 415, 68 P.3d 1065 (2003).

Reconsideration should be granted because the summary judgment decision is contrary to law. CR 59(a)(7). Reconsideration should also be granted because substantial justice has not been done. With regard to the DOL transcript, the trial court imposed what appears to be a court reporter certification requirement which is not required by the evidence rule. The order denying the motion to reconsider should be reversed.

X. CONCLUSION

The State has not met its burden of proving that there is no issue of material fact. *See Kim v. Lakeside Adult Family Home, supra*. The defense summary judgment motion should have been denied. The motion to reconsider should have been granted. The judgment should be reversed.

DATED this the 20th day of November, 2016.

Respectfully submitted,
MUENSTER & KOENIG

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Of Attorneys for the Estate of James Rogers

CERTIFICATE OF SERVICE

I certify that on or about the 20th day of November, 2016, I caused a true and correct copy of this document to be served on counsel of record via email and first class mail.

Dated this the 20th day of November, 2016.

S/ John R. Muenster
Attorney at Law