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COURT OF APPEALS
DIVISION II

2019 JAN -4 PM 1:03

STATE OF WASHINGTON

No. 51457-5-II

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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL KERNS, as the Personal Representative of the
ESTATE OF CHRISTOPHER KERNS,

Appellant,

v.

WASHINGTON STATE PATROL and STATE OF WASHINGTON,

Respondents.

APPELLANT'S OPENING BRIEF

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CR 56(c)19

COMES NOW Appellant, Michael Kerns, as the personal representative of the Estate of Christopher Kerns (“Kerns”), and hereby submits Appellant’s Opening Brief.

I. INTRODUCTION

This case concerns the improper dismissal on summary judgment of Kerns’ claims against the Washington State Patrol and its employee, Trooper Nash (“WSP” and “Trooper Nash”). Kerns was killed by Joseph Schaffer (“Schaffer”) when he struck Kerns as he drove through a red light into a marked crosswalk. Forty-three minutes before killing Kerns, Schaffer had been released by the WSP by Trooper Nash from the scene of another automobile accident where he was the at fault driver in a rear end collision. At that scene, Schaffer exhibited behaviors evidencing impairment, which were also identified as signs of impairment in WSP Trooper Nash’s training materials. These signs include Schaffer’s bad driving, which evidence lack of attention, lack of vigilance, and poor motor control skills. Additional signs include Schaffer’s errors on his witness statement, including signing in the wrong place, providing the wrong date, and writing illegibly. Diane Garvey (“Garvey”), who Schaffer hit, spoke with Schaffer at the scene and described him as “wired” and “strange”, feeling that he stood unusually close to her, did not apologize for the collision, stated, “I knew I was going to hit you,” and displayed glossy eyes and a strange, inappropriate grin and

had a “wired” affect. Garvey noted Trooper Nash would have had the opportunity to observe the same behavior in Schaffer as he too interacted with Schaffer and observed them together. Finally, Schaffer sat in the back of Trooper Nash’s patrol vehicle for several minutes when told by Trooper Nash return to Schaffer’s own car. These behaviors are all consistent with impairment and the results of Schaffer’s toxicology screen, conducted by the WSP’s own lab. (CP 320-321). This toxicology screen showed Schaffer had fatal levels of *both* benzodiazepines and opiates in his system. According to the unrebutted testimony of Kerns’ expert, it was possible to determine from the metabolites that Schaffer had such drugs in his system at the time of the first accident, and the effects of such quantities of drugs would be, and were, apparent during his interactions with Trooper Nash and consistent with behaviors Trooper Nash was trained to recognize as indicia of impairment. Despite this, Trooper Nash permitted the impaired Schaffer to leave the scene, resulting in Kerns’ death forty-three minutes later.

II. ASSIGNMENT OF ERROR AND ISSUES RELATING TO ASSIGNMENT OF ERROR

A. Kerns make the following assignment of error:

1. That the trial court erroneously granted summary judgment where issues of material fact were presented;

2. That the trial court erroneously granted summary judgment by failing to take all inferences in light of the non-moving party as evidenced by the trial court's weighing of evidence and analysis of evidence and inferences not supported by the movant's pleadings or declarations.
3. That the trial court erroneously granted summary judgment by applying the public duty doctrine, which is inapplicable to the instant claims, and/or where an exception applies, and where there are disputed facts barring application of the public duty doctrine on summary judgment.
4. That the trial court erroneously granted summary judgment pursuant to the public duty doctrine, which doctrine has been essentially abrogated by the existence of exceptions exceeding the rule and no public policy reasons support its continued application.

B. Issues relating to the assignment of error:

1. Whether summary judgment was proper where issues of material fact were presented and un rebutted evidence showed that Schaffer was impaired at the time he interacted with Washington State Patrolman, Trooper Nash.

2. Whether summary judgment was proper where the public duty doctrine was not applicable and/or exceptions apply to the factual and legal posture of the case and where disputed issues of material fact also preclude application of the public duty doctrine on summary judgment.
3. Whether the public duty doctrine should be abrogated or limited based on the undesirable results of shielding government litigants from traditional considerations applicable to all other tort defendants, which does not serve the predominate public policy of deciding cases on their merits and subjecting tort litigants to liability where traditional elements of duty, breach and foreseeability are evident.

III. STATEMENT OF THE CASE

A. Factual Background.

Joseph Schaffer killed Christopher Kerns in an accident forty three minutes after he was released from the scene of a prior accident by the Washington State Patrol, where he was also the at fault driver. (CP 167, 205, 301). Schaffer told officers at the scene of Kerns death that he had taken oxytocin, OxyContin, and benzodiazepines previously that day. (CP 163-164). In addition, Schaffer's blood was drawn after the second accident

Testing of Schaffer's blood revealed that Schaffer had the following drugs in his system:

- .22 mg/L of Oxycodone
- .07 mg/L of Diazepam
- .01 mg/L of Nordiazepam
- .01 mg/L of Clonazepam
- .25 mg/L of Aprazam
- .01 mg/L of Apha hydrozxl alprazolam
- 7-aminoclonazepam

(CP 131). These results were obtained by the Washington State Toxicology Lab's examination and establish that Schaffer was impaired at the time of his interaction with the WSP at the scene of the first accident. (CP 133-134). This evidence was not rebutted at summary judgment and, if believed by a jury, provide evidence that Schaffer was impaired when contacted by Trooper Nash. (CP 133-134). Kerns' expert, Dr. Janci Lindsay, forensic toxicologist, reviewed the results of Schaffer's blood test and provided unrebutted testimony that Schaffer was impaired at the time of the first accident. (CP 133-134). Dr. Lindsay further opined that Schaffer had taken drugs prior to his interaction with Trooper Nash as evidenced by the presence of metabolites (which appear only after a drug has been metabolized by the body for a certain amount of time, and result from the body breaking down the drug) in Schaffer's system, Schaffer's behavior at the scene of the JBLM accident, and Schaffer's own admissions of drug dependence. (CP 132-134). At summary

judgment, this testimony was not rebutted by the WSP creating unsurmountable issues of material fact.

1. Joseph Schaffer Exhibited Evidence of Impairment When Interacting with Washington State Patrol Trooper Nash.

On April 17, 2014, Schaffer left his home in Olympia around 9:00 a.m. or 9:30 a.m. to drive to a medical appointment in Seattle. (CP 58). Schaffer was driving to see his psychiatrist, who prescribed benzodiazepines for him. (CP 45). After his appointment, Schaffer drove toward his home in Olympia on southbound Interstate 5 and found himself in stop-and-go traffic around Fife. (CP 166). The congestion continued for approximately twenty miles, during which Schaffer testified that he kept having “near misses.” (CP 166). Schaffer eventually collided with Garvey’s rear bumper near Joint Base Lewis McChord (“JBLM”). (CP 166). Garvey and Schaffer exited Interstate 5 at the JBLM exit to exchange information and report the incident to the authorities. (CP 177). After they stopped and exited their cars to speak, Garvey noted that Schaffer came uncomfortably close to her, stopping only two feet away from Garvey. (CP 178 - 179). Garvey described this interaction:

A. [Schaffer] came up probably two feet away from me.

Q. Okay.

A. And he had – like, I was looking at my car, and he just had a huge grin on his face. Like that I remember very clearly because I thought it was very odd behavior.

[....]

... he had a big smile on his face. And I just was like, why is this guy who hit me like – I think I was visibly upset. Like, I was like – you know, just upsetting. And he had a big smile on his face, and his eyes were like, very big.

And I remember just being, like – feeling, like, why – like, no one, even a friend, wouldn't, like, necessarily step that close to you. Like two feet away, that's pretty close for a stranger to come up to you...

[...]

Q. When you say his eyes were big, was it, you know, like they were -- strained open, or do you mean the pupils?

A. Well, definitely they were open wide, but I can't remember the pupils specifically, I just remember, like, looking at him and feeling like – I didn't – like, he did not seem drunk to me. He wasn't, like, slurring his words or stumbling around or anything. He seemed, like, wired or something, like, you know --

Q. So –

A. Or maybe, honestly, like, I thought maybe he had some sort of mental issues or he was hyped up on – I don't know -- or just a very strange person.

(CP 178 - 179). Garvey felt this behavior was strange, given that Schaffer was a stranger to Garvey, and Schaffer had just rear-ended her vehicle. (CP 179). Garvey also testified that Schaffer's "huge grin" and "wired" demeanor was peculiar and insensitive given the circumstances. (CP 179 - 180). This sort of behavior, such as insensitive statements, failure to show remorse for one's actions, and failure to respect personal space are all signs of impairment according to Kerns' expert's testimony and WSP's own training materials. (CP 133, 253, 280). Trooper Nash was in a position to observe Garvey's interactions with Schaffer and did observe his behavior for himself. Garvey

also included Schaffer's unusual statements in her witness statement, which was completed at the scene. (CP 108, 215-221).

Trooper Nash arrived at the scene minutes after Garvey and Schaffer exited Interstate 5. (CP 196). Upon his arrival, Trooper Nash spoke to both parties and directed Schaffer and Garvey to return to their respective vehicles to complete witness statements. (CP 197, 200). In response to Trooper Nash's direction, Schaffer did not return to his own vehicle, but instead went and sat in the backseat of Trooper Nash's patrol vehicle until Trooper Nash again contacted him. (CP 198). After some minutes, Trooper Nash corrected Schaffer and directed him back to his own car. (CP 198). Contrary to Trooper Nash's declaration testimony that such a mistake is common, when deposed Trooper Nash admitted in his deposition that this had happened only a few times in his sixteen year career as a trooper and conceded that he felt Schaffer's behavior was unusual. (CP 199). Kerns' expert also testified that getting into a patrol vehicle without law enforcement direction is extremely unusual and troubling. (CP 152). Schaffer's confusion and failure to follow simple directions are additional clear signs of impairment, which Trooper Nash personally observed. (CP 133). Further, the finder of fact could infer that this behavior is an admission of wrongdoing.

Trooper Nash testified in accord with the dispatch records that he was on the scene for approximately thirty-seven minutes, and he remained in his

vehicle for much of that time. (CP 202 – 203, 223 - 225). As a result, Trooper Nash did not take advantage of the opportunity to follow up on Schaffer’s signs of impairment, such as to observe Schaffer complete his witness forms or interact with the JBLM fire personnel who appeared at the scene.¹ (CP 202). Trooper Nash also failed to review Schaffer and Garvey’s witness forms before he left the scene. (CP 108). In failing to do so, Trooper Nash neglected to recognize that in her witness statement, Garvey wrote that when he approached her, Schaffer told her, “I was following you for so long – I knew I would hit you. - Exact quote.” (CP 108, 215-221). Trooper Nash scanned the witness statement upon which Schaffer had misspelled routine words, wrote illegibly, wrote the wrong date, and signed the wrong part of the document. (CP 172 - 173). In addition, Trooper Nash could not recall how long he conversed with Schaffer, but conceded he had interacted with Schaffer. (CP 204). Because he sat in his car during the roadside encounter, Trooper Nash also failed to use the opportunity to further observe Schaffer’s speech and motor skills, despite his knowledge of these tests and protocol, and did not ask Schaffer to remove his spectacles or ask him any questions about his destination, health, or medications. (CP 194, 209-210).

¹ Fire and ambulance did not examine Schaffer, he merely reported he was “fine.” (Transcript 13:19-14:2).

Trooper Nash failed to take advantage of an important phase of driving under the influence detection in accord with this training: personal contact. (CP 254-256). Because Trooper Nash remained in his vehicle for the majority of the encounter at JBLM, he also failed to observe the additional behavioral indicators of impairment Schaffer displayed. (CP 209-210). Despite it being part of his training, Trooper Nash failed in his encounter with Schaffer to ask basic questions or observe Schaffer despite Schaffer's already present indicia of impairment. Such interactions are appropriate where a driver is at fault in a collision, exhibits an altered affect with a victim and law enforcement, and demonstrates confusion with basic instructions like, "return to your car," and in completing a witness statement.

Regardless, the known aspects of Trooper Nash's interaction with Schaffer demonstrate evidence of impairment which Trooper Nash was trained to identify and understand the importance. Further, Trooper Nash had additional tools to confirm concerns of impairment, such as follow up with questions and requests to perform certain tasks, like retrieve registration and license, or fill out a form, to observe motor skills, and ability to comprehend instructions. (CP 255). Trooper Nash failed to respond appropriately to Schaffer's impairment as evidenced by Schaffer and failed to collect additional evidence of Schaffer's impairment. (CP 208-209).

Despite Schaffer's poor driving, odd behavior, and confusion, Trooper Nash did not administer any of the routine field sobriety tests or ask any of the routine questions that would have provided additional evidence of Schaffer's impairment. (CP 209). As a sixteen-year veteran of the WSP, Trooper Nash has undergone extensive training in recognizing and investigating impaired drivers. (CP 185-186, 227-238). Trooper Nash has participated in multiple training sessions devoted to recognition and processing of suspects who are driving while impaired, including prescription impairment, and is trained in all phases of detection of impaired drivers and field sobriety tests. (CP 187-189). Specifically, the Horizontal Gaze Nystagmus ("HGN") is identified in Trooper Nash's trainings as strong evidence of both alcohol and drug impairment, which is also impossible to fake the results. (CP 194-195). Trooper Nash testified that he is familiar with HGN, HGN is the most reliable of the field sobriety tests for which he was trained, and an HGN only takes seconds to administer. (CP 193-194). Trooper Nash, through his testimony, confirmed that while the HGN was key in identifying drug impairment, he did not administer such test. (CP 194-195). Trooper Nash further testified:

- Q. So again, it could be possible that a driver exhibiting this behavior is impaired by drugs or alcohol, it could be possible that there's a benign explanation, and it could be possible that they have medical or vehicle problems, correct?
- A. Correct, ma'am.
- Q. And it would be incumbent upon the officer to rule out those other potential issues?

- A. Rule out what?
- Q. If the officer observes these behaviors and chooses to stop the driver, it would be incumbent upon the officer to identify whether it's a vehicle problem, a medical problem, or the driver's impaired?
- A. Correct.
[...]
- Q. You also indicated that you didn't do additional you didn't ask certain – certain questions or perform the HGN with Mr. Schaffer because you concluded he was not impaired. Is that an accurate statement of your answer to Mr. Throgmorton's question?
- A. Correct, ma'am.
[...]
- Q. So the tools we went over – Horizontal Eye Nystagmus, additional questions – is it fair to say that those tools are available to confirm an existing suspicion that you have an impaired driver? That's one circumstances you would use those; correct?
- A. Yes, ma'am. Again, like I said before, there are other things you take into consideration. You use all your senses. Your sight, your smell, and your hearing. What they say to you. What they – all of those are taken into consideration that leads to that, ma'am.

(CP 191–92, 209, 210–211). In spite of Trooper Nash's admitted familiarity and experience with all phases of detection of driving while impaired, and Schaffer's indicia of impairment, Trooper Nash permitted Schaffer to leave the scene and kill Kerns.

Specifically, pursuant to Trooper Nash's ARIDE² training, conducted by NHTSA³, the most common and reliable behaviors evidencing an impaired driver are problems in maintaining lane position, speed and braking problems,

² Advanced Roadside Impaired Driving Enforcement

³ National Highway Traffic Safety Administration

and judgment problems, all of which Schaffer exhibited and admitted to, stating to Garvey, “ I was following you for so long. . . I knew I would hit you.” (CP 137, 240-248, 252). A unimpaired person, facing an accident, might move to a slower lane, increase following distance, get off the roadway, rest, or any number of behaviors demonstrating proper judgment. Schaffer was also cited at the scene for following too closely, further evidencing Trooper Nash’s knowledge of Schaffer’s bad driving. (CP 137). Despite his acknowledged responsibility and learned skills to identify impaired drivers, according to the un rebutted testimony of Kerns’ expert, Trooper Nash ignored the evidence of Schaffer’s impairment and permitted him to return to the roadway. “Despite his extensive training and daily contact with impaired drivers, Trooper Nash cited and released Mr. Schaffer without determining, even though time and circumstances permitted him Nash [sic] to administer an SFST, why Mr. Schaffer was at fault.” (CP 152) (emphasis in original).

WSP’s regulation manual explicitly requires officers to investigate and document collisions resulting in injury. (CP 297-299). The manual also identifies Schaffer’s behavior such as confusion, trouble following direction, and altered affect as indicia of impairment. (CP 297-299). Kerns’ expert, Officer Stanley Kephart, opined regarding Trooper Nash’s conduct that, “at no time during his contact did Trooper Nash demonstrate that he was curious or concerned at all about the behavior and conduct of Schaffer, the at fault

driver.” (CP 151). Trooper Nash failed to fulfill the duties required of him as a trooper and thus failed to respond appropriately to Schaffer’s impairment. “Trooper Nash’s actions, behavior, and conduct contradicted his department’s service mission and policy, his extensive training, and the expectation of performance for a veteran trooper of his years of service.” (CP 152).

2. Schaffer Killed Kerns 43 Minutes After he was Released from the Scene by Trooper Nash.

Approximately forty-three minutes after Trooper Nash encountered Schaffer at the JBLM scene, Schaffer ran a red light at the intersection of River Road and North Meridian Avenue in Puyallup, Washington. (CP 130, 301). As he travelled through the intersection, Schaffer struck Kerns in the crosswalk, killing him. (CP 155-156, 301). After Schaffer struck Kerns, Schaffer travelled into the Korum Ford parking lot, where he struck two more vehicles. (CP 155).

Korum employee Mike Parks (“Parks”) observed the accident that killed Kerns and Schaffer himself. (CP 155). Parks observed Schaffer braked only briefly as Schaffer struck Kerns, then appeared to accelerate as he swerved into the Korum parking lot. (CP 155). When Schaffer’s vehicle came to a rest, Parks observed that Schaffer took several minutes to exit the vehicle through the passenger side door. (CP 156). Parks immediately noticed that as he exited the vehicle, Schaffer was stumbling and having difficulty walking.

(CP 156). Parks spoke to Schaffer after he exited the vehicle and noted that Schaffer was slurring his words. (CP 156). Parks followed Schaffer into the Korum Ford restroom. (CP 156). During that time, Schaffer was trying to call his wife, although he could not recall her number, nor could he operate his phone. (CP 156). Parks ultimately called Schaffer's wife for him, advising her that Schaffer had killed someone, and gave her the address of Korum Ford. (CP 156). Based on his observations, Parks concluded that Schaffer was impaired by some kind of medication and he did not believe he was impaired by anything he could have taken at the scene due to the timing of his observations. (CP 156).

Officer Adam Culp ("Officer Culp") of the Puyallup Police Department arrived at the scene, and was advised by a firefighter who had attended to Schaffer, that Schaffer "seemed a little out of it, and was having a hard time keeping his head up as he spoke." (CP 302). The firefighter also advised Officer Culp that he could not smell any intoxicants on Schaffer but felt he may be under the influence of some kind of drug. (CP 302). Officer Culp spoke to Schaffer directly and noted that Schaffer seemed distracted and spoke with slow, semi-slurred speech. (CP 302). Officer Culp asked Schaffer what he had done since his doctor's appointment, but Schaffer was unable to account for the seven hours since he had left his doctor's office. (CP 302). As Schaffer conversed with Officer Culp, Schaffer asked for a piece of paper.

(CP 302). Schaffer then began to list all the medications he was currently taking. (CP 302). In his deposition, Schaffer further testified:

Q. I'll represent to you that this is a document that you completed at the site of the accident on Meridian telling the officer all of the drugs that you had taken and your dosage.

A. Uh-huh.

Q. So you reported to the officer the date of the accident that you had taken Protonix?

A. Yes.

Q. Oxycodone?

A. Mm-hmm.

Q. OxyContin?

A. Mm-hmm.

Q. Seroquel?

A. The Seroquel I wouldn't have taken, no.

Q. Okay. So you're stating, when you – when you completed this for the medications that you were on, that was an error?

A. Oh yeah. I was higher than a kite by then.

(CP 163-164).

Schaffer's blood was drawn at the hospital. Subsequent testing of his blood revealed that Schaffer had the following drugs in his system:

- .22 mg/L of Oxycodone
- .07 mg/L of Diazepam
- .01 mg/L of Nordiazepam
- 01 mg/L of Clonazepam
- .25 mg/L of Aprazam
- .01 mg/L of Apha hydrozxl alprazolam
- 7-aminoclonazepam

(CP 131). The results of the toxicology report conclusively establish that Schaffer was significantly impaired at the time of the JBLM accident, and if believed by a jury, establish that Schaffer was impaired when he encountered

Trooper Nash. (CP 133-134). Dr. Lindsay reviewed the results of Schaffer's blood test, and concluded that Schaffer was impaired when he encountered Trooper Nash based on the presence of metabolites in Schaffer's system and that such impairment would be evident through a number of behaviors. (CP 132-134). Testimony from Garvey and Trooper Nash show that Schaffer actually exhibited the behaviors identified by Dr. Lindsay, which she concluded would occur after ingesting the drugs found in Schaffer's system. The levels of the toxicology report show fatal levels of benzodiazepines *and* fatal levels of opiates. (CP 131). Dr. Lindsay's testimony also rebutted Schaffer's contention that he only took additional doses of his medication after the fatal collision, opining that this statement is wholly inconsistent with the tremendous quantity of drugs in Schaffer's system, the presence of metabolites of the drugs (which appear only after the body has been breaking down the drug for some time), in Schaffer's system, Schaffer's behavior at the scene of the JBLM accident, and Schaffer's own admissions of drug dependence, use, and addiction. (CP 132-134).

Garvey's observations and Dr. Lindsay's conclusions are also consistent with Schaffer's admissions at his sentencing hearing. On November 21, 2014, Schaffer pleaded guilty to vehicular homicide and was sentenced to sixty months in prison for Kerns' death. (CP 326). Schaffer wrote a letter to the sentencing judge, Judge Cuthbertson. (CP 325). In his

letter, Schaffer admits to losing consciousness before striking Kerns, admits to being impaired, admits to losing track of the drugs he was taking that day, and admits to having a substance abuse problem. (CP 328 - 329). In his letter, Schaffer contends that he was lost when he struck Kerns, although he later testified that he has travelled the stretch of Interstate 5 between Seattle and Olympia countless times. (CP 168, 322).

Schaffer further admitted in his deposition that he was an addict, and testified unequivocally that he had been taking narcotics for over sixteen years, would order drugs from the internet, had failed at rehab for drug use, and had crossed state lines in order to obtain opiates and benzodiazepines. (CP 165, 169). This testimony establishes that Schaffer consistently took drugs at a level that would result in withdrawals if not available, which he also admitted at the scene of Kerns' death. (CP 133, 318). This testimony also rebuts the assertion that Schaffer was not impaired at the time he interacted with Trooper Nash. If believed by a jury, such testimony, including the testimony of forensic toxicologist Dr. Lindsay, establish that Schaffer was impaired when he collided with Garvey, and that Trooper Nash released an impaired driver back onto the highway, foreseeably resulting in the collision that killed Kerns.

B. Procedural History

The current action was filed on March 23, 2016 by Michael Kerns, Christopher Kerns' father and the personal representative of Kerns' estate.

After the trial court granted a continuance of the trial date, Respondent filed its Motion for Summary Judgment on September 1, 2017. The trial court heard Respondent’s Motion on October 27, 2017, and despite calling it an “extraordinarily close call,” the trial court granted summary judgment in favor of the Respondent. (Transcript 33:22–34:24).

At summary judgment, Respondent also brought an untimely motion to strike certain documents on which the Appellant relied in its Response to Summary Judgment, including its own toxicology report. (CP 335-339). Such motion was filed outside of the time parameters set by Pierce County Local Rule 7(a)(3)(A), but the documents were admissible through exceptions to the hearsay rule and the rules governing experts. (CP 363–368). Regardless, the trial court did appear to consider the evidence which Respondent sought to strike. This appeal timely followed.

IV. ARGUMENT

A. Standard of Review

Summary judgment is only proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c), Hontz v. State, 105 Wash.2d 302, 311, 714 P.2d 1176 (1986), citing Hartley v. State, 103 Wash. 2d 768, 774, 698 P.2d 77 (1985). An appeal

from an order granting summary judgment is reviewed de novo, with the Court of Appeals engaging in the same inquiry as the trial court. Brouillet v. Cowles Pub. Co., 114 Wash.2d 788, 791 P.2d 526 (1990). The Court of Appeals must reconsider both the law and facts. Redding v. Virginia Mason Medical Center, 75 Wash. App. 424, 878 P.2d 483 (1994).

The purpose of summary judgment is to avoid a useless trial. A trial is not useless, and is in fact absolutely necessary, where there is genuine issue as to any material fact. Barber v. Bankers Life & Cas. Co., 81 Wash.2d 140, 144, 500 P.2d 88 (1972). A fact is material if the outcome of the litigation depends on it. Balise v. Underwood, 62 Wash.2d 195, 199, 381 P.2d 966 (1963). Furthermore, “even if the basic facts are not in dispute, if the facts are subject to reasonable conflicting inferences, summary judgment is improper.” Kelley v. Tonda, 198 Wash. App. 303, 310–11, 393 P.3d 824 (2017), quoting Southside Tabernacle v. Pentecostal Church of God, Pac. Nw. Dist., Inc., 32 Wash. App. 814, 821, 650 P.2d 231 (1982). The Court of Appeals must view the facts and all reasonable inferences therefrom in the light most favorable to the non-moving party. Kelley, 198 Wash. App. at 310, citing Holmquist v. King County, 182 Wash. App. 200, 207, 328 P.3d 1000 (2014).

B. Summary Judgment is Not Proper Where there are Genuine Issues of Material Fact and Credibility.

At summary judgment, numerous issues of material fact were presented. The sole evidence that Schaffer was *not* impaired when he encountered Trooper Nash, was Trooper Nash's own self-serving comments. (CP 209). A jury could determine that such comments are not entitled to credence when weighed against contrary pieces of evidence. This evidence includes the fact that Schaffer was the at-fault driver in the prior accident with Garvey. (CP 167, 205). Schaffer also made unusual statements at the scene, i.e., "I knew I would hit you" and acted strangely by displaying a "wired" appearance, standing too closely to Garvey, and behaving strangely. (178-180, 206). Schaffer also evidenced confusion by getting into Trooper Nash's patrol vehicle when told to return to his own vehicle. (CP 198). Finally, there is unrebutted medical evidence that Schaffer was impaired in the form of WSP's toxicology screen and Dr. Lindsay's unrebutted analysis of the screen. (CP 133-134).

When plaintiff's counsel argued the import of what Garvey perceived during her interaction with Schaffer at the JBLM scene, the court seemingly dismissed the significance of Garvey's observations, stating 'Well, what did she see other than the fact that you said she thought he was high or mentally ill? When was that? Was that after he contacted her or

before the police arrived? Was that something she thought of after, ‘Hey, that guy might have been mentally ill or high?’” (Transcript 22:25-26:5). Such statements demonstrate that the court failed to take inferences in favor of the non-moving party, further, such questions were answered by Garvey, who reported she thought Schaffer’s behavior was unusual at the time of the actual collision. (CP 179). A jury, hearing the same evidence could easily conclude that where Schaffer’s unusual behavior was apparent to a lay individual, after mere moments of interaction, it would certainly be obvious to a trained veteran of the WSP. Kelley, 198 Wash. App. at 310–11. Further, Schaffer’s behavior as evidence by Garvey’s observations, was also cumulative of the already exhibited bad driving and attendant judgment errors.

However, the trial court, in granting Respondent’s Motion for Summary Judgment, stated “And I don’t think you can say ipso facto because somebody hit someone else on the road then you have to immediately check for signs of intoxication that are not overt because there is no probable cause to do that. You just have a crash, and that’s it.” (Transcript 34:5-9). This statement demonstrates that the trial court again weighed the evidence and gave the initial collision little weight. The weight given to these facts are the province of the jury. This statement characterizes the collision as the sole fact available to Trooper Nash and

ignores that the significance of such facts as outlined in WSP's training materials. Specifically, WSP's own training materials provide that bad driving is considered significant evidence of impairment, which Trooper Nash conceded was training he had received. (CP 252-253). Trooper Nash also had additional evidence of impairment beyond the collision, including the statements to Garvey, Schaffer's affect, the appearance of his eyes, which Garvey noted, Schaffer's confusion in sitting in the back of a patrol car, and Schaffer's incomplete and confusing completion of the witness statement. (CP 172-173, 179-180, 198, 206). On such evidence a jury could also conclude that Schaffer's conduct of going to the patrol vehicle is itself an admission of guilt. Cumulatively, these facts demonstrates an issue of material fact as to Trooper Nash's knowledge at the time he interacted with Schaffer. Further, such issue cannot be disposed of on summary judgment based solely on Trooper Nash's self-serving testimony. The jury is entitled to review the evidence and discount Trooper Nash's testimony as self-serving, not credible, and unpersuasive when weighed against the totality of the evidence.

C. Public Duty Doctrine Does Not Apply to the Instant Claim.

WSP argued that the public duty doctrine dictated dismissal on its motion for summary judgment. In order to establish that WSP owed Kerns a duty, Kerns must show that one of four exceptions to the public duty

doctrine applied: (1) legislative intent; (2) a failure to enforce; (3) the rescue doctrine; or (4) a special relationship. Cummins v. Lewis County, 156 Wn.2d 844, 133 P.3d 458 (2006). At summary judgment, WSP relied heavily on the case of Bailey v. Town of Forks, in support of dismissal. Bailey, 108 Wn.2d 262, 737 P.2d 1257 (1987). However, Bailey demonstrates that application of the failure to enforce exception is appropriate in this case as in Bailey. In Bailey, it was alleged that an officer had contact with an intoxicated individual who the officer permitted to get, “behind the wheel.” Bailey, 108 Wn.2d at 265. Dismissal on summary judgment was reversed by the appellate court who found that the plaintiff had satisfied all three elements of the failure to enforce exception.

In Bailey, it was alleged the officer was negligent in permitting an obviously intoxicated driver to drive. Id. The municipality argued that no duty of care was owed and that the public duty doctrine warranted dismissal. Id. at 266. Here, as in Bailey, the same duty is owed to prevent an impaired driver like Schaffer from operating a motor vehicle and permitting an impaired driver to drive is negligence. Bailey, 108 Wn.2d at 268; RCW 46.61.502. Further, here, as in Bailey, Kerns alleges that the officer had knowledge of impairment, but failed to take corrective action, which would have prevented the foreseeable consequences of letting an impaired driver resume driving. Bailey, 108 Wn.2d at 269. Further, Kerns, like others on

the roadway, are entitled to the protection of RCW 46.61.502, prohibiting the operation of motor vehicles where the driver is impaired, in order to avoid the foreseeable harm resulting from permitting such drivers to operate vehicles on the roadways. Id.

The disputed issue is Trooper Nash's contention that he did not know that Schaffer was impaired. Where disputed, such issues are within the province of a jury. As held in Waite v. Whatcom County, where the failure to enforce exception applies and involves a question of fact, specifically whether the governmental agent responsible for enforcing statutory requirements possessed actual knowledge of the statutory violation, our courts have held that the issue of knowledge is for the jury. Waite v. Whatcom County, 54 Wn. App. 682, 775 P.2d 967 (1989). In permitting the case to proceed to the jury and overturning the erroneous grant of summary judgment by the trial court in Waite, the appellate court held, "We conclude that the actual knowledge element of the failure to enforce exception is similarly a question of fact for the jury." Waite, 54 Wn. App. at 686. In its analysis, the court identified the same issues presented in this matter, "It is often difficult to supply direct evidence of actual knowledge [. . .] nevertheless circumstantial evidence may support a finding of actual knowledge." Waite, 54 Wn. App. at 686-87. In Waite, the government agent was considered sufficiently experienced to understand

the import of his observations, but failed to act. Here, like in Waite and Bailey, Trooper Nash was also sufficiently trained and experienced to understand the import of Schaffer's conduct in light of his training and experience. (CP 152-153). Again and significantly, conduct which resulted in the immediate conclusion by lay witness Garvey that Schaffer was "high". (CP 180). Further, and cumulatively, the import of Trooper Nash's observations is set forth throughout WSP's training materials. Such materials make Trooper Nash's assertions that there was nothing problematic about Schaffer's questionable. Like in Bailey and Waite, an issue of fact is presented, which the jury must determine, as to whether evidence shows that Trooper Nash identified Schaffer's impairment, but failed to take corrective action. Certainly, an issue of fact is created by Trooper Nash's actual knowledge of the accident, Schaffer's confusion in getting in his patrol car, and personal interactions with an individual described as "wired" and "off" by a lay person after approximately 120 seconds of contact. (CP 180). The significance of *exactly* these types of observations are conceded by Trooper Nash and outlined in WSP's training materials and the ARIDE training which Trooper Nash received. CP 252-256, 279-281). Clearly there is circumstantial evidence casting doubt upon Trooper Nash's knowledge which the trial court erroneously resolved based upon Trooper Nash's statements despite ample evidence calling into

question the veracity and weight of Trooper Nash's testimony. Like Waite, such matters fall squarely within the province of the jury and reversal of summary judgment is required.

D. Public Policy Should Not Protect a Defendant from the Foreseeable Consequences of its Negligence.

Public policy also does not support permitting the government to distance itself from liability based solely on Trooper Nash's statements. Prior to ruling that the public duty doctrine did not bar the suit, the Bailey Court observed:

One commentator has observed that in each case we have applied these basic tort principles-duty, foreseeability, and pertinent public policy-to find an exception to the public duty doctrine. We have almost universally found it unnecessary to invoke the public duty doctrine to bar a plaintiff's lawsuit.

Bailey, 108 Wn.2d at 266 (internal citations omitted). The court went on to note, "In effect, the public duty doctrine places in this court's hands the task of determining whether affording special protection to agents of the government violates the Legislature's directive, which requires governmental bodies to be liable in tort 'to the same extent as if they were a private person or corporation.'" Bailey, 108 Wn.2d at 267, quoting RCW 4.96.010; 090. In Bailey, the court permitted the case to go to the jury because the police officer was a governmental agent with a duty to enforce statutory requirements, who was empowered to enforce the same statute at

issue in this case, the prohibition against driving while impaired. Bailey, 108 Wn.2d at 270. The posture of Bailey permitted the case to proceed to the jury based on the plaintiff's *allegation* that the officer failed to take corrective action, despite possessing actual knowledge of statutory violations. Id. Bailey does not stand for the proposition that summary judgment is warranted where an officer simply denies knowledge of impairment in the face of contrary evidence.

Here, as in Bailey, the alleged statutory violation is driving in an impaired state. Id. Further, here, as in Bailey, it is *alleged* that the impairment of the driver was apparent to the officer. There is no recitation as to what evidence was offered to show that the driver in Bailey was obviously impaired, the court merely stated, "according to Ms. Bailey, the officer allowed Medley to take the wheel of the pickup truck and drive away even though Medley's intoxicated state was apparent." Bailey, 108 Wn.2d at 269. The same allegations are made in this case. The fact that, unlike in Bailey, the WSP disputes that Schaffer was impaired does not dictate summary judgment is proper under the public duty doctrine or Bailey. Rather, it is for the jury to hear the evidence and determine if WSP violated its duty to the public when it permitted an impaired driver to operate a vehicle, resulting in the foreseeable death of Kerns. Waite, 54 Wn. App. 682.

While in this case there is ample evidence that Schaffer was impaired when he was in contact with Trooper Nash, the Bailey court permitted the case to proceed based solely on the allegation of Ms. Bailey that the driver's impairment was apparent to the officer. Here, WSP makes much of the fact that Trooper Nash asserts that Schaffer was not impaired. (Transcript 13:11-14:2). This argument is problematic in several respects. First, Trooper Nash's self-serving assertion that Schaffer was not impaired is not sufficient to obtain summary judgment. Summary judgment should only follow if there is no reliable evidence creating an issue of material fact as to Trooper Nash's alleged observations and knowledge of facts showing impairment. That is not the case here where Trooper Nash's self-serving statements are contradicted by observable facts of impairment: 1) Schaffer's bad driving and statements about his driving, 2) Garvey's observations of Schaffer which include a "wired" appearance, unusual affect, and strange statements which Trooper Nash observed and were included in Garvey's witness statement, 3) Schaffer's confusion in getting into the officer's car despite contrary instructions, and 4) numerous errors on his witness statement. (CP 167, 172-173, 178-180, 198, 205) Second, like in Bailey, it is known that Schaffer was impaired based upon WSP's own toxicology screen and the un rebutted testimony demonstrating that Schaffer had drugs in his system at the time he contacted Trooper Nash. (CP 133-134). Though

this was not available to Trooper Nash at the time, it corroborates Garvey's observations and identifies the behaviors Schaffer would have displayed and did, in fact, display at the scene of the first accident. (CP 134, 136). Third, while WSP repeatedly tries to minimize the importance of the facts available to Trooper Nash, here, like in Bailey, such questions are for the jury. It is apparent that the trial court engaged in an inappropriate weighing of the evidence and made improper credibility determinations when evaluating Trooper Nash's, Garvey's, and Dr. Lindsay's testimony. Here, any jury could significantly discount the credibility of Trooper Nash's self-serving statements regarding the insignificance of Schaffer's bad driving, his confusion, his statements, and conduct toward Garvey where each of these items are identified by WSP as *evidence of impairment*. (CP 252-253). These facts and their weight are all for the jury to in accord with the traditional analysis of tort claims, there is little justification for utilizing the flawed public duty doctrine to avoid a hearing of this case on the merits before a jury.

Further, even if the public duty doctrine were applicable in this, this case presents an opportunity to abrogate or limit the doctrine in favor of traditional negligence analysis and tort considerations. Here, each of the factors discussed *supra* are reflected in Trooper Nash's training and are in accord with the results of WSP's toxicology findings. Perhaps, ultimately,

the WSP may avoid liability in this case, but what is the public policy reason for permitting WSP to avoid a trial on these facts? Such trial would consider traditional notions of duty, breach, and foreseeability present in any tort action and applicable to every non-government defendant. In this case, as with so many others, what is the public policy justification for sparing WSP from trial in these circumstances? The anticipated response is an assertion that permitting this case to proceed would result in a flood of similar cases. However, even if true, providing a remedy to an aggrieved individual on the merits of the case is a higher policy consideration than a speculative flood of claims. Further, the Bailey decision occurred in 1987. There is no evidence of such a flood of cases following Bailey. This strongly suggests that, to the extent the public policy considerations are genuine, they are overwrought, particularly when compared with the value of deciding cases on their merits by permitting individuals an opportunity to try their cases before a jury.

E. Schaffer Was Actually Impaired.

It is not disputed that Trooper Nash did not have the benefit of the toxicology screen when he interacted with Schaffer, however, such evidence is still significant on summary judgment. The toxicology screen and the analysis by Dr. Lindsay establish that Schaffer was impaired at the scene of the first accident. (CP 133-134). Such evidence may be persuasive

to the jury in response to Trooper Nash's repeated efforts to minimize the significance of Schaffer's behavior and his observations. The toxicology screen demonstrates the tremendous amount of drugs in Schaffer's system and establishes a timeline for their ingestion. (CP 131-132). Kerns' death occurred only forty-three minutes following Trooper Nash's contact with Schaffer. (CP 301). The toxicology analysis corroborates Garvey's observations. (CP 134, 136). The toxicology report is consistent with the behaviors Garvey observed. This is true even though Garvey is not familiar with the effects of the specific drugs found in Schaffer, yet the behaviors she witnessed were consistent with the impact of these drugs on a person. (CP 136). As was apparent at summary judgment, WSP would seek to minimize the significance of Schaffer's behaviors. The toxicology screen makes it difficult for WSP to deny the fact that Kerns was actually impaired at the time he encountered Trooper Nash. Also the behaviors Dr. Lindsay associates with the drugs found in Schaffer's system are consistent with behaviors observed by Trooper Nash and Garvey and consistent with the behaviors identified in WSP's training material for drivers impaired by substances other than alcohol. (CP 130, 252-253).

The toxicology screen shows that Schaffer was impaired and that he behaved in a way consistent with the opiates and benzodiazepines found, *in fatal levels*, in his system. (CP 131). Such evidence rebuts WSP's argument

that Schaffer consumed the drugs *after* interacting with Trooper Nash by demonstrating that such theory is inconsistent with the evidence of metabolites in Schaffer's system. (CP 132, 135). Significantly, the quantity of drugs ingested by Schaffer is tremendous. Either the amount of opiates or the amount of benzodiazepines would be fatal to a person naive to such drugs. (CP 131). In addition to the behaviors discussed throughout this brief, the toxicology screen provides evidence that Schaffer was impaired and that such impairment would be apparent to a trained WSP trooper. (CP 134, 136, 152). Further the fact that the behaviors Dr. Lindsay describes are also present in WSP's materials is also persuasive of their significance to a trained trooper. Ultimately, it is for the jury to determine the weight given such evidence, but clearly, such evidence strongly undercuts the veracity of Trooper Nash's protestations that there was no evidence of impairment during his interaction with Schaffer.

V. CONCLUSION

Summary judgment was inappropriate in this case. Issues of material fact are presented as to the import of the facts available and known to Trooper Nash evidencing Schaffer's impairment. Further application of the public duty doctrine is inappropriate where Trooper Nash owed a duty to prevent an impaired driver like Schaffer to drive after interacting with

him as the impaired at-fault driver in a motor vehicle accident. Had Trooper Nash properly enforced the laws of the state, the tragic death of Kerns forty-three minutes after Schaffer was released by Trooper Nash would not have occurred.

DATED this 4th day of January 2018.

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DECLARATION OF SERVICE

STATE OF WASHINGTON

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served via E-mail per agreement and U.S. Mail, postage pre-paid, a copy of the foregoing Appellant's Opening Brief to:

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Signed at Tacoma, Washington this 4th day of January 2018.

McGAVICK GRAVES, P.S.

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