

FILED
Court of Appeals
Division II
State of Washington
5/23/2018 1:47 PM

No. 51457-5-II

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 REPLY BRIEF

Lori M. Bemis, WSBA #32921
McGavick Graves, P.S.
Attorney for Appellant
1102 Broadway, Suite 500
Tacoma, WA 98402
Telephone (253) 627-1181
Facsimile (253) 627-2247

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	2
A.	Summary Judgment is Improper Where Genuine Issues of Material Fact and Credibility Remain.	2
1.	Summary Judgment Requires the Court to View All Evidence in Favor of the Non-Moving Party.....	2
2.	WSP’s Own Toxicology Report Demonstrates that Schaffer Was Impaired at the Time of the JBLM Collision.....	6
B.	The Failure to Enforce Exception Applies; Thus the Public Duty Doctrine Does Not Bar the Present Lawsuit, and WSP Is Liable.	7
1.	The Duty Imposed by RCW 70.96A.120(2) Is Not the Sole Source of WSP’s Duty When Encountering an Impaired Driver.....	7
2.	WSP has a Duty to Remove Impaired Drivers from the Roadway Pursuant to RCW 46.61.502	9
3.	RCW 70.96A.120(2) Does Not Supersede the Duty of an Officer to Removed Impaired Drivers from the Roadway	10
4.	WSP’s Interpretation of their Duty is Narrow, Not in Accord with Public Policy or the Law; and Under WSP’s Narrow, Erroneous Interpretation WSP Officers only have a Duty to Intercept Driver’s Impaired by Alcohol.	12
5.	<u>Bailey</u> Supports Reversal of Summary Judgment, WSP Overstates Portions of the Analysis in <u>Bailey</u> and Ignores the Holding in <u>Bailey</u>	12

C.	The Factfinder is Entitled to Determine, and Would Likely Conclude, that Nash had Actual Knowledge of Schaffer’s Impairment.	14
D.	WSP’s Objections to the Estate’s Evidence are Without Merit	16
	1. WSP is Incorrect When Making Its Assignment of Error.....	16
	2. The Puyallup Police Reports Are Admissible on Multiple Grounds	17
	3. Schaffer’s Sentencing Hearing Testimony and Letter are Admissible On Multiple Grounds	19
III.	CONCLUSION	20

TABLE OF AUTHORITIES

State Cases

<u>Bailey v. Town of Forks</u> , 108 Wn.2d 262, 737 P.2d 1257 (1987).....	9, 10, 11, 12, 13, 14, 15
<u>Barker v. Advanced Silicon Materials, LLC, (ASIMI)</u> , 131 Wash. App. 616, 128 P.3d 633 (2006).....	3
<u>Brown v. Spokane Fire Prot. Dist. No. 1</u> , 100 Wash. 2d 188, 668 P.2d 571 (1983).	16
<u>Burmeister v. State Farm Ins. Co.</u> , 92 Wash. App. 359, 966 P.2d 921 (1998)	17,18
<u>Cole v. Harveyland LLC</u> , 163 Wn. App. 199, 253 P.3d 70 (2011).	16
<u>Folsom v. Burger King</u> , 135 Wash.2d 658, 958 P.2d 301 (1998).....	4
<u>Renz v. Spokane Eye Clinic, P.S.</u> , 114 Wash. App. 611, 60 P.3d 106 (2002).....	3
<u>Taylor v. Bell</u> , 185 Wn. App. 270, 340 P.3d 951 (2014).....	16
<u>Waite v. Whatcom County</u> , 54 Wash. App. 682, 775 P.2d 967 (1989).....	14, 15
<u>Weaver v. City of Spokane</u> , 168 Wn. App. 127, 275 P.3d 1184 (2012).....	8,11
<u>Westberry v. Interstate Distributor Co.</u> , 164 Wn. App. 196, 263 P.3d 1251 (2011).	5

Statutes

RCW 5.44.010	19, 20
--------------------	--------

RCW 5.45.020	17
RCW 5.45.040	17
RCW 9A.72.085.....	17
RCW 46.61.500(1)(d).....	9
RCW 46.61.502	9, 10, 12
RCW 46.61.502(1)(c)	9
RCW 46.61.520(1)(a)(b).....	8
RCW 46.61.515	10
RCW 70.96A.120.....	8, 9, 11
RCW 70.96A.120(2).....	7, 8, 10, 12
WPIC 92.10	10
 <u>Superior Court Rules</u>	
ER 613	18, 19, 20
ER 703	19
ER 801(d)(2).....	17
ER 803(a)(3)	18
ER 803(a)(4)	18
ER 803(b).....	17, 18
ER 901(b)(1)	18

COMES NOW Appellant, Michael Kerns, as the personal representative of the Estate of Christopher Kerns (“Kerns”), and hereby submits Appellant’s Reply Brief in support of its appeal and in opposition to the appeal filed by the Washington State Patrol (“WSP”).

I. INTRODUCTION

This case concerns the trial court’s improper dismissal on summary judgment of Kerns’ claims against the WSP and WSP Officer Nash (“Nash”). Joseph Schaffer (“Schaffer”) killed Kerns as the at-fault driver in a collision approximately forty-three minutes after he was stopped by WSP, where he was also the at-fault driver in a collision near Joint Base Lewis-McChord (“JBLM”). Due to the uncontested testimony of Dr. Lindsay and WSP’s own toxicology report, it is known that Schaffer was impaired by benzodiazepines and opiates, both major central nervous system depressants whose effect is magnified when taken together, at the time of his contact with Nash. Schaffer exhibited behavior consistent with the impairment evidenced by his toxicology screen, including unusual affect, poor judgment, causing a car accident, reporting several near misses prior to the car accident, a “wired” look, and confusion in response to simple instructions. Despite this, Nash negligently let Schaffer drive away from the accident at JBLM, leading directly to Kerns’ death forty-three minutes later.

II. ARGUMENT

A. Summary Judgment is Improper Where Genuine Issues of Material Fact and Credibility Remain.

The record in this case is replete with issues of material fact and determinations of credibility; and because both must be determined by the finder of fact, the trial court's order granting WSP's Motion for Summary Judgment is improper. The trial court ignored and improperly weighed the evidence upon which a factfinder could conclude that Schaffer was impaired, and that Nash ignored those signs of impairment when he permitted Schaffer to drive. Instead, the trial court relied on the self-serving statements of Nash regarding the lack of significance he placed on Schaffer's role as the at-fault driver at the JBLM collision, the fact that Schaffer got into Nash's patrol car when told to return to his own car, and other unusual behavior.

1. Summary Judgment Requires the Court to View All Evidence in Favor of the Non-Moving Party.

The record amply supports that the trial court improperly weighed the evidence at summary judgment. For example, the trial court improperly questioned Garvey's perception of Schaffer at the scene. (RP 21:25-26:11). The trial court questioned the accuracy and significance of Garvey's observations during her interaction with Schaffer at the JBLM scene when the court asked "what did she see other than the fact that you said she

thought he was high or mentally ill?” (RP 21:25-22:1). At summary judgment, the court is required to weigh this evidence in favor of Kerns. When the trial court cast doubt onto Garvey’s observations, the trial court clearly invaded the province of the jury by weighing Garvey’s credibility. A reasonable jury could be persuaded that Garvey’s observations of Schaffer’s affect were significant. Garvey’s observations include Schaffer’s speech, eyes, how closely he stood, and his unusual comments. (CP 178-180). Dr. Janci Lindsay testified that all of Garvey’s observations were indicative of impairment; impairment which Nash would also be in a position to observe due to his longer interaction with Schaffer. (CP 133-134). WSP sought to dismiss Garvey’s observations of Schaffer as she was a “housewife,” and whose observations were “neither here nor there.” (RP 27:5-12). The trial court cannot adopt WSP’s assessment of Garvey as issues of credibility remain in the sole province of the factfinder, not the court. Barker v. Advanced Silicon Materials, LLC, (ASIMI), 131 Wash. App. 616, 624, 128 P.3d 633 (2006), (citing Renz v. Spokane Eye Clinic, P.S., 114 Wash. App. 611, 623, 60 P.3d 106 (2002)).

Garvey’s testimony that Schaffer was “wired,” had strange affect, failed to respect her personal space, and made inappropriate comments such as, “I knew I would hit you [. . .],” should not have been weighed by the trial court. (CP 178-180). A jury, hearing such testimony, could conclude

that if a lay person found such observations significant, Nash's testimony regarding his observations were not credible and were self-serving. The jury, not the court, is entitled to make that determination.

The trial court also improperly weighed evidence relating to the fact that Schaffer was the at-fault driver in the JBLM collision when the trial court concluded "you just have a crash, and that's that." (CP 167, 205, RP 34:5-9). Again, Schaffer's status as the at-fault driver is an additional fact to be considered by the jury. (CP 167, 205). Folsom v. Burger King, 135 Wash.2d 658, 958 P.2d 301 (1998).

Clearly, the trial court also failed to consider the significance of Schaffer as the at-fault driver in the context of Nash's training and reliance thereon in his interaction with Schaffer. Nash does not dispute that he is trained to recognize bad driving as a sign of impairment. (CP 252-253). Nash cited Schaffer for bad driving as the at-fault driver, yet for a reason that was never clarified, Nash asserts that he did not identify Schaffer's impairment as the cause of his poor driving. (CP 152, 191-192). In his self-serving testimony, Nash avers that Schaffer did not seem impaired. (CP 208-209).

Contrastingly, Garvey immediately had concerns about Schaffer's conduct after only moments of interaction. Garvey, a lay person, quickly identified that something was "off" about Schaffer, yet Nash, a sixteen-year

veteran of the WSP with extensive training in such matters, testified he saw nothing. (CP 178-180; 208-209). Garvey also wrote in her witness statement, which was provided to Nash, that Schaffer had told her “I was following you for so long, I knew I was going to hit you.” (CP 206, 221).

The trial court was required to interpret this testimony in favor of the non-moving party and give the jury an opportunity to see it for what it was: a self-serving attempt by Nash to distance himself from his responsibility in causing Kerns’ death. Similarly, the trial court ignored the potential significance of Schaffer sitting in the back of Nash’s patrol vehicle. (CR 198). Again, the trial court construed the evidence as presented by Nash, opining that Schaffer was intimidated or nervous. (CP 199). It is for the jury to discount or find significant such testimony; notably Nash also testified that this was unusual for a suspect to voluntarily sit in his patrol car and it had only happened a few times in his entire career. (CP 199). It is possible the factfinder could also see Schaffer sitting in the patrol car as an admission of guilt. Summary judgment is only appropriate if reasonable minds could reach only one conclusion about the evidence presented. Westberry v. Interstate Distributor Co., 164 Wn. App. 196, 204, 263 P.3d 1251 (2011). Clearly, multiple interpretations of the evidence presented exist, which were favorable to Kerns.

The cumulative impact of the aforementioned evidence could allow the factfinder to conclude that Schaffer was impaired at the time of the JBLM collision, and that Nash failed to fulfill his responsibilities by detaining Schaffer. Again, given the different conclusions that reasonable minds could reach when considering the foregoing evidence, the trial court's order granting summary judgment was improper.

2. WSP's Own Toxicology Report Demonstrates that Schaffer Was Impaired at the Time of the JBLM Collision.

WSP's own toxicology report establishes that Schaffer was impaired at the time of the JBLM collision. (CP 133-134). Dr. Lindsay, Kerns' expert, offers un rebutted testimony regarding the significance of the toxicology readings and the presence of metabolites in the toxicology report as evidence of consumption of opiates and benzodiazepines at the time of Schaffer's encounter with Nash. (CP 133-134) The factfinder could readily conclude that Schaffer was visibly impaired at the time he encountered Nash at JBLM in accord with the massive quantity of benzodiazepines and opiates found in his system. Dr. Lindsay's testimony established that, on a more probable than not basis, Schaffer was under the influence of both opiates and benzodiazepines at the time of the JBLM collision; that his conduct as observed by Nash and Garvey was consistent with his toxicology report and the known impact of the drugs Schaffer was

on; and that the evidence of consuming opiates and benzodiazepines would be apparent, particularly to a trained officer, as Mr. Kephart also opined. (CP 133-134, 146-154). This testimony corroborated Garvey's observations that Schaffer's behavior was "odd" and he appeared "wired" at the time she encountered him at JBLM. (CP 179).

B. The Failure to Enforce Exception Applies; Thus the Public Duty Doctrine Does Not Bar the Present Lawsuit, and WSP Is Liable.

Nash had a clear duty to intercept Schaffer when he encountered an impaired Schaffer at the site of the JBLM collision; therefore, the failure to enforce exception applies and the present matter cannot be disposed of under the public duty doctrine.

1. The Duty Imposed by RCW 70.96A.120(2) Is Not the Sole Source of WSP's Duty When Encountering an Impaired Driver.

Officers have a duty to remove impaired drivers from the roadway. RCW 70.96A.120(2) is not the sole source of this duty. For the first time, on appeal, WSP asserts that WSP is only required to detain a driver who is "incapacitated or gravely disabled," and contends that Schaffer was neither. The text of RCW 70.96A.120(2) reads that "[e]xcept for a person who may be apprehended for possible violation of laws related to driving or being in physical control of a vehicle while under the influence of intoxicating liquor or any drug ... a person who appears to be incapacitated or gravely disabled

by alcohol or other drugs and who is in a public place... shall be taken into protective custody...” WSP’s argument fails. WSP does not acknowledge that RCW 70.96A.120(2) is not the sole source of the duties of officers with respect to impaired drivers. Further, WSP clearly ignores the language in the statute which explicitly excepts from RCW 70.96A.120(2) persons who may be apprehended for possible violations of the Washington State DUI laws. Therefore, RCW 70.96A.120(2) could not even apply to Schaffer since Schaffer would be subject to the scrutiny of an impaired driver¹.

WSP relies on Weaver v. City of Spokane, 168 Wn. App. 127, 275 P.3d 1184 (2012) to assert that “whether a defendant owes a duty to the complaining party is a question of law.” Id. at 139. However, the trial court in Weaver addressed the element of duty under RCW 70.96A.120, which was argued above, is not the sole source of an officer’s duty when dealing with impaired individuals, particularly not in instances where the impaired person is operating a motor vehicle. Weaver involved a pedestrian who was hit and killed by a drunk driver. In Weaver, unlike in this case, the officer encountered the plaintiff as an intoxicated pedestrian, not as a driver of a motor vehicle. Id. at 132. As a pedestrian, the source of authority for an officer to take Weaver into custody would be RCW 70.96A.120.

¹ Schaffer was convicted of vehicular homicide while under the influence of intoxicants, under RCW 46.61.520(1)(a)(b). State v. Schaffer, Pierce County Superior Court Case No. 14-1-01520-0.

The most problematic aspect of this analysis is that RCW 70.96A.120 is focused solely on the harm that may come to the intoxicated person not the harm he may represent to others if operating a motor vehicle. Under this analysis, WSP would be limiting its duty solely to the driver of a vehicle under RCW 70.96A.120, ignoring its duty to individuals sharing the roadway with an impaired driver. RCW 46.61.500(1)(d). Ch. 46.61 RCW clearly evidences a legislative intent to protect the public from drivers of motor vehicles who are impaired. Bailey v. Town of Forks, 108 Wn.2d 262, 737 P.2d 1257 (1987).

2. WSP has a Duty to Remove Impaired Drivers from the Roadway Pursuant to RCW 46.61.502.

WSP's argument that Nash has no duty to remove drivers who are merely impaired is without merit. First, the assertion that Schaffer is "merely impaired" is not a legal standard, but a factual assertion to be made by the jury. RCW 46.61.502 irrefutably establishes legislative concerns with the impact of impaired persons operating motor vehicles. Nash had a duty to remove the impaired Schaffer from the roadway pursuant to RCW 46.61.502. RCW 46.61.502 provides that a person is guilty of driving under the influence, if while driving or having a vehicle in their custody or control, "the person is under the influence of or affected by an intoxicating liquor, marijuana, or drug..." RCW 46.61.502(1)(c). In accord with the law, the

Washington State jury instructions dictate that “[a] person is under the influence of or affected by the use of intoxicating liquor/marijuana/drug if the person’s ability to drive a motor vehicle is lessened in *any appreciable degree.*” WPIC 92.10; (emphasis supplied).

A reasonable jury could find that Schaffer was affected by the drugs in his system as demonstrated by rear-ending Garvey’s vehicle. This fact alone is of great significance; however, Schaffer also exhibited confusion, affect, and made unusual statements at the scene, all of which were observable by Nash. (CP 179-180, 205). Notably in Bailey, RCW 70.96A.120(2) and RCW 46.61.515² were both argued as alternate sources of the officer’s duty to take the driver into custody. WSP clearly owed a duty in this case.

3. RCW 70.96A.120(2) Does Not Supersede the Duty of an Officer to Remove Impaired Drivers from the Roadway.

That an individual may be properly detained under RCW 70.96A.120(2), does not suggest that RCW 70.96A.120(2) is the sole authority under which an officer can remove an impaired driver from the roadway. There is no authority to suggest that an individual could not be detained under RCW 46.61.502. Despite making the argument, WSP offers no support for the premise that RCW 70.96A.120(2) is the sole authority to

² The State’s DUI laws are now codified under RCW 46.61.502.

detain impaired drivers, because none exists. These statutes are not mutually exclusive, and to argue as such would suggest that WSP is not required to take impaired drivers into custody unless they have reached the level of incapacitated or gravely disabled. Again, RCW 70.96A.120 is focused on the harm that may come to the intoxicated person, not to the public at large.

The plaintiff in Weaver looked to Bailey v. Town of Forks, 108 Wash.2d 262, 737 P.2d 1257 (1987) to establish a threshold duty under RCW 70.96A.120. The Weaver court found Bailey factually distinguishable, as the officers in Bailey knew of a statutory violation by the driver, prior to any obligation arising under RCW 70.96A.120. Weaver 168 Wn. App. at 139. As correctly observed in Bailey, officers have a broad duty to take corrective action when they have knowledge of a violation of the law and the injured party is within the class of persons intended to be protected by the law. (CP 205); Bailey, 108 Wn.2d at 268.

As early as the 1987 decision in Bailey, our courts have questioned the wisdom of permitting governments to escape liability for tortious conduct. Under WSP's analysis, this window would be opened yet further by finding RCW 70.96A.120 as the sole source of the officer's duty when encountering an impaired driver.

4. WSP's Interpretation of Their Duty is Narrow, Not in Accord with Public Policy or the Law; and Under WSP's Narrow, Erroneous Interpretation WSP Officers only have a Duty to Intercept Driver's Impaired by Alcohol.

WSP's argument opens a dangerous precedent of limiting the duty of WSP to remove impaired drivers from the roadway. If WSP's interpretation was correct, police and highway patrol would only be able to take into custody drivers that are incapacitated or gravely disabled, but not drivers who are impaired. Further, the analysis would solely be directed at the driver, not at the potential harm to others. The Washington State DUI laws were clearly intended to have broad reach as they include drivers who do not reach the legal limit, but are still unable to safely drive a motor vehicle, as well as those who exceed the legal limit, and drivers impaired by any other reason. WSP's assertion of such a limited duty is wholly unsupported by RCW 46.61.502 and RCW 70.96A.120(2).

5. Bailey Supports Reversal of Summary Judgment, WSP Overstates Portions of the Analysis in Bailey and Ignores the Holding in Bailey.

The Bailey Court did not need to reach the public duty doctrine to reach its holding that the failure to enforce exception applied. Bailey, 108 Wash. 2d at 263. Here, as in Bailey, the same result is appropriate.

WSP repeatedly argues that the failure to enforce exception did not apply because Nash did not have actual knowledge of Schaffer's

impairment. This argument fails. Significantly, the Supreme Court in Bailey permitted the case to proceed to the jury based on the allegation that the driver was intoxicated. Its holding relied upon the following posture, “Ms. Bailey alleged that the police officer took no corrective action and possessed actual knowledge of statutory violations.” Bailey, 108 Wn.2d at 269. Kerns makes the same allegations here, that Nash had knowledge of Schaffer’s impairment and statutory violation, but took no corrective action.

Bailey asserts that actual knowledge of a statutory violation, not just knowledge of impairment, is sufficient to trigger the officer’s duty. “[A] governmental officer’s knowledge of an actual violation creates a duty of care to all persons and property who come within the ambit of the risk created by the officer’s negligent conduct.” Bailey, 108 Wash.2d 262. Here, it is undisputed that Nash had actual knowledge of at least a statutory violation by Schaffer; in fact, Officer Nash cited Schaffer at the scene of the JBLM collision. (CP 167, 205). Knowledge of such a statutory violation, specifically for bad driving, imposed a duty on Nash to remove Schaffer from the road. (CP 252-253).

Further, Nash arguable also had knowledge of Schaffer’s impairment. An assertion Kerns is permitted to argue to a jury. Against Nash’s self-serving denials must be set the evidence of impairment: 1) bad driving, 2) “wired appearance”, 3) confusion, 4) unusual affect, and

5) admissions of fault and prior bad driving. (CP 166, 167, 179-180, 198, 205). Further, as in Bailey, the toxicology report establishes that Schaffer was actually impaired during his encounter with Nash. (CP 133-134). Nash attempted to dilute his duty by stating that though he saw signs of impairment like bad-driving and confusion, Schaffer was not impaired. Circumstantial evidence can support a finding of actual knowledge, as “it is often difficult to supply direct evidence of actual knowledge.” Waite v. Whatcom Cty., 54 Wash. App. 682, 686–87, 775 P.2d 967 (1989). Here, it is probable that a jury will not find Nash’s testimony compelling or credible. Waite, 54 Wn. App. at 682. Consequently, Nash’s denials of actual knowledge are not sufficient to take this case from the jury.

C. The Factfinder is Entitled to Determine, and Would Likely Conclude, that Nash had Actual Knowledge of Schaffer’s Impairment.

Here, the factfinder could conclude that Officer Nash knew that Schaffer was impaired. Circumstantial evidence can support a finding of actual knowledge. Waite 54 Wash. App. at 686–87. Put simply, Nash’s denials are not sufficient to take this case from the jury and must be weighed against the behavior Schaffer exhibited at the scene.

Kerns has supplied ample evidence of impairment observable by Nash. Waite 54 Wn.App. at 686-87. Not only were Schaffer’s behaviors exactly what Nash was trained to look for, but Nash was undisputedly aware

of them. The factfinder could reasonably conclude that Nash identified the impairment, but failed to take corrective action. Bailey 108 Wn.2d 262; Waite 54 Wn.App. 682.

As a policy matter, the idea that an officer can admit to seeing numerous indicia of impairment (as set out and listed in WSP's own training materials) and avoid a trial simply by averring that he did not identify the impairment is anathema to our state's law. Already the public duty doctrine is of questionable merit as noted in Bailey, "This raises the difficult question as to 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. To trigger the additional protections offered to government employees under the public duty doctrine solely on the untested testimony of one witness goes too far. WSP attempts to cloak this case in the philosophies underpinning the public duty doctrine. However, at its heart, WSP is requesting the protections of the public duty doctrine to be available solely on the testimony of Nash, without regard to contrary testimony. This expands the doctrine and exempts the testimony of a governmental employee from the normal scrutiny that any witness would face. Nothing in Bailey or Waite suggests

such a result or holds that litigants cannot test the self-serving testimony of government employees like any witness.

D. WSP's Objections to the Estate's Evidence Are Without Merit.

1. WSP is Incorrect when Making its Assignment of Error.

WSP's sole assignment of error on its cross appeal is that the trial court admitted certain materials Kerns submitted in opposition to WSP's motion for summary judgment. The trial court properly admitted the evidence at issue. The basis for WSP's objections are each documents' authenticity and/or admissibility. However, these objections are each superseded by another rule permitting admission. Consequently, WSP's objections are without merit.

Generally, trial court rulings on evidentiary issues are reviewed for abuse of discretion. Cole v. Harveyland LLC, 163 Wn. App. 199, 213, 253 P.3d 70 (2011). However, a reviewing court will review evidentiary rulings made in conjunction with summary judgment de novo. Taylor v. Bell, 185 Wn. App. 270, 285, 340 P.3d 951 (2014). Even if the trial court erred in admitting Kerns' materials into evidence, the issue on appeal is whether the trial court's error was prejudicial, because an "error without prejudice is not grounds for reversal." Brown v. Spokane Fire Prot. Dist. No. 1, 100 Wash. 2d 188, 196, 668 P.2d 571 (1983).

2. The Puyallup Police Reports are Admissible on Multiple Grounds.

The police reports and WSP toxicology report submitted as evidence by Kerns were properly authenticated and are admissible as public records.

The police reports are admissible as public records:

Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state ... when duly certified by the respective officers having by law the custody thereof..., shall be admitted in evidence in the courts of this state.

RCW 5.44.040. The toxicology report was prepared by the WSP. ER 801(d)(2). The police reports were received by Kerns in response to a public records request to the Puyallup Police Department. (CP 372). The reports, when produced in response to said request, were accompanied by a letter from the records custodian of the Puyallup Police Department and clearly demonstrate that said records were regularly maintained in the ordinary course of business. (CP 372; RCW 5.44.040). Police reports are business records and are admissible as such. RCW 5.45.020, ER 803(b). In addition, the officers' statements themselves are submitted under penalty of perjury. Each officer certified that their reports was made "under penalty of perjury," in compliance with RCW 9A.72.085.

WSP argues that Kerns' counsel cannot authenticate the police reports herself. WSP's reliance on Burmeister v. State Farm Ins. Co., 92

Wash. App. 359, 366, 966 P.2d 921 (1998) for this proposition is misplaced. In Burmeister, the plaintiff's counsel simply attached a portion of a police report to a memorandum and stated that, under penalty of perjury, it was a true and accurate copy of the original. Id. Here the documents are supported by the declaration of the reporting agency and the reports themselves are executed under penalty of perjury. Further, "[a] document can be authenticated with the testimony of a witness with knowledge that the document is what it claims to be." ER 901(b)(1), Burmeister, 92 Wn. App. at 366. Here, Kerns produced the letter from the custodian of records, which identifies the documents produced as a "copy of case 14003020." (CP 372). This case number matches the case number identified on the police reports produced. (CP 301-307). In addition, WSP has raised no issue which actually calls into question the authenticity of the police reports.

In addition, the observations of the officers set forth under penalty of perjury contained in the aforementioned police reports are admissible as prior statements of witnesses, statements of a then-existing physical condition, and statements made for seeking medical treatment. ER 613; ER 803(a)(3); ER 803(a)(4). Kerns is entitled to impeach and rebut WSP's assertions with this evidence.

Finally, the police reports are admissible as they were reviewed and considered by Kerns' expert in preparing her report. (CP 128). Pursuant to

ER 703, the facts on which an expert relies in forming opinions and conclusions are admissible, even when the documents in which those facts contained are not. ER 703. The police reports, at a minimum, may be considered insofar as they provide support for the competency of Dr. Lindsay's testimony and her conclusions. ER 703.

3. Schaffer's Sentencing Hearing Testimony and Letter are Admissible on Multiple Grounds.

Schaffer's statements, as well as his letter, were offered in open court at his sentencing hearing, and are therefore admissible as court records and under ER 613 as a prior inconsistent statement. The transcript is admissible as a court record:

The records and proceedings of any court in the United States, or any state or territory, shall be admissible in evidence in all cases in this state when duly certified by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court [. . .]

RCW 5.44.010. The transcript of the presiding judge, Schaffer, and other parties involved at the hearing is authenticated by the court reporter's declaration, which asserts that the transcript was a "true and accurate transcript of the proceedings and testimony taken". (CP 384). Similar to the police reports, WSP also identifies nothing that could call the authenticity of the transcript into question.

The testimony itself is admissible under ER 613 as a prior inconsistent statement. WSP relies on Schaffer's deposition in support of their position that Schaffer was unimpaired at the time he killed Kerns. Kerns is entitled to offer Schaffer's former inconsistent testimony, which acknowledges his impairment, discusses the same events, and directly contradicts his later deposition testimony in which Schaffer claims he was sober. Kerns is entitled to rebut WSP's evidence with Schaffer's earlier statements. ER 613.

Schaffer's letter is also admissible as a court record. RCW 5.44.010. Schaffer's letter was entered into the court record, as evidenced by the Clerk's e-filing stamp, at the sentencing hearing. (CP 376). The content of the letter is again admissible under ER 613, to contradict Schaffer's recollection of events with his own testimony.

WSP's objections to the aforementioned evidence is also relevant only to weight and credibility, rather than admissibility of the evidence. Weight of the evidence, as well as the credibility, is in the province of the factfinder. Consideration of these exhibits was proper.

III. CONCLUSION

Statutory authority clearly authorizes admission of the materials submitted by Kerns in opposition to WSP's summary judgment, and the trial court properly admitted said evidence at the summary judgment

hearing. Despite the admission of this evidence, the trial court improperly weighed the evidence and credibility of witnesses. The trial court's order granting summary judgment in the present matter was in error, as it invaded the province of the jury. A reasonable jury could find Nash had knowledge of Schaffer's impairment and failed to fulfill his duty to remove Schaffer from the roadway.

DATED this 23rd day of May 2018.

MCGAVICK GRAVES, P.S.

By:



Lori M. Bemis, WSBA #32921
Of Attorneys for Appellant

DECLARATION OF SERVICE

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 electronically filed the above Appellant's Reply Brief with the Clerk of the Court for the Washington State Court of Appeals, Division II, which will send notification of such filing to the following:

Michael T. Throgmorton
Attorney General of Washington
7141 Cleanwater Drive SW
PO Box 40126
Olympia, WA 98504-0126
MichaelT3@ATG.WA.GOV

Signed at Tacoma, Washington this 23rd day of May 2018.

McGAVICK GRAVES, P.S.

By: Anita K. Acosta
Anita K. Acosta

MCGAVICK GRAVES, PS

May 23, 2018 - 1:47 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51457-5
Appellate Court Case Title: In re the Estate of Michael Kerns
Superior Court Case Number: 16-2-06433-2

The following documents have been uploaded:

- 514575_Briefs_20180523134307D2684246_6871.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Reply Brief 052318.PDF

A copy of the uploaded files will be sent to:

- aka@mcgavick.com
- michael3@atg.wa.gov
- micheller1@atg.wa.gov
- torolyef@atg.wa.gov

Comments:

Sender Name: Anita Acosta - Email: aka@mcgavick.com

Filing on Behalf of: Lori Marie Bemis - Email: lmb@mcgavick.com (Alternate Email: kon@mcgavick.com)

Address:
1102 Broadway, Suite 500
Tacoma, WA, 98402
Phone: (253) 627-1181 EXT 253

Note: The Filing Id is 20180523134307D2684246