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

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

Appellants,

v.

WASHINGTON STATE PATROL; and STATE OF WASHINGTON,

Respondents.

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**RESPONDENT'S OPENING BRIEF**

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## I. INTRODUCTION

This case concerns the failure-to-enforce exception to the public duty doctrine recognized in *Bailey v. Town of Forks*, 108 Wn.2d 262, 269, 737 P.2d 1257 (1987), *amended*, 753 P.2d 523 (1988). The Estate of Christopher Kerns (the Estate or Kerns) sued the Washington State Patrol (WSP) after Kerns was struck and killed by Joseph Schaffer while crossing the street in Puyallup. Kerns' Estate alleges Mr. Schaffer was impaired at the site of a prior low-speed, rear-end collision an hour earlier and that the officer who responded to that collision, Trooper Darrel Nash, negligently failed to discover Mr. Schaffer's impairment and prevent him from driving. WSP moved for summary judgment, arguing Trooper Nash owed no duty to Kerns under the public duty doctrine. The Estate responded that Trooper Nash had a duty under the failure-to-enforce exception to the public duty doctrine.

In order to establish the failure-to-enforce exception, the Estate bore the burden of demonstrating two things. First, the Estate had to show that Mr. Schaffer was incapacitated or gravely disabled at the time of his encounter with Trooper Nash. This is because the failure-to-enforce exception does not apply unless the officer has a mandatory duty to take a specific action and fails to do so. In Washington, law enforcement officers do not have a mandatory duty to arrest impaired drivers; they only have a mandatory duty to take into custody individuals who are publicly "incapacitated" or "gravely disabled."

RCW 70.96A.120(2). The Estate failed to make that showing in this case because it did not present any evidence or argument that Mr. Schaffer was incapacitated or gravely disabled; the Estate only argued he was impaired.

Second, the Estate bore the burden of showing Trooper Nash had actual knowledge that Mr. Schaffer was incapacitated or gravely disabled. This is because the failure-to-enforce exception applies only when an officer has actual knowledge of a statutory violation requiring him to take a specific action and fails to do so. Here, the Estate failed to present evidence Trooper Nash had actual knowledge that Mr. Schaffer was even impaired, let alone that he was incapacitated or gravely disabled. For those reasons, summary judgment was properly granted.

In addition, WSP presents an argument on cross appeal that the trial court erroneously considered inadmissible evidence submitted by the Estate in deciding WSP's motion for summary judgment.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Given that RCW 70.96A.120(2) imposes a mandatory duty to take into custody only individuals who are incapacitated or gravely disabled, did the Estate fail to state a claim under the failure-to-enforce

exception announced in *Bailey* where it presented no such evidence and only argued that Mr. Schaffer was impaired?

2. Did the trial court properly grant summary judgment based on the Estate's failure to offer evidence that Trooper Nash had actual knowledge that Mr. Schaffer was incapacitated or gravely disabled as required under the failure-to-enforce exception to the public duty doctrine?

3. Should this Court reject the Estate's facial challenge to the public duty doctrine because it remains bound by the Supreme Court's recognition of that doctrine?

### **III. ASSIGNMENT OF ERROR ON CROSS APPEAL**

WSP assigns error to the trial court's consideration of inadmissible materials submitted by the Estate in support of its response to WSP's motion for summary judgment. WSP timely objected to those materials, and the trial court erred in considering them.

### **IV. ISSUE ON CROSS APPEAL**

Did the trial court err by considering materials the Estate submitted in support of its response to WSP's motion for summary judgment that the Estate impermissibly attempted to authenticate through the declaration of its own counsel and which were inadmissible hearsay?

## V. STATEMENT OF THE CASE

### A. Mr. Schaffer's Extensive History of Prescription Drug Abuse Made Him Highly Tolerant to Prescription Opioids

On April 17, 2014, Joseph Schaffer traveled from his home in Olympia to Seattle for a medical appointment. Clerk's Papers (CP) at 26-27. A retired plumber, Mr. Schaffer had used prescription narcotics for years to treat chronic back pain he suffered as a result of spinal stenosis and degenerative disk disease. CP at 25, 32-33. Due to his extensive use of narcotics, Mr. Schaffer had developed a significant tolerance to opiates. CP at 39. Mr. Schaffer testified that as of April 2014, his usual routine resulted in him taking 30 milligrams of Oxycodone up to four times a day, in addition to 40 milligrams of OxyContin up to three times a day. CP at 33. In addition to painkillers, Mr. Schaffer also took prescription benzodiazepines to treat anxiety and depression. CP at 35. As of April 2014, Mr. Schaffer testified he was taking one milligram of Clonazepam three times per day. CP at 35.

Mr. Schaffer testified he abstained from taking his usual medications the morning of April 17, 2014, because he knew he would be driving that day. CP at 34-35, 38. Mr. Schaffer's wife also confirmed that he did not take his usual medication before leaving the house, as it was his usual practice not to do so if he was getting ready to drive. CP at 26. She described him as alert and oriented when he left. CP at 26. Mr. Schaffer testified his wife could tell when

he had taken opiates or benzodiazepines. CP at 52-53. He also testified he abstained from his usual afternoon dose of medication that day. CP at 35, 44.

**B. Trooper Nash Encountered Mr. Schaffer After Mr. Schaffer Had a Low-Speed, Rear-End Collision with Diane Garvey in Heavy Traffic Near the Joint Base Lewis-McChord Gate**

On his way back from Seattle, Mr. Schaffer got stuck in heavy rush hour traffic around Fife. CP at 47. After about 20 miles of stop-and-go driving, the vehicle in front of him slammed on its brakes and Mr. Schaffer, unable to stop in time, tapped its rear bumper. CP at 47. He got out of his car and asked the other driver, Diane Garvey, to take the next exit for Joint Base Lewis-McChord so they could exchange insurance information. CP at 47-48. He then returned to his car and pulled in behind her off the freeway. CP at 47-48.

While Mr. Schaffer and Mrs. Garvey exchanged information, Trooper Darrel Nash was dispatched to the scene. CP at 98. On arrival, he saw Mr. Schaffer and Mrs. Garvey conversing. CP at 99. Separating them, he took a statement from Mrs. Garvey and learned that Mr. Schaffer had rear-ended her in traffic before the two pulled off the road. CP at 99. Trooper Nash saw no reportable damage to either car, but since Mrs. Garvey complained of back pain, he summoned medical aid before interviewing Mr. Schaffer. CP at 99.

Mr. Schaffer admitted he had tapped Mrs. Garvey's rear bumper in stop-and-go traffic. CP at 99. During their conversation, Trooper Nash conversed with Mr. Schaffer for ten to fifteen minutes at a distance of about

four feet. CP at 99. At no time during the encounter did Mr. Schaffer display any signs of impairment. CP at 99. Mr. Schaffer's speech was not slurred, and his eyes were neither red, nor watery. CP at 99. Throughout the encounter, Mr. Schaffer responded appropriately to Trooper Nash's questions and conversed freely about the collision. CP at 99. Trooper Nash observed no abnormalities in Mr. Schaffer's speech patterns or in his gait when he ordered Mr. Schaffer to return to his vehicle. CP at 99. Mr. Schaffer did misunderstand Trooper Nash's instruction to "return to his vehicle" and instead got into Trooper Nash's patrol vehicle. CP at 99. Trooper Nash testified that was not an uncommon mistake, and Mr. Schaffer apologized and complied when Trooper Nash corrected him. CP at 99. Trooper Nash observed no prescription bottles in Mr. Schaffer's vehicle, and he smelled no suspicious aromas emanating from Mr. Schaffer or his car. CP at 99. At no point during his encounter with Mr. Schaffer did Trooper Nash develop probable cause to search him or his vehicle, nor did Trooper Nash develop grounds to arrest or otherwise detain Mr. Schaffer. CP at 99-100.

Mr. Schaffer filled out a handwritten statement, and Trooper Nash cited him for following too closely. CP at 100. After responding ambulance personnel checked both drivers, Trooper Nash released them and cleared the scene at 6:24 p.m. CP at 100. At that time, he testified he had no information indicating either driver was impaired or otherwise unsafe to drive. CP at 100.

**C. Mr. Schaffer Became Upset After Getting Stopped, Missed His Exit, Got Lost in Tacoma, and Struck Mr. Kerns an Hour Later**

Mr. Schaffer left the scene and drove north on I-5, planning to take Highway 512 through Puyallup, south to Olympia, then through Yelm. CP at 67-68. Because he was upset, he missed his exit. CP at 68. As a result, he took the River Road exit and got lost in Tacoma. CP at 61-62. He got hungry, so he stopped and ate before continuing on his way home. CP at 75.

Around 7:10 p.m., Mr. Schaffer ran a red light at River Road and N. Meridian and struck Mr. Kerns in the crosswalk, killing him. CP at 94. He then careened into a car dealership and hit a number of cars before coming to a stop. CP at 95. He was knocked unconscious by the impact. CP at 57.

**D. After the Accident, Mr. Schaffer Swallowed a Bottle of Pills, Which “Spiked His Blood up Through the Ceiling”**

When he awoke, Mr. Schaffer found himself trapped in his vehicle. CP at 54. He described what happened next:

After the accident, I had a little vial of pills with me that I always took when I went to Seattle. In case I broke down or got stuck, I had my medication. And when I got in the accident, I was afraid that I would get caught with those pills on me, so I took them. I didn't think I'd have to do a blood test. I thought I'd have to do just a breathalyzer. But I was wrong.

CP at 37. Mr. Schaffer testified the bottle contained “three or four pills... two of them were oxycodone, and two of them were benzodiazepines.” CP at 37.

Asked for more specificity as to what was in the bottle of pills he ingested after

striking Mr. Kerns, Mr. Schaffer said “I think I had two oxycodone, two clonazepam, and an unidentified benzodiazepine. It may have been a Xanax or an alprazolam.” CP at 45. Asked when he ingested these pills, Mr. Schaffer answered “[b]efore I even got out of the car.” CP at 55.

Mr. Schaffer testified his ingestion of these pills after he struck Mr. Kerns “spiked [his] blood up through the ceiling.” CP at 37. Asked to clarify whether he took any pills before hitting Mr. Kerns, Mr. Schaffer testified it was only after he struck Mr. Kerns that he “swallowed the whole vial.” CP at 41, 43. As Mr. Schaffer put it: “I’m not saying I was right or anything. I was definitely wrong and at fault in this accident.” CP at 66.

Over three hours after killing Mr. Kerns and taking the pills, Mr. Schaffer’s blood was drawn pursuant to a warrant. CP at 131. The results of the test showed lethal levels of benzodiazepines and opiates in his system. CP at 131. The only reason he was not killed was because of his significant tolerance level to these drugs, built up over years of abuse. CP at 133.

**E. Diane Garvey Thought Mr. Schaffer “Had Some Sort of Mental Issues” or Was “Just a Very Strange Person,” But She Did Not Believe He Was Drunk and Did Not Tell Trooper Nash She Suspected Anything Was Wrong With Him**

Mrs. Garvey was deposed on June 15, 2017. CP at 344. While she thought Mr. Schaffer rear-ending her was “avoidable,” she did not find anything unusual about it, admitting that “accidents happen to everyone.”

CP at 345. Asked whether Mr. Schaffer's eyes were "glossy," she could not recall them being so. CP at 346. Mrs. Garvey testified she was a homemaker with no medical background and no experience identifying people who are on prescription drugs. CP at 347-48. While she is familiar with people who are drunk or high on marijuana, she did not think Mr. Schaffer was drunk or high. CP at 180, 349. Mr. Schaffer did not slur his words or stumble around. CP at 180. As a result, Mrs. Garvey concluded Mr. Schaffer either had "some sort of mental issues" or was "just a very strange person." CP at 179-80.

Mrs. Garvey stated she was "very shaken up" immediately after the accident and "had somewhere to be." CP at 351. As a result, she did not share any of her observations with Trooper Nash, nor did she express any concerns about Mr. Schaffer's driving, appearance, or behavior. CP at 350-51.

**F. The Trial Court Granted Summary Judgment Based on the Estate's Failure to Demonstrate that Trooper Nash Was Actually Aware of Mr. Schaffer's Alleged Impairment**

After settling with Mr. Schaffer's insurance, Mr. Kerns' Estate sued WSP, arguing Trooper Nash had a duty to enforce the traffic laws and that he negligently failed to discover Mr. Schaffer's impairment and prevent him from driving, resulting in Kerns' death. CP at 392-97. WSP moved for summary judgment, arguing the Estate failed to establish the actual knowledge required

on the part of Trooper Nash to invoke the failure-to-enforce exception, and that its claim was therefore barred by the public duty doctrine. CP at 1-18.<sup>1</sup>

The Estate responded and, relying on the opinion of its forensic toxicologist, argued that based on the results of his blood screening taken over three hours after the accident, Mr. Schaffer had been impaired at the time of his earlier encounter with Trooper Nash. CP at 113-15. In reaching that conclusion, the Estate's toxicologist expressly discounted Mr. Schaffer's testimony that he had not been impaired at the time of his encounter with Trooper Nash, as well as his statement that he swallowed several pills immediately after striking Mr. Kerns. CP at 131-37. She also relied on a number of observations made by Mrs. Garvey, which she concluded demonstrated "multiple signs of significant intoxication." CP at 138. Based on the toxicologist's report, the Estate's police procedures expert further opined that Trooper Nash had been negligent in failing to determine the cause of Mr. Schaffer's impairment. CP at 152.

Based on the blood test results and the testimony of its experts, the Estate alleged an issue of fact existed as to whether Mr. Schaffer was impaired

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<sup>1</sup> Initially, the Estate's only claim was negligent training and supervision against WSP. CP at 395-96. However, the Estate presented no evidence that WSP negligently trained or supervised Trooper Nash to the trial court and argued only that WSP was responsible for Trooper Nash's alleged negligence under respondeat superior. On appeal, the Estate does not argue its negligent training and supervision claim and so has abandoned it. See *Johnson v. Phoenix Assur. Co. of New York*, 70 Wn.2d 726, 729, 425 P.2d 1 (1967) (arguments not raised in opening brief on appeal will not be considered).

at the time he encountered Trooper Nash. CP at 102-123. It argued that it had a right to present Mr. Schaffer's "indicia of impairment" to a jury. CP at 119.

The trial court granted summary judgment, finding no evidence Trooper Nash had actual knowledge Mr. Schaffer was impaired at the time of their encounter.<sup>2</sup> Report of Proceedings (RP) at 34. The court noted that while the toxicology report indicated Mr. Schaffer had "lots of drugs on board," the evidence indicated he was "habituated to shocking levels of opiates." RP at 34.

It went on to note:

[P]eople who become habituated figure out how to deal with the day to day world. I mean, we have functional alcoholics. It's no different with drug users.... [but] [Trooper Nash] didn't know that [Mr. Schaffer] was a drug addict. He didn't know that he had been taking opiates for the last 20 years. And there was no way for him to know that... And I don't think you can say *ipso facto* because somebody hit somebody 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 that.

RP at 34. Absent actual knowledge, the court noted the Estate's request to present Mr. Schaffer's alleged "indicia of impairment" to a jury was "just the kind of secondhand guesswork that the public duty doctrine and the case law prohibits." RP at 34. The Estate appeals.

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<sup>2</sup> As argued below, actual knowledge of "impairment" is not the correct standard. See *infra* Sec. A. Rather, the Estate was required to show Trooper Nash was actually aware that Mr. Schaffer was incapacitated or gravely disabled before he would have had a mandatory duty to take him into custody. RCW 70.96A.120(2). Absent such a mandatory duty, the Estate failed to establish the failure-to-enforce exception.

## VI. SUMMARY OF ARGUMENT

Summary judgment was correctly granted because the failure-to-enforce exception to the public duty doctrine does not apply in this case. RP at 34. That exception applies only where an officer has a mandatory duty to take a specific action to correct a statutory violation. *Halleran v. Nu W., Inc.*, 123 Wn. App. 701, 714, 98 P.3d 52 (2004). There is no mandatory duty to arrest impaired drivers in Washington. *Cf. Bailey*, 108 Wn.2d at 269 (recognizing only a duty to take into custody “publicly incapacitated” individuals under RCW 70.96A.120(2)). The only mandatory duty that exists requires officers to take into protective custody persons who are publicly incapacitated or gravely disabled. *Bailey*, 108 Wn.2d at 262. *See also Weaver v. Spokane Cty.*, 168 Wn. App. 127, 139, 275 P.3d 1184 (2012) (citing RCW 70.96A.120(2)). Since the Estate argued only that Mr. Schaffer was impaired and neither argued nor presented any evidence that he was incapacitated or gravely disabled, it failed to demonstrate that the failure-to-enforce exception applied.

Even if it had alleged that Mr. Schaffer was incapacitated or gravely disabled, summary judgment was also appropriate because the Estate failed to establish the actual knowledge requirement of the failure-to-enforce exception. *See Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (holding that

summary judgment is appropriate under the public duty doctrine absent evidence of actual knowledge on the part of the official). Specifically, the Estate failed to demonstrate Trooper Nash had actual knowledge that Mr. Schaffer was committing a statutory violation at the time of their encounter. *See Bailey*, 108 Wn.2d at 269. Instead, the Estate argued that based on the behaviors Mr. Schaffer exhibited to another person, Diane Garvey, Trooper Nash's training should have led him to discover Mr. Schaffer's alleged impairment for himself. CP at 119 (citing *Bailey*, 108 Wn.2d at 269). But Mrs. Garvey never communicated her observations to Trooper Nash. CP at 350-51. Trooper Nash testified that based on his own observations and training, he did not believe Mr. Schaffer was impaired. CP at 99-100. While the Estate argues Trooper Nash was negligent in failing to discover Mr. Schaffer's alleged impairment, knowledge that a person could – or even should – discover in the exercise of reasonable care is constructive knowledge, not actual knowledge. *Atherton*, 115 Wn.2d at 532-33. Constructive knowledge is not sufficient to trigger a duty under the failure-to-enforce exception. *Id.*

Nor does *Bailey* require remand for trial in this case as the Estate suggests. Brief of Appellant (Br. of Appellant) at 24. In *Bailey*, there was no issue as to whether the officer had actual knowledge of a statutory violation. *Bailey*, 108 Wn.2d at 264. Here, while the Estate argues that

whether Mr. Schaffer was impaired presented an issue of fact, this Court's precedents hold that evidence of impairment alone is insufficient to avoid summary judgment absent evidence of actual knowledge. *See Weaver*, 168 Wn. App. at 139 (rejecting the Estate's alternative argument "that the determination of whether Mr. Weaver was incapacitated or gravely disabled by alcohol is an issue of fact that should be presented to the jury").

This Court should also reject the Estate's facial challenge to the public duty doctrine. Br. of Appellant at 4. As this Court has acknowledged, it is bound by the Washington Supreme Court's recognition of the public duty doctrine. *Johnson v. State*, 164 Wn. App. 740, 754, 265 P.3d 199 (2011).

Finally, even if it were to determine remand were appropriate, this Court should preclude the trial court from considering on remand the inadmissible materials the Estate submitted in response to WSP's summary judgment motion. CP at 335-38. Trial courts may not consider inadmissible evidence in ruling on a motion for summary judgment, and the Estate failed to authenticate the materials it submitted in support of its response to WSP's motion, some of which were also hearsay. Since WSP timely objected to those materials, the trial court's consideration of them was erroneous.

## VII. STANDARD OF REVIEW

The Estate appeals from the trial court's order granting summary judgment. Review of a summary judgment order is *de novo*, and this Court engages in the same inquiry as the trial court. *Atherton*, 115 Wn.2d at 516.

## VIII. ARGUMENT

### A. **The Public Duty Doctrine Bars the Estate's Suit Because the Estate Failed to Offer Any Argument or Evidence that Mr. Schaffer Was Incapacitated or Gravely Disabled at the Time He Encountered Trooper Nash**

A duty to all is a duty to no one. To be actionable, a duty "must be owed to the injured plaintiff, and not one owed to the public in general." *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). Thus, "under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that the duty breach was owed to the injured person as an individual and not merely the breach of an obligation owed to the public in general." *Id.*

While it is not limited to the context of law enforcement, the public duty doctrine is commonly applied to the police functions of government. *See, e.g., Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983) (doctrine held to bar suit against county for failure to police to timely respond to calls for assistance); *Mason v. Bitton*, 85 Wn.2d 321, 326-27, 534 P.2d 1360 (1975) (doctrine applied to bar suit against State Patrol for

alleged negligent pursuit of fleeing vehicle); *Goggin v. City of Seattle*, 48 Wn.2d 894, 900, 297 P.2d 602 (1956) (city not liable for failure to enforce ordinance mandating removal of vehicles constituting a nuisance); *Fluckiger v. City of Seattle*, 103 Wn. 330, 332, 174 P. 456 (1918) (city not “bound to secure a perfect execution of its by-laws” nor for “neglect of duty on the part of its officers in respect to their enforcement”). As a general rule, therefore, “law enforcement activities are not reachable in negligence.” *Keates v. City of Vancouver*, 73 Wn. App. 257, 267, 869 P.2d 88 (1994).

There are four exceptions to the public duty doctrine: (1) special relationship, (2) legislative intent, (3) failure-to-enforce, and (4) volunteer rescue. *Babcock v. Mason Cty. Fire Dist. No. 6*, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001). Only if an exception applies does the State owe a duty to the plaintiff, the breach of which is actionable. *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992). Here, the Estate relies only on the failure-to-enforce exception. Br. of Appellant at 23-27 (citing *Bailey*, 108 Wn.2d at 268).

The failure-to-enforce exception is narrowly construed. *Atherton*, 115 Wn.2d at 531. It applies only when: (1) there is a statutory duty to take corrective action; (2) governmental agents responsible for enforcing the statutory requirements possess actual knowledge of a statutory violation; (3) they fail to take corrective action; and (4) the plaintiff is within the class the statute is intended to protect. *Halleran*, 123 Wn. App. at 714.

“For the failure to enforce exception to apply, government agents also must have a *mandatory* duty to take a specific action to correct a statutory violation.” *Halleran*, 123 Wn. App. at 714 (emphasis added). Such a duty does not exist if the statute vests the officer with broad discretion. *Smith v. City of Kelso*, 112 Wn. App. 277, 282, 48 P.3d 372 (2002) (citing *Forest v. State*, 62 Wn. App. 363, 369, 814 P.2d 1181 (1991)). Here, the Estate argues Trooper Nash had a duty to take Mr. Schaffer into custody because he was operating a motor vehicle while impaired. Br. of Appellant at 23-31 (citing *Bailey*). But no statute creates a mandatory duty for officers to take impaired drivers into custody, so the Estate’s argument fails.

**1. Under RCW 70.96A.120(2), the Estate was required to show Mr. Schaffer was incapacitated or gravely disabled**

Citing *Bailey*, the Estate argues that Trooper Nash had a duty to take Mr. Schaffer into custody for driving while impaired. In doing so, the Estate erroneously argues that the officer’s duty in *Bailey* was based on his failure to take an intoxicated driver into custody. *See* Br. of Appellant at 24-25 (arguing that Kerns, like *Bailey*, was “entitled to the protection of RCW 46.61.502”). But neither RCW 46.61.502 nor its 1987 counterpart created a *mandatory* duty to arrest intoxicated or impaired drivers.<sup>3</sup> That is why the

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<sup>3</sup> Former RCW 46.61.515 (1987). *See Bailey*, 108 Wn.2d at 269. Critically, while *Bailey* noted RCW 46.61.515 established “criminal sanctions for driving or being in physical control of a motor vehicle while under the influence of alcohol,” it recognized that the mandatory duty to take custody arose separately under RCW 70.96A.120(2). *Id.*

opinion in *Bailey* was amended to replace the word “intoxicated” with “incapacitated.” *Bailey*, 753 P.2d 523 (1988).

Instead, the failure-to-enforce exception recognized in *Bailey* was based on RCW 70.96A.120(2), which provides:

Except for a person who may be apprehended for possible violation of laws relating 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 by a peace officer...”

Emphasis added. *Bailey* expressly relied on this statute – not the DUI law – as the basis of the mandatory duty to arrest. *Bailey*, 108 Wn.2d at 269.

**2. Despite being required to show that Mr. Schaffer was incapacitated or gravely disabled, the Estate argued only that he was “impaired”**

Despite this, nowhere in its brief does the Estate ever cite to RCW 70.96A.120(2), much less argue that Mr. Schaffer was incapacitated or gravely disabled. In opposition to summary judgment, the Estate never offered any evidence that Mr. Schaffer was incapacitated or gravely disabled. Instead, it now makes the same immaterial argument to this Court that it made to the trial court: that Mr. Schaffer was “impaired.”<sup>4</sup>

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<sup>4</sup> WSP anticipates the Estate may argue this Court may not consider this argument because it was not raised before the trial court. However, this Court may review a party’s “failure to establish facts upon which relief can be granted” at any time. *See* RAP 2.5(a).

As this Court has recognized, RCW 70.96A.120(2) addresses only individuals who are incapacitated or gravely disabled by alcohol or drugs and who are in a public place. *Weaver*, 168 Wn. App. at 139. It does not apply to all persons who are simply intoxicated. Since RCW 70.96A.120(2) involves a significant deprivation of liberty by allowing an officer to take a person into protective custody against that person's will, it must be strictly construed and should not be loosely read to include all persons who exhibit signs of intoxication. *Id.*; *Mays v. State*, 116 Wn. App. 864, 869, 68 P.3d 1114 (2003) (since the protective custody provisions of Chapter 70.96A involve a significant deprivation of liberty, it must be read narrowly). RCW 70.96A.120(2) is narrowly drawn to reach only those who are "incapacitated by alcohol or drugs and in need of treatment." *Hontz v. State*, 105 Wn.2d 302, 307, 714 P.2d 1176 (1986).

The Estate's evidence of impairment does not establish that Mr. Schaffer was incapacitated or gravely disabled. In *Weaver*, this Court held the plaintiff was not incapacitated or gravely disabled, despite the fact that he showed signs of intoxication. *Weaver*, 168 Wn. App. at 138. He had slurred speech, bloodshot and watery eyes, and was weaving from side to side. *Id.* The officer testified Weaver acted as if he was in possession of his faculties and did not appear to be confused. *Id.* Weaver did not have difficulty communicating and appeared to know where he wanted to go. *Id.*

Contrast those facts with the facts in this case. When Trooper Nash arrived, Mr. Schaffer and Mrs. Garvey had pulled off I-5 to exchange insurance information. CP at 47-48, 177. Trooper Nash did not observe any sign of Mr. Schaffer being under the influence of alcohol or drugs. CP at 99-100. Mr. Schaffer completed an accident form as requested by Trooper Nash. CP at 100. And, perhaps most importantly, the only other person to observe Mr. Schaffer, Mrs. Garvey, testified that he did not seem impaired:

He did not seem drunk to me. He wasn't, like, slurring his words and stumbling around or anything. He seemed like wired or something....I thought he had some sort of mental issues where he was hyped up on – I don't know – or just a very strange person.

CP at 180.

In this case, the Estate never pled, argued, or presented any evidence that Mr. Schaffer was gravely disabled or incapacitated during his interaction with Trooper Nash. The Estate's repeated assertions that he was "impaired" are therefore immaterial because they are insufficient to trigger a mandatory duty to take him into custody under RCW 70.96A.120(2).

An analogous situation was addressed in *Boyce*. Mrs. Boyce was required to present evidence of gross negligence in order to establish liability. *Boyce v. West*, 71 Wn. App. 657, 667, 862 P.2d 592 (1993). She neither alleged gross negligence in her complaint nor provided the Court with evidence supporting an allegation of gross negligence. *Id.* at 665-66.

Her expert only opined that Mr. West's conduct was negligent. *Id.* at 666. In affirming summary judgment, the Court held that because there was no material issue of fact as to the existence of gross negligence, an essential element of her claim, summary judgment was proper. *Id.*

**3. Summary judgment was appropriate because the Estate failed to present evidence creating a genuine issue of material fact as to whether Mr. Schaffer was incapacitated or gravely disabled**

Once WSP moved for summary judgment pointing out the absence of evidence to support the Estate's claim, the Estate was required to come forward and set forth specific detailed facts, not conclusory allegations, to show that a genuine issue of material fact existed as to the existence of an essential element in its case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If it did not do so, then the Court properly granted summary judgment. *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Here, summary judgment should be affirmed because the Estate failed to offer any evidence that Mr. Schaffer was incapacitated or gravely disabled at the time he encountered Trooper Nash. Therefore, Trooper Nash had no mandatory duty to take him into custody pursuant to RCW 70.96A.120(2).

**B. Summary Judgment Should Also Be Affirmed Because the Estate Failed to Show Actual Knowledge on the Part of Trooper Nash as Required to Establish the Failure-to-Enforce Exception**

Incapacitation is only the first element required to invoke the failure-to-enforce exception announced in *Bailey*. The other is actual knowledge. Thus, even if the Estate had alleged Mr. Schaffer was incapacitated or gravely disabled, to establish a prima facie negligence claim against WSP under the failure-to-enforce exception, it still would have had to show Trooper Nash had actual knowledge that Mr. Schaffer was incapacitated or gravely disabled. *Bailey*, 108 Wn.2d at 269. Absent actual knowledge, the exception does not apply, and the public duty doctrine bars the Estate's claim. *Id.*

The Estate also argues it was entitled to a trial because it *alleged* Trooper Nash had actual knowledge. Br. of Appellant at 23-31 (citing *Bailey*, 108 Wn.2d at 268). But *Bailey* decided only that the allegations in the plaintiff's complaint were sufficient to survive a motion for judgment on the pleadings. *Bailey*, 108 Wn.2 at 264. Unlike Ms. Bailey, in this case, the Estate was responding to a motion for summary judgment. CP at 1-18. In doing so, it was required to go beyond its pleadings and produce evidence creating an issue of fact as to whether Trooper Nash had actual knowledge that Mr. Schaffer was incapacitated or gravely disabled. *See Young*, 112 Wn.2d at 225. Its failure to do so made summary dismissal proper.

**1. Absent actual knowledge, the failure to enforce exception does not apply**

Actual knowledge is “direct and clear knowledge, as distinguished from constructive knowledge.” BLACK’S LAW DICTIONARY 950 (9th ed. 2009). The Estate bore the burden of establishing Trooper Nash had actual knowledge that Mr. Schaffer was incapacitated or gravely disabled at the time of their encounter. *See Halleran*, 123 Wn. App. at 714. Mere constructive knowledge is not enough. *See, e.g., Atherton*, 115 Wn.2d at 532-33; *Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988); *Smith v. State*, 59 Wn. App. 808, 814, 802 P.2d 133 (1990); *Zimbelman v. Chaussee Corp.*, 55 Wn. App. 278, 282, 777 P.2d 32 (1989).

Here, the statute the Estate must rely upon is RCW 70.96A.120(2), which requires officers to take into protective custody “a person who appears to be incapacitated or gravely disabled by alcohol or other drugs and who is in a public place.” *See Bailey*, 108 Wn.2d at 269. However, as shown above, the Estate failed to offer any evidence or argument that Mr. Schaffer was incapacitated or gravely disabled; it merely argued that he was “impaired.” *See supra* Sec. A.

The Estate also presented no evidence Trooper Nash had actual knowledge that Mr. Schaffer was incapacitated. Instead, the Estate presented evidence it alleges established Mr. Schaffer’s impairment, and it

argues that whether Trooper Nash had actual knowledge was an issue of fact. Br. of Appellant at 24-25 (citing *Waite v. Whatcom Cty.*, 54 Wn. App. 682, 775 P.2d 967 (1989)). *Waite*, however, is distinguishable. It does not stand for the proposition that whether an officer has actual knowledge is always an issue of fact.

In *Waite*, Officer Frey, an inspector for the county Public Works Department, approved the installation of a propane furnace in the basement of a home in violation of building codes. *Waite*, 54 Wn. App. at 684. The furnace later exploded, damaging the home and injuring the owners. *Id.* They sued, alleging Frey had been negligent. *Id.* at 685. The county moved for summary judgment, arguing the public duty doctrine barred the suit. *Id.*

Before the county brought its motion, Frey died. *Id.* at 684. Prior to his death, however, Frey spoke to the Director of the Public Works Department and his assistant, who testified by deposition that while Frey was qualified, he “appeared surprised and dismayed that he had approved the installation.” *Id.* at 684-85. The Director also testified he “would be surprised if one of his inspectors did not know the prohibition on installing propane furnaces in basements.” *Waite*, 54 Wn. App. at 684. And his assistant testified Frey’s reaction “indicated to [him] that Frey knew the installation violated the code.” *Id.* at 685. Nevertheless, the trial court

dismissed, finding the action was barred by the public duty doctrine. *Id.* The plaintiffs appealed. *Waite*, 54 Wn. App. 685.

The Court of Appeals reversed. *Id.* at 688. It noted that “the determination of whether the failure to enforce exception applies involves a question of fact [as to] whether the government agent responsible for enforcing the statutory requirements possessed actual knowledge of a statutory violation.” *Id.* at 686. Based on the testimony of the Director and his assistant, the court found an issue of fact existed as to whether Frey had actual knowledge that installation of the furnace violated the building code, and it remanded the case for trial. *Waite*, 54 Wn. App. 682.

Unlike the inspector in *Waite*, in this case, there is no question Trooper Nash was aware that driving while impaired was illegal. The question here is whether Trooper Nash had actual knowledge that Mr. Schaffer was incapacitated. RCW 70.96A.120(2). But “Frey knew the furnace was a propane furnace because he made a notation to that effect on his Dailey Inspection Record.” *Waite*, 54 Wn. App. at 687. By contrast, no evidence was presented in this case indicating Trooper Nash knew Mr. Schaffer was impaired, let alone that he was incapacitated or gravely disabled. Trooper Nash testified Mr. Schaffer displayed no signs of impairment, and no one – not Mrs. Garvey nor the ambulance crew – advised him of any suspicion that anything was wrong with Mr. Schaffer.

By contrast, on facts analogous to those here, this Court rejected the plaintiff's argument that the question of whether an officer has actual knowledge of impairment is an issue of fact for a jury. *See Weaver*, 168 Wn. App. at 139. In *Weaver*, a deputy sheriff encountered a pedestrian who was intoxicated. *Id.* at 132. His intoxication was apparent from his bloodshot, watery eyes and his weaving from side to side. *Id.* at 131. Nevertheless, he had no problem communicating and apparently knew where he wanted to go, so the deputy released him. *Id.* at 132. Shortly thereafter, the pedestrian was hit by a car and later died of his injuries. *Id.*

Weaver's estate sued, arguing that the deputy acted negligently by failing to protect him despite having actual knowledge of his incapacitation. *Id.* at 133. The trial court dismissed, finding the suit was barred by the public duty doctrine. *Id.* The estate appealed, arguing in the alternative that whether the deputy had actual knowledge of Weaver's incapacitation was an issue of fact. *Weaver*, 168 Wn. App. at 139. But absent evidence that the officer had actual knowledge that Mr. Weaver was incapacitated, this Court rejected that argument, holding that "whether a defendant owes a duty to a complaining party is a question of law." *Id.* (quoting *Hostetler v. Ward*, 41 Wash. App. 343, 349, 704 P.2d 1193 (1985)).

Finally, the Estate also argues that given the "indicia of impairment" Mr. Schaffer displayed, the credibility of Trooper Nash's "self-serving

comments” also presented an issue of fact. Br. of Appellant at 21, 23, 26-27. It points to the opinion of its forensic toxicologist, who concluded that based on the blood test and Mrs. Garvey’s observations, Mr. Schaffer had been impaired at the time he encountered Trooper Nash and that Nash was negligent for failing to discover his impairment. Br. of Appellant 31-33.

First, even if the toxicologist’s conclusions were sound, which they were not, it would only establish that Mr. Schaffer was impaired at the time of the first accident, not that he was incapacitated or that Trooper Nash actually knew he was incapacitated. Second, the record shows that the Estate’s expert based her opinion on a number of fictions. She relied, for example, on Mrs. Garvey’s alleged statement that Mr. Schaffer’s eyes were “glossy” when in fact, Mrs. Garvey testified she did not recall them being so. CP at 346. Despite the fact that no one who had been at the scene of the first accident testified that Mr. Schaffer appeared intoxicated, she also opined that Mr. Schaffer displayed “multiple signs of significant intoxication.” CP at 133. These “signs” included Mr. Schaffer’s failure to apologize for hitting Mrs. Garvey, his failure to show any remorse, his grinning and standing “too close” to Mrs. Garvey, his “insensitive” statement that he “was following her for so long, that he knew he was going to hit her,” his anger and confusion, and the fact that Mrs. Garvey described him as seeming “odd,” “off,” and “weird.” CP at 130, 133. The Estate’s

toxicologist also opined that the fact Mr. Schaffer “re-entered I-5 going the opposite direction that (sic) he intended despite being familiar with the area for some 25 years” was also “an indication that he was significantly intoxicated.”<sup>5</sup> CP at 130.

In fact, Mrs. Garvey testified she was familiar with the signs of alcohol and marijuana intoxication, and she expressly stated that Mr. Schaffer did *not* appear intoxicated. CP at 180, 349. And, most importantly, Mrs. Garvey also testified that she did not share any of her observations or concerns with Trooper Nash. CP at 350-51. Nor did she testify that Trooper Nash personally observed Mr. Schaffer display the same behaviors he displayed to her before Nash arrived on-scene.

Nonetheless, the Estate argues that a jury is entitled to weigh Trooper Nash’s credibility. Br. of Appellant at 23. But if all the Estate had to do to defeat summary judgment was allege Trooper Nash was lying, the actual knowledge requirement of the failure-to-enforce exception would be meaningless, since plaintiffs could avoid summary judgment by simply inviting juries to disbelieve the officer. As the trial court found, that is the sort of “secondhand guesswork” the public duty doctrine forbids. RP at 34.

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<sup>5</sup> In fact, Mr. Schaffer testified he re-entered I-5 going north because “northbound traffic was moving. Southbound wasn’t. So I didn’t want to get back into that southbound mess.” CP 67. Instead, Mr. Schaffer used his “25 years” of familiarity with the area to plan another route home to Olympia via Highway 512 through Parkland and Yelm. CP 68.

In any case, the Estate offered no evidence that Trooper Nash was lying or that he had actual knowledge that Mr. Schaffer was incapacitated. That is why the Estate argues that based on his training and Mr. Schaffer's presentation, Trooper Nash *should have known* Mr. Schaffer was unsafe to drive. CP at 119 (citing *Bailey*, 108 Wn.2d at 265). But knowledge that one could or "using reasonable care or diligence should have" is not actual knowledge; it is constructive knowledge. *See* BLACK'S LAW DICTIONARY 950 (9th ed. 2009). And constructive knowledge is not sufficient to trigger a duty under the failure-to-enforce exception. *See, e.g., Atherton*, 115 Wn.2d at 532-33; *Honcoop*, 111 Wn.2d at 190-91; *Smith*, 59 Wn. App. at 814; *Zimbelman*, 55 Wn. App. at 282. Thus, this Court should affirm the trial court's grant of summary dismissal.

## **2. *Bailey* Does Not Require Remand for Trial**

The Estate also argues that remand is required under *Bailey*, 108 Wn.2d at 268. *Bailey*, however, is distinguishable because it arose in the context of an appeal from an order granting judgment on the pleadings. *Id.* at 264. The Court in *Bailey* was therefore required to assume the truth of Ms. Bailey's allegations *Id.* The *Bailey* Court never addressed whether actual knowledge had been established, as it assumed that fact to be true based solely on the allegations in the complaint. *Id.* In this case, however, the Estate could not simply rely on the allegations in its pleadings in

response to WSP's summary judgment motion. *Young*, 112 Wn.2d at 225. Rather, it was required to go beyond those pleadings and come forward with evidence demonstrating a genuine issue of fact as to whether Trooper Nash had actual knowledge that Mr. Schaffer was incapacitated. *See Id.* (citing *Celotex Corp.*, 477 U.S. at 325). It failed to do so.

**C. This Court Should Reject the Estate's Request to Overturn Case Law Recognizing the Public Duty Doctrine**

Beyond arguing that the public duty doctrine does not apply, the Estate mounts a facial challenge, arguing the public duty doctrine "should be abrogated or limited." Br. of Appellant at 4. But this Court is bound by Supreme Court precedent, which clearly recognizes the public duty doctrine. The Court should thus affirm the dismissal of the Estate's claim.

The public duty doctrine was first clearly applied in Washington in *Baerlein v. State*, 92 Wn.2d 229, 595 P.2d 930 (1979). There, the Supreme Court held that a regulatory statute that "imposes a duty on public officials which is owed to the public as a whole... does not impose any duties owed to a particular individual which can be the basis for a tort claim." *Id.* at 231 (citing *Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978)). While it did not refer to it as the public duty doctrine until later in *J & B Dev. Co., Inc. v. King Cty.*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983), the public duty doctrine has been recognized in Washington ever since.

The Supreme Court later overruled *J & B Dev. Co.* on other grounds<sup>6</sup> but the public duty doctrine remains firmly established in Washington. See *Weaver*, 168 Wn. App. at 143. This Court has applied it as recently as 2011 and 2012. *Id.* In doing so, it expressly rejected the same invitation the Estate makes here to abandon the public duty doctrine, noting “[u]ntil such time as our Supreme Court overrules itself, we are bound by its holding that the public duty doctrine applies in the State of Washington.” *Id.* (quoting *Johnson v. State*, 164 Wn. App. 740, 754, 265 P.3d 199 (2011)). Consistent with *Weaver* and *Johnson*, this Court remains bound by the Supreme Court’s recognition of the public duty doctrine.

#### IX. ARGUMENT ON CROSS APPEAL

For the foregoing reasons, this Court should affirm the trial court’s summary dismissal of the Estate’s negligence claim. If the Court does affirm the trial court’s grant of summary judgment, then it need not address the issues raised by this cross appeal. However, if the Court determines that remand is appropriate, it should preclude the trial court from considering the inadmissible materials the Estate submitted in response to WSP’s summary judgment motion. CP at 335-38.

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<sup>6</sup> See *Meaney v. Dodd*, 111 Wn.2d 174, 179, 759 P.2d 455 (1988). Notably, the *Meaney* court overruled *J & B Dev. Co.* because it “imposed too great a responsibility on government and too little responsibility on the citizen.” *Id.*

**A. In the Alternative, This Court Should Sustain WSP's Objection to the Inadmissible Materials the Estate Submitted in Support of Its Response to WSP's Summary Judgment Motion**

Trial courts may not consider inadmissible evidence in ruling on motions for summary judgment. *See, e.g., Cano-Garcia v. King Cty.*, 168 Wn. App. 223, 249, 277 P.3d 34 (2012); *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 746, 87 P.3d 774 (2004); CR 56(e). Despite this, in response to WSP's motion for summary judgment, the Estate submitted and referenced a number of materials that were inadmissible. CP at 335-38. Specifically, these materials included police reports that the Estate improperly attempted to authenticate through the affidavit of its counsel, excerpts of Mr. Schaffer's statements at the sentencing hearing in his criminal case, and a letter Mr. Schaffer submitted to the court at sentencing. CP at 335-38. These documents were inadmissible, and as the Estate concedes, the trial court considered them in ruling on WSP's summary judgment motion. Br. of Appellant at 19. Accordingly, any remand should be accompanied by an order precluding consideration of these materials.

**1. WSP timely objected to the Estate's attempt to introduce inadmissible materials in response to WSP's summary judgment motion**

At the outset, the Estate argues WSP's objection to the inadmissible materials it offered was in fact a motion to strike and was therefore untimely under Pierce County Local Rule (PCLR) 7(a)(3)(A). It was not.

Pierce County local rules require opposing parties to be served with notice of a civil motion "no later than the close of business on the sixth court day before the day set for the hearing." PCLR 7(a)(3)(A). By its terms, the rule applies to civil motions, not objections to the admissibility of evidence.

Challenges to evidence or declarations submitted in the context of a summary judgment motion, however, are not really motions to strike. They are objections to the admissibility of evidence. *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009). This is because "materials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal." *Id.* Consequently, "it is misleading to denominate as a 'motion to strike' what is actually an objection to the admissibility of evidence." *Id.* While such objections *may* be brought in the form of a motion to strike, the objecting party need not make such a formal

motion; it may preserve the objection as late as “in a reply brief rather than by a separate motion.” *Id.*

Here, the Estate filed the inadmissible materials at issue on October 16, 2017. CP at 160. Pierce County only hears civil motions on Friday mornings, and it requires six days to note a civil motion for hearing. PCLR 7(a). Consequently, it was not possible for WSP to note a separate motion to strike the inadmissible materials prior to hearing on its summary judgment motion, which was already noted by agreement of parties for October 27, 2017. CP at 387-88. By the Estate’s logic then, it could submit inadmissible evidence with impunity as long as it did so close enough to the motion hearing so that WSP would not have time to note a motion to strike. That is not the state of the law, and WSP’s objection to the inadmissible evidence the Estate offered was timely. *See Cameron*, 151 Wn. App. at 658.

**2. The police reports the Estate attempted to authenticate through the declaration of its own counsel were inadmissible**

In responding to WSP’s motion for summary judgment, the Estate relied on supplemental police reports purportedly filed by three officers who responded to the scene of the accident where Mr. Schaffer struck Mr. Kerns. CP at 300-318. But the Estate failed to properly authenticate the reports with appropriate supporting affidavits and instead attempted to authenticate them through the declaration of its own counsel. CP at 160. Since the Estate’s

counsel did not possess any personal knowledge enabling her to authenticate these documents, the reports were inadmissible and should not have been considered.

Proper authentication of a document is a condition precedent to its admissibility. ER 901(a). The requirement of authentication “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* However, supporting affidavits must be based on personal knowledge. CR 56(e); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988). Absent a declaration from someone who has such knowledge, this Court has held that attorneys themselves may not authenticate police reports simply by certifying under penalty of perjury that they are “true and accurate copies” of originals. *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365-66, 966 P.2d 921 (1998). That is exactly what the Estate did here. CP at 160, 369-70. It was thus error for the trial court to consider them in deciding WSP’s motion. *Id.* at 365-66.

**3. Excerpts from Mr. Schaffer’s statements at sentencing in his criminal case submitted by the Estate should not have been considered**

In addition, the Estate also submitted excerpts from the November 2014 hearing at which Mr. Schaffer was sentenced for the crime of vehicular homicide in the death of Mr. Kerns. CP at 322-26. It quoted these excerpts in its brief, as well as to excerpted passages that it did not provide to the

court, in an attempt to create an issue of fact by impeaching Mr. Schaffer's testimony with prior unsworn statements. CP at 116 (referencing page 13 of Mr. Schaffer's statement at sentencing), CP at 122.

These excerpts should not have been considered by the court. Mr. Schaffer's prior hearsay statements at the sentencing hearing were neither under oath nor were they the subject of cross-examination. They were thus not admissible under ER 802(d)(1), and since Mr. Schaffer is not a party to this action, his statements are not "admissions" under ER 802(d)(2). Accordingly, the trial court erred by considering them.

**4. Mr. Schaffer's unsworn letter submitted to the sentencing court was also inadmissible and should not have been considered**

Finally, the Estate also relied on a letter Mr. Schaffer purportedly wrote to the sentencing judge in responding to WSP's motion for summary judgment. CP at 327-34. This document was likewise inadmissible hearsay. ER 801. Mr. Schaffer is not a party to this action, and his prior unsworn, out-of-court statements are not admissions under ER 801(d)(2). Moreover, unless the statements he made in the letter were offered for the truth of the matters asserted therein, they have absolutely no relevance to this action. ER 402. They should not have been considered by the court below.

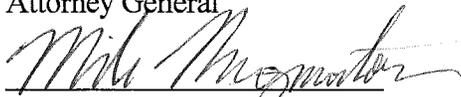
## X. CONCLUSION

The only claim raised in this appeal is that Trooper Nash had a duty to take Mr. Schaffer into protective custody under RCW 70.96A.120(2). In order to establish that element of the failure-to-enforce exception to the public duty doctrine, the Estate was required to show (1) that Mr. Schaffer was incapacitated or gravely disabled – not merely impaired – and (2) that Trooper Nash had actual knowledge of those facts.

Despite that, in opposition to WSP's summary judgment motion, the Estate offered no evidence or argument to establish either element. Instead, the Estate argued the wrong standard by alleging only that Mr. Schaffer was "impaired." Even so, the Estate also failed to show Trooper Nash had actual knowledge that Mr. Schaffer was impaired, let alone that he was incapacitated or gravely disabled as required by the statute. Consequently, the Estate failed to demonstrate that the failure-to-enforce exception applies, and the public duty doctrine bars its suit. For these reasons, this Court should affirm the trial court's order granting summary judgment.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of March, 2018.

ROBERT W. FERGUSON  
Attorney General



Michael J. Throgmorton, WSBA #44263  
Assistant Attorney General, OID #91023  
Attorney for Defendant WSP

NO. 51457-5

**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,

Respondent.

(Pierce County Cause  
No. 16-2-06433-2)

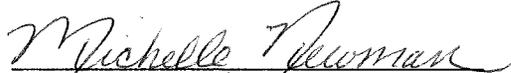
CERTIFICATE OF  
SERVICE

I, Michelle Newman, hereby declare that on March 22, 2018, I caused to be sent for service a copy of the foregoing document on the attorney for Appellate, as set forth below:

Attorney for Appellate:	<input checked="" type="checkbox"/> United States Mail
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McGavick Graves	<input checked="" type="checkbox"/> Email
1102 Broadway, Suite 500	
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<a href="mailto:lmb@mcgavick.com">lmb@mcgavick.com</a>	

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22nd day of March, 2018, at Olympia, WA.

  
MICHELLE NEWMAN

**ATTORNEY GENERAL OF WASHINGTON**

**March 22, 2018 - 2:33 PM**

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**Appellate Court Case Title:** In re the Estate of Michael Kerns  
**Superior Court Case Number:** 16-2-06433-2

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