

FILED

SEP 19 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29878-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DELORES WEAVER, as Personal Representative
of the ESTATE Of DUANE E. WEAVER,

Appellant,

v.

SPOKANE COUNTY,
a Washington State Municipal Corporation,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PEND OREILLE COUNTY
THE HONORABLE REBECCA BAKER

BRIEF OF APPELLANT

SMITH GOODFRIEND, P.S.

NORDSTROM LAW FIRM, PLLC

By: Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

By: Stephen L. Nordstrom
WSBA No. 11267

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

323 So. Pines
Spokane, WA 99206
(509) 924-8000

Attorneys for Appellant

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RULES AND REGULATIONS

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I. INTRODUCTION

RCW 70.96A.120(2) requires that “a person who appears to be incapacitated or gravely disabled by alcohol . . . shall be taken into protective custody by a peace officer” Relying on the “public duty doctrine” and “policy considerations,” the trial court held on summary judgment that a county officer had no duty to take into protective custody a pedestrian, whom he believed was “obviously intoxicated,” and who was walking unsteadily in traffic late on a winter night, wearing dark covered clothing, and in sub-freezing temperatures, on a busy arterial, which was covered with ice after heavy snowfall made the sidewalks “non-existent.”

Duane Weaver was struck and fatally injured by a drunk driver on February 9, 2008, roughly an hour after a Spokane deputy stopped Mr. Weaver, and, though concerned that he posed an obvious threat to himself and to drivers who might encounter him, told Mr. Weaver to walk facing traffic. This Court should reverse and remand for trial because Mr. Weaver is in the class of persons that the Legislature sought to protect under RCW 70.96A.120(2) when it imposed on local law enforcement an obligation to take into

protective custody those who “appear[] to be incapacitated or gravely disabled by alcohol.”

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its order granting Spokane County’s Motion for Summary Judgment and denying Plaintiff’s Motion for Partial Summary Judgment. (CP 160-162) (Appendix A)

2. The trial court erred in entering its April 5, 2011, letter opinion. (CP 158-159) (Appendix B)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

RCW 70.96A.120(2) provides that “a person who appears to be incapacitated or gravely disabled by alcohol . . . shall be taken into protective custody by a peace officer” (Appendix C)

1. Does RCW 70.96A.120(2) impose a mandatory duty upon law enforcement to take into protective custody persons who appear “incapacitated or gravely disabled by alcohol”?

2. Did the trial court err in finding on summary judgment that Mr. Weaver was not “incapacitated or gravely disabled by alcohol” because “Mr. Weaver was interacting with [Deputy Melville], responded to his questions, and followed his suggestions,” when the Deputy concluded that Mr. Weaver was

“obviously intoxicated,” and that he presented a hazard to himself and motorists by walking in the wrong direction on a busy, icy roadway, in subfreezing temperatures, late at night, clad in light-weight dark clothing, causing cars to swerve to avoid him?

IV. STATEMENT OF FACTS

A. Duane Weaver Was Struck And Fatally Injured An Hour After Deputy Melville Failed To Take Him Into Protective Custody After Stopping Mr. Weaver, Who Was Obviously Intoxicated And Walking On An Icy Road In Heavy Traffic.

While walking on Division Street in Spokane County on February 9, 2008, Duane E. Weaver was struck by a drunk driver. Mr. Weaver sustained catastrophic injuries, including severe traumatic brain injury, and fractures of the legs, back (resulting in paraplegia), skull, face, wrists and scapula. (CP 49) Seventeen months later, Mr. Weaver died of his injuries. (CP 51) His estate brought this action for damages because Spokane County’s agent, Deputy Marc Melville, had failed to take Mr. Weaver into protective custody as required by RCW 70.96A.120(2). (CP 1-4)

Approximately one hour and twenty minutes before he was struck, Spokane County Deputy Marc Melville saw Mr. Weaver attempting to walk on the snow berms covering the sidewalk along Division Street. (CP 48, 57-58, 75) Deputy Melville then saw Mr.

Weaver step into the roadway in the outside lane of North Division Street and begin walking with his back to traffic, close to the location where he was eventually struck by the drunk driver. (CP 57-58, 60, 63, 75) It was midnight, and the temperature was in the mid-twenties. (CP 56, 60) Mr. Weaver was wearing dark jeans, a dark shirt, and a dark jacket, halfway zipped. He had no hat, no gloves, and no flashlight. (CP 61, 75, 78)

Because the snow berms made the sidewalks “non-existent,” Deputy Melville knew Mr. Weaver had no choice but to walk in the roadway, which was “wet and icy.” (CP 48-49, 58) Deputy Melville also knew that Division was one of the busiest streets in Spokane, and that on this particular night, traffic was still “pretty heavy.” (CP 58) Deputy Melville also knew that midnight to three a.m. is when most drunk drivers are on the road. (CP 59-60)

When Deputy Melville stopped him, Mr. Weaver was “obviously intoxicated.” (CP 58-59, 63, 75) “[H]is eyes were bloodshot and watery,” (CP 59, 75) “[h]is speech was slurred,” he was “weaving side to side,” (CP 57, 59, 75), and “hav[ing] a hard time maintaining his balance.” (CP 48-49, 58, 75) Cars were “swerving” to avoid hitting Mr. Weaver, creating not only a danger

of serious harm to Mr. Weaver, but also to other members of the travelling public. (CP 57-58, 75)

Deputy Melville knew that an intoxicated individual's judgment is poor, and that his reaction time is slower than someone who is not intoxicated. (CP 61) Deputy Melville knew that Mr. Weaver was disoriented. When he asked Mr. Weaver where he was going, Mr. Weaver responded, "Home," and explained that home was "Downtown." (CP 58, 75) Deputy Melville knew that downtown was over five miles in the opposite direction. (CP 58, 60, 75) Deputy Melville told Mr. Weaver he was going the wrong way. (CP 58, 75) Deputy Melville was concerned for Mr. Weaver's safety, and told him so. (CP 58, 75)

Deputy Melville knew from his training that an individual who poses a danger to himself or others should be taken into protective custody, and transported to a safe place. In his deposition, Deputy Melville explained his obligations under the "community caretaking function":

A. They consider it a community caretaking function. And that is if you see somebody walking down the road and they appear to be unable to take care of themselves, you'll take them into protective custody and get them some place safe.

Q. So is that training with protective custody?

A. I guess a better way of saying it is rather than protective custody is we're trained that, if based on our opinion and the circumstance surrounding it, the totality of the circumstances is the term we use, if we think they're in a situation where they're a danger to themselves or to others or they can't take care of themselves for whether it's mental reasons, drugs, alcohol, or whatever, or their age and in the area that they are, we will do what we can to get them some place safe or where they need to be, so yes, we do get training in that.

(CP 60-61)

Deputy Melville acknowledged that the night of February 9th was a "pretty slow night . . ." and that he had the time and the opportunity to take Mr. Weaver "off the roadway . . . down to this apartment . . . or downtown." (CP 61) But Deputy Melville did not take Mr. Weaver into protective custody. Instead he told Mr. Weaver "if he had to walk in traffic because of the snow, to be facing the traffic." (CP 59, 75) However, Deputy Melville acknowledged that walking against traffic would have been of little benefit under the circumstances:

Q. So I guess I just need you to clarify for me your concern for his safety.

A. Right.

Q. Because he's in the roadway?

A. Right.

Q. But his speech is slurred.

A. Right.

Q. Eyes were watery and red?

A. Yes.

Q. And he's weaves [sic] back and forth.

A. Yes, sir.

Q. And if he does turn to face traffic, would you agree with me that his ability to avoid oncoming traffic or vehicles would still be hindered compared to somebody who is not intoxicated?

A. Yes, sir.

(CP 61)

Following his admonition to walk facing traffic, Deputy Melville watched as Mr. Weaver walked through the parking lot of a closed Carl's Junior restaurant, and continued to watch until Mr. Weaver was hidden from view by the restaurant building. (CP 59, 63, 75) Deputy Melville then put his car in gear and drove away. (CP 63) Just a little over an hour later, Deputy Melville learned that, while facing traffic, a drunk driver had struck Mr. Weaver. (CP 60, 78)

B. The Trial Court Held That The “Public Duty Doctrine” Barred Mr. Weaver’s Estate’s Claim For Medical And Funeral Expenses.

Mr. Weaver died from injuries sustained on the night of February 9, 2008, seventeen months later. On October 28, 2009, Mr. Weaver’s mother, Delores Weaver, was appointed as the personal representative of his estate. (CP 2, 51-54) On November 18, 2009, she served Spokane County with a Notice of Claim. (CP 2) Mr. Weaver died without statutory heirs to pursue a statutory wrongful death action under RCW 4.20.010. On January 27, 2010, Ms. Weaver filed a complaint for damages under RCW 4.20.046, limited to Mr. Weaver’s medical and funeral expenses. (CP 1-4)

The County and Ms. Weaver both moved for summary judgment. Pend Oreille Superior Court Judge Rebecca Baker (“the trial court”) granted the County’s motion and dismissed the complaint based on the “public duty doctrine.” (CP 160-62) In a letter opinion the trial court held that none of the four exceptions to the public duty doctrine applied, and in particular that RCW 70.96A.120(2) did not impose a duty on Deputy Melville to take Mr. Weaver in protective custody. (CP 158) The trial court reasoned, “I do think that the fact that Mr. Weaver was interacting with the

officer, responded to his questions, and followed his suggestions would not, as a matter of law, define him as 'gravely disabled,' much less 'incapacitated by alcohol.'" (CP 158 (internal citations omitted)) The trial court also reasoned that RCW 70.96A.120(2) must be strictly construed because it involves a "deprivation of liberty" and that "policy considerations" weighed against imposing a duty on the County. (CP 158)

The Weaver estate timely appealed. (CP 163-165)

V. ARGUMENT

The trial court erroneously granted the County summary judgment based on the public duty doctrine because RCW 70.96A.120(2) imposes a mandatory duty on police officers to take into protective custody an individual who appears "incapacitated or gravely disabled by alcohol." Moreover, as the County breached this duty of care as a matter of law, the trial court erred in denying the estate's motion for partial summary judgment. At a minimum, the trial court erred in weighing the facts to determine as a matter of law that Mr. Weaver was not "incapacitated" or "gravely disabled" by alcohol.

Review of summary judgment is de novo. ***Yonker By & Through Snudden v. State Dept. of Soc. & Health Services***, 85 Wn. App. 71, 75, 930 P.2d 958 (1997). This court should reverse, direct entry of partial summary judgment in favor of the estate on the issues of duty and breach of duty. At a minimum, it should remand for trial because the trial court resolved disputed issues of fact.

A. The County Owed Mr. Weaver A Duty Of Reasonable Care That Included The Mandatory Duty Under RCW 70.96A.120(2) To Take Into Protective Custody A Person Who Is “Incapacitated Or Gravely Disabled By Alcohol.”

In broadly waiving the State’s sovereign immunity, the Legislature has directed that both the State and local governments “shall be liable for damages arising out of their tortious conduct . . . to the same extent as if they were a private person or corporation.” RCW 4.96.010; RCW 4.92.090. “Washington State and its subdivisions are therefore liable for their torts and subject to suit like any other person or corporation.” ***Howe v. Douglas County***, 146 Wn.2d 183, 188, 43 P.3d 1240 (2002). “By this act, the legislature promised the people of this state that the government and its agents would exercise reasonable care or would be held accountable just like any private person or corporation.” ***Cummins***

v. Lewis County, 156 Wn.2d 844, 862-63, ¶38, 133 P.3d 458 (2006) (Chambers, J., concurring).

Washington courts have held that “for one to recover from a municipal corporation in tort it must be shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general.” *Bailey v. Town of Forks*, 108 Wn.2d 262, 265, 737 P.2d 1257 (1987), *amended*, 753 P.2d 523 (1988) (citations omitted). This rule is known as the “public duty doctrine.” There are four established bases for imposing liability on government under the public duty doctrine: (1) legislative intent; (2) a failure to enforce; (3) the rescue doctrine; and (4) a special relationship. *Bailey*, 108 Wn.2d at 268. These bases for liability, while called “exceptions” to the public duty doctrine, “embody traditional negligence principles,” and are used by Washington courts as “focusing tools” for determining when a public entity owes a duty to the plaintiff, rather than the public in general. *Taggart v. State*, 118 Wn.2d 195, 217-18, 822 P.2d 243 (1992). “If one of these exceptions applies, the government will be held as a matter of law to owe a duty to the

individual plaintiff or to a limited class of plaintiffs.” *Cummins*, 156 Wn.2d at 853, ¶14. Each of these exceptions apply here.

“When a duty is owed to a specific individual or class of individuals, that person or persons may bring an action in negligence for breach of that duty.” *Rodriguez v. Perez*, 99 Wn. App. 439, 444, 994 P.2d 874, *rev. denied*, 141 Wn.2d 1020 (2000). “[T]he determination of whether an actionable duty was owed to the plaintiff represents a question of law to be decided by the court.” *Cummins*, 156 Wn.2d at 852, ¶11. Under RCW 70.96A.120(2), the County has a mandatory duty to take into protective custody persons who appear to be incapacitated or gravely disabled by alcohol. This court should reverse because the County owed Mr. Weaver a duty under each of the four “exceptions” to the public duty doctrine.

- 1. The County Owed Mr. Weaver A Duty To Enforce RCW 70.96A.120(2), Which Imposes On Peace Officers A Mandatory Duty To Take Into Protective Custody Persons Who Are “Incapacitated Or Gravely Disabled By Alcohol.”**

The trial court erred in holding that the County could not be liable to Ms. Weaver for the failure to enforce RCW 70.96A.120(2)’s mandatory duty to take into protective custody a person

“incapacitated or gravely disabled by alcohol.” Under the “failure to enforce” exception, local government will be liable to a plaintiff if (1) governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, (2) fail to take corrective action despite a statutory duty to do so, and (3) the plaintiff is within the class the statute intended to protect. **Bailey**, 108 Wn.2d at 268.

These elements are all present here. There is no question that Deputy Melville was responsible for enforcing RCW 70.96A.120(2), that the statute imposed upon him a mandatory duty to take “corrective action,” and that Mr. Weaver falls within the class of persons the Legislature intended to protect.

The Legislature enacted RCW ch. 70.96A as a “comprehensive statute” to provide a “continuum of treatment” for drug and alcohol users. RCW 70.96A.010-011. In its statement of purpose, the Legislature stated “that the use of alcohol and other drugs has become a serious threat to the health of the citizens of the state of Washington.” RCW 70.96A.011. Part of RCW ch. 70.96A’s “continuum of treatment” is to protect persons who currently pose a danger to themselves or others because of their

use of alcohol or drugs. RCW 70.96A.120(2) therefore imposes a mandatory duty on peace officers to take into protective custody a person who appears incapacitated or gravely disabled by alcohol or other drugs:

... 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 or staff designated by the county*

RCW 70.96A.120(2) (emphasis added).

A person is incapacitated by alcohol if, “as a result of the use of alcohol . . . [he] is gravely disabled or presents a likelihood of serious harm to himself or herself, to any other person, or to property.” RCW 70.96A.020(14). A person is gravely disabled if, “as a result of the use of alcohol . . . [he] [i]s in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety.” RCW 70.96A.020(12). When detaining a person under this statute, “The peace officer . . . shall make every reasonable effort to protect his or her health and safety.” RCW 70.96A.120(2).

Our Supreme Court has held that local government’s failure to enforce the duty imposed by RCW 70.96A.120(2) is actionable in

tort. See **Bailey**, 108 Wn.2d 262. In **Bailey**, a police officer ordered a person he knew to be drunk to leave the area, and observed him get behind the wheel of his truck. The driver later struck and severely injured the plaintiff, who sued the City of Forks alleging its officer was negligent in not detaining the driver. The trial court dismissed the claim. The Supreme Court reversed, and held that RCW 70.96A.120(2) imposed upon the City a mandatory duty, actionable in tort, to take into custody a “publicly incapacitated individual.” 108 Wn.2d at 269.

As in **Bailey**, the County is liable in tort for the failure to enforce RCW 70.96A.120(2) and take Mr. Weaver into protective custody. The Legislature’s use of the word “shall” in the statute evidences the intent to impose a mandatory duty of care. See, e.g., **King v. Hutson**, 97 Wn. App. 590, 594-96, 987 P.2d 655 (1999) (county had duty to confiscate dangerous dog under RCW 16.08.100, which provides that the animal control authority “shall . . . immediately confiscate[]” “[a]ny dangerous dog” under certain conditions).

RCW 70.96A.120(2) also establishes a particular and circumscribed class of persons who must be taken into protective

custody. It narrowly and specifically defines that class – those who are in a public place and appear to be “incapacitated” or “gravely disabled.” See RCW 70.96A.020(12) (defining “gravely disabled” as someone “in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety”); RCW 70.96A.020(14) (defining “incapacitated” as someone who “is gravely disabled or presents a likelihood of serious harm to himself or herself, to any other person, or to property”).

The statutory language also establishes the Legislature’s intent to *protect* this circumscribed class. The Legislature directed peace officers to take into *protective* custody an individual who is incapacitated or gravely disabled by alcohol. The statute further mandates that “[t]he peace officer . . . shall make every reasonable effort to *protect* his or her health and safety.” RCW 70.96A.120(2) (emphasis added). Thus, the statute is specifically aimed at protecting the safety of persons incapacitated or disabled by the use of alcohol.

Deputy Melville by his training and experience had “actual knowledge” of his statutory “community caretaking” obligation. (CP 60-61) He failed to take corrective action despite RCW

70A.96.120(2)'s unambiguous statutory mandate. Indeed, as in **Bailey**, Deputy Melville stated that he stopped Mr. Weaver just before the accident, concluded that Mr. Weaver was "obviously intoxicated," and that Mr. Weaver presented a likelihood of serious harm to himself and a danger to others because he was "interfering with the flow" of traffic, causing cars to "swerve" to avoid hitting him. (*Compare* CP 57-59, 75 with **Bailey**, 108 Wn.2d at 264-65). The County owed Mr. Weaver a duty to enforce RCW 70.96A.120(2). This court should reverse the order granting summary judgment and direct partial summary judgment on the issue of duty in favor of Ms. Weaver.

2. The County Owed Mr. Weaver A Duty Of Care Under RCW 70A.96.120(2) Based On The "Legislative Intent" Exception To The Public Duty Doctrine.

The County also owed Mr. Weaver a duty to protect Mr. Weaver under the "legislative intent" exception to the public duty doctrine. This exception applies "when the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons." **Bailey**, 108 Wn.2d at 268. The County is liable because RCW 70A.96.120(2) "creates a governmental duty to protect particular individuals . . . and the

injured party was one of the persons designed to be protected.” ***Yonker By & Through Snudden v. State Dept. of Soc. & Health Services***, 85 Wn. App. 71, 78, 930 P.2d 958 (1997) (Department of Social and Health Services owes duty to abused children and their parents to reasonably investigate allegations of child abuse based on legislative intent in RCW ch. 26.44), *rev. denied*, 132 Wn.2d 1010 (1997).

“The requirement is not that the class be small or narrow, but that it be particular and circumscribed.” ***Yonker***, 85 Wn. App. at 79 (quotations omitted). This requirement is met here. The Legislature expressed a clear intent to protect those who are “incapacitated or gravely disabled by alcohol or other drugs and who [are] in a public place” RCW 70A.96.120(2). Mr. Weaver is a member of that protected class. This court should hold that the Legislature intended to impose upon the County a duty to take Mr. Weaver into protective custody.

3. The County Established A Special Relationship With Mr. Weaver After Assuring Him That He Would Be Safe By Walking Facing Traffic On A Dark And Icy Road, Knowing That Mr. Weaver Was Unable To Exercise Care For His Own Safety.

The County is additionally liable because the assurances

and advice provided to Mr. Weaver by Deputy Melville created a duty of care under the “special relationship” doctrine. A special relationship arises “where (1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff.” ***Beal for Martinez v. City of Seattle***, 134 Wn.2d 769, 785, 954 P.2d 237 (1998); ***Noakes v. City of Seattle***, 77 Wn. App. 694, 698, 895 P.2d 842, *rev. denied*, 127 Wn.2d 1021 (1995).

In ***Beal***, the Supreme Court affirmed denial of summary judgment to the defendant City under the special relationship exception where a wife seeking to repossess her property from her estranged husband made a single call to 911, was assured “we’re going to send somebody there,” and was shot by her husband while waiting outside in reliance on the police response. 134 Wn.2d at 784-88. In ***Noakes***, Division One reversed a grant of summary judgment to the defendant City where plaintiffs called 911 seeking police response to a prowler, were assured “We’ll send someone

out,” and were assaulted by the prowler while waiting in their home in reliance on the police response. 77 Wn. App. at 698-700.

Here, Deputy Melville was in direct contact with Mr. Weaver, assured him that facing traffic would protect him, and Mr. Weaver relied on this assurance. The direct, in person interaction between Mr. Weaver and Deputy Melville was far more contact than either of the plaintiffs had in *Beal* or *Noakes*, where plaintiffs’ brief phone conversations with a 911 operator established the requisite special relationship.

Here, after being stopped Mr. Weaver pointed at the snow berms and said to Deputy Melville, “Look at it. What do you want me to do?” (CP 75) Knowing that the sidewalks were non-existent, and that Mr. Weaver’s only option was to walk in the icy roadway, Deputy Melville nevertheless directed Mr. Weaver to walk facing traffic, ostensibly to reduce the risk from oncoming traffic. (CP 48-49, 58-59, 75) Shortly after his exchange with Deputy Melville, Mr. Weaver was struck while walking facing traffic, as Deputy Melville had instructed. (CP 78) This court should hold that the County had a duty to Mr. Weaver under the special relationship exception, as well as the other exceptions to the public duty doctrine.

4. The County Increased The Risk To Mr. Weaver After Stopping Him, Expressing Concern For His Safety, And Advising Him To Walk Facing Traffic.

The County is also liable for failing to “exercise reasonable care after assuming a duty to warn or come to the aid of a particular plaintiff.” *Bailey*, 108 Wn.2d at 268. Under the “rescue doctrine,” “[i]f a rescuer fails to exercise such care and consequently increases the risk of harm to those he is trying to assist, he is liable for any physical damages he causes.” *Brown v. MacPherson’s, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975) (State owed duty to the plaintiffs under the rescue doctrine where it led an avalanche expert and real estate broker to believe that it would convey avalanche warnings to plaintiffs).

The rescue doctrine applies here because Deputy Melville warned Mr. Weaver to walk in the road facing traffic, knowing full well that his instructions would not eliminate, but could increase the danger that Mr. Weaver posed to himself and oncoming traffic. (CP 61, 75) Deputy Melville knew that Mr. Weaver had no other option than to walk in the roadway. (CP 48-49, 58) Deputy Melville knew that the snow berms adjacent to the road made the sidewalks “non-existent.” (CP 58, 75) Deputy Melville knew that cars would have a

difficult time avoiding Mr. Weaver because he was wearing dark clothing, had no flashlight, and the roads were wet and icy. (CP 49, 61, 78) Deputy Melville also knew that Mr. Weaver was walking in traffic when drunk drivers are most commonly on the road. (CP 59-60)

Mr. Weaver relied on Deputy Melville's advice. He was struck and killed a little over one hour later, doing exactly what Deputy Melville had advised him to do. (CP 78) The County owed Mr. Weaver a duty of care under the rescue doctrine, in addition to the other three "exceptions" to the public duty doctrine.

5. The Trial Court Erred In Relying On "Policy Considerations" To Hold No Duty Exists.

The trial court also erroneously determined that policy considerations – presumably concerns about unlimited municipal liability – supported its ruling. (CP 158) As the Court noted in *Bailey*, the application of the failure to enforce exception does not "expose [the Defendant] to the specter of unlimited liability," because liability is "limited by the requirements of foreseeability and proximate cause." 108 Wn.2d at 270-71 (citations omitted). Statutory defenses of comparative fault, RCW 4.22.070, and in the

proper case, intoxication, RCW 5.40.060,¹ further limit the specter of unlimited municipal liability for the failure to comply with RCW 70.96A.120(2).

The duty imposed by RCW 70.96A.120(2) is limited. It does not require police officers to take into protective custody every person in public who has had a few drinks; rather, it only requires them to take into custody those who appear “incapacitated or gravely disabled by alcohol.” “[T]he protective custody provisions of RCW 70.96A.120 are narrowly drawn so as to reach only certain individuals incapacitated by alcohol.” *Hontz v. State*, 105 Wn.2d 302, 307, 714 P.2d 1176 (1986) (rejecting facial constitutional challenge to RCW 70.96A.120 as vague and overbroad under former definition of “incapacitated by alcohol”). The trial court erred in allowing its own notions of public policy to trump the express intent of the Legislature to protect persons who are unable to

¹ In “an action for damages for personal injury or wrongful death,” RCW 5.40.060 bars recovery of damages if the “person injured or killed was under the influence of intoxicating liquor or any drug,” that condition caused injury or death, and the jury finds the plaintiff “more than fifty percent at fault.” RCW 5.40.060(1). That statute is inapplicable here because Mr. Weaver died without statutory heirs to pursue a wrongful death claim and his personal representative sought only medical and funeral expenses pursuant to RCW 4.20.046. (CP 1-4, 40-41) See *Wilson v. Grant*, ___ Wn. App. ___, 2011 WL 2802909 (July 19, 2011).

protect themselves. See *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 428, 833 P.2d 375 (1992) (“public policy is to be declared by the Legislature, not the courts”).

The trial court also erred by reasoning that RCW 70.96A.120 involves a “deprivation of liberty” and thus must be strictly construed. (CP 158) Rules of statutory construction only apply where a statute is ambiguous. *Senate Republican Campaign Comm. v. Pub. Disclosure Comm’n of State of Wash.*, 133 Wn.2d 229, 241-42, 943 P.2d 1358 (1997); *In re Dependency of J.W.H.*, 147 Wn.2d 687, 696, 57 P.3d 266 (2002) (“We see nothing ambiguous about the term ‘custodian,’ and thus no need to construe the statute.”). The County never argued and the trial court did not find that RCW 70.96A.120 is ambiguous. The statute provides clear definitions of “incapacitated by alcohol” (RCW 70.96A.020(14)) and “gravely disabled” (RCW 70.96A.020(12)). Further, the statute by its terms, provides qualified immunity to peace officers who take persons into protective custody “in compliance with this chapter and are performing in the course of their official duty.” RCW 70.96A.120(7). Because the Legislature has clearly expressed its intent and mandated officers take persons

such as Mr. Weaver into protective custody, the trial court's reliance on "policy considerations" to dismiss this lawsuit was error.

6. The Public Duty Doctrine Conflicts With The Express Intent Of The Legislature And This Court Should Refuse To Apply It Further.

While the estate met each of the four exceptions to the public duty doctrine, appellant urges this court to abandon its flawed method of analyzing governmental liability. Continued application of the public duty doctrine conflicts with the Legislature's waiver of sovereign immunity of State and local government. See RCW 4.92.090; RCW 4.96.010. This court should follow the Legislature's clear instruction that governments are liable for their tortious acts and analyze government liability under traditional tort principles rather than the "public duty doctrine."

The public duty doctrine's "original function was a focusing tool that helped determine to whom a governmental duty was owed." *Cummins v. Lewis County*, 156 Wn.2d 844, 861, ¶36, 133 P.3d 458 (2006) (Chambers, J., concurring). The doctrine expanded over time and eventually came to be an independent hurdle that plaintiffs must overcome to sue the government. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 291, 669

P.2d 451 (1983) (Utter, J., concurring) (“The public duty doctrine is in reality merely a not so subtle and limited form of sovereign immunity.”).

Traditional tort principles provide an adequate check on unlimited government liability – the policy rationale for the public duty doctrine. **Bailey**, 108 Wn.2d at 271; **Chambers-Castanes**, 100 Wn.2d at 291-92 (Utter, J., concurring). For example, the failure to enforce and legislative intent exceptions’ requirement that a plaintiff be within the class the statute intended to protect simply asks what is already required under traditional tort analysis. See **Cameron v. Murray**, 151 Wn. App. 646, 656, ¶19, 214 P.3d 150 (2009), *rev. denied*, 168 Wn.2d 1018 (2010) (“To determine whether a duty of care exists based upon a statutory violation, Washington courts apply the *Restatement* test, which, among other things, requires that the injured person be within the class of persons the statute was enacted to protect.”); see also **Baerlein v. State**, 92 Wn.2d 229, 232, 595 P.2d 930 (1979) (“A clear statement of legislative intent to protect individuals does not need an ‘exception’ to the traditional rule; it is simply a statutory duty imposed upon the governmental entity.”).

Moreover, the Legislature remains “free to limit or eliminate” any duty imposed by a court. ***Taggart v. State***, 118 Wn.2d 195, 224, 822 P.2d 243 (1992). The public duty doctrine conflicts with the Legislature’s clear and unambiguous waiver of sovereign immunity. This court should reverse and hold as a matter of law that the County owed Mr. Weaver a duty of care.

B. There Are No Issues Of Material Fact Regarding Whether Deputy Melville Breached His Duty To Take Mr. Weaver Into Protective Custody. At A Minimum, The Trial Court Erred In Granting Summary Judgment To The County.

While the issue of breach of duty is normally a question of fact, the trial court erred in denying Ms. Weaver’s motion for partial summary judgment because there were no disputed issues of material fact regarding Deputy Melville’s failure to comply with the duty of care imposed by law. Where, as here, no reasonable juror could find that Deputy Melville complied with the duty imposed by RCW 70A.96.120(2), Mr. Weaver was entitled to partial summary judgment on the issue of breach of duty as a matter of law. See ***Hill v. Cox***, 110 Wn. App. 394, 402, 41 P.3d 495 (2002) (affirming summary judgment for plaintiff because “reasonable minds could not differ regarding the material facts”), *rev. denied*, 147 W.2d 1024 (2002).

In denying Weaver's motion and granting the County's motion for summary judgment, the trial court concluded that Mr. Weaver was not gravely disabled or incapacitated based on "*the fact* Mr. Weaver was interacting with the officer, responded to his questions, and followed his suggestions." (CP 158) (emphasis added) But only a dispute over a *material* issue of fact can defeat summary judgment. CR 56(c). The "facts" cited by the trial court are not material to whether Mr. Weaver was "incapacitated" under RCW 70.96A.120(2) – that is whether he was "gravely disabled or present[ed] a likelihood of serious harm to himself . . . to any other person, or to property," RCW 70.96A.020(14), or "in danger of serious physical harm resulting from a failure to provide for his . . . essential human needs of health or safety." RCW 70.96A.020(12).

Deputy Melville conceded that Mr. Weaver was "obviously intoxicated" because his "eyes were bloodshot and watery," "[h]is speech was slurred," he was "weaving side to side," and he was "hav[ing] a hard time maintaining his balance." (CP 57-59, 75) Deputy Melville knew that Mr. Weaver's intoxication would hinder his ability to avoid oncoming traffic. (CP 61; see also CP 48) Deputy Melville knew that Mr. Weaver was over five miles from his

stated destination, heading in the wrong direction, and wearing only jeans and an unzipped jacket, ill-prepared for the sub-freezing weather. (CP 58-61, 75) Mr. Weaver was wearing dark clothing, had no flashlight, and presented a hazard to oncoming traffic on roads that were “wet and icy.” (CP 49, 61, 78) To compound this danger, Mr. Weaver was walking along Division Street during “heavy traffic” and in the early morning hours, when most drunk drivers are on the road. (CP 58-60) Deputy Melville had already observed that Mr. Weaver posed a danger to drivers by forcing them to swerve on an icy road to avoid him. (CP 57-58, 75) Deputy Melville himself was “concerned for [Mr. Weaver’s] safety.” (CP 58, 75)

At a minimum, the trial court impermissibly weighed the evidence to determine that Mr. Weaver was not “gravely disabled” or “incapacitated by alcohol.” (CP 158) Even if these facts were not sufficient to justify judgment as a matter of law in favor of the plaintiff on the issue of breach of duty, the evidence presented a factual issue for the jury. See *Bailey*, 108 Wn.2d at 271 (remanding for trial on issues of breach and proximate cause); *Yonker*, 85 Wn. App. at 76 (“Once a duty is established, whether

the defendant breached the duty and whether that breach was a proximate cause of the plaintiff's injuries are normally questions of fact.").

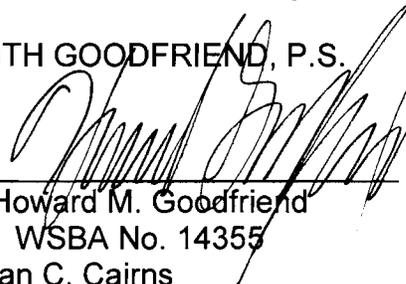
VI. CONCLUSION

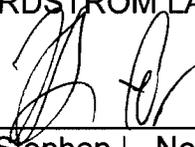
The trial court erred in holding the County immune from suit given the clear statutory mandate of RCW 70.96A.120(2), and in failing to hold that the County breached a duty of care as a matter of law. This Court should reverse and remand for trial on Ms. Weaver's claim that the County breached a specific and enforceable duty to take incapacitated persons into custody.

Dated this 15th day of September, 2011.

SMITH GOODFRIEND, P.S.

NORDSTROM LAW FIRM, PLLC

By: 

By: 

Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

Stephen L. Nordstrom
WSBA No. 11267

Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 15, 2011, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

| | |
|---|--|
| Office of Clerk Court of Appeals - Division III P.O. Box 2159 Spokane, WA 99201-2159 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail |
| Stephen L. Nordstrom Nordstrom Law Firm, PLLC 323 S. Pines Road Spokane Valley, WA 99206 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail |
| Peter J. Johnson Johnson Law Group 103 E. Indiana, Suite A Spokane, WA 99207-2317 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail |

DATED at Seattle, Washington this 15th day of September, 2011.



Amanda C. King

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SUPERIOR COURT
PEND OREILLE COUNTY, WA

SUPERIOR COURT, STATE OF WASHINGTON, PEND OREILLE COUNTY

* * *

DELORES WEAVER, as personal
representative of the Estate of DUANE E.
WEAVER,

NO. 10-2-00021-2

Plaintiff,

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DISMISSING
PLAINTIFF'S COMPLAINT WITH
PREJUDICE

v.

SPOKANE COUNTY, a Washington State
Municipal Corporation,

Defendant.

* * *

This matter coming regularly before the Court on Defendant Spokane County's Motion for
Summary Judgment, and the Court having considered the following pleadings:

1. Plaintiff's Complaint for Damages;
2. Defendant's Answer and Affirmative Defenses;
3. Defendant's First Amended Answer and Affirmative Defenses;
4. Plaintiff's Motion and Memorandum in Support of Motion for Partial Summary
Judgment Re: Affirmative Defenses and Proximate Cause;
5. Declaration of Stephen L. Nordstrom in Support of Plaintiff's Motion for Partial
Summary Judgment Re: Affirmative Defenses and Proximate Cause;
6. Defendant's Motion for Summary Judgment and Memorandum of Authorities in

ORDER GRANTING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND DISMISSING
PLAINTIFF'S COMPLAINT WITH PREJUDICE - 1

JOHNSON LAW GROUP
103 E. Indiana, Suite A
Spokane, WA 99207-2317
TEL: (509)825-5000 FAX:(509) 326 7503

- 1 Support of Defendant's Motion for Summary Judgment;
- 2 7. Statement of Undisputed Facts;
- 3 8. Plaintiff's Memorandum in Opposition to County's Motion for Summary
- 4 Judgment;
- 5 9. Memorandum of Authorities in Opposition to Plaintiff's Motion for Summary
- 6 Judgment; and
- 7 10. Plaintiff's Reply in Support of Partial Summary Judgment;

8 After hearing argument of counsel, and being fully advised in the premises, and it appearing that
 9 there is no genuine issue of material fact and the Defendant is entitled to judgment as a matter of
 10 law, and thus Plaintiff's Motion for Partial Summary Judgment Re: Affirmative Defenses and
 11 Proximate Cause is moot, now, therefore,

12 IT IS HEREBY ORDERED that the Defendant Spokane County's Motion for Summary
 13 Judgment be, and it is hereby, granted, and that Plaintiff's lawsuit is dismissed with prejudice.

14 DATED this 21st day of April, 2011.

15 **REBECCA M. BAKER**

16

JUDGE REBECCA M. BAKER

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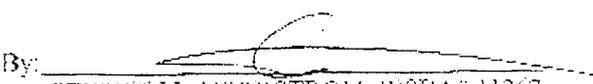
JOHNSON LAW GROUP

By: 

PETER J. JOHNSON, WSBA #6195
Attorney for Defendant

Approved as to Form and Content,
Notice of Presentment Waived:

NORDSTROM LAW FIRM, PLLC

By: 
STEPHEN L. NORDSTROM, WSBA# 11267
Attorneys for Plaintiff

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ORDER GRANTING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND DISMISSING
PLAINTIFF'S COMPLAINT WITH PREJUDICE - 3

JOHNSON LAW GROUP
103 E. Indiana, Suite A
Spokane, WA 99207-2317
TEL: (509) 835-3000 FAX: (509) 326-7503

Superior Court of the State of Washington
For Stevens, Pend Oreille and Ferry Counties

Stevens County Courthouse - Colville
Pend Oreille County Hall of Justice - Newport
Ferry County Courthouse - Republic

Rebecca M. Baker, Judge
Department 1

Allen C. Nielson, Judge
Department 2

Evelyn A. Bell
Court Administrator

April 5, 2011

Mailing Address:

215 S. Oak, Suite 209
Colville, WA
99114-2861

Telephone:

(509) 684-7520
Spokane 777-2741, ext. 520
Fax: 509-685-0679

Mr. Stephen L. Nordstrom
Nordstrom Law Firm, PLLC
323 S. Pines Rd.
Spokane, WA 99206

Mr. Peter J. Johnson
Johnson Law Group
103 E. Indiana, Suite A
Spokane, WA 99207-2317

Gentlemen:

Re: *Weaver v. Spokane County*
Pend Oreille County Cause No. 10-2-00021-2

I apologize to both of you for the length of time it has taken me to get you my decision on your respective motions for summary judgment. I had thought I would have some time to address the issues while conducting a two-week trial in Pend Oreille County at the end of February, but unfortunately the file was laid aside and it escaped my attention until week before last. I have, however, now had a chance to review your excellent briefing and to review numerous cases in relation to the applicability of the public duty doctrine as it relates to the particular facts of this case and the statutory scheme associated with RCW 70.96A.120.

Primarily because of the requirement of strict construction of statutes where a significant deprivation of liberty is involved, and the definition of "gravely disabled" in RCW 70.96A.020(12), and in consideration of the policy considerations behind the enactment of RCW 70.96A.120, I conclude that the defendant's motion for summary judgment of dismissal should be granted.

In doing so, I of course have found, as a matter of law, on the undisputed facts before me, that none of the four exceptions to the public duty doctrine applies. While this is indeed a close question with respect to the "failure to enforce" and the "legislative intent to protect a particular individual or class" exceptions, I do think that the fact that Mr. Weaver was interacting with the officer, responded to his questions, and followed his suggestions would not, as a matter of law, define him as "gravely disabled" (RCW 70.96A.020(12), much less "incapacitated by alcohol" (RCW 70.96A.020(14)) when the latter is read together with the definition of "likelihood of serious harm" (RCW 70.96A.020(18)(a)). The other two exceptions appear not to present such a close issue, in my view.

The above ruling makes the plaintiff's motion for partial summary judgment moot.

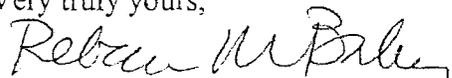
Mr. Stephen L. Nordstrom
Mr. Peter J. Johnson
April 5, 2011
Page 2

In my materials I did not have a proposed order from Mr. Johnson. If he would please prepare one (in the format contemplated by CR 56(h)) and circulate it to Mr. Nordstrom for approval as to form, and then to me for signature and entry, I would appreciate it.

Incidentally, I will not be back in Pend Oreille County until April 21, so if a presentation hearing is necessary for some reason, please feel free to contact our Court Administrator, Evelyn Bell, to set up a telephonic hearing on a day other than a Law and Motion Docket.

Thank you again for your patience in receiving this decision.

Very truly yours,



Rebecca M. Baker

cc: Court file

C

West's Revised Code of Washington Annotated Currentness

Title 70. Public Health and Safety (Refs & Annos)

Chapter 70.96A. Treatment for Alcoholism, Intoxication, and Drug Addiction (Refs & Annos)

→ **70.96A.120. Treatment programs and facilities--Admissions--Peace officer duties--Protective custody**

(1) An intoxicated person may come voluntarily to an approved treatment program for treatment. A person who appears to be intoxicated in a public place and to be in need of help, if he or she consents to the proffered help, may be assisted to his or her home, an approved treatment program or other health facility.

(2) Except for a person who may be apprehended for possible violation of laws not relating to alcoholism, drug addiction, or intoxication and 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 and except for a person who may wish to avail himself or herself of the provisions of RCW 46.20.308, a person who appears to be incapacitated or gravely disabled by alcohol or other drugs and who is in a public place or who has threatened, attempted, or inflicted physical harm on himself, herself, or another, shall be taken into protective custody by a peace officer or staff designated by the county and as soon as practicable, but in no event beyond eight hours brought to an approved treatment program for treatment. If no approved treatment program is readily available he or she shall be taken to an emergency medical service customarily used for incapacitated persons. The peace officer or staff designated by the county, in detaining the person and in taking him or her to an approved treatment program, is taking him or her into protective custody and shall make every reasonable effort to protect his or her health and safety. In taking the person into protective custody, the detaining peace officer or staff designated by the county may take reasonable steps including reasonable force if necessary to protect himself or herself or effect the custody. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime.

(3) A person who comes voluntarily or is brought to an approved treatment program shall be examined by a qualified person. He or she may then be admitted as a patient or referred to another health facility, which provides emergency medical treatment, where it appears that such treatment may be necessary. The referring approved treatment program shall arrange for his or her transportation.

(4) A person who is found to be incapacitated or gravely disabled by alcohol or other drugs at the time of his or her admission or to have become incapacitated or gravely disabled at any time after his or her admission, may not be detained at the program for more than seventy-two hours after admission as a patient, unless a petition is filed under RCW 70.96A.140, as now or hereafter amended: PROVIDED, That the treatment personnel at an approved treatment program are authorized to use such reasonable physical restraint as may be necessary to retain an incapacitated or gravely disabled person for up to seventy-two hours from the time of admission. The sev-

enty-two hour periods specified in this section shall be computed by excluding Saturdays, Sundays, and holidays. A person may consent to remain in the program as long as the physician in charge believes appropriate.

(5) A person who is not admitted to an approved treatment program, is not referred to another health facility, and has no funds, may be taken to his or her home, if any. If he or she has no home, the approved treatment program shall provide him or her with information and assistance to access available community shelter resources.

(6) If a patient is admitted to an approved treatment program, his or her family or next of kin shall be notified as promptly as possible by the treatment program. If an adult patient who is not incapacitated requests that there be no notification, his or her request shall be respected.

(7) The peace officer, staff designated by the county, or treatment facility personnel, who act in compliance with this chapter and are performing in the course of their official duty are not criminally or civilly liable therefor.

(8) If the person in charge of the approved treatment program determines that appropriate treatment is available, the patient shall be encouraged to agree to further diagnosis and appropriate voluntary treatment.

CREDIT(S)

[1991 c 290 § 6; 1990 c 151 § 8; 1989 c 271 § 306; 1987 c 439 § 13; 1977 ex.s. c 62 § 1; 1974 ex.s. c 175 § 1; 1972 ex.s. c 122 § 12.]

<(Formerly: Uniform Alcoholism and Intoxication Treatment)>

Current with all 2011 Legislation

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