

**FILED**

OCT 17 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 29878-7-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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

*Appellant,*

v.

SPOKANE COUNTY,  
a Washington State Municipal Corporation

*Respondent.*

---

BRIEF OF RESPONDENT

---

PETER J. JOHNSON, WSBA #6195  
Attorneys for Respondent  
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## I. STATEMENT OF THE CASE

Appellant's "Introduction" contains improper argument, misstatements of fact, and facts which are not in evidence. In addition, the Appellant misstates the trial court's ruling on summary judgment. Accordingly, this Statement of the Case is provided.

This action arises from a contact between Spokane County Sheriff's Deputy Marc Melville (hereinafter "Deputy Melville") and Duane Weaver (hereinafter "Weaver"). On February 8, 2008, at approximately 11:57 p.m., Deputy Melville was driving his patrol car south on Division when he observed Weaver walking northbound on Division on the east side of the road on top of the plowed snow. CP 75. Deputy Melville observed Weaver step off the snow into the street. CP 75. Deputy Melville observed at least two cars change lanes to keep from hitting Weaver. CP 61-62. Deputy Melville stopped Weaver and told Weaver he was concerned for his safety because he was walking in the lanes of traffic. CP 75.

Deputy Melville asked Weaver where he was headed. CP 75. Weaver stated he was headed home. CP 58. When Deputy Melville asked him where home was, he said downtown and did not offer an address. CP 58. Deputy Melville asked Weaver if his address was on his license and Weaver

said no. CP 57. When Deputy Melville told him he was headed the wrong way, he said, "I'm going down there," and pointed east down Wedgewood. CP 58. Deputy Melville did not take what Weaver said as a lie but more that he could not make Weaver tell him the truth. CP 58. Deputy Melville believed Weaver was headed to a friend's house down Wedgewood. CP 60. Weaver did not seem confused at all (CP 58, Dep. 17:2-25) and Deputy Melville felt Weaver knew where he wanted to go down Wedgewood way. CP 58 (Dep. 18:1-15).

Deputy Melville believed Weaver was intoxicated because his speech was slurred, his eyes were bloodshot and watery, and he was swaying as they spoke. CP 59 (Dep. 21:22-25). Deputy Melville requested Weaver's driver license, which Weaver gave him, and checked for warrants. CP 57 (Dep. 11:4-18). Deputy Melville advised Weaver not to walk on Division because it was too busy. CP 75. Weaver said "ok." CP 75. Deputy Melville, in accordance with the law,<sup>1</sup> told Weaver that if Weaver had to walk in the

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<sup>1</sup> RCW 46.61.250 states in part:

...  
(2) Where sidewalks are not provided any pedestrian walking or otherwise moving along and upon a highway shall, when practicable, walk or move only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction and upon meeting an oncoming vehicle shall move clear of the roadway.

roadway, he should walk facing traffic so he could see oncoming traffic. CP 75, 58 (Dep. 13:18-19).

Weaver walked away from Deputy Melville and off Division, into the parking lot of a Carl's Jr. restaurant and towards Wedgewood. CP 59 (Dep. 23:8-15). Deputy Melville last saw Weaver as he walked through the parking lot and around the rear corner of the Carl's Jr. building. CP 63 (Dep. 44:8-25, 45:1-7).

At 1:20 a.m., approximately 1 hour and 20 minutes after Deputy Melville saw Weaver walk away from Division, Weaver was struck by an intoxicated driver, Daniel West, while Weaver was walking southbound on Division, in the northbound curb lane of traffic. CP 3, 78. The accident occurred about a hundred yards from where Weaver had earlier been contacted by Deputy Melville. CP 58, 63 (Dep. 48:8-12). Weaver was seriously injured in the accident and ultimately died from injury complications on July 9, 2009. CP 1-4. Prior to his death, Weaver settled a claim for his injuries with the drunk driver's insurer for policy limits of \$100,000. CP 19.

Weaver's estate (hereinafter "Estate") sued Spokane County, which employed Deputy Melville, claiming that had Deputy Melville taken Weaver

into protective custody the accident would not have occurred and Weaver would not have been injured. CP 1-4.

## **II. ASSIGNMENTS OF ERROR**

The trial court determined as a matter of law that Weaver did not meet the requisite elements of RCW 70.96A because he was not incapacitated or gravely disabled as required by the statute to be taken into protective custody and that given the policy considerations behind the enactment of RCW 70.96A.120, none of the four exceptions to the public duty doctrine applied. Given the undisputed facts of this case, the trial court did not err in its holding.

## **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

The Estate's "Issues Related to Assignments of Error" also contains misstatements of fact or facts not in evidence. These errors are addressed in the Respondent's Statement of Facts section which follows.

The summary judgment motions in the trial court dealt solely with the question of duty. Contrary to the Estate's position, no question of duty arises under RCW 70.96A.120(2) arises absent a determination by Deputy Melville that Weaver appeared to be incapacitated or gravely disabled. More appropriately, the issue before this Court is: Did Weaver appear to Deputy

Melville to fit the statutory definitions of either incapacitated or gravely disabled as required by RCW 70.96A.120(2) and require being taken into protective custody or did Deputy Melville owe an individualized duty to Weaver under any exceptions to the public duty doctrine?

#### IV. STATEMENT OF FACTS

A. WEAVER WAS STRUCK BY A DRUNK DRIVER ON FEBRUARY 9, 2008, AND FATALLY INJURED.

As noted above, the Estate misstates numerous facts or offers facts which are not in evidence. For proper analysis, it is essential that these errors be addressed. The Estate's misstatements include:

Weaver was walking unsteadily and Weaver had a hard time maintaining his balance. These are misstatements. The record actually reflects: Weaver was not stumbling when he walked away from Deputy Melville. CP 63 (Dep. 45:21-22). Deputy Melville testified that "Anybody would have had a difficult time walking on top of a pile of snow that had been plowed there." CP 58 (Dep. 16:6-7). Deputy Melville could not tell whether Weaver stepped off the snow or stumbled; he was having a hard time walking on the pile of snow. CP 58 (Dep. 16:2-9). Deputy Melville did not know if Weaver lost his balance or anything like that. CP 75, 58 (Dep. 16:8-9).

Deputy Melville was concerned that Weaver posed an obvious threat to himself. Nowhere in the record does Deputy Melville make this statement. Deputy Melville's concern was that Weaver was walking on Division, in the roadway, with his back to traffic, contrary to law. CP 75, 58 (Dep. 13:18-19). Deputy Melville was not concerned about Weaver because he was intoxicated but just because he was walking in the traffic lane. CP 58 (Dep. 15:21-23, 13:18-19).

Weaver was an obvious threat to drivers who might encounter him. Nowhere in the record does Deputy Melville make this statement. This states a fact which is not in evidence. Deputy Melville testified his concern was that Weaver was walking on Division, in the roadway, with his back to traffic, contrary to law. CP 75, 58 (Dep. 13:18-19). Deputy Melville noted that two cars changed to the middle lane to keep from hitting Weaver because the snow left very little space to allow Weaver to pass on their right side. CP 57 (Dep. 12:20-24).

Deputy Melville concluded Weaver presented a hazard to himself and others by walking in the wrong direction. Nowhere in the record does Deputy Melville render this conclusion. To the contrary, the record demonstrates the following: The law requires a person walking along a roadway where

sidewalks are not available to walk facing traffic. CP 48, 58 (Dep. 13:18-19). Deputy Melville, in accordance with the law, told Weaver that if Weaver had to walk in the roadway, he should walk facing traffic so he could see oncoming traffic. CP 75, 58 (Dep. 13:18-19). When informed by Deputy Melville that Division was too busy to be walking on, Weaver said “ok” and left Division. CP 75.

Weaver was clad in light-weight, dark clothing. This is a misstatement of fact. Deputy Melville testified that he felt the jacket Weaver was wearing was appropriate for the weather. CP 61 (Dep. 34:21-25). In addition, the record reflects that Weaver was wearing mixed colored clothing. CP 48.

Deputy Melville knew Weaver had no choice but to walk in the roadway. This is a misstatement of fact. Deputy Melville testified he told Weaver that Division was too busy for him to be walking on it (CP 75) and told Weaver to stay off of Division. CP 63 (Dep. 49:4-7). Weaver told Deputy Melville that he would stay off the street (CP 75, 63, Dep. 45:19-20) and he left Division. CP 75. Deputy Melville was not concerned about Weaver walking there (Wedgewood). CP 60 (Dep. 29:4-7).

Weaver created a danger of serious harm to himself. This is not a statement of fact but a conclusion. Nowhere in the record does Deputy Melville testify this was the case. Deputy Melville testified to just the opposite: “Q: Would you agree with me that the likelihood of him being seriously harmed was pretty slim? A: It could have been, yes. Yes sir.” CP 58 (Dep. 15:2-4). Deputy Melville was not concerned about Weaver being intoxicated (CP 58) or about him walking Wedgewood way. CP 60. Weaver told Deputy Melville he would stay off the street. CP 75, 63 (Dep. 45:18-20). Weaver left Division. CP 75.

Deputy Melville knew Weaver was disoriented. This is a misstatement of fact. Nowhere in the record does Deputy Melville testify that he felt Weaver was disoriented. Deputy Melville testified he observed just the opposite: Weaver was not having any difficulty communicating. CP 58 (Dep. 15:16-18). Weaver did not seem confused at all. CP 58 (Dep. 18:11-12). Weaver seemed like he knew where he wanted to go. CP 58 (Dep. 18:13-15). Weaver appeared in possession of his faculties. CP 63. Weaver did not offer his address but Deputy Melville did not feel Weaver was lying to him but more that he could not make Weaver tell him the truth. CP 58

(Dep. 17:2-25, 18:1-10). Deputy Melville was not concerned about Weaver because he was intoxicated. CP 58 (Dep. 15:20-23).

Deputy Melville acknowledged that walking against traffic would have been of little benefit. This is a misstatement of fact. The record reflects there are no laws that prohibit a pedestrian from being intoxicated and walking legally upon a roadway where no sidewalk is provided as long as he stays to the far left. CP 48. The law says pedestrians should walk facing traffic so that they can see traffic coming towards them. CP 48, 58 (Dep. 13:17-20).

Weaver was struck and killed doing exactly what Deputy Melville had advised him to do. This is a misstatement of fact. Weaver told Deputy Melville he would stay off the street. CP 75, 63 (Dep. 45:18-20). “Q: And he was on Division where you told him not to walk? A: Right.” CP 63 (Dep. 48:23-24). “Q: Assuming he was walking with traffic, then was he doing everything that you told him to do? A: If he was doing that, except for staying off Division, yes.” CP 64 (Dep. 49:4-7).

In summary, the Estate has either misstated the actual evidence or has drawn conclusory inferences from the actual facts while labeling these conclusions as facts.

B. THE TRIAL COURT HELD THAT NONE OF THE FOUR EXCEPTIONS TO THE PUBLIC DUTY DOCTRINE APPLIED.

Based on the undisputed facts, the trial court held before it that Weaver was neither incapacitated nor gravely disabled as required by RCW 70.96A.120 and that none of the four exceptions to the public duty doctrine applied. Because the Estate was unable to establish the necessary elements of its claims, summary judgment was properly granted.

#### V. STANDARD OF REVIEW

This Court reviews an order on summary judgment de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate when there is “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). “A material fact is of such a nature that it affects the outcome of the litigation.” *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). The Court considers the facts and inferences from the facts in the light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Factual issues may be decided as a matter of law when reasonable minds could reach but one conclusion or when the factual dispute is so remote it is not material. *Ruffer v. St. Frances Cabrini Hosp. of Seattle*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990).

A defendant moving for summary judgment may meet the initial burden by pointing out the absence of evidence to support the nonmoving party's case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). "If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff." *Young*, 112 Wn.2d at 225 (footnote omitted). The facts set forth must be specific, detailed, and not speculative or conclusory. *Sanders v. Woods*, 121 Wn. App. 593, 600, 89 P.3d 312 (2004). If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial,' then the trial court should grant the motion." *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

## **VI. ARGUMENT**

### **A. ABSENT THE APPLICATION OF RCW 70.96A.120(2) TO WEAVER, THERE IS NO DUTY UNDER THE FAILURE TO ENFORCE OR LEGISLATIVE INTENT EXCEPTIONS TO THE PUBLIC DUTY DOCTRINE.**

The complaint alleges that Weaver was incapacitated or gravely disabled by alcohol triggering the protective custody provisions of RCW 70.96A.120(2). CP1-4. The Estate claims that because Deputy Melville did

not take Weaver into protective custody under this statute, he breached a duty owed to Weaver under the exceptions to the public duty doctrine. Prior to reaching the question of whether any duty existed, it must first be determined whether under the facts known to Deputy Melville, Weaver appeared to be incapacitated or gravely disabled as required by RCW 70.96A. If Weaver was not incapacitated or gravely disabled, the discussion of any duty under the failure to enforce or legislative intent exceptions to the public duty doctrine ends.

1. RCW 70.96A.120 addresses issues related to treatment for alcoholism and chemical dependency.

The material facts are undisputed. However, the Estate makes argumentative assertions in an attempt to bridge the gap between the undisputed facts and the requirements of RCW 70.96A.120(2). The trial court held as a matter of law that Weaver did not meet the requisite elements to be taken into protective custody. RCW 70.96A.120(2) does not authorize protective custody if, as here, Weaver did not appear to Deputy Melville to be incapacitated or gravely disabled as defined by the statute. The fact that Weaver appeared intoxicated (CP 75) was not sufficient to take him into protective custody. Being drunk in public does not trigger this statute.

RCW 70.96A.120(2) provides in part:

**RCW 70.96A.120**

**Treatment programs and facilities — Admissions — Peace officer duties — Protective custody.**

...

(2) ... 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 ... and as soon as practicable, but in no event beyond eight hours brought to an approved treatment program for treatment. ...

RCW 70.96A.120(2) (emphasis added). For the proper application of this statute, RCW 70.96A.020 provides the following definitions:

For the purposes of this chapter the following words and phrases shall have the following meanings unless the context clearly requires otherwise:

...

(12) ... “[G]ravely disabled” means that a person, as a result of the use of alcohol or other psychoactive chemicals: (a) Is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or (b) manifests severe deterioration in routine functioning evidenced by a repeated and escalating loss of cognition or volitional control over his or her actions and is not receiving care as essential for his or her health or safety.

...

(14) “Incapacitated by alcohol or other psychoactive chemicals” means that a person, as a result of the use of alcohol or other psychoactive chemicals, is gravely disabled or presents a likelihood of serious harm to himself or herself, to any other person, or to property.

...

(16) “Intoxicated person” means a person whose mental or physical functioning is substantially impaired as a result of the use of alcohol or other psychoactive chemicals.

...

(18) “Likelihood of serious harm” means:

(a) A substantial risk that: (i) Physical harm will be inflicted by an individual upon his or her own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one’s self; (ii) physical harm will be inflicted by an individual upon another, as evidenced by behavior that has caused the harm or that places another person or persons in reasonable fear of sustaining the harm; or (iii) physical harm will be inflicted by an individual upon the property of others, as evidenced by behavior that has caused substantial loss or damage to the property of others; or

...

(26) “Treatment” means the broad range of emergency, detoxification, residential, and outpatient services and care, ... which may be extended to alcoholics and other drug addicts ... incapacitated by alcohol or other psychoactive chemicals, and intoxicated persons.

...

RCW 70.96A.020(12), (14), (16), (18)(a), and (26) (emphasis added).

RCW 70.96A.120(2) authorizes compulsory alcohol treatment of someone who presents an immediate danger to himself or others or is gravely disabled or incapacitated by alcohol or drugs. *Butler v. The Honorable E. Kato*, 137 Wn. App. 515, 527, 154 P.3d 259 (2007).

2. The facts do not justify application of RCW 70.96A.120(2).

The undisputed facts demonstrate that Deputy Melville observed the following at the time of his contact with Weaver:

- Weaver was walking and was not stumbling. CP 63 (Dep. 45:22-23).
- Weaver was not having any difficulty communicating. CP 58 (Dep. 15:15-18).
- Weaver did not seem confused at all. CP 58 (Dep. 18:11-12).
- Weaver located his driver's license and gave it to Deputy Melville. CP 57 (Dep. 11:4-6).
- Weaver appeared in possession of his faculties. CP 63 (Dep. 45:17).
- The jacket Weaver was wearing was appropriate for the weather. CP 61 (Dep. 34:21-25).
- Weaver told Deputy Melville he would stay off Division. CP 63 (Dep. 45:19-21).
- Weaver seemed like he knew where he wanted to go. CP 58 (Dep. 18:13-15).
- Deputy Melville believed Weaver was headed to a friend's house or somebody he knew down Wedgewood. CP 60 (Dep. 28:9-10).

- Weaver walked towards Wedgewood, which is where he told Deputy Melville he was going. CP 63 (Dep. 45:16).
- Deputy Melville was not concerned about Weaver walking down Wedgewood in the condition he found him. CP 60 (Dep. 29:4-7).

The Estate dismisses these facts as not material to whether Weaver was incapacitated or gravely disabled under RCW 70.96A.120(2). (*See* Appellant's Brief, p. 28.) However, these factors were critical to Deputy Melville determining whether Weaver was subject to the extraordinary step of placing him into custody for his own protection. The Washington Supreme Court has recognized this:

Thus, by the statute's language the elements which trigger protective custody are: (1) a person whose judgment is so impaired by alcohol that he is incapable of realizing and making a rational decision with respect to his need for treatment; and (2) who constitutes a danger to himself, another person, or property; and (3) is in a public place, or (4) has threatened, attempted or inflicted physical harm on another.

*Hontz v. State of Washington*, 105 Wn.2d 302, 306, 714 P.2d 1176 (1986)  
(emphasis added).

The focus of this statute is on alcohol and chemical dependency. There are no facts which indicate that Weaver needed treatment for alcohol dependency or that he was so impaired by alcohol he was incapable of

making a decision with respect to a need for treatment. As the above undisputed facts evidence, neither Weaver's physical nor mental functioning appeared to Deputy Melville to be substantially impaired nor did Weaver's judgment appear so impaired by alcohol that he was incapable of making a decision as to a need for treatment.

3. RCW 70.96A.120(2) authorizes a substantial deprivation of freedom and should be strictly construed.

RCW 70.96A.120(2) authorizes the taking of a person into protective custody and compulsory treatment. "Protective custody" is defined in Black's Law Dictionary 1162 (8<sup>th</sup> ed. 2004) as: "The government's confinement of a person for that person's own security or well-being such as ... an incompetent person who may harm others." Had Deputy Melville taken Weaver into protective custody under RCW 70.96A.120(2), Weaver must have been taken "as soon as practicable, but in no event beyond eight hours" "to an approved treatment program for treatment." Protective custody is emergency detention without prior process and is clearly a significant deprivation of liberty. Where a significant deprivation of liberty is involved, statutes must be construed strictly. *In re LaBelle*, 107 Wn.2d 196, 205, 728 P.2d 138 (1986) (citing *In Re Cross*, 99 Wn.2d 373, 379, 662 P.2d 828 (1983)).

RCW 70.96A provides a specific definition of “incapacitated” which requires the “likelihood of serious harm.” As those terms are defined, they mean that for Weaver to have been taken into protective custody at the time Deputy Melville spoke with him, there had to be a substantial risk that Weaver would harm himself or others as evidenced by threats or attempts by him to commit suicide or inflict physical harm on himself or behavior by him that had caused physical harm or fear of physical harm to others or caused substantial loss or damage to the property of others. No facts exist to support any of these elements.

As noted by Spokane Police Department Corporal David L. Adams, “There are no laws that prohibit a pedestrian from being intoxicated and walking legally upon a roadway where no sidewalk is provided as long as he stays to the far left.” CP 48. Weaver’s compliance with that law at the time he was struck cannot be stretched into a threat or attempt to inflict harm upon himself, others or others’ property.

The fact that Weaver was an intoxicated pedestrian was not sufficient to place him in protective custody and compulsory treatment. To the contrary, the Washington Supreme Court has held:

... [T]he protective custody provisions of RCW 70.96A.120 are narrowly drawn so as to reach only certain individuals

incapacitated by alcohol **and in need of treatment** - that is, persons whose intoxicated condition renders them dangerous to themselves or others.

*Hontz*, 105 Wn.2d at 307 (emphasis added). This statute requires much more than intoxication:

[T]he statute is rather specific and contains reasonably clear guidelines. A person must appear to be “incapacitated by alcohol”. A definition is provided with two components: judgment so impaired by alcohol that a decision as to the need for treatment is incapable of being made **and** dangerousness – to himself, other, or property. In addition, the person must be in a public place or have threatened, attempted or inflicted physical harm on another.

*Hontz*, 105 Wn.2d at 307-308 (emphasis added).

A linchpin in this statute is that the person is so incapacitated as to need immediate treatment. Weaver clearly did not meet the definition of incapacitated nor did he qualify as gravely disabled. The definition of “gravely disabled” contained in RCW 70.96A states in part that a person as a result of the use of alcohol is in danger of serious physical harm resulting from his failure to provide for his essential human needs of safety. RCW 70.96A.020(12) does not define “essential human needs of safety.”

“Gravely disabled” as defined in RCW 70.96A.020(12) is identical to its definition in RCW 71.05.020(17) which deals with the civil commitment of those with mental illnesses. Therefore, cases which discuss

“gravely disabled” such that a person is unable to provide for his essential needs provide a clear basis for defining the application of the “gravely disabled” standard in RCW 70.96A.120(2). In that regard, the Washington Supreme Court has held:

... [T]he nature of the inquiry under RCW 71.05.020(1)(a), which necessarily involves critical judgments concerning a person’s ability to provide for his basic needs, is such that there is a danger of imposing majoritarian values on a person’s chosen lifestyle which, although not sufficiently harmful to justify commitment, may be perceived by most of society as eccentric, substandard, or otherwise offensive. In order to avoid the erroneous commitment of such persons under the gravely disabled standard, the State must present recent, tangible evidence of failure or inability to provide for such essential human needs as food, clothing, shelter, and medical treatment which presents a high probability of serious physical harm within the near future unless adequate treatment is afforded. Furthermore, the failure or inability to provide for these essential needs must be shown to arise as a result of mental disorder and not because of other factors. So construed, the definition of “gravely disabled” set forth in RCW 71.05.020(1)(a) is neither vague nor overbroad.

*In re Labelle*, 107 Wn.2d at 202-205.

This analysis is in accord with *Hontz* which held that one of the elements necessary to trigger protective custody under RCW 70.96A.120(2) was “a person whose judgment is so impaired by alcohol that he is incapable of realizing and making a rational decision with respect to his need for treatment.” There is no allegation by the Estate nor is there any evidence in

the record that Weaver was in need of treatment and unable to make a rational decision as to that need.

It is illogical for the Estate to propose that the protections provided to those “gravely disabled” and subject to protective custody and involuntary commitment for treatment because of mental illness should be different than protections provided to those “gravely disabled” because of alcoholism or chemical dependency. Even more nonsensical is the argument that a pedestrian who is under the influence of alcohol should be detained and placed into compulsory treatment without respect for the clear restrictions of the statutes and case law interpreting them.

The Washington Supreme Court in *LaBelle* stated:

... [U]nder the gravely disabled standard, ... the potential for harm must be “great enough to justify such a massive curtailment of liberty.” *Harris*, at 283, quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 31 L. Ed. 2d 394, 92 S. Ct. 1048 (1972). In *Harris*, we held that the risk of danger to self or others must be substantial and the harm must be serious before involuntary commitment is justified. Similarly we construe the gravely disabled standard of RCW 71.05.020(1)(a) to require a showing of a substantial risk of danger of serious physical harm resulting from failure to provide for essential health and safety needs.

...

... [W]here as here a significant deprivation of liberty is involved, statutes must be construed strictly. *In re Cross*, 99 Wn.2d 373, 379, 662 P.2d 828 (1983).

*In re Labelle*, 107 Wn.2d at 204-205.

Based upon the undisputed facts in this matter, Weaver was neither “incapacitated” nor “gravely disabled” as required by law. Thus, Deputy Melville had no authority to take him into protective custody.

Since Weaver was not subject to being taken into protective custody pursuant to RCW 70.96A.120(2), neither the failure to enforce nor the legislative intent exceptions to the public duty doctrine apply as those exceptions require the application of a statute to trigger the analysis of a duty. In addition, the facts do not establish a duty under the other exceptions to the public duty doctrine.

**B. NO INDIVIDUALIZED DUTY WAS OWED TO WEAVER BY DEPUTY MELVILLE.**

**1. Public Duty Doctrine**

This doctrine provides that a governmental entity can be held liable only when 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 at large (*i.e.*, a duty to all is a duty to no one). *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1998) (quoting *J & B Dev. Co. v. King Cy.*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983)). A general responsibility to the public, rather than to individual members of the public, does not create a duty of

care. *Osborn v. Mason County*, 157 Wn.2d 18, 28, 134 P.3d 197 (2006) (quoting *Campbell v. City of Bellevue*, 85 Wn.2d 1, 9, 530 P.2d 234 (1975)). Under most circumstances “[t]he relationship of police officer to citizen is too general to create an actionable duty. The courts generally agree that responding to a citizen's call for assistance is basic to police work and not special to a particular individual.” *Torres v. City of Anacortes*, 97 Wn. App. 64, 74, 981 P.2d 891 (1999).

There are four circumstances, referred to as “exceptions,” in which a government entity acquires a special duty of care owed to a particular plaintiff or a limited class of potential plaintiffs rather than to the public in general: (1) where there is a “legislative intent” to impose such a duty, (2) where the state is guilty of a “failure to enforce” a statutory duty, (3) where the government has engaged in “volunteer rescue” efforts, and (4) where a “special relationship” exists between the plaintiff and the state. *Pierce v. Yakima County*, 161 Wn. App. 791, 798, 251 P.3d 270, 273 (2011) (citing *Donohoe v. State*, 135 Wn. App. 824, 834, 142 P.3d 654 (2006); *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001)). Whether a duty exists is a question of law. *Osborn*, 157 Wn.2d at 22-23.

Regardless of RCW 70.96A.120(2), the Estate is unable to create any legal duty owed to Weaver because it is unable to satisfy any of the “exceptions” to the public duty doctrine.

2. Failure to Enforce Exception.

The Estate alleges that Deputy Melville owed a duty to Weaver under the failure to enforce exception to the public duty doctrine. Under this exception, a public official owes a duty to an individual if: (1) the official has a duty to enforce a statute, (2) the official has actual knowledge of a statutory violation, (3) the official fails to correct the violation, and (4) the plaintiff is within the class the statute protects. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). *See also, Smith v. State*, 59 Wn. App. 808, 814, 802 P.2d 133 (1990), review denied, 116 Wn.2d 1012, 807 P.2d 884 (1991); and *Taylor*, 111 Wn.2d at 163. The plaintiff has the burden of establishing all four elements of this exception. *Atherton Condo. Apartment-Owners Ass'n Bd. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990). The failure to enforce exception is to be construed narrowly. *Id.*

- a. *Deputy Melville had no duty to enforce RCW 70.96A.120(2) as to Weaver.*

Deputy Melville did not have a duty to enforce RCW 70.96A.120(2) as to Weaver because that statute was not applicable to him. Stated another way, Weaver was not in violation of that statute. None of the undisputed facts satisfy this element of the failure to enforce exception and, therefore, this exception does not apply.

- b. *Deputy Melville did not have actual knowledge of Weaver's violation of RCW 70.96A.120(2).*

Assuming *arguendo* that Weaver was incapacitated or gravely disabled as mandated by RCW 70.96A.120(2), the Estate has failed to establish that Deputy Melville had actual knowledge of this violation. As the undisputed facts clearly show, Deputy Melville had no such knowledge. Absent actual knowledge, the failure to enforce exception does not apply.

- c. *Corrective Action of Statutory Violation*

The only statutes which Weaver arguably violated were RCW 9A.84.030(1), disorderly conduct, or RCW 46.61.250(2), walking in the roadway with traffic. These violations were corrected when Weaver left Division and told Deputy Melville he would stay off the street. Other than

issuing Weaver a citation, there was no other corrective action Deputy Melville could have legally taken.

The Estate further contends that Deputy Melville had a mandatory duty to take Weaver into protective custody. This contention is based upon the use of the term “shall” in RCW 70.96A.120(2). Again, this argument ignores the fact that this statute did not apply to Weaver. Nonetheless, Washington courts have held that the term “shall” may also be construed in a directory sense, depending upon the intent of the legislature.

“A fundamental rule of statutory construction is that the court must interpret legislation consistently with its stated goals.” *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) (citing *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 140, 814 P.2d 629 (1991)), cert. denied, 532 U.S. 920 (2001). To ascertain legislative intent, the courts look to the statute’s declaration of purpose. *Donohoe*, 135 Wn. App. at 844. Such declarations are “useful in determining how the legislative body intended the entire statute to operate,” and “can be crucial to the interpretation of a statute.” *Food Servs. of Am. v. Royal Heights*, 123 Wn.2d 779 at 788, 871.

When “shall” is used in a statute which sets forth the responsibilities of a public official, the word may be either mandatory or permissive. The general considerations relevant to this determination are stated in *Spokane County ex rel.*

*Sullivan v. Glover*, 2 Wn.2d 162, 169, 97 P.2d 628 (1940): As a general rule, the word “shall,” when used in a statute, is imperative and operates to impose a duty which may be enforced, while the word “may” is permissive only and operates to confer discretion. These words, however, are frequently used interchangeably in statutes, and without regard to their literal meaning. In each case, the word is to be given that effect which is necessary to carry out the intention of the legislature as determined by the ordinary rules of construction. Our Supreme Court has more recently stated: In determining the meaning of the word “shall” we traditionally have considered the legislative intent as evidenced by all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another. *State v. Huntzinger*, 92 Wn.2d 128, 133, 594 P.2d 917 (1979).

*Milton v. Waldt*, 30 Wn. App. 525, 528-529, 635 P.2d 775 (1981) (emphasis added).

In *Donohoe*, 135 Wn. App. at 849, the court held that the failure to enforce exception applied only where there was a mandatory duty to take a specific action to correct a known statutory violation. Again, the Estate’s argument ignores insurmountable gaps. First, the statute had to apply to Weaver. Second, Weaver had to have violated the statute. Third, Deputy Melville had to have actual knowledge of a violation of RCW 70.96A.120(2). Without satisfying these elements, Deputy Melville had no duty to act.

It is a well recognized principle that police officers have great discretion in enforcing laws even when those laws contain seemingly mandatory language, because it is “common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.” *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2806 (2005). *See also, Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999).

A person’s sobriety must be judged by the way he appears to those around him. *Young v. Caravan Corp.*, 99 Wn.2d 655, 659, 663 P.2d 834, 672 P.2d 1267 (1983); *Wilson v. Steinbach*, 98 Wn.2d 434, 439, 656 P.2d 1030 (1982); *Shelby v. Keck*, 85 Wn.2d 911, 915, 541 P.2d 365 (1975). Nothing in RCW 70.96A.120(2) purports to remove Deputy Melville’s discretion in determining if Weaver was in violation of the statute.

- d. *RCW 70.96A.120(2) did not carve out a particular class of which Weaver was a part.*

Under either the failure to enforce and the legislative intent exceptions, the Estate must identify either “a class which the statute intended to protect” (failure to enforce) (*see Bailey*, 108 Wn.2d at 269-70) or a “particular and circumscribed class” (legislative intent) that is narrower than the public at large (*see Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d

911, 969 P.2d 75 (1998)). Thus, any duty to protect Weaver individually must have been expressly created by the statute.

“[T]o ascertain legislative intent, courts look to the statute’s declaration of purpose.” *Donohoe*, 135 Wn. App. at 844. A review of RCW 70.96A clearly shows that its purpose is to address a serious threat to the “health of the citizens of the state”:

**RCW 70.96A.011**

**Legislative finding and intent — Purpose of chapter.**

The legislature finds that the use of alcohol and other drugs has become a serious threat to the health of the **citizens of the state of Washington**. The use of psychoactive chemicals has been found to be a prime factor in the current AIDS epidemic. Therefore, a comprehensive statute to deal with alcoholism and other drug addiction is necessary.

The legislature agrees with the 1987 resolution of the American Medical Association that endorses the proposition that all chemical dependencies, including alcoholism, are diseases. It is the intent of the legislature to end the sharp distinctions between alcoholism services and other drug addiction services, to recognize that chemical dependency is a disease, and to insure that prevention and treatment services are available and are of high quality. It is the purpose of this chapter to provide the financial assistance necessary to enable the department of social and health services to provide a discrete program of alcoholism and other drug addiction services.

RCW 70.96A.011 (emphasis added).

The public duty doctrine is based upon a policy that legislative enactments and executive regulations passed for public benefit should not be discouraged by exposing the government to unlimited liability for individual claims. *Taylor*, 111 Wn.2d at 163. General precatory language in a statute does not identify a particular and circumscribed class of individuals. *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 607, 871 P.2d 601, rev. denied, 124 Wn.2d 1029 (1994). In *Pepper*, the court held that because the legislature clearly stated the statute was enacted “for the citizens of the state of Washington,” it referenced the public and not a narrow class of specific property owners, and the legislative intent exception did not apply. This is the exact language at issue in this action. Only if a statute expresses a legislative intent to protect a particular class of individuals may members of that class bring a tort action against the governmental entity under that statute. *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988).

A law enforcement officer’s duty to protect the citizens is a general duty owed to the public as a whole. No duty exists unless the duty breached is owed to the injured person as an individual and is not a breach of an obligation owed to the public at large. *Halleran v. NuWest*, 123 Wn. App. 701, 710 (2004). Duty to the public at large precludes liability. *Babcock*, 144

Wn.2d at 784-785; *Taylor*, 111 Wn.2d at 170; *Halleran*, 123 Wn. App. at 714.

The Estate contends that the use of “incapacitated or gravely disabled” in RCW 70.96A.120(2) is sufficient to create a class which the statute intended to protect and to set Weaver apart from the general public. The Washington Supreme Court has dismissed similar arguments:

A cause of action for negligence will not lie unless the defendant owes a duty of care to plaintiff. Appellants contend law enforcement agencies have a statutory duty to provide police protection ... While this may be true in a broad sense, courts have consistently held that absent a clear legislative intent or clearly enunciated policy to the contrary, these duties are owed to the public at large and are unenforceable as to individual members of the public.

*Chambers-Castanes v. King County*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983) (citations omitted).

As clearly articulated in Chapter 70.96A, this legislation was enacted for the health of the citizens of the state and not created for a particular and circumscribed class of which Weaver was a member. A threat to the public at large, as the legislature in this chapter found alcohol, drugs and the AIDS epidemic to be, created a duty owed to all, not individually to Weaver. The Estate is unable to identify a class created by the statute that is narrower than

the public at large. Thus neither the failure to enforce nor the legislative intent exceptions can apply.

3. Legislative Intent.

The legislative intent exception requires that the legislation “evidenced a clear intent to identify and protect a particular and circumscribed class of persons. *Halvorsen v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978). The standard for a statute to identify a “particular and circumscribed class of persons” for the legislative intent exception is more stringent than what is required to identify a class of persons for the failure to enforce exception. *Waite v. Whatcom County*, 54 Wn. App. 682, 688, 775 P.2d 967 (1989). The Court of Appeals has explained this standard in detail:

The requirement is not that the class be small or narrow, but that it be "particular and circumscribed." *Donaldson*, 65 Wn. App. at 667. "Particular" means "involving, affecting, or belonging to a part rather than the whole of something: . . . not universal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1647 (3d ed. 1976). "Circumscribe" means "to set limits or bounds to: . . . to define, mark off or demarcate carefully." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 410 (3d ed. 1976). Neither of these qualifiers necessarily means that the protected group must be small or narrow. Indeed, such is not the requirement. For example, the class of persons protected in *Donaldson*, victims of domestic violence, unfortunately cannot be described as small. It is, however, particular and circumscribed, as is the class sought to be protected here.

*Yonker v. Department of Social & Health Services*, 85 Wn. App. 71, 79-80, 930 P.2d 958 (1997).

In order for the legislative intent exception to apply, the legislature's intent to protect a particular and circumscribed class of persons "must be clearly expressed within the provision—it will not be implied." *Ravenscroft*, 136 Wn.2d at 930 (citing *Baerlein v. State*, 92 Wn.2d 229, 232, 595 P.2d 930 (1979)).

Statutory provisions which evidence only an intent to benefit the public as a whole, rather than a particular class of individuals, do not give rise to a duty of care pursuant to the legislative intent exception. *See e.g.*, *Ravenscroft*, 136 Wn.2d at 929 (regulations which refer to recreational boating are primarily aimed at protecting the public, not just members of a particular class consisting of those who participate in recreational boating); *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 563, 104 P.3d 677 (2004) (statute empowering cities to take actions necessary to combat local disasters evidences intent to protect "the people of the state," rather than a particular group of individuals).

Where a specific duty of care has been identified pursuant to the legislative intent exception, the courts have stressed the fact that the

applicable statute expressly focused on the protection of a specific class of individuals. *See e.g., Yonker*, 85 Wn. App. at 78-80 (duty of care arises from RCW 26.44.010 which declares the chapter's purpose to safeguard the welfare of abused and neglected children); *Donaldson v. Seattle*, 65 Wn. App. 661, 666-68, 831 P.2d 1098 (1992) (duty of care arises from RCW 10.99.010 which declares the chapter's purpose to be "to assure the victim of domestic violence the maximum protection from abuse.").

Despite the Estate's contention to the contrary, **Chapter 70.96A RCW – Treatment for Alcoholism, Intoxication, and Drug Addiction**, evidences only an intent to benefit the citizens of the State of Washington in general, rather than to identify a specific group of individuals that are owed a special duty of care. This chapter clearly evidences that general purpose in the following ways:

- the use of alcohol and drugs has become a serious threat to the health of the citizens of the state
- the use of psychoactive chemicals is a prime factor in the current AIDS epidemic
- it is the legislature's intent to end the distinction between alcoholism and other drug addiction services; and

- the purpose of the chapter is to enable DSHS to provide alcohol and drug addiction services

Despite these broad declarations by the legislature, the Estate asserts that the legislative intent of this statute was to protect a circumscribed class of individuals consisting of those persons incapacitated or gravely disabled by alcohol. Such a class was not carved from the citizens of the state by this legislature or this statute. Accordingly, no individualized duty was owed to Weaver by this statute. Thus, the legislative intent exception does not apply.

#### 4. Special Relationship

A governmental authority may be liable to an individual who establishes that a particular duty was owed to that individual who could justifiably rely upon assurances specifically sought and which the government expressly gave. *See Meaney v. Dodd*, 111 Wn.2d 174, 179-80, 759 P.2d 455 (1988). A government duty cannot arise from implied assurances. *See Honcoop*, 111 Wn.2d at 192-93; *Taylor*, 111 Wn.2d at 167, 759 P.2d 447. “It is only where a direct inquiry is made by an individual and . . . information is clearly set forth by the government, the government intends that it be relied upon and it is relied upon by the individual to his detriment, that the government may be bound.” *Meaney*, 111 Wn.2d at 180, 759 P.2d 455. The

individual must seek an express assurance and the government must unequivocally give that assurance. *See id.*

In order for the special relationship exception to apply, Weaver must have sought an express assurance and Deputy Melville must have unequivocally given that assurance. *Babcock*, 144 Wn.2d at 789. There is simply nothing in the record which demonstrates that Weaver sought any assurance from Deputy Melville or that Deputy Melville provided an express assurance to Weaver which could give rise to justifiable reliance.

Deputy Melville requested that Weaver leave Division, which was too busy, and that if he was walking in the roadway, to comply with the law which required a pedestrian on a roadway to walk facing traffic. CP 75, 58 (Dep. 13:18-19). There is nothing about this conversation nor any evidence in the record that raises this conversation to the level of the required express assurance. The Estate cites no authority for equating a request by an officer for a person to comply with the law as an express assurance. *See Meaney*, 111 Wn.2d at 180; *Taylor*, 111 Wn.2d at 168 (overruling in part *J & B Dev. Co.*, 100 Wn.2d 299, 669 P.2d 468, a case imposing government liability in part on the government's implicit assurances that the plaintiff had complied with building codes).

Even viewing the facts and all inferences in a light most favorable to Weaver, the Estate has failed to show that Weaver justifiably relied upon an explicit assurance by Deputy Melville to his detriment. When Deputy Melville first contacted Weaver, he was walking with his back to traffic. As testified by Deputy Melville, the law requires that a pedestrian walk facing traffic so that he can see the traffic coming towards him. CP 58. Deputy Melville requested Weaver move off Division and that he comply with this law. There is no evidence whatsoever that Weaver relied to his detriment on Deputy Melville's request that Weaver stay off Division. In fact, Weaver obviously ignored this request.

The Estate must demonstrate sufficient facts, not mere speculation or argumentative assumptions, showing that Weaver justifiably relied on an explicit assurance given by Deputy Melville. *Babcock*, 144 Wn.2d at 791-92. To bind the government, Weaver must have relied upon the assurance to his detriment. *Id.* at 793. Absent an express assurance specifically sought by Weaver, expressly given by Deputy Melville and relied upon by Weaver to his detriment, the special relationship exception does not apply.

5. Rescue Doctrine

A public entity has a duty under this exception when an injured party reasonably relies, or is in privity with a third party that reasonably relies, on its promise to aid or warn. *See, e.g., Bratton v. Welp*, 145 Wn.2d 572, 576-77, 39 P.3d 959 (2002); *Babcock*, 144 Wn.2d 774, 778, 30 P.3d 1261 (2001) (finding no duty to aid because reliance was unreasonable); *Beal v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998) (analyzing duty to aid under “special relationship” doctrine); *Honcoop*, 111 Wn.2d at 192-93 (1988) (holding duty to warn exists only if public entity makes “assurances that could give rise to justifiable reliance”). There is no evidence that Weaver relied on Deputy Melville to warn him of the danger of walking with his back to traffic. Reasonable reliance is the linchpin of the rescue doctrine.” *Osborn*, 157 Wn.2d at 25; *Brown v. MacPherson’s Inc.*, 86 Wn.2d 293, 301, 545 P.2d 13 (1975).

There is absolutely no evidence in the record that, as the Estate alleges, Deputy Melville assured Weaver “that facing traffic would protect him.” (*Appellant’s Brief*, p. 21.) There is no evidence that Deputy Melville failed to exercise reasonable care in advising Weaver. In fact, the evidence is that Deputy Melville advised Weaver to leave Division because it was too

busy and, that should he have to walk in the roadway, he should comply with the law and walk facing traffic. CP 75, 58 (Dep. 13:18-19).

Under CR 56(e), a party opposing summary judgment “may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” A party must make reference to documentary evidence in the record in support of each factual assertion in its brief, rather than mere reference to pleadings which themselves contain unsupported factual assertions. See RAP 10.3(a)(5) (reference to record must be included for each factual statement); *Grobe v. Valley Garbage Serv., Inc.*, 87 Wn.2d 217, 228-29, 551 P.2d 748 (1976) (cases on appeal are decided only from evidence in the record). Only those facts that have been verified by reference to documentary evidence in the record can be relied upon. The Estate has failed in this burden because many of the statements described as “facts” by the Estate are merely assumptions, conclusions or argumentative assertions.

The Estate alleges that Deputy Melville knew that his “instructions would not eliminate, but could increase the danger that Mr. Weaver posed to himself and oncoming traffic.” (*Appellant’s Brief*, p. 20.) Again, there is not

one iota of evidence in the record of this alleged knowledge by Deputy Melville. In reality, what the Estate is suggesting is that an officer who requests a person to comply with the law (RCW 46.61.250) is knowingly doing so to the detriment of the public for whose benefit the law was enacted. This is nonsensical. The Estate is not able to remotely demonstrate any evidence which satisfies the necessary elements under the rescue exception to the public duty doctrine. This exception does not apply.

6. The trial court did not err in holding that no duty exists.

The Estate misstates the trial court's ruling. There is nothing to indicate that "unlimited municipal liability" was either argued or considered by the trial court in its decision. To determine whether Weaver was part of a class which the legislature clearly intended to protect, the trial court was required to look at the policy considerations behind the enactment of RCW 70.96A.120. This was both appropriate and necessary.

It is likewise misleading for the Estate to assert that either RCW 5.40.060 or *Wilson v. Grant*, \_\_\_ Wn. App. \_\_\_, 2011 WL 2802909 (July 19, 2011), are relevant to this appeal. The Court in *Wilson* discussed which claims under the general survival and special survival statutes benefit the decedent's estate or the statutory beneficiaries. Neither RCW 5.40.060

nor *Wilson* were at issue in the summary judgment motion before the trial court and they should not be considered. In fact, the Estate's brief misinterprets the application of RCW 5.40.060 to this case.

7. The public duty doctrine should not be applied.

The Estate contends this Court should abandon the public duty doctrine. However, as the Court of Appeals recognized in *Timson v. Pierce County Fire Dist. No. 15*, 136 Wn. App. 376, 383, 149 P.3d 427 (2006) (citing *Donohoe*, 135 Wn. App. 824, 142 P.3d 654, 662-63 (2006)), the doctrine remains good law in Washington. This Court is bound by controlling precedent. See *State v. Hairston*, 133 Wn.2d 534, 539, 946 P.2d 397 (1997).

C. THE UNDISPUTED FACTS DO NOT SUPPORT THE TAKING OF WEAVER INTO PROTECTIVE CUSTODY.

The fact that Weaver died as a result of a tragic accident one hour and twenty minutes after Deputy Melville spoke with him did not make Weaver an incapacitated or gravely ill person as defined by RCW 70.96A.120(2). To have deprived Weaver of his freedom by taking him into protective custody and submitting him to compulsory treatment, mandated that Weaver's conduct or condition rise to the very high standards and explicit requirements

of RCW 70.96A. Weaver's condition and conduct simply did not rise to that level.

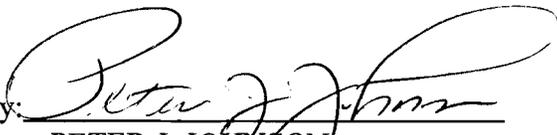
When a party is unable to establish a genuine issue as to a material fact or fails to make a showing sufficient to establish all elements essential to his case, the court must grant summary judgment. *Young*, 112 Wn.2d at 225. The trial court did not err in granting summary judgment to the County.

### VII. CONCLUSION

RCW 70.96A.120(2) did not apply to Deputy Melville's contact with Weaver. The Estate simply cannot meet the required elements of the statute. Regardless of the application of this statute, the Estate did not meet any of the elements necessary to invoke any of the exceptions to the public duty doctrine. Therefore, the trial court was correct in denying the Estate's motion for summary judgment and it was appropriate to grant the County's motion for summary judgment.

DATED this 17<sup>th</sup> day of October, 2011.

JOHNSON LAW GROUP

By:   
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Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of October, 2011, a true and correct copy of the foregoing was placed in an envelope, sealed and deposited into the United States Mail at Spokane, Washington, with first class postage fully prepaid thereon, addressed to the following:

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