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NO. 365727

COURT OF APPEALS, DIVISION III,  
OF THE STATE OF WASHINGTON

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Deborah Phifer, Personal Representative of the estate of Mr. Phifer,

Appellant/Plaintiff,

v.

State of Washington Department of Labor and Industries,

Respondent/Defendant.

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APPELLANT'S AMENDED OPENING BRIEF

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## I. INTRODUCTION

Deborah Phifer, on behalf of the Estate of Fred Phifer, (“Mr. Phifer”) is seeking review of the trial court’s orders granting summary judgment to State of Washington Department of Labor and Industries (“Department”) on the issues of whether Department owed an ordinary duty of care and/or a heightened duty of care to Mr. Phifer pursuant to *Hutchins v. 1001 Fourth Ave Assoc*, 116 Wn.2d 217, 227-28, 802 P.2d 1360, 1366 (1991) and the Restatement (Second) of Torts § 315 and 319 (1965)). Mr. Phifer claims that the Department owed him a duty of care of listening in good faith to his request for workman’s compensation benefits and act accordingly. The Department breached this duty by failing to listen and ask questions of Mr. Phifer and instead jumping to conclusions and calling the police and accusing him of being suicidal without any reasonable basis for this accusation.

Mr. Phifer claims that the Department had an ordinary duty of care to not make that accusation unless it had a solid foundation to make it. Additionally, Mr. Phifer claims that The Department had a heightened duty of care based on the insurer/insured business relationship.

## II. ASSIGNMENTS OF ERROR

**Assignment of Error No. 1:** The trial Court erred in ruling that The Department did not owe a duty of care to Appellant to listen attentively and in good faith to Mr. Phifer's requests for workman's compensation benefits and to act accordingly.

**Assignment of Error No. 1:** The trial Court erred in ruling that The Department did not owe a heightened duty of care to Appellant based on their insurer/insured business relationship pursuant to *Hutchins*, 116 Wn.2d 217, 227-28.

## III. ISSUES PRESENTED FOR REVIEW

1. Whether a state agency owes a duty of care to act as a reasonable state agency in handling an insured's request for benefits in a reasonable manner and determining whether insured is simply upset by delay in benefits or is actually suicidal.
2. Whether a state agency that has an insurer/insured business relationship with plaintiff owes heightened duty of care to an insured handling an insured's request for benefits in a reasonable manner and determining whether insured is simply upset by delay in benefits or is actually suicidal.

#### IV. STATEMENT OF THE CASE

1. On July 1, 2008, Mr. Phifer filed a workers' compensation claim with Mr. Phifer for an on-the-job injury of his back and hands while working as a grinder. CP 71.
2. The claim was assigned to Annabea Alvarado, who was a workers' compensation claim adjudicator employed by The Department. CP 12.
3. Ms. Alvarado's responsibilities as a claims manager for The Department included: "review reports of accidents, make sure criteria is met for allowance of a claim, review for time-loss benefits, for loss of earning power benefits..." CP 388.
4. From the time that Mr. Phifer filed his claim, he was being treated by Dr. Lefors for his work place injuries and for depression. CP 455-464.
5. In the days prior to August 4, 2008, Mr. Phifer called Ms. Alvarado to find out why he was not getting time loss benefits and left several voicemails for Ms. Alvarado to call him back. CP 12-13.
6. On August 4, 2008, while Mr. Phifer was sharpening his wife's knives in his home kitchen, Ms. Alvarado called Mr. Phifer back and Mr. Phifer answered the call. *Id.*
7. The contents of the conversation are in dispute. Mr. Phifer alleges that: Ms. Alvarado was angry and lectured him as to why he was calling

her so many times and that he wasn't her only client and to stop calling her so much. *Id.* Ms. Alvarado then asked "what do you do all day, lay around and watch TV all day?" *Id.* Although this irritated Mr. Phifer, he responded that he did what his doctor ordered, which was to move around for a while and then rest and then move again. *Id.* Ms. Alvarado then asked what he was doing, and he responded that he was sharpening his wife's knives because his profession was being a grinder and he was good at sharpening knives. *Id.* Ms. Alvarado then put him on hold and Mr. Phifer waited for about 5-10 minutes on hold. *Id.* When Ms. Alvarado came back on the line, she informed Mr. Phifer that she was going to issue partial payments for time loss and asked Mr. Phifer not to call so much. *Id.* Mr. Phifer never said that he was suicidal or anything that would have made anyone believe that he was suicidal. CP 14-15; 416-18. Mr. Phifer was going to explain why he was sharpening knives, but was not given the opportunity because Ms. Alvarado put him on hold. CP 416-18.

8. Ms. Alvarado's note that she wrote on the day of the phone call states:

"[rtc] to status not happy the way things were going, was having very bad thoughts, he felt like a loser, feels like he has hit a brick wall and feels like ending it all. [S]ays supervisor at magic metals caused his mental health issue. says that he is about to lose his house. cm advised would pay provisional until we get things sorted out. Stated has been seeing dr. lefors since 05/22/08. has always had back

problems has 7 messed up discs. in the past has gone thru dvr was trained for real estate did that for 14 years...asked iw if he wanted cm to contact mental health or authorities to pay him a visit to discuss his bad thgouths stated no, he would like to speak w/dr. wms...per protocol cm notified yakima police dept.

CREATE DATE: 08/04/08”

CP 194.

9. According to Ms. Alvarado, despite Mr. Phifer stating that he did not want mental health or authorities to pay him a visit, Ms. Alvarado still called the Yakima Police Department to report that Mr. Phifer was suicidal. CP 389-90.

10. The Department’s policy in place for handling injured workers that threatened suicide, in relevant part, was as follows:

“To: All Claims Staff

From: Jody Moran, Program Manager Claims Administration

Subject: When an Injured Worker Threatens Suicide

*This is an update to my December 11, 2001 memo when it was brought to my attention that we had not been handling workers’ threats of suicide consistently. In order to make our process more uniform and to improve the timeliness of our response, the following instructions are being provided:*

When an injured worker tells you that he/she is threatening to commit suicide, you need to contact the appropriate County Law Enforcement Agency in the county where the worker lives. The list of County ‘Suicide and Crisis Phone Numbers’ is attached. Although we are not asking you to also contact the ‘Crisis/Mental Health Agency,’ that agency is listed for your information as well. As a courtesy, you should also contact the worker’s attending physician, and in particular, the worker’s psychiatrist if one is providing care under the claim.

*NEW INFORMATION—if you receive the worker’s call before 8 a.m. or after 5p.m., first call WSP (902-6367) to let them know you will be calling 911; and then call 911, and ask to be transferred to the appropriate county to report the worker’s suicide threat.*

Please DO NOT complete an internal L&I Incident Report UNLESS the worker threatens you (or other department staff) with bodily harm, or you receive threats of destructions of agency property.

Your immediate attention in following this protocol is appreciated. Thank you.” CP 396 (emphasis in original).

11. The Department routinely got callers that were stressed with the way their claims are going and it was not uncommon to have callers express actual threats of suicide. CP 395; 404-406.
12. This was the Departments only and official policy on what to do when an injured workers threatened to commit suicide. CP 407-408.

13. The Department did not provide any trainings to its claims managers on how to apply this policy. *Id.*
14. On the date of the phone call, Ms. Alvarado had Mr. Phifer's attending physician's, Dr. Lefors contact information, but she did not call him. CP 391-92.
15. If Mr. Phifer's attending physician, Dr. Lefors, had been contacted and agreed to respond, Dr. Lefors could have evaluated Mr. Phifer at his home. CP 438.
16. Ms. Alvarado reported to the police department that Mr. Phifer threatened to end his life that that he had weapons (knives), which caused the police officers to approach Mr. Phifer with their "guard up." CP 439-41.
17. Minutes after Mr. Phifer hung up the phone with Ms. Alvarado, he had three police officers at his front door who handcuffed him and stated that The Department's claims manager had called them to report that Mr. Phifer was suicidal and threatening to commit suicide and that had knives out. CP 13-14.
18. The police officers handcuffed Mr. Phifer and had him wait in his house until an evaluator came to check on him. *Id.*; CP 18-20. The police officers inquired about whether Mr. Phifer had guns in his house and proceeded to search his house and take his guns out of his safe. *Id.*

19. The police officers then took Mr. Phifer to the police station to keep waiting on the evaluator. *Id.* At the police station, Mr. Phifer was held in a room and hand cuffed to a pipe that ran across the wall. *Id.* The evaluator finally arrived and evaluated Mr. Phifer and determined that he was not suicidal and had him released. *Id.*

20. Mr. Phifer was detained in handcuffs by the police at his house for about 30 minutes and held in handcuffs at the police station for about 45 minutes. CP 420-21.

21. Being detained police officers and taken and held in handcuffs at the police station caused Mr. Phifer a flare up of his dormant post traumatic stress disorder (“PTSD”) that had been dormant since he was beaten almost to death by police officers at Toppenish police station in the 19070s. *Id.*; CP 19-39; 266-67; 273-79; 420-21; 431-32.

22. Before being detained on August 4, 2008, despite symptoms of depression, Mr. Phifer’s physician, Dr. Lefors opined that Mr. Phifer was not suicidal. CP 266-67; 431-432.

23. After the August 4, 2008 incident, Mr. Phifer was diagnosed with PTSD and The Department accepted this medical condition as part of Mr. Phifer’s work injury claim. CP 23-39; 69-70; 269-79.

24. During the time that Ms. Alvarado worked as a claims manager for The Department, injured workers complained against her for being rude on the phone on a daily basis. CP 393.

25. During the time of the incident, Ms. Alvarado was consistently absent and late to work, which made it so that she had to play catch-up in returning calls to the injured workers' claims that she managed. CP 409-411. The ideal number of claims for a claims manager to handle was 200-220 at a time. *Id.* During the time of the incident, Ms. Alvarado was handling about 300 claims. *Id.*

26. Another claims manager for The Department, Mary Garza, shared an instance when she handled a call from an injured worker that suggested that he was suicidal: Ms. Garza informed him that she would have to call the authorities and the injured worker responded by stating “nevermind, I’m fine” and Ms. Garza did not have to call the police. CP 404-06. Ms. Garza stated that she just had to show the injured worker that she was listening and that she would have to call the authorities if the injured worker did mean that he was suicidal, which allowed the injured worker to clarify that he was not actually suicidal. *Id.*

## **V. ARGUMENT**

### **A. STANDARD OF REVIEW ON APPEAL FROM SUMMARY JUDGMENT**

The legal standard that the district court was following in making its decision was the standard of summary judgment. The standard of review of an order of summary judgment is *de novo*. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 301, 45 P.3d 1068 (2002). The appellate Court performs the same inquiry as the trial court. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992). The evidence and reasonable inferences from the evidence are construed by the Court in favor of the nonmoving party. *Miller v. Likins*, 109 Wn. App. 140, 144, 34 P.3d 835 (2001); *See Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Miller*, 109 Wn. App. 140, 144. A material fact is one that affects the outcome of the litigation. *Ruff*, 125 Wn.2d 697, 703; *see Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990), *citing Morris v. McNicol*, 83 Wn.2d 491, 494, 519

P.2d 7 (1974). Generally, questions of fact are properly left for the jury and may be determined as matters of law only when reasonable minds could reach but one conclusion. *Jenson v. Scribner*, 57 Wn. App. 478, 480, 789 P.2d 306 (1990).

The moving party bears the initial burden to prove by uncontroverted facts that there is no genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If it carries this burden, the burden then shifts to the nonmoving party, to show a *prima facie* case based on the facts and “reasonable inference” from the facts. *Pelton v. Tri-State Memorial Hosp., Inc.*, 66 Wn. App. 350, 354, 831 P.2d 1147 (1992). An inference is a “process of reasoning by which a fact or proposition sought to be established is deduced as a *logical sequence* from other facts, or a state of facts, already proven or admitted.” *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 853, 751 P.2d 854 (1988), quoting *Dickinson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986) (emphasis in original).

The nonmoving party bears the burden, not to prove facts, but to produce evidence that discloses the existence of a genuine issue of material fact. *See Meyer v. University of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

Summary judgment should be granted only when the responding party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Miller*, 109 Wn. App 140, 145.

**B. The Department Is Liable For The Negligence of Its Employees And Is Held To Its Internal Directives**

Washington State waived sovereign immunity through RCW 4.92.090. “Implicitly, this waiver functions as a promise that the State and its agents will use reasonable care while performing its duties at the risk of incurring liability.” *Joyce v. State, Dep’t of Corr.*, 155 Wn.2d 306, 309, 119 P.3d 825, 827 (2005) *superseded on other grounds*. “Internal directives, department policies, and the like may provide evidence of the standard of care and therefore be evidence of negligence.” *Id.* at 324.

**C. The Department, Through Ms. Alvarado, Owed a Duty of Care to Mr. Phifer to Listen And Ask Appropriate Questions To Determine How To Respond**

The Department is responsible for the negligent acts of its employees as long the employee is engaged at the time in the furtherance of the employer's interest. *Rahman v. State*, 170 Wn.2d 810, 816, 246 P.3d 182, 184 (2011), *overturned on other grounds due to legislative action*. Ms. Alvarado owed a duty to Mr. Phifer to respond to Mr. Phifer’s request for

benefits in good faith, to listen and to ask follow up questions to determine the best way to handle his call.

When viewing the facts in the light most favorable to Mr. Phifer, Ms. Alvarado breached this duty by failing to listen to Mr. Phifer's concerns and comments. Mr. Phifer's testimony is that he never said anything about hurting himself or wanting to commit suicide. A reasonable claims manager in the same or similar circumstances would not have reported that Plaintiff was suicidal to the police unless he actually threatened suicide. A reasonable person acting as a claims manager would have asked follow up questions to ascertain whether Mr. Plaintiff was just upset having just suffered an injury and not receiving any workman's compensation benefits or if he in fact was threatening suicide. When viewing the facts in the light most favorable to Plaintiff, Ms. Alvarado should not have called the police because Plaintiff did not threaten to hurt himself or to commit suicide.

Mr. Phifer also testified that Ms. Alvarado put him on hold when he mentioned that he was sharpening his wife's knives and did not give him the opportunity to explain why he was sharpening knives. Mr. Phifer testifies that if he would have not been put on hold, he would have explained that he was sharpening knives so that his wife could cut

tomatoes without squishing. If Ms. Alvarado would have simply listened to Mr. Phifer to explain why he was sharpening knives, she would have known that Mr. Phifer was not threatening to commit suicide and would not have called the police on Mr. Phifer. A reasonable claims manager would have asked follow up questions and acted accordingly. This is a breach of Ms. Alvarado's duty.

Ms. Alvarado's own testimony admits that she asked Mr. Phifer whether he wanted her to "contact mental health or authorities to pay him a visit to discuss his bad thoughts[, he] stated no, he would like to speak with Dr. [Williams]." Cp 389-90. Ms. Alvarado still called the police. *Id.* A reasonable claims manager would not have called the police considering that the injured worker indicated that he would follow up with his doctor.

Ms. Alvarado also breached her duty by failing to call Mr. Phifer's attending physician. Ms. Alvarado admits that she had Mr. Phifer's attending provider's phone number on hand, but decided not to call him even though this was instructed in the Department's policy.

Ms. Garza gave an example of what a reasonable person would have done in the same or similar circumstances when she was a claims manager and handled a call from an injured worker that suggested that he was suicidal: Ms. Garza informed him that she would have to call the authorities and the injured worker responded by stating "nevermind, I'm

fine” and Ms. Garza did not have to call the police. *Id.* at Ex. B, 21:22-24:17. Ms. Garza states that she just had to show the injured worker that she was listening and that she would have to call the authorities if the injured worker did mean that he was suicidal, which allowed the injured worker to clarify that he was not actually suicidal. *Id.*

This is the opposite of what Ms. Alvarado did with Mr. Phifer; she put him on hold and called the authorities even after Mr. Phifer said that he was fine. A reasonable person that was concerned about whether somebody was in danger of committing suicide would have taken every precaution and would have also called the person’s doctor who could have intervened and cleared up the misunderstanding. Viewing this evidence in the light most favorable to Plaintiff, it is evident that Ms. Alvarado did not exercise ordinary care by not listening to Mr. Phifer when he requested that she not call the mental health or the authorities, but she still called the police and then failed to call his attending provider, Dr. Lefors.

Mr. Phifer’s aggravation of his PTSD happened when he was taken into a holding cell at the police station and held there for about forty-five minutes to an hour. One of the arresting officers, Officer Gonzalez, testified that the suicide evaluation could have happened at Mr. Phifer’s home if his counselor would have been called. CP 438. Ms. Alvarado testified that she had Dr. Lefors’ phone number on hand and could have

called him, but chose not to. Mr. Phifer was expecting to be evaluated as to whether he was suicidal or not at his home, and once he was held at holding cell at the jail, “everything came back to me where I was beat up down in Toppenish [...] and they tried to kill me down there and I, I didn’t know but what these guys would try to hurt me too.” *Id.* at Ex. C at 69:13–70:10. Dr. Lefors also testified that Mr. Phifer’s PTSD was reawakened by being put in “some kind of holding area.” *Id.* at D 72:23-73:3. Viewing the facts in the light most favorable to Mr. Phifer, if Ms. Alvarado would have called Dr. Lefors, his PTSD symptoms would have been avoided because he would have more likely than not been able to be interviewed at his home and avoid being taken into a jail cell where he was beaten in 1975.

**D. Statutes And The Department’s Internal Memorandums Are Evidence of Negligence**

WPI 60.03 states that a violation of a statute or internal governmental policy is not necessarily negligence, but may be considered by the jury as evidence in determining negligence. RCW 5.40.050.

Ms. Alvarado failed to follow the Department’s internal memo—which Ms. Garza stated was the Department’s only policy regarding injured workers that threaten suicide. The policy only applies “[w]hen an injured worker tells you that he/she is threatening to commit suicide.” Viewing the evidence in the light most favorable to Mr. Phifer, he did not make threat to commit suicide, so, pursuant to the internal memo, Ms.

Alvarado should not have called the police. Furthermore, Ms. Alvarado also failed to follow the internal memorandum of calling the injured worker's attending physician, Dr. Lefors.

Furthermore, our legislature has established the Suicide-safer homes task force. RCW 43.70.445. The task force has established simple steps to take in prevention of suicide, which have been encapsulated in the acronym LEARN: Look for signs, Empathize and Listen, Ask directly about suicide, Remove the Danger and Next steps.

<https://depts.washington.edu/saferwa/resources/learn/>.

Ms. Alvarado failed to empathize and listen. If she would have listened, she would have acknowledged that Mr. Phifer specifically stated that he did not need to have the police called to his house. Furthermore, if Ms. Alvarado would have allowed Mr. Phifer to explain himself, he would have explained that he was sharpening knives for his wife and was not thinking of committing suicide with them.

**E. Insurer-Insured Special Relationship Between The Department and Mr. Phifer Creates A Heightened Standard of Care**

The Department is endowed by our Legislature with the power and responsibility to act as an insurer for our State's workforce. The Department does not use taxpayers money to pay out benefits to workers that are injured. "The department shall formulate and adopt rules governing the method of premium calculation and collection." RCW

51.16.035. The Board that is appointed to oversee the Department's actions is titled "Board of Industrial *Insurance* Appeals." RCW 51.52, *et seq.* (emphasis added).

The Department is in the business of insuring our State's workers for injuries that are suffered at work. RCW 48.30.015 provides that insurers have a duty to promptly fairly and in good faith investigate its insured's claims and provide the benefits that the insured is entitled to. Our State has exercised its police power in creating the Department as an agency to act as an insurer for workplace injuries. RCW 51.04.010.

With great power comes great responsibility. The Department is required to:

“supervise the providing of prompt and efficient care and treatment, including care provided by physician assistants[,] chiropractic care, and including care provided by licensed advanced registered nurse practitioners, to workers injured during the course of their employment at the least cost consistent with promptness and efficiency, without discrimination or favoritism[...] PROVIDED FURTHER, That the department may recommend to an injured worker particular health care services and providers where specialized treatment is indicated or where cost effective payment levels or rates are obtained by the department: AND PROVIDED FURTHER, That the department may enter into contracts for goods and services including, but not limited to, durable medical equipment so long as statewide access to quality service is maintained for injured workers. [...] [The Department] shall make a record of the commencement of every disability and the termination thereof and, when bills are rendered for the care and treatment of injured workers, shall approve and

pay those which conform to the adopted rules, regulations, established fee schedules, and practices of the director and may reject any bill or item thereof incurred in violation of the principles laid down in this section or the rules, regulations.” RCW 51.04.030.

The Department even has authority to require treating physicians to undergo continuing medical education courses and to sanction physicians that provide medical treatment under this statute to injured workers. *Washington State Dept. of Labor and Industries v. Kantor*, 94 Wash.App. 764, 973 P.2d 30 (1999) *review denied* 139 Wash.2d 1002, 989 P.2d 1139. The Department has complete authority over injured workers’ medical treatment and wage loss benefits. This is exactly the type of protective relationship that establishes a special duty between a business establishment and its customer as described in *Hutchins*, 116 Wn.2d 217, 227-28 (*Citing* Restatement (Second) of Torts § 315 (1965)). This relationship establishes a heightened duty on the Department than that of an ordinary person because the Department is placed in a position of trust. This is akin to the special relationship between a jailer and an inmate that requires the jailer to ensure health welfare and safety. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924, 927 (2010). Just as a jailer has complete control over an inmate’s room and board, the Department has complete control over injured workers’ financial well being (through time loss) and healthcare.

This heightened duty requires the Department to act in good faith in listening to Mr. Phifer's requests for the financial and healthcare benefits that he was entitled to. The duty includes hiring enough claims managers to handle the appropriate number of claims so that the claims managers can give appropriate attention to each claim that they are handling without being rushed. The duty also includes establishing appropriate policies and training for claims managers to handle injured workers' comments regarding thoughts of sadness, frustration and thoughts of being suicidal, and how to distinguish between these.

It is logical that injured workers calling the Department for their benefits are inherently in a stressful situation having been injured at work and having their financial and healthcare destiny in the hands of the Department. The Department has a duty to establish appropriate policies to serve injured workers appropriately in their distressed situation. The Department has the duty to align its policies with statutory guidelines on how to respond to injured workers thoughts of suicide as established by the RCW 43.70.445 task force in LEARN. The Department has the duty to train its claims managers on how to apply these policies.

The Department also has the duty to have enough claims managers to make arrangements for the optimum number of claims per claims managers, so that each claim could be given the proper time and attention.

The “July 22, 2001 Update Memorandum” was the official policy that the Department followed in handling phone calls from injured workers that threatened suicide. This policy allows discretion to the claims manager by stating that:

“The list of County ‘Suicide and Crisis Phone Number’ is attached. Although we are not asking you to also contact the ‘Crisis/Mental Health Agency,’ that agency is listed for your information as well. As a courtesy, you should also contact the worker’s attending physician, and in particular, the worker’s psychiatrist if one is providing care under the claim” *Id.*

The Department allows discretion to its claims managers, but does not provide any training or guidance on how to apply this policy and to exercise this discretion. This is a negligent way to allow claims managers to guess on what information to get from the injured worker and who is the appropriate person to call. This is negligent considering that Ms. Alvarado and Ms. Garza testified that they routinely get callers that are stressed with the way their claims are going and it is not uncommon to have callers express actual threats of suicide.

The policy itself is a breach of the Department’s duty to Mr. Phifer because it does not provide claims managers any specific guidance on how to determine whether the injured worker is simply upset and depressed due to being injured, or if the injured worker is actually threatening suicide. The policy does not even attempt to provide the common sense guidance

that is encapsulated in LEARN, which is to listen and ask questions. The policy itself states that its purpose is to make the process more “uniform and to improve the timeliness of our response,” instead of being focused on the wellbeing of the injured workers.

Furthermore, the Department was having Ms. Alvarado handle 300 claims, but the ideal number for any claims manager to handle was 200-220. The Department was allowing Ms. Alvarado to handle these many claims knowing that Ms. Alvarado was consistently absent and late to work and was playing “catch up” with returning injured workers’ phone calls. This is a breach of the Departments’ duty to Mr. Phifer.

**F. Ms. Alvarado’s Phone Call To The Police and Failure to Call Mr. Phifer’s Attending Doctor Was a Proximate Cause of his PTSD Because He Was an Eggshell Plaintiff**

When there is evidence in the record that the plaintiff is an “eggshell plaintiff” the jury instruction on proximate cause WPI 30.18.01 becomes necessary. *Buchalski v. Universal Marine Corp.*, 393 F.Supp. 246, 248 (W.D.Wash. 1975). While simply reporting someone to the police as being suicidal is not sufficient to cause PTSD, for Mr. Phifer this was not the case because he suffered from PTSD that was re-activated by being detained and taken to the police station. The police officers approached Mr. Phifer with their guard up because they were told that Mr. Phifer had weapons (knives) and was threatening to kill himself. This made it so that

the police officers handcuffed Mr. Phifer because they expected him to be armed and threatening suicide.

The “but for” test of cause in fact is satisfied here because, “but for” the Department’s accusation that Plaintiff was suicidal and had weapons to the police, Plaintiff would not have been handcuffed, detained and taken to the police station. *See Christen v. Lee*, 113 Wn.2d 479, 507, 780 P.2d 1307 (1989); *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985). Furthermore, being arrested by the police is a “natural and proximate” cause of being accused to the police of having weapons and being suicidal. *Lewis v. Scott*, 54 Wn.2d 851, 341 P.2d 488 (1959).

#### **G. Conclusion**

The Department had a duty to listen intently and in good faith to Mr. Phifer’s request for workmans’ compensation benefits on August 4, 2008. The Department also had a duty to not call the police because Mr. Phifer did not make any suicidal threats. Viewing the facts in the light most favorable to Mr. Phifer, the Department breached this duty by wrongfully assuming that Mr. Phifer was suicidal, calling the police and failing to call his medical provider. Mr. Phifer hereby requests that the Court reverse the trial court’s decision and remand this matter for trial. Appellant is also asking the Court to award costs.

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Respectfully submitted this 6th day of May, 2019.

/S/ Favian Valencia  
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**CERTIFICATE OF SERVICE**

The undersigned makes the following declaration certified to be true under penalty of perjury pursuant to RCW 9A.72.085:

On the date given below, I hereby certify that the attached document hereto was served on the following in the manner indicated:

<b>Derek Thomas Taylor</b> <b>1116 W Riverside Ave, Ste 100</b> <b>Spokane, WA 99201-1113</b> <b>derekt@atg.wa.gov</b>	<input type="checkbox"/> Electronic mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input type="checkbox"/> U.S. mail <input checked="" type="checkbox"/> Other: via Court Website
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<b>The Court of Appeals of the State of Washington Division III</b> <b>500 N Cedar St</b> <b>Spokane, WA 99201-1905</b> <b>Fax (509)456-4288</b>	<input type="checkbox"/> Electronic mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input type="checkbox"/> U.S. first class mail <input checked="" type="checkbox"/> Other: Court website
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Executed this 6th day of May, 2019, at Yakima, Washington.

/S/ Favian Valencia  
Favian Valencia

**SUNLIGHT LAW, PLLC**

**May 15, 2019 - 9:47 AM**

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