NO. 321215

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BETTYJEAN TRIPLETT, et al.,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES, et al,

Petitioners.

BRIEF OF APPELLANT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

On March 21, 2006, Kathleen Smith, a developmentally disabled resident at the state operated Lakeland Village (Lakeland) residential care facility near Medical Lake, Washington, drowned in the bathtub after having an epileptic seizure. Kathleen Smith became a voluntary resident at Lakeland at age 14 and was always a voluntary resident there. Ms. Smith's seizure disorder was diagnosed when she was an infant and for many years her seizures had been controlled with medication. Nevertheless, because of Ms. Smith's history of seizure disorder, Lakeland's care plan for Ms. Smith required that she be visually supervised "at arm's length" while bathing. Lakeland employee Michael Noland was Ms. Smith's caregiver that day and when Ms. Smith told him that she was finished with her bath, he told her to go ahead and get out of the tub, left the bathroom area and became engaged in a conversation with his supervisor. 20 minutes later, another employee found Ms. Smith face down in the water in the tub. She could not be revived. Ms. Smith had had a seizure and collapsed into the tub. It was her first seizure in nearly 18 years.

This federal civil rights case, brought under 42 U.S.C. § 1983, against Department of Social and Health Services (DSHS),[1] DSHS Secretary Robin Arnold-Williams, DSHS Program Director Linda Rolfe and Mr. Noland by Ms. Smith's mother and brother, presents the central issue of whether Michael Noland violated Ms. Smith's liberty interest in safety and security protected by the Fourteenth Amendment by walking away from the bathroom instead of visually supervising Ms. Smith at arm's length as she ended her bath. The Defendants seek reversal of the trial court's order denying summary judgment.

Summary judgment dismissing the action should have been granted because since Ms. Smith was not held in state custody against her will, had been a voluntary resident of Lakeland Village for 38 years and/or did not drown as a result of a state created danger, no constitutionally protected right was violated. *Campbell v. State of Wash. Dep't of Soc. & Health Servs.*, 671 F.3d 837, 839 (9th Cir. 2011), *cert. denied,* 133 S. Ct. 275 (2012). Even if this court now finds that Ms. Smith had such a right and that it was violated, the individually named Defendants are entitled to qualified immunity because the right was not clearly established at the

[1] In addition to the department, Secretary, Director, and Mr. Noland, the complaint names DSHS's Division of Developmental Disabilities, DSHS's Aging and Disability Services Administration, and Lakeland Village as defendants.

time of the events in question. *Ashcroft v. al-Kidd*, ___ U.S.___, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011).

In addition, summary judgment dismissing the action against DSHS and its subdivisions, Secretary Arnold-Williams, and Director Rolfe should have been granted because they are not "persons" subject to suit under 42 U.S.C. § 1983, and the Secretary and Director did not participate in the alleged violation of Ms. Smith's rights. *Will v. Michigan Dep't. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to grant summary judgment establishing qualified immunity and dismissing Plaintiffs' claims under 42 U.S.C. § 1983, because no federally protected right was violated, and if a federally protected right was violated, it was not clearly established at the time of the alleged violation.

2. The trial court erred in failing to grant summary judgment dismissing Plaintiffs' 42 U.S.C. § 1983 claims against the Department of Social and Health Services, DSHS Secretary Robin Arnold-Williams and DSHS Program Director Linda Rolfe because the state agency and its

officials sued in their official capacities are not "persons" against whom a § 1983 action may be brought.

3. The trial court erred in failing to grant summary judgment dismissing Plaintiffs' 42 U.S.C. § 1983 claims against DSHS Secretary Robin Arnold-Williams and DSHS Program Director Linda Rolfe individually because neither Secretary Arnold-Williams nor Director Rolfe personally participated in the alleged violation of rights.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether Ms. Smith, a voluntary resident at Lakeland Village who was not taken into custody and held against her will, had a Fourteenth Amendment Due Process right to supervision while bathing.

2. Whether the life-long seizure disorder which caused Ms. Smith to drown in the bathtub was a danger created by the state that Ms. Smith would not have otherwise faced.

3. Whether the State of Washington, DSHS, DSHS Secretary Robin Arnold-Williams and/or DSHS Director Linda Rolfe, in their official capacities, are "persons" subject to suit under 42 U.S.C. § 1983.

4. Whether DSHS Secretary Robin Arnold-Williams and/or Program Director Linda Rolfe personally participated in the failure to supervise Ms. Smith's bath.

IV. STATEMENT OF THE CASE

Kathleen Smith was a 51-year-old, mentally disabled, voluntary resident of Lakeland Village, a state operated residential facility for persons with mental disabilities. CP at 43, 46. Ms. Smith became a voluntary resident of Lakeland Village at age 14 at her family's request and resided at Lakeland until her death on March 21, 2006. CP at 43, 48. Kathleen's mother, BettyJean Triplett was her legal guardian. CP at 46. Kathleen was always a voluntary resident at Lakeland, was not a ward of the state, was not in state custody, and was never involuntarily committed at Lakeland. CP at 42-43. Ms. Smith was developmentally disabled and while she was not capable of living on her own, she became fairly independent in most of her daily routines at Lakeland. CP at 56. For example, though she was sometimes hard to understand, Kathleen could speak well and carry on a conversation, could dress herself, took medication herself with staff supervision, was employed at the Clay Factory painting ceramics and assisting other clients in the STARS program at Lakeland, and kept some of the money she earned in a savings account. CP at 55-57.

Ms. Smith began having seizures shortly after her birth and medication was prescribed to control the seizures. CP at 55. Even though Ms. Smith's seizures were well controlled with medication–she had not had a seizure since February 1989–the prescription for anti-seizure medication

continued until her death. CP at 55-57, 59, 107. Because of her history of controlled seizures, Ms. Smith's care plan at Lakeland included a requirement that she be visually supervised within arm's reach while bathing. CP at 59, 141.

On March 21, 2006, Ms. Smith was being assisted by Michael Noland, employed at Lakeland as an Attendant Counselor 3. CP at 62. At approximately 4:15 p.m., Mr. Noland asked Ms. Smith if she wanted a shower or a bath before dinner. CP at 62. Ms. Smith indicated she wanted a bath and at approximately 4:30 Mr. Noland accompanied Ms. Smith to the bathroom and assisted with running the bath. CP at 62. Approximately 15 minutes after she got into the bath, Ms. Smith called to Mr. Noland and said she was finished. CP at 62. Mr. Noland told her to go ahead and get out of the bath, then left Ms. Smith unattended to get out and dry herself off. CP at 62.

Mr. Noland left the bathroom area and became engaged in conversation with another employee in another part of the residence. CP at 62. Ms. Smith had been unattended for approximately 20 minutes when another employee discovered her unconscious in the bathtub. CP at 62. The autopsy indicated that Ms. Smith likely suffered a seizure before drowning in the bathtub. CP at 6, 12, 113.

This action was brought by Kathleen's mother, BettyJean Triplett, and her brother, Kevin Smith, for a violation of civil rights under 42 U.S.C. § 1983. Plaintiffs claim that Kathleen's Fourteenth Amendment substantive due process right to safety and bodily security were violated by Defendants when she was left in the bath unattended.[2] This is the second time the case has come before the Court of Appeals. In *Triplett v. State, Dep't of Soc. & Health Servs.*, 166 Wn. App. 423, 268 P.3d 1027 (2012), this Court reversed the trial court's denial of summary judgment and ordered dismissal of Plaintiffs' state law wrongful death and survival actions.

While the interlocutory appeal of the state tort law case was pending, the Ninth Circuit decided *Campbell*, 671 F.3d 837, upholding summary judgment dismissing a § 1983 case with facts remarkably similar to the instant case. *Campbell* held that a voluntary resident at a state operated residential facility for mentally disabled persons, who died after nearly drowning during an unsupervised bath, was not deprived of her Fourteenth Amendment substantive due process right to bodily safety and security. Defendants here sought summary judgment based on *Campbell,* together with well-settled federal decisional law precluding § 1983 claims against

[2] The Plaintiffs claim violation of a constitutional right to the companionship of Kathleen. Assuming *arguendo* that Plaintiffs have such a right, their § 1983 action is dependent on a showing that a state actor violated Kathleen's constitutional rights. *See Toguchi v. Chung,* 391 F.3d 1051, 1060 (9th Cir. 2004); *Corales v. Bennett*, 488 F.Supp.2d 975 (C.D. Cal. 2007).

state agencies or officials. The trial court denied summary judgment on all of the grounds asserted and this Court granted discretionary review.

V. ARGUMENT

A. Standard Of Review

A party is entitled to summary judgment when, after reviewing the pleadings, affidavits, and depositions in the light most favorable to the non-moving party, the court finds that there is no issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ruff v. County of King,* 125 Wn.2d 697, 703, 887 P.2d 886 (1995). A material fact is a fact which will affect the outcome of the litigation. *Id.* A defendant may show that there are no material facts at issue, or that the plaintiff cannot meet the burden of proof to establish the required elements of a claim. *Guile v. Ballard Comty. Hosp.,* 70 Wn. App. 18, 21, 851 P.2d 689, *review denied,* 122 Wn.2d 1010, 863 P.2d 72 (1993); *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

To establish a § 1983 claim, the plaintiff must show that (1) a "person" (2) acting under color of state law (3) deprived the plaintiff of a right protected by the Constitution of the United States or federal law. 42 U.S.C. § 1983, *Levine v. City of Alameda,* 525 F.3d 903, 905 (9th Cir. 2008). In addition, when qualified immunity is alleged, the plaintiff has

the burden of establishing that the right allegedly violated was "clearly established" so that the defendant would have known that the conduct complained of violated the constitution. *Elder v. Holloway,* 510 U.S. 510, 514, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994). Appellate courts review summary judgments de novo and engage in the same inquiry as the trial court. *Weyerhaeuser Co. v. Commercial Union Ins. Co.,* 142 Wn.2d 654, 692 n.17, 15 P.3d 115 (2000).

B. Summary Judgment Should Have Been Granted Because No Federally Protected Right Was Violated

1. Failure To Supervise Ms. Smith's Bath Did Not Violate Her Fourteenth Amendment Due Process Right

The Due Process Clause of the Fourteenth Amendment "does not transform every tort committed by a state actor into a constitutional violation." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). *DeShaney* and cases following it established that a state actor's failure to fulfill a duty to protect a citizen from injury, while actionable under state tort law, is seldom actionable under 42 U.S.C. § 1983 because an individual's constitutional right to safety/protection from injury is not violated unless either the "special relationship" or "state created danger" exceptions apply. *Campbell v. State, Dep't of Soc. and Health Servs.*, 671 F.3d 837, 842-43 (2011). The "special relationship" exception applies when a

person is taken into custody involuntarily and held against his/her will. *Id.* (citing *DeShaney*, 489 U.S. at 198-200). The "state created danger exception" applies only when a state actor "creates or exposes a person to a danger he or she would not have otherwise faced." *Campbell,* 671 F.3d at 845 (citing *Kennedy v. City of Ridgefield,* 439 F.3d 1055, 1061 (9th Cir. 2006)). Here, as in *Campbell*, no constitutional right was violated because neither exception applies.

2. The *Campbell* Case

The material facts in *Campbell* are almost the same as the facts in the instant case. Justine Campbell was a 33-year-old voluntary resident in a state operated residential facility, where she was attended and cared for by DSHS employees. *Campbell*, 671 F.3d at 839-840. Ms. Campbell, like Kathleen Smith, was placed in the state residence by her family because she had a seizure disorder together with mental disabilities that allowed her to be fairly independent in her everyday life but also required daily care and assistance. *Id.* Because of her seizure disorder, Ms. Campbell's care plan for many years required that she be closely supervised while bathing and that a baby monitor be used to monitor her while bathing. *Id.* However, in the year of her death, the baby monitor requirement was not included in the care plan, which only required that Ms. Campbell not be left alone too long. *Id.* Like Kathleen Smith, Justine Campbell was a

voluntary resident at the state facility, but because of her mental disability, her movements were monitored and the doors at the home were locked to make sure she did not wander away from the home. *Id.*[3]

Justine Campbell was left unsupervised in the bathtub and was found unconscious in the bath water. *Id.* at 841. She was partially revived but passed away several days later due to complications caused by the near drowning. *Id.* Her mother sued Justine Campbell's DSHS caregivers under 42 U.S.C. § 1983 claiming they violated her civil rights by failing to include the baby monitoring provision in Justine's care plan and failing to properly supervise her bath. *Id.* at 841-42.

The trial court in *Campbell* examined the state's relationship with Justine Campbell and granted summary judgment dismissing the civil rights action on the grounds that Justine's right to bodily security and safety guaranteed by the Fourteenth Amendment had not been violated. *Campbell v. Washington,* 2009 WL 2985481, *8 (W.D. Wash. 2009). Further, the trial court in *Campbell* held that even if Ms. Campbell's right was violated, the caregivers were entitled to qualified immunity because the right was not clearly established at the time of her death so that the caregivers would have known that their conduct violated Justine

[3] At the cottage at Lakeland Village where Kathleen Smith resided, doors were locked at night. During the day, residents like Ms. Smith who were ambulatory could walk around the grounds at Lakeland. CP at 142-44.

Campbell's constitutional right. *Id.* at *9. The Ninth Circuit affirmed, holding that neither the special relationship nor state created danger exceptions applied because (1) Justine Campbell was a voluntary resident, and was not in state custody held against her will (no special relationship), *Campbell,* 671 F.3d at 842-45, and (2) Ms. Campbell's death was caused by pre-existing physical and mental limitations, which were not created or made worse by the state (no state created danger), *Campbell,* 631 F.3d 845-47, –therefore, Ms. Campbell's Fourteenth Amendment substantive due process right was not violated. *Campbell,* 671 F.3d at 839. The Ninth Circuit did not reach the "clearly established" prong of qualified immunity.

Campbell is a published decision and therefore is controlling authority in the federal trial courts in the Ninth Circuit, *Sanders County Republican Cent. Committee v. Fox,* 717 F.3d 1090, 1091-1092 (9th Cir. 2013). *Campbell* is persuasive authority entitled to great weight in Washington state courts and it applies to cases filed both before and after its publication. *Strange v. Spokane County*, 171 Wn. App. 585, 593-95, 287 P.3d 710 (2012).

3. There Was No Special Relationship Because Ms. Smith Was A Voluntary Resident At Lakeland Village

In *DeShaney*, the United States Supreme Court held that the special relationship exception giving rise to a constitutional duty to protect a person from harm arises only "when the State takes a person into its custody and holds him there against his will." *DeShaney*, 489 U.S. at 199-200. The Court explained the exception as follows:

> The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. . .The affirmative duty to protect arises not from the State's knowledge of the individual's predicament, or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

Id. at 200.

An involuntary custodial relationship is the threshold element of the special relationship exception and voluntary residence in a state operated facility does not satisfy the requirement, as the Ninth Circuit explained in *Campbell* - "Mere custody, however, will not support a 'special relationship' claim where a 'person *voluntarily resides* in a state facility under its custodial rules.'" *Campbell*, 671 F.3d at 843 (quoting *Walton v. Alexander*, 44 F.3d 1297, 1305 (5th Cir. 1995)); *see also Torisky v. Schweiker*, 446 F.3d

438, 446 (3d Cir. 2006): "Thus a custodial relationship created merely by an individual's voluntary submission to state custody is not a 'deprivation of liberty' sufficient to trigger the protections of *Youngberg*."[4]

Kathleen Smith was not an involuntarily committed mental patient. On the contrary, it is undisputed that Kathleen Smith had been a voluntary resident at Lakeland since the age of 14. Therefore, under *Campbell* and *DeShaney*, Ms. Smith's voluntary residence at Lakeland did not create a special relationship and no Fourteenth Amendment right was violated by the alleged failure to supervise her bath.

Respondents' position, argued in the trial court, is that Ms. Smith's residence at Lakeland was transformed from voluntary to involuntary because the doors to Ms. Smith's cottage were locked at night for security, her movements were closely monitored, and Lakeland personnel could have taken action to prevent her from leaving Lakeland by herself or with someone else. It is undisputed that because of her disability, Ms. Smith was not able to live on her own and needed round-the-clock care. However, by providing the care and security Kathleen Smith needed, Lakeland did not take Kathleen into custody against her will but rather fulfilled her needs. *See Campbell*, 671 F.3d at 843-44.

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[4] In *Youngberg v. Romeo*, 457 U.S. 307, 309, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982), the Supreme Court extended the Fourteenth Amendment substantive due process right to reasonable safety to involuntarily committed mental patients.

In *Campbell*, the Ninth Circuit considered the arguments that placing locks on doors to control Justine Campbell's ability to leave her home, maintaining control over which home she would live in, maintaining control of her transportation, diet, and wardrobe and maintaining control over how and when Justine bathed converted her custody from voluntary to involuntary. Recognizing that such measures were taken to protect Ms. Campbell's safety, provide needed care, and allow her to live as independently as possible given the nature of her disability, the Court rejected the argument, stating:

> When Justine entered the program, she could not prepare meals for herself, needed assistance with transportation, needed assistance with bathing, and needed round-the-clock supervision. SOLA's ability to assist and supervise Justine in these ways is the reason she entered the SOLA program in the first place. Campbell testified that she had wanted Justine to enroll in SOLA so Justine could live a "somewhat independent, normal life" and "do as much as she could," meaning, more than she could do on her own. As the district court noted, what Campbell alleges were Defendants' liberty-restraining acts were merely part of SOLA's efforts to "ensure [ ] Justine's day-to-day safety and care." The state's performance of the very acts for which an individual voluntarily enters state care does not transform the custodial relationship into an involuntary one.

Campbell, 671 F.3d at 843-44.

In the instant case, just as in *Campbell*, Ms. Triplett and Mr. Smith "[do] not articulate how any of the purportedly duty triggering affirmative acts [they] listed were acts taken by the state 'against [Kathleen's] will.'" *Id.* at 844-45. There is not a scintilla of evidence in the record suggesting that

Kathleen Smith was ever restrained, held against her will, denied visitation or furlough to be with family, or made to do anything against her will. Nor is there any evidence that Kathleen's care at Lakeland or any other state facility was compelled by the State. It is undisputed that Kathleen Smith's mother, BettyJean Triplett, was her legal guardian and could have sought care in a different facility or opted for care in the family home or at a suitable private facility. As Kathleen's mother, Ms. Triplett chose Lakeland when Kathleen was 14, and as her mother and legal guardian chose to continue Kathleen's residence at Lakeland. Lakeland was Ms. Smith's home where she was always a voluntary resident. She needed and desired the care and security that was provided at Lakeland. There was no "involuntary custody" and no "special relationship" here.

4. Ms. Smith Was Not Exposed To A State Created Danger

The state created danger exception applies when a state actor took an affirmative action that placed a person in the way of a danger created by the state actor that the person would not have otherwise faced. *DeShaney*, 489 U.S. at 201; *Campbell*, 671 F.3d at 846-47. The plaintiffs in *DeShaney* claimed that the state was responsible, under 42 U.S.C. § 1983, for serious injuries to a minor child who, having been previously beaten, was returned to the custody of his father when state social workers knew there was a danger

that the father was abusive and might beat the child again. The Supreme Court affirmed dismissal of the § 1983 claim, stating:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

DeShaney, 489 U.S. at 201.

Here, as in *DeShaney*, while Mr. Noland knew, because of the supervision provision in Kathleen Smith's care plan, that Kathleen faced a danger while bathing because of her seizure disorder, the danger existed before Kathleen Smith came to live at Lakeland and was not of Mr. Noland's or the state's making. Although Kathleen Smith had not had a seizure in nearly 18 years, it might still be argued that by leaving her alone to get out of the bath in the face of the care plan provision, Mr. Noland breached a state law duty of care. The potential for state law tort liability notwithstanding, Mr. Noland "had no constitutional duty to protect [Kathleen.]" *Id.*

In *Campbell*, the plaintiffs claimed that because of Justine Campbell's disabilities, which included seizure disorder, she faced the danger of injury or death while bathing and that the state created danger exception applied because the state knew about the danger Justine faced while bathing and still failed to provide adequate safeguards or supervision.

Campbell, 671 F.3d at 845. After analyzing *DeShaney*, together with Ninth Circuit precedent involving state created danger, the Court in *Campbell* rejected the state created danger claim, stating:

> Our decisions in *Patel* and *Johnson* and the Supreme Court's decision in *DeShaney* compel the outcome here. Although Defendant Pate was the SOLA manager responsible for coordinating Justine's care, including the annual updating of Justine's PSP, and Defendants Mitchell and McGenty were responsible for monitoring Justine on a daily basis, none of them acted affirmatively to place Justine in the way of a danger they had created. Indeed, a long bath was one of Justine's favorite activities—one she frequently enjoyed. Justine's death was caused by the dangers inherent in her own physical and mental limitations. Defendants' prior efforts to help keep Justine safe do not render them responsible for creating the danger to which she tragically succumbed. [Citing *DeShaney*],http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027114&pubNum=708&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search) ("[T]he Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation.").

Campbell, 671 F.3d 846-47.

Despite some non-material differences in the facts–Justine Campbell liked to take baths, while Kathleen Smith usually showered but chose a bath on the night in question; the monitoring provision had been removed from Justine Campbell's care plan but remained in Kathleen Smith's-*Campbell* is directly on point here because in both cases the danger arose from the lifelong mental and physical limitations, not from an affirmative act by the caregivers. Plaintiffs here argue that *Campbell* does not apply because in

Campbell, the plaintiffs claimed that Justine's rights were violated because the state removed the monitoring provision from the care plan and failed to adequately monitor Justine Campbell's bath, while in this case the monitoring provision was included in the plan but was not followed. This factual distinction makes no difference because the outcome in *Campbell* was not based on the content of her care plan but the fact that "Justine's death was caused by the dangers inherent in her own physical condition and mental limitations." *Campbell,* 671 F.3d at 847. The provisions of her care plan notwithstanding, Kathleen Smith's death was caused by the same "dangers inherent in her own physical condition and mental limitations" that caused Justine Campbell's. Ms. Smith had these conditions and limitations when she came to live at Lakeland, and there is nothing in the record to suggest that state actors did anything that caused or worsened the disorders or that the defendants "left [Ms. Smith] in a situation that was more dangerous than the one in which they found [her]." *Campbell*, 671 F.3d at 845; *Patel v. Kent School Dist.*, 648 F.3d 965, 974 (9th Cir. 2011). While the facts here might show a "lapse in judgment" and plaintiffs here "may well have a complaint against defendants under Washington tort law," they did not create the danger to which Kathleen Smith succumbed, and no constitutional violation occurred. *Campbell*, 671 F.3d at 847.

B. The Defendants Are Entitled to Qualified Immunity Because Ms. Smith's Constitutional Right To A Supervised Bath Was Not Clearly Established

Even if this Court chooses not to apply *Campbell* and decides that Ms. Smith had a constitutional right to safety and security that was violated, Defendants have qualified immunity because Ms. Smith's right to be protected from the kind of harm alleged was not (and still is not) clearly established so that Mr. Noland would have understood that his failure to supervise Ms. Smith at arm's length as she got out of the bath was a violation of her Fourteenth Amendment substantive due process right. Qualified immunity protects a state actor from liability under § 1983 where the conduct in question does not violate clearly established constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Qualified immunity is intended to relieve state actors who err and unknowingly violate constitutional rights from having to stand trial or face the other burdens of litigation. *Pearson v. Callahan,* 555 U.S. 223, 231-232, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009). It is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. *Id.* (citing *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). Qualified immunity is "a pure question of law" and plaintiff has the burden to show the rights claimed to have been

violated were clearly established. *Elder v. Holloway,* 510 U.S. 510, 514, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994).

In *Saucier v. Katz,* the United States Supreme Court described a two-step inquiry for analyzing qualified immunity. First, in the light most favorable to the party claiming injury, do the facts alleged show the [state actors'] conduct violated a constitutional right? If the answer to this question is "no," the inquiry ends and the case is dismissed. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2141, 150 L. Ed. 2d 272 (2001). If the first inquiry shows a constitutional right was violated, the second step is to ask whether the right was clearly established, in light of the specific context of the case being considered. *Id.* The contours of the allegedly violated right must be sufficiently clear that a reasonable official would understand that what they are doing violates that right. In other words, "[I]n the light of preexisting law the unlawfulness must be apparent." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Existing precedent need not be precisely on point, but must be such that the constitutional question is beyond debate. *Ashcroft v. al-Kidd,* ___ U.S.___, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011). If the state actor made a reasonable mistake as to what the law requires, the state actor is entitled to immunity. *Saucier*, 533 U.S. at 205; *Strange v. Spokane County*, 171 Wn. App. 585, 593-95, 287 P.3d 710 (2012). The

qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). While the court may consider the two qualified immunity inquiries in sequence, this is not mandatory and courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009).

The first prong of the qualified immunity analysis–whether a constitutional right was violated–is covered in section A, *supra*. Just as with the first prong, *Campbell* and *DeShaney* provide the answers to the questions posed in the second prong of the qualified immunity analysis–the right claimed to have been violated was not clearly established.

In the trial court, Plaintiffs argued that Ms. Smith's constitutional right to a supervised bath was clearly established by cases recognizing the special relationship and state created danger exceptions, such as *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006); *Penilla v. City of Huntington Park*, 115 F.3d 707 (9th Cir. 1997); and *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), and that recognition of the exceptions in those cases was sufficient to put Mr. Noland on notice that his failure to

supervise Kathleen Smith's bath was a violation of Ms. Smith's due process rights. *See* CP at 81-83. The Plaintiffs' approach is incorrect. Courts confronted with deciding the issue of whether a claimed right was clearly established are required to "focus on the right *not* in a general, abstract sense, but rather in a practical, 'particularized' sense . . . . The proper focus is not upon the right at its most general or abstract level, but at the level of its application to specific conduct." *Moran v. State of Washington*, 147 F.3d 839, 845 (1998). *See also Ashcroft v. al-Kidd*, 131 S. Ct. at 2084:

> The Court of Appeals also found clearly established law lurking in the broad "history and purposes of the Fourth Amendment." 580 F.3d. at 971. We have repeatedly told courts—and the Ninth Circuit in particular . . . not to define clearly established law at a high level of generality. The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.

Although it is not necessary that there be controlling authority that is exactly on point in order to clearly establish that particular conduct violates the constitution, there should at least be a "robust consensus of cases of persuasive authority" that establish the violation. *Id.*

Here, there was no such authority or "robust consensus" available to Mr. Noland on March 26, 2006, and neither *Kennedy*, *Penilla*, nor *Grubbs* would have been helpful to him. None of those cases have any

factual resemblance to this case–none took place in a residential caregiving setting, and all involved affirmative acts by the state actors that placed a person in a danger they would not have otherwise faced. All three cases were distinguished by the Ninth Circuit in *Campbell,* where the court noted that the claims in *Campbell*, which were the same as the claims made here, "resemble more closely those in *Patel,* 648 F.3d at 968-70. . . and *Johnson v. City of Seattle*, 474 F.3d 634 (9th Cir. 2007) where we did not find a state-created danger exception, than those in the cases in which we did [citing, among others, *Kennedy, Penilla* and *Grubbs*]." *Campbell*, 671 F.3d at 845. Since the judges of the Ninth Circuit distinguished *Kennedy, Penilla* and *Grubbs* and held that no constitutional duty was owed by the state caregivers who failed to supervise Justine Campbell's bath because neither the special relationship nor state created danger exceptions applied, Mr. Noland would have been hard pressed to determine that those cases clearly established a constitutional duty to supervise Kathleen Smith's bath. *See Ashcroft v. al-Kidd*, 131 S. Ct. at 2084-85; *Strange v. Spokane County*, 171 Wn. App. at 595-96.

The issue was properly addressed and analyzed by the trial judge in *Campbell:*

> [T]he duty owed to a developmentally disabled person who has been voluntarily placed in state care is still in flux. . . nearly *every case* interpreting *Youngberg* – and every one

> that the Court is aware of at the circuit level – has limited that case's scope to involuntarily committed individuals. . . Defendants were not reasonably on notice that failing to remain in the bathroom with Justine while she bathed was a constitutional violation. Even if Defendants had interfered with a protected right, this right was not a clearly established one. Defendants are therefore entitled to qualified immunity. (Emphasis in original).

Campbell, 2009 WL 2985481, *9 (W.D. Wash. 2009).

It is untenable to suggest, in light of *Campbell*, that Michael Noland should have been able to legally determine that Ms. Smith was a *de facto* involuntary resident or that his decision to leave her unsupervised while she got out of the bath, knowing that she had not had a seizure for many years, was a violation of her substantive due process right to safety and security under the Fourteenth Amendment. At the very least, a reasonable caregiver in Mr. Noland's position could have made a reasonable mistake of law regarding the constitutionality of his decision to leave Ms. Smith unattended to get out of the bathtub. Whether the question of qualified immunity is approached from *Saucier's* first prong (was a constitutional right violated) or second prong (was the right clearly established) the answer to both questions is "no" and the Defendants are entitled to qualified immunity. *See Strange*, 171 Wn. App at 593-97.

C. DSHS, Its Sub-agencies, Secretary and Program Director Are Not "Persons" Subject To Suit Under 42 U.S.C. § 1983

Plaintiffs' complaint alleges that "Defendants" violated the Plaintiffs' rights under the Fourteenth Amendment and does not allege specific acts or involvement by any individual other than Mr. Noland. It is well-settled that a § 1983 action may not be maintained against the state, its agencies or its officials or employees acting in their official capacities because those entities are not "persons" within the meaning of §1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989); *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983). Likewise the action may not be maintained against individuals, including supervisors or agency officials, who did not directly participate in the alleged violation of rights. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

In their response to the motion for summary judgment on this ground in the trial court Plaintiffs offered no response other than to cite *Taylor* and claim that Secretary Arnold-Williams and Director Rolfe are individually liable based upon their personal participation in the alleged deprivation because a post-incident investigation showed some short-comings at Lakeland. However, the action should have been dismissed

because Plaintiffs failed to offer any competent evidence that Secretary Arnold-Williams and/or Director Rolfe knew of or participated in Michael Noland's failure to supervise Ms. Smith's bath, or were aware of any relevant conditions or failed to take any constitutionally required action, before the events in question.

In *Taylor*, the Court upheld the dismissal of 42 U.S.C. § 1983 claims against the Nevada Attorney General, the Nevada Secretary of Corrections, and a Lieutenant who was in charge of the maximum security unit where the plaintiff was housed. *Taylor*, 880 F.2d at 1045. The Court upheld dismissal based on the plaintiff's failure to provide evidence of personal participation by the named officials. *Id.* With regard to the Lieutenant, the Court wrote at 880 F.2d at 1045:

> None of the affidavits Taylor attached as exhibits contained any facts to support the allegation that Belleville personally prevented law clerks and law books from reaching Taylor. Also, none of the affidavits contained any facts showing Belleville knew of unconstitutional actions by prison guards under his control and failed to prevent them. A summary judgment motion cannot be defeated by relying solely on conclusory allegations. . .

Plaintiffs here failed to present any evidence that the Secretary or Director personally failed to supervise Ms. Smith's bath or that they knew that Mr. Noland failed to supervise her bath. Lacking sufficient evidence, Plaintiffs asked the Court to continue hearing of the summary judgment

motion as to the Secretary and Director so they could depose the Secretary and the Director. Plaintiffs made this request in their May 6, 2013 response a mere 11 days prior to the noted motion for summary judgment hearing on May 17, 2013.[5] Plaintiffs had four years preceding the filing of the motion for summary judgment to depose Arnold-Williams and Rolfe and failed to do so. Additionally, there were over four months between the filing of their response and the October 11, 2013 summary judgment hearing and they still did not note depositions. Counsel has offered no explanation for the failure to seek the depositions in the preceding four and a half years. In such circumstances, delay of the proceedings is not warranted and neither *Winston v. State*, 130 Wn. App. 61, 121 P.3d 1201 (2005) nor *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986) help the Plaintiffs.

There were no allegations in the complaint, and no evidence produced in response to summary judgment, that either Secretary Arnold-Williams or Director Rolfe was present or had involvement with Kathleen Smith's bath on the evening of March 26, 2010. In accordance with the well-settled federal law the trial court's denial of the motion to

[5] The case, which was filed on May 2, 2009, ended up continued to October 11, 2013 when the assigned judge was required to recuse and the case was reassigned to Judge Eitzen. CP at 170, 174-79.

dismiss the action against the Secretary and Program Director should be reversed and the complaint dismissed.

VI. CONCLUSION

Michael Noland did not violate Ms. Smith's Fourteenth Amendment substantive due process right by leaving her unattended to finish her bath and the constitutional right for a disabled voluntary resident in a state residential facility to be supervised while bathing has, to date, not been established. For these reasons together with the other reasons set forth, the trial court's denial of summary judgment should be reversed and summary judgment dismissing the Plaintiffs' claims under 42 U.S.C. § 1983 should be granted.

RESPECTFULLY SUBMITTED this 31 day of July, 2014.

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PROOF OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

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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.

DATED this 31 day of July, 2014, at Spokane, Washington.

NIKKI GAMON