NO. 32121-5-III

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.

APPELLANTS' REPLY BRIEF

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A. The State Created Danger Exception Does Not Apply

Relying on *Penilla v. City of Huntington Park,* 115 F.3d 707 (9th Cir. 1997), *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989), and *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006); and disregarding *Campbell v. State Dep't. of Soc. & Health Servs.*, 671 F.3d 837 (9th Cir. 2011), the Estate argues that Mr. Noland created the danger which caused Ms. Smith's death. As noted in *Campbell*, *Penilla, Wood* and *Kennedy* are factually distinguishable and not applicable when the alleged danger is failure to supervise the bath of a mentally disabled voluntary resident of a state operated facility. The holdings and reasoning of *Campbell* are determinative here: there was no state created danger.

Penilla is not helpful here. The relevant facts are set forth at page 708 of the opinion:

> In the late morning of May 15, 1994 Juan Penilla ("Penilla") was on the porch of his home in Huntington Park, California. He became seriously ill. His neighbors and a passerby called 911 for emergency medical services, and attempted to assist Penilla until emergency services arrived. Huntington Park Police Officers Settles and Tua arrived first. The officers examined Penilla, found him to be in grave need of medical care, cancelled the request for paramedics, broke the lock and door jamb on the front door of Penilla's residence, moved him inside the house, locked the door, and left at approximately 11:30 a.m. The next day, family members found Penilla dead on the floor inside the house.

Mr. Penilla was being attended to by neighbors and was about to be cared for by the paramedics who had been summoned. When the officers, knowing Penilla was gravely ill, removed him from the care of his neighbors, cancelled the call for paramedics, broke into Mr. Penilla's house and left him there helpless, they created the danger that resulted in his death. In the instant case, Kathleen Smith was in no distress when she told Mr. Noland she had finished her bath and was ready to get out – she had not had a seizure since 1989. Failure to follow the bathing directive for arm's length supervision was not "an affirmative act akin to those found in [Penilla]." *Campbell*, 671 F.3d at 847.

Wood is not helpful here. In *Wood,* the plaintiff was in no danger of being assaulted when the state trooper encountered her. When the trooper arrested the driver of the car in which Ms. Wood was riding, impounded the car and left Ms. Wood to fend for herself at 2:30 in the morning in a high crime area, he acted affirmatively to place her in danger of being assaulted and was deliberately indifferent to the danger he created. *Wood*, 879 F.2d at 589-90. Here, Kathleen Smith came to Lakeland Village with a disability that caused her to be in danger while bathing. The state did not create or enhance that danger, and while the failure to protect Kathleen from the dangers associated with bathing may

give rise to a claim for breach of a tort duty, the failure to properly supervise her bath was not an "affirmative ac[t] akin to those found in [Wood]." *Campbell*, 671 F.3d 847.

Kennedy is not helpful here. In *Kennedy*, the plaintiffs were in no danger until the officer notified their assailant of the allegations the Kennedy's made against him without first warning them, as he had promised to do, so they could be alert and protect themselves. As anticipated, when the assailant found out the Kennedy's had accused him of sexual assault, he attacked the unsuspecting family, shooting and killing two of them and seriously wounding a third. The officer's affirmative act of notifying the assailant without first warning the Kennedys was an affirmative act that placed the Kennedys in danger that they "otherwise would not have faced." *Kennedy*, 439 F.3d 1062-63. Here, the dangers Kathleen Smith faced were not created by any affirmative act by any state actor, but were "limitations she brought with her into custody." *See Campbell*, 671 F.3d at 844. Mr. Noland's failure to remain within arm's length of Kathleen Smith while she got out of the bathtub was not an "affirmative ac[t] akin to those found in [Kennedy]." *Campbell,* 671 F.3d at 847.

Unlike *Penilla, Wood* and *Kennedy*, *Campbell* is on point and is not only helpful but is dispositive. In *Campbell*, as in the instant case, the

plaintiffs alleged that attendants created a danger by leaving a mentally disabled resident "alone in the bathtub." *Campbell*, 671 F.3d at 845. Despite the remarkably similar facts and issues, the Estate urges that *Campbell* is irrelevant because the bathing directive in Ms. Campbell's care plan had been relaxed and did not contain the "arm's length" requirement that Ms. Smith's care plan contained. As pointed out in *Campbell*, the fact that the state made efforts to keep a resident safe from danger does not make them the creator of the danger:

> 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.

Campbell, 671 F.3d at 847.

The Estate argues, in effect, that the provisions of the care plan Lakeland created for Kathleen Smith became constitutional guarantees that the care articulated in the plan would be carried out. No authority supports the Estate's position and such an outcome would be contrary to the decisions of the Ninth Circuit in *Campbell* and the United States Supreme Court in *DeShaney*, where the court stated:

> [T]he claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation. (Citations omitted). A State may, through its courts and legislatures, impose such

> affirmative duties of care and protection upon its agents as it wishes. But not 'all common-law duties owed by government actors were ... constitutionalized by the Fourteenth Amendment.' (Citation omitted).

DeShaney v. Winnebago County Dep't. of Soc. Servs, 489 U.S. 189, 202, 109 S. Ct. 998, 1007, 103 L. Ed. 2d 249 (1989). And, *see Monahan v. Dorchester Counseling Ctr., Inc.,* 961 F.2d 987, 993 (1st Cir. 1992), where a voluntary patient with a history of jumping out of vehicles requested to be moved from the residential facility where he was housed to a mental hospital and was taken to the mental hospital but not admitted. Plaintiff stated he did not wish to return to the residential facility but was escorted to a van to be returned anyway. During transport he jumped out of the van and was injured. The court found no state-created danger, stating:

> To hold that by negligently (or with "deliberate indifference") giving Monahan a ride in an insecure vehicle—thereby rendering him "more vulnerable" to a danger—the Commonwealth committed a constitutional violation, would convert most torts by state actors into constitutional violations. For example, a veteran's administration doctor who negligently operates on a patient, worsening his condition, can be said to have rendered the patient more vulnerable to a danger. The Supreme Court clearly had in mind something more when it referred to "render[ing a party] more vulnerable to [a danger]." [Citing DeShaney]109 S.Ct. at 1006.

Monahan, 961 F.2d at 993.

Although the State created Kathleen Smith's care plan and is accountable for the failure to follow it by its state-created duty of care, the State did not create the danger that caused Kathleen's death and summary judgment dismissing the § 1983 claim is required.

B. The Special Relationship Exception Does Not Apply

Relying primarily on *Clark v. Donahue*, 885 F. Supp. 1159 (S.D. Indiana 1995), and *Toriski v. Schweiker*, 446 F.3d 438 (3rd Cir. 2006), and again disregarding *Campbell,* despite its remarkably similar facts and issues, the Estate argues that because Kathleen Smith was subject to Lakeland Village rules and procedures directed to the safety and security of its disabled residents, Ms. Smith was, *de facto*, taken into custody and held against her will. The argument is not supported by decisional law, including *Clark* or *Toriski,* or by the undisputed facts in this case. Applying *DeShaney* and *Campbell* to this case, Ms. Smith was always a voluntary resident of Lakeland Village, was not "taken into custody" by the State and was never "held against her will." Therefore, no special relationship can be established.

The undisputed facts established by the record here are that Kathleen Smith became a voluntary resident of Lakeland Village in 1967. CP at 43. Lakeland was chosen by Ms. Smith's parents, and Ms. Smith remained a voluntary resident at Lakeland for the rest of her life. CP at

43, 48. Ms. Smith's mother became her legal guardian when she reached 18 years old and participated in the formulation of her care plan at Lakeland. CP at 50, 128-30. Lakeland residents and their guardians are provided with the rules and policies that apply to Lakeland residents and consent to abide by those rules and policies. CP at 135-40. Residents like Kathleen Smith have freedom to come and go and are provided with the assistance they need to safely do so. Kathleen, in conjunction with her mother/guardian could choose whether she wished to continue to live at Lakeland. However, because of her disabilities, Kathleen was not capable of simply leaving Lakeland and going out into the world on her own. Lakeland rules and policies allow Lakeland to monitor resident movements, lock facilities at night and delay departure from the facility for up to 72 hours to assure the resident has a place to go that will provide the safety, security and services they need to continue to live as independently as possible given their limitations. CP at 135-41, 148-50. Focusing on the circumstances of Ms. Smith's residency at Lakeland, while she was subject to the rules and policies that were in place for her safety and security, there is nothing in the record to suggest that Kathleen was ever restrained, held against her will or denied the ability to move freely around the campus at Lakeland Village, travel in the community or leave Lakeland to spend time with her family.

Clark, an Indiana trial court decision denying summary judgment, cited by the Estate is not helpful here. In *Clark*, two patients, voluntarily committed to the state mental hospital, died as a result of "severe medical and physical mistreatment." Even though the court stated that "the relevant inquiry must focus on the actual circumstances of Plaintiffs' confinement," the decision contains no description of the alleged mistreatment, no description of the patients' mental health conditions and no description of the conditions of the patients' confinement or custody. Nevertheless, the judge in *Clark* concluded that *DeShaney* would not apply to "deliberate indifference to the patient's medical needs, or the patient's right to safe conditions, while the patient is incapacitated or restrained in a mental health facility," concluding that there was a question of fact concerning whether the patients were voluntarily committed or not. *Clark*, 885 F. Supp. at 1162. *Clark* is distinguishable because this case involves no allegations of medical or physical mistreatment and no allegations that Kathleen was incapacitated or restrained in a mental health facility. In addition, *Clark* has no precedential value, is contrary to applicable Ninth Circuit precedent such as *Campbell* and, given its lack of reasoning or analysis, is not persuasive.

In *Torisky*, also cited by the Estate, voluntary patients of a state mental health facility in Pennsylvania were transferred to private facilities,

located several hours away from the state facility, against their will and the wishes of their families. The patients were taken from the state facility by state actors and transported to the other facilities against their will and were physically prevented from having contact with family members as they were taken away from the facility. The court recognized that, under *DeShaney,* voluntary commitment does not give rise to the same constitutional protections afforded to involuntary patients under *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). The court noted that commitment labeled as voluntary could become *de facto* involuntary in cases where an individual's liberty is curtailed. *Torisky*, 446 F.3d at 447-48. The *Torisky* court, noting that "the relevant inquiry must focus upon the actual circumstances of Plaintiff's confinement," remanded the case for further proceedings to determine whether the transfer of the patients against their will amounted to *de facto* involuntary commitment triggering *Youngberg* protections. *Id. Torisky* is not helpful here. There is no evidence that Kathleen was transferred to Lakeland against her will or denied access to her family and no evidence that Kathleen was ever restrained or forced to do anything against her will. As the case law discussed below indicates, curtailment of residents' liberty as necessary to provide for their safety and security does not convert voluntary custody to involuntary custody.

The record establishes that Kathleen Smith lived happily at Lakeland Village and "there is no evidence to suggest that [Ms. Smith] expressed a desire to leave the [facility] and defendants refused to allow [her] to do so." *Lanman v. Hinson*, 529 F.3d 673, 681 (6th Cir. 2008) (voluntary patient at mental hospital consented to treatment including restraints to prevent him from harming himself or others, and medication to calm him down). Any limitations on Kathleen's freedom were caused by her mental condition, not by the State, and Lakeland's implementation of rules and policies for the protection of residents in need of supervision is not the same as the total deprivation of freedom imposed on inmates or involuntarily committed mental patients. *See Walton v. Alexander*, 44 F.3d 1297, 1305 (5th Cir. 1995) (resident at state operated school for the deaf, with strict regulations concerning student movements was not in a *DeShaney* "special relationship"), and *Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 992 (1st Cir. 1992) (voluntary resident in state residential facility for mentally disabled was not *de facto* involuntary patient even though he desired to move to another facility that refused to accept him). *See also Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459 (3d Cir. 1990), where the same circuit that decided *Torisky* held that a voluntary resident at a home for mentally disabled children, which had policies similar to those the Estate relies on here, was not a *de*

facto involuntary resident. The resident in *Fialkowski* was supposed to be supervised at all times while eating because his disability included stuffing large amounts of food into his mouth, presenting a serious choking hazard. When a part-time employee provided the resident with two peanut butter sandwiches and turned her back, the resident stuffed both sandwiches into his mouth and choked to death. Rejecting the argument that restrictions on residents made them *de facto* involuntary residents entitled to *Youngberg* protections, the court stated:

> In this case, Walter Fialkowski's personal liberty was not substantially curtailed by the state in any way. His parents voluntarily placed him at the Greenwich Home CRRS; indeed, they specifically sought such a facility because they were not satisfied that he was making sufficient progress at the training facility in which he was previously placed. Not only were the Fialkowskis free to remove their son from the CRRS if they wished, but Walter Fialkowski himself enjoyed considerable freedom of movement. He was thus not deprived of freedom "through incarceration, institutionalization or other similar restraint of personal liberty." *DeShaney,* 109 S.Ct. at 998.

Fialkowski, 921 F.2d.at 465-66.

The *de facto* involuntary commitment issue was analyzed in *Campbell*, where the facts were nearly identical to this case and the same arguments the Estate urges here were made and rejected. In *Campbell*, the plaintiff argued that Justine Campbell was in involuntary custody because the state placed locks on the doors of Justine's home to control her ability

to leave, maintained control over which home Justine lived in after 1995, controlled Justine's transportation, diet, and wardrobe, and maintained control over how and when Justine bathed. The court found the state's restrictions were necessary for the residents care and security and did not amount to "involuntary custody," stating:

> Even accepting Campbell's version of the facts, these state actions did not convert Justine's voluntary custody into involuntary custody. 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.

Kathleen Smith's mother and stepfather voluntarily brought her to Lakeland Village in 1967 and Kathleen was "eager" to be admitted. CP at 48. Kathleen's residency was not instigated by the state and was not required by the state. CP at 43. Kathleen's mother consented, as her parent when Kathleen was a minor and as her legal guardian when she

became an adult, to Kathleen's residence at Lakeland Village under Lakeland's rules. CP at 94. When she came to Lakeland and thereafter, Kathleen could not prepare meals for herself, needed assistance with transportation, needed assistance with bathing, and needed round-the-clock supervision. Lakeland's ability to assist and supervise Kathleen in these ways is the reason she came to Lakeland in the first place. There is no suggestion in the record that Kathleen or her mother ever wanted her to leave Lakeland Village, that she was ever prevented from leaving or that she was ever restrained or held against her will. The record shows that Lakeland provided Ms. Smith with the care and supervision she sought and needed because of the disability she had when she came to Lakeland. There is simply no evidence that the state took Kathleen Smith into custody and held against her will. Here, as in *Campbell*, *Walton*, *Monahan*, *Lanman* and *Fialkowski*, the special relationship exception noted in *DeShaney* does not apply.

C. Michael Noland Is Entitled To Qualified Immunity

Relying on *Holloman ex rel. Holloman v. Harland,* 370 F.3d 1252, 1266 (11th Cir. 2004), the Estate argues that qualified immunity does not apply because Mr. Noland, the attendant counselor assigned to care for and assist Ms. Smith with bathing, was not engaged in a "discretionary function" when he left her unattended to get out of the bathtub. However,

the Estate misapplies and misinterprets *Holloman* – since Mr. Noland was clearly acting within the scope of his position as Ms. Smith's attendant his actions pertaining to her bath were discretionary. In addition, the Estate argues that it is clearly established that a mentally disabled voluntary resident of a state operated residential facility has a constitutional right to be supervised while bathing in accordance with the resident's individual care plan. No authority supports the Estate's assertion and *Campbell* clearly establishes that Ms. Smith had no such right. Therefore, Mr. Noland is entitled to qualified immunity.

1. Mr. Noland Was Engaged In A Discretionary Function

Relying on *Holloman*, the Estate argues that discretionary immunity need not be considered in this case because Mr. Noland was "neither engaged in legitimate job related functions, nor was he executing these functions in an authorized way when Kathleen died." Put another way, the Estate argues that since Mr. Noland failed to follow the directive that Kathleen Smith be supervised at arm's length while bathing, he was not engaged in a discretionary function. The argument misconstrues *Holloman*, where the court cautioned against the analysis the Estate now urges:

> Consider the first prong of the test—whether the official is engaged in a legitimate job-related function. In *Sims v. Metropolitan Dade County*, 972 F.2d 1230 (11th Cir.1992),

> "we did not ask whether it was within the defendant's authority to suspend an employee for an improper reason; instead, we asked whether [the defendant's] discretionary duties included the administration of discipline." (Citation omitted). Similarly, in assessing whether a police officer may assert qualified immunity against a Fourth Amendment claim, we do not ask whether he has the right to engage in *unconstitutional* searches and seizures, but whether engaging in searches and seizures *in general* is a part of his job-related powers and responsibilities. (Citation omitted). Put another way, to pass the first step of the discretionary function test for qualified immunity, the defendant must have been performing a function that, *but for* the alleged constitutional infirmity, would have fallen within his legitimate job description.

Holloman ex rel. Holloman v. Harland, 370 F.3d at 1266 (emphasis in original).

Accordingly, the relevant inquiry here is whether it was within Mr. Noland's job description to supervise and assist Kathleen Smith when she was bathing. It is undisputed that "Michael Noland was working as an 'Attendant Counselor 3.' Mr. Noland was acting in the course and scope of his employment with the State Entities on March 21, 2006, and on that date he was assigned the responsibility for the care and supervision of Kathleen Smith." CP at 5-6, 11. Clearly, the "job related function" prong of *Holloman's* discretionary function test is satisfied here.

The authority prong of *Holloman* is also satisfied. Again, the proper inquiry requires the court to "look to the general nature of the defendant's action, temporarily putting aside the fact that it may have been

committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances." *Id.*

> When a government official goes completely outside the scope of his discretionary authority, he ceases to act as a government official and instead acts on his own behalf. Once a government official acts entirely on his own behalf, the policies underlying the doctrine of qualified immunity no longer support its application. . .
>
> The inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act. Framed that way, the inquiry is no more than an "untenable" tautology. (Citation omitted). 'Instead, a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties.'

Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1281-82 (11th Cir. 1998).

In other words, to determine whether a particular act is within Mr. Noland's discretionary authority the court should not, as the Estate urges, focus on whether Mr. Noland failed to supervise Ms. Smith at arm's length as she exited the tub but whether his authority included supervising Ms. Smith while bathing. See the examples set forth in *Harbert*, 157 F.3d at 1282-1283. Here, it is undisputed that as Ms. Smith's Attendant Counselor 3, Mr. Noland's authority included supervising her bath. Both prongs of the discretionary function test as set

forth in *Holloman* are established by the undisputed record. Therefore, qualified immunity applies.

2. No Clearly Established Constitutional Right Was Violated

The Estate next argues that since the "state created danger" exception is clearly established in cases like *Penilla, Kennedy* and *Wood,* as previously discussed, it was therefore clearly established that it is a constitutional violation to fail to properly supervise one in voluntary state custody while bathing. The Estate's analysis focuses on the right to safety and security as affected by "special relationship" and/or "state created danger" in a general sense instead of the particularized sense that is required. *See Ashcroft v. al-Kidd*, __ U.S. __, 131 S. Ct. 2074, 2084, 179 L. Ed. 2d 1149 (2011). For example, the Estate assumes, without any supporting authority and contrary to the holding in *Campbell*, that Mr. Noland was on notice that Ms. Smith was a *de facto* involuntary patient and/or that his failure to supervise Ms. Smith at arm's length as she got out of the bathtub constituted a "state created danger." In support of its position, the Estate relies on three federal trial court decisions: *Clark v. Donohue*, 855 F. Supp. 1159 (S.D. Indiana 1995), *Estate of Cassara v. Illinois*, 853 F. Supp. 273 (N.D. Ill. 1994) and *United States v. Pennsylvania*, 832 F. Supp. 122 (E.D. Pa. 1993). None of these cases

have any precedential value in the Ninth Circuit and all three, if interpreted as the Estate contends, are in conflict with *Campbell* and the majority of federal circuit decisions that follow *DeShaney* in holding that Fourteenth Amendment protections typically are not accorded to persons unless they are taken into state custody and held against their will. Even if Mr. Noland had been aware of the trial court decisions denying CR 12(b)(6) motions in *Cassara* and *United States v. Pa.*, and denying summary judgment in *Clark*, he would have been hopelessly confused —especially if he had the benefit of the numerous circuit court decisions in conflict with those three cases (e.g. *Fialkowski, supra., Monahan, supra., Walton, supra.,* and *Lanman, supra.*) — and the trial judge's decision in *Campbell,* where it was recognized that the applicable law is not clearly established. *See Campbell v. State of Wash.*, 2009 WL 2985481, *9 (W.D. Wash. 2009):

> [T]he duty owed to a developmentally disabled person who has been voluntarily placed in state care is still in flux . . . Defendants were not reasonably on notice that failing to remain in the bathroom with Justine while she bathed was a constitutional violation.

Campbell clearly established the law in the Ninth Circuit that a voluntary resident in a state residential facility for the mentally disabled does not have a constitutional right to safety and security while bathing.

Therefore, it cannot reasonably be said that Mr. Noland was on notice that such a right existed.

D. Secretary Arnold-Williams and Director Rolfe Are Not Proper Parties

There is no evidence establishing that Secretary Arnold-Williams or Director Rolfe participated in or were aware of the decision to leave Ms. Smith unattended while she got out of the bathtub. Therefore, even if the Estate could establish a § 1983 claim against Mr. Noland, Secretary Arnold-Williams and Director Rolfe are not proper parties.

The Estate argues that Secretary Arnold-Williams and Director Rolfe "had responsibility to take action to correct the deficiencies at Lakeland and in failing to do so were complicit in Ms. Smith's death," and are not entitled to summary judgment "because there is a genuine material issue of material fact as to whether they knew Lakeland was understaffed and not carrying out IHPs. Further, that Lakeland failed to investigate concerns that Mr. Noland was not providing proper direct care to patients." Respondent's Brief at 34-35. In support of these allegations, the Estate cites CP at 106 through 116, a document entitled "Death Review on Kathleen Smith," date June 20, 2006, authored by Barry M. Smith, M.D. A thorough review of this document reveals no facts in support of the Estate's allegations. Dr. Smith's report focused on

Kathleen Smith's medical condition and the cause of her death. Dr. Smith concluded:

> Kathy died as a result of an accident. There was no suggestion of abusive treatment. She received good care in general. An appropriate response by the nursing staff followed her discovery beneath the water in the tub.
>
> She was not properly supervised during the bathing and the clearly outlined procedures were not followed.

CP at 116.

Dr. Smith's report does not support the factual allegations found in Respondent's Brief at 34. Dr. Smith makes no reference to Lakeland's investigation of staffing levels, Mr. Noland's job performance or ensuring staff implementation of IHP's.

In fact, it appears the Estate has mistaken Dr. Smith's report for CP at 117-25, the Department of Health and Human Services Centers for Medicare and Medicaid Services' (DHHS) Statement of Deficiencies and Plan of Correction, dated April 4, 2006. However, this statement does not support the Estate's factual allegations either. The DHHS statement focuses on deficiencies in Lakeland's post incident investigation and notes that a more thorough investigation would have considered whether insufficient staffing levels, varied opinions of Mr. Noland's patient care performance and/or failure to sufficiently track compliance with IHPs played a role in Kathleen's Smith's death. The statement does not contain

any conclusion that any of these conditions contributed to Kathleen's death, but criticizes Lakeland for deferring to the ongoing criminal investigation of the incident instead of investigating further to determine whether any of these deficiencies were factors in Kathleen Smith's death. Significantly, nothing in the report suggests that there were deficiencies that caused Kathleen Smith's death that were known to exist before Kathleen Smith's death and that were made known to Secretary Arnold-Williams or Director Rolfe. Accordingly, the Estate's characterization of the record in this regard is incorrect and there is, in fact, nothing in the record that suggests that Secretary Arnold or Director Rolfe were aware of deficiencies that resulted in Kathleen Smith's death and failed to take action.

> Liability under section 1983 arises only upon a showing of personal participation by the defendant. (Citation omitted). A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them. There is no respondeat superior liability under section 1983. (Citation omitted).

Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

When allegations of supervisor liability are based on "conclusory allegations unsupported by factual data," summary judgment in favor of the supervisor should be granted. *Id.*

The Estate continues to claim that depositions of Secretary Arnold-Williams and Director Rolfe should be allowed before summary judgment is considered. However, the record demonstrates that the Estate had four years before the motion was filed and an additional four months between the time the motion was filed and the time the motion was heard to take the depositions but failed to note them. To date, counsel for the Estate has offered no explanation for the delay. Continuance is not appropriate unless good cause for the delay is demonstrated. *Winston v. State Dep't of Corr.*, 130 Wn. App. 61, 64-66, 121 P.3d 1201 (2005). At the very least, the Estate should have provided an explanation of why Secretary Arnold Williams and Director Rolfe were not deposed during the four plus years between filing the action and the summary judgment hearing.

> [I]n the context of a summary judgment proceeding . . . the court properly denies a continuance request where (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence, (2) the requesting party does not state what evidence would be established through the additional discovery, or (3) the desired evidence will not raise a genuine issue of material fact.

In Re Estate of Fitzgerald, 172 Wn. App. 437, 448, 294 P.3d 720, 726 (2012), citing *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425, 427-28 (1986).

Here, even if the Estate had offered a valid reason for the four year delay, depositions of the Secretary and Director would have made no

difference since neither can be liable as supervisors if Mr. Noland's alleged failure to properly supervise Ms. Smith as she got out of the bathtub was not a constitutional violation. *See Williams v. Porterville Police Dept.*, 441 Fed. Appx. 538, 539 (9th Cir. 2011), citing *Jackson v. City of Bremerton*, 268 F.3d 646, 653-54 (9th Cir. 2001) ("neither a municipality nor a supervisor, however, can be held liable under § 1983 where no injury or constitutional violation has occurred").

Since Mr. Noland committed no violation of Ms. Smith's constitutional rights and the record does not show the Secretary or Director participated in or were aware of any constitutional violation, summary judgment in dismissing the action against them is appropriate.

II. CONCLUSION

Based on the foregoing arguments and authorities together with those set forth in Appellants' opening brief, the trial court order denying

summary judgment should be reversed and the Estate's 42 U.S.C. § 1983 claim should be dismissed.

RESPECTFULLY SUBMITTED this 26th day of November, 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 20 day of November, 2014, at Spokane, Washington.

NIKKI GAMON