

Supreme Court No. 93397-9  
Court of Appeals No. 32121-5-III

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SUPREME COURT OF THE STATE OF WASHINGTON

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BETTYJEAN TRIPLETT and KEVIN SMITH as Personal  
Representatives of the Estate of Kathleen Gail Smith; BETTYJEAN  
TRIPLETT, individually; and KEVIN SMITH, individually,

*Plaintiffs-Respondents,*

vs.

WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH  
SERVICES; WASHINGTON STATE DEPARTMENT OF SOCIAL  
AND HEALTH SERVICES DIVISION OF DEVELOPMENTAL  
DISABILITIES; WASHINGTON STATE DEPARTMENT OF  
SOCIAL & HEALTH SERVICES AGING & DISABILITY SERVICES  
ADMINISTRATION; LAKELAND VILLAGE; WASHINGTON  
STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES  
SECRETARY ROBIN ARNOLD-WILLIAMS; WASHINGTON  
STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES  
DIRECTOR LINDA ROLFE; MICHAEL NOLAND, an individual,

*Defendants-Petitioners.*

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RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION AND STATEMENT OF THE CASE

This case arises from the death of Kathleen Gail Smith, an adult resident of a state-operated facility for persons with mental disabilities known as Lakeland Village. Ms. Smith suffered from profound mental disabilities, having the mental capacity of a young child. She also suffered from a seizure disorder that had to be controlled with medication.

Ms. Smith died after she was placed into a bathtub and left alone, contrary to her written "individual habilitation plan" at Lakeland Village, which required "visual supervision (within arm[']s reach)" while bathing. CP 104 (parentheses in original; brackets added).<sup>1</sup> Ms. Smith's "attendant counselor," an employee of Lakeland Village named Michael Noland ("Noland"), helped prepare the bath and then left. Approximately 20 minutes later, another Lakeland Village employee who happened to go into the bathing area found Ms. Smith lying on her right side in the bathtub, with her face fully submerged. An autopsy concluded that she died from "asphyxia due to fresh-water drowning in bathtub due to epileptic seizure with incapacitation[.]" CP 112 (brackets added). A subsequent investigation confirmed that Ms. Smith "was not

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<sup>1</sup> The relevant portion of the habilitation plan, CP 104-05, is reproduced in the Appendix. Ms. Smith is referred to as "Kathy Smith" on the sixth row of CP 104.

properly supervised during the bathing and the clearly outlined procedures were not followed." CP 116. <sup>2</sup>

Ms. Smith's mother, Bettyjean Triplett, and her brother, Kevin Smith, individually and as co-personal representatives of Ms. Smith's estate (collectively "Triplett"), filed suit alleging wrongful death and survival claims as well as claims for violation of her substantive due process rights to safety, bodily security and life brought under 42 U.S.C. § 1983. The complaint named the Washington State Department of Social and Health Services ("DSHS"), two DSHS officials, Robin Arnold-Williams ("Arnold-Williams") and Linda Rolfe ("Rolfe"), and Noland as defendants.

In a prior discretionary review, the Court of Appeals held that Triplett's claims under Washington's wrongful death and survival statutes should be dismissed because no damages are recoverable under these statutes for the benefit of nondependent parents or siblings. *See Triplett v. Washington State Dep't of Social & Health Servs.*, 166 Wn. App. 423, 268 P.3d 1027, *rev. denied*, 174 Wn. 2d 1003 (2012).

In this discretionary review, the Court of Appeals held that Arnold-Williams, Rolfe and Noland are not entitled to qualified

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<sup>2</sup> The State's "death review," CP 106-16, is reproduced in the Appendix. The events leading to Ms. Smith's death are described at CP 110-11.

immunity from Triplett's § 1983 claims. *See Triplett v. Washington State Dep't of Social & Health Servs.*, 193 Wn. App. 497, 373 P.3d 279, 285-95 (2016). The court also dismissed discretionary review of the claims against Arnold-Williams and Rolfe as improvidently granted pending further discovery regarding their personal participation in Ms. Smith's death. *See id.*, 373 P.3d at 295-96.

## **II. SCOPE OF ISSUES PRESENTED FOR REVIEW**

### **A. There are no issues before the Court involving the State of Washington, State agencies, or State officials in their official capacity.**

The Petition for Review identifies all defendants in the superior court as "Petitioners," and refers to the "State Defendants" and the "State" as the party or parties seeking review. *See Pet. for Rev.*, at 1-2 In the superior court and the Court of Appeals, Triplett acknowledged that the State, State agencies, and State officials in their official capacity are not "persons" subject to liability under § 1983 and are immune from suit under the Eleventh Amendment to the U.S. Constitution. *See Triplett*, 373 P.3d at 284. The Court of Appeals so held. *See id.* Accordingly, the State, State agencies and State officials in their official capacity are not aggrieved by the Court of Appeals decision below, and are not entitled to further

review. *See* RAP 3.1 (stating only an aggrieved party may seek review).

**B. Arnold-Williams and Rolfe have not challenged the Court of Appeals' dismissal of discretionary review regarding their personal participation in Ms. Smith's death.**

The Petition for Review does not identify the dismissal of discretionary review of Triplett's claims against Arnold-Williams and Rolfe as an issue presented for review, nor is there any authority or argument regarding the dismissal of discretionary review. *See* Pet. for Rev., at 3. "[A] decision by the judges dismissing review" is deemed to be a "decision terminating review." RAP 12.3(a)(3)(ii) (brackets added). A petition for review is the only means to obtain review by this Court of a Court of Appeals decision terminating review. *See* RAP 13.4(a). The petition must identify the issues presented for review. *See* RAP 13.4(b)(5). The scope of review is limited to issues raised in the petition. *See* RAP 13.7(b). The failure to raise the Court of Appeals' dismissal of discretionary review of Triplett's claims against Arnold-Williams and Rolfe, or to provide any argument or authority regarding this issue, should preclude further review by this Court.

**C. The sole issue before the Court is whether the individual defendants are entitled to qualified immunity.**

Because the liability of the State, State agencies and State officials in their official capacity is not contested, and because discretionary review regarding the personal participation of Arnold-Williams or Rolfe in Ms. Smith's death has been dismissed as improvidently granted, the sole issue presented for review is the availability of qualified immunity for the individual defendants. *See* Pet. for Rev., at 3.

**III. GROUNDS FOR DENYING REVIEW**

Before addressing the criteria for review under RAP 13.4(b) (Part B), it is necessary to address Petitioners' characterization of the law governing this case (Part A).

**A. The Court of Appeals properly held that the individual defendants were not entitled to summary judgment dismissing Triplett's claim under 42 U.S.C. § 1983 based on the federal common law governing qualified immunity.**

"Federal law defines the scope of qualified immunity from 42 U.S.C § 1983 claims." *Petcu v. State*, 121 Wn. App. 36, 63, 86 P.3d 1234 (citing *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980)),

*rev. denied*, 152 Wn. 2d 1033 (2004).<sup>3</sup> "The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, — U.S. —, 136 S. Ct. 305, 308 (2015) (quotation omitted). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). "When properly applied, it protects all but the plainly incompetent or those who knowingly violate the law." *Id.* (quotation omitted).

In this case, the Court of Appeals properly determined that the individual defendants are not entitled to qualified immunity under federal law because Ms. Smith had a clearly established constitutional right not to be deprived of her life through the deliberate indifference of state employees acting within the scope of employment. *See Triplett*, 193 Wn. App. at 285-95.

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<sup>3</sup> *See also Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9<sup>th</sup> Cir. 2009) (stating "qualified immunity is a doctrine of *federal* common law"; emphasis in original); *Woodson v. City of Richmond*, 88 F. Supp. 3d 551, 577 (E.D. Va. 2015) (describing qualified immunity as "a federal common law precept applicable in Section 1983 cases").

Qualified immunity from federal civil rights claims differs from qualified immunity from state law claims. *See Babcock v. Dep't of Social & Health Servs.*, 116 Wn. 2d 596, 617 n.12, 809 P.2d 143 (1991) (stating "the scope of immunities under 42 U.S.C. § 1983 does not determine the scope of immunities from state tort claims"); *Petcu*, 121 Wn. App. at 63 (quoting *Babcock*).

**1. Ms. Smith had the right not to be deprived of her life through the deliberate indifference of state employees acting within the scope of employment under the Due Process Clause of the Fourteenth Amendment.**

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part: "[n]o State shall ... deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. 14, § 1 (brackets & ellipses added). In addition to procedural fairness, this provision guarantees "substantive" due process, and prohibits certain government actions regardless of the fairness of the procedures used to implement them. *See Daniels v. Williams*, 474 U.S. 327, 331 (1986). "[T]here can be no question that an interest protected by the text of the [Fourteenth Amendment Due Process Clause] is implicated" when "the actions of the State were part of a causal chain resulting in the undoubted loss of life." *County of Sacramento v. Lewis*, 523 U.S. 833, 856 (1998) (Kennedy, J., concurring; brackets added). Petitioners do not question the existence of this right in general, but they misapprehend the circumstances when it is violated as well as the Court of Appeals decision below.

- a. **Ms. Smith's constitutional right does not hinge upon a "special relationship" or "state-created danger" because her death was caused by state actors, rather than private actors.**

Petitioners argue that there is no constitutional duty to protect persons from harm in the absence of a "special relationship" or "state-created danger," relying primarily on the U.S. Supreme Court's decision in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989). *See* Pet. for Rev., at 9-12. However, the facts, reasoning and result of *DeShaney* are limited to cases involving the State's obligation to protect the substantive due process rights of its citizens against invasion by **private actors**. The decision does not apply to cases involving **state actors**, as confirmed by subsequent case law.

*DeShaney* involved a claim that state and local government entities and their agents violated the Due Process Clause of the Fourteenth Amendment by failing to protect a child from abuse by the child's natural father. *See* 489 U.S. at 194-95. The father "was in no sense a state actor." *Id.* at 201. Under these circumstances, the Court reasoned:

nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by **private actors**. The Clause is phrased as a limitation on the State's power to act, not as a

guarantee of certain minimal levels of safety and security. It forbids ***the State itself*** to deprive individuals of life, liberty, or property without “due process of law,” but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text .... Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

*Id.* at 195-96 (emphasis & ellipses added).

Based on the foregoing reasoning, the Court in *DeShaney* concluded, “[a]s a general matter ... a State’s failure to protect an individual against ***private violence*** does not constitute a violation of the Due Process Clause.” *Id.* at 197 (brackets & ellipses added). The Court recognized two exceptions to the general rule of nonliability for such private violence: (1) if there is an involuntary custodial relationship between the state and the victim (known as the “special relationship” exception); or (2) if affirmative acts of state agents place the victim in a dangerous situation or render the victim more vulnerable (known as the “state-created danger” exception). *See Huffman v. County of Los Angeles*, 147 F.3d 1054, 1058-59 (9<sup>th</sup> Cir. 1998) (describing the *DeShaney* exceptions).<sup>4</sup>

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<sup>4</sup> Triplett provided argument and authority regarding both *DeShaney* exceptions in the superior court and the Court of Appeals, as an alternative to the direct state action theory of liability. *See Triplett*, 373 P.3d at 288.

Subsequent case law, including U.S. Supreme Court precedent, has recognized that *DeShaney* and its exceptions are limited to cases involving **private actors** and **private violence**.<sup>5</sup> *DeShaney* does not require a special relationship or state-created danger as a prerequisite to finding a constitutional violation based on the conduct of **state actors**. The Court of Appeals below discussed at length a number of cases attesting to this principle, none of which have been acknowledged or addressed in the Petition

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<sup>5</sup> See, e.g., *Town v. Castle Rock v. Gonzales*, 545 U.S. 748, 755 (2005) (quoting *DeShaney* as holding that the "'substantive' component of the Due Process Clause does not requir[e] the State to protect the life, liberty, and property of its citizens against invasion by **private actors**"; emphasis added, brackets & quotation marks in original); *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (stating *DeShaney* "generally limits the constitutional duty of officials to protect against assault by **private parties** to cases where the victim is in custody," and "*DeShaney* does not hold ... that there is no constitutional right to be free from assault committed by **state officials themselves** outside of a custodial setting"; emphasis & ellipses added); *Huffman*, 147 F.3d at 1058-59 (repeatedly recognizing *DeShaney* and its exceptions are limited to "**private violence**"; emphasis added); *Johnson v. City of Seattle*, 474 F.3d 634, 639 (9<sup>th</sup> Cir. 2007) (quoting *DeShaney* for the proposition "a State's failure to protect an individual against **private violence** simply does not constitute a violation of the Due Process Clause"; emphasis added); *Jamison v. Storm*, 426 F. Supp. 2d 1144, 1157 (W.D. Wash. 2006) (citing *DeShaney* for the proposition that "the failure to protect an individual against **private violence** is not a Due Process Clause violation"; emphasis added).

A search of the Westlaw legal research service reveals more than 300 published decisions that appear to recognize the limitation of *DeShaney* to cases involving "private actors" and "private violence." Search of Westlaw, Allstates and Allfeds databases, for records containing "DeShaney /s ('private actor' or 'private violence')," conducted on Sept. 30, 2016. Some of these decisions appear to be cited by the Court of Appeals. See *Triplett*, 373 P.3d at 289-90. These decisions are not acknowledged or addressed in the Petition for Review.

for Review. *See Triplett*, 373 P.3d at 288-93.<sup>6</sup> Given this authority, Petitioners' claim that the Court of Appeals erred in limiting *DeShaney* to cases involving private violence is untenable. *See* Pet. for Rev., at 12-15.<sup>7</sup> Petitioners' attempt to apply *DeShaney* to this case involving state actors was properly rejected by the appellate court.

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<sup>6</sup> *See also Gray v. University of Colorado Hospital Authority*, 672 F.3d 909, 927 (10<sup>th</sup> Cir. 2012) (stating "an act of '**private violence**'" is a "precondition" to application of *DeShaney* and its exceptions; emphasis added); *Lanman v. Hinson*, 529 F.3d 673, 682 n.1 (6<sup>th</sup> Cir. 2008) (stating "*DeShaney* decided only that the State is not responsible for the actions of **third-party private actors**" and distinguishing *DeShaney* from a case involving the conduct of state actors; emphasis added); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 724 (3<sup>rd</sup> Cir. 1989) (distinguishing *DeShaney* on grounds that "*DeShaney*'s injuries resulted at the hands of a **private actor**, whereas *Stoneking*'s resulted from the actions of a **state employee**"; emphasis added); *Clark v. Donahue*, 885 F. Supp. 1159, 1161-62 (S.D. Ind. 1995) (stating "where the harm to the patient was allegedly caused by the affirmative mistreatment (i.e., deliberate indifference) of **state actors** .... the *DeShaney* analysis becomes almost moot because the state action element of the plaintiff's claim is clearly established"; emphasis & ellipses added, parentheses in original).

<sup>7</sup> Petitioners cite four Ninth Circuit decisions that happen to rely on *DeShaney* to analyze claims against state actors. *See* Pet. for Rev., at 13. As the Court of Appeals correctly noted, in *Campbell v. Washington Dep't of Social & Health Servs.*, 671 F.3d 837 (9<sup>th</sup> Cir. 2011), "[t]here is no suggestion in the district court or on appeal that the application of *DeShaney* was ever questioned." *Triplett*, 193 Wn. App. at 515 (brackets added). The same is true of the remaining cases cited in the Petition for Review. *See Penilla v. City of Huntington Park*, 115 F.3d 707 (9<sup>th</sup> Cir. 1997), *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082 (9<sup>th</sup> Cir. 2000); *Amos v. City of Page*, 257 F.3d 1086 (9<sup>th</sup> Cir. 2001). The analysis in these decisions may be explained by the way that the parties framed the issues. At most, these decisions *implicitly* endorse application of *DeShaney* to state actors. Petitioners do not cite any cases that *expressly* endorse application of *DeShaney* to state actors. In any event, the Court of Appeals did not err because it was not required to follow the decisions cited by Petitioners in preference to decisions specifically holding that *DeShaney* does not apply to claims involving state actors.

**b. Deliberate indifference by state actors that endangers a person's life "shocks the conscience" in the constitutional sense necessary to come within the protection of the Due Process Clause.**

Petitioners argue that the Court of Appeals failed to apply what they describe as "the 'shocks the conscience' test" for substantive due process claims, relying on *City of Sacramento v. Lewis*, 523 U.S. 833 (1998), and this Court's citation of *Lewis* in *Braam v. State*, 150 Wn. 2d 689, 704, 81 P.3d 851 (2003). See Pet. for Rev., at 15-17. As the Court of Appeals correctly noted, the phrase "shocks the conscience" refers to the standard of fault required to find a violation of substantive due process:

In *County of Sacramento v. Lewis*, 523 U.S. 833, 846-49, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), the Court held that the culpability standard for all substantive due process claims arising from executive action is whatever fault standard—along a continuum from deliberate indifference to intent to harm—"shocks the conscience," given the factual context of the deprivation. Facts relevant to fixing fault along that continuum include whether the state actor has time to deliberate and whether the actor must weigh competing interests. *Id.* at 851-53, 118 S.Ct. 1708.

*Triplett*, 193 Wn. App. at 522 n.6. Merely negligent acts are generally insufficient to shock the conscience and state a constitutional violation, while intentional acts are generally sufficient. See *Lewis*, 523 U.S. at 848-49. Whether acts falling within a middle range—i.e., more than negligent but less than

intentional, such as deliberate indifference, gross negligence or recklessness—state a constitutional violation depends upon the circumstances. *See id.* at 849-50.

However, in this case, the deliberate indifference standard of fault was conceded by Petitioners in the lower courts, and the Court of Appeals declined to definitively resolve the issue:

The parties appear to agree that the standard of culpability required to demonstrate a deprivation of an individual's substantive due process right to bodily security in the present context is deliberate indifference.<sup>8</sup>

<sup>8</sup> Both sides have relied on the “deliberate indifference” standard in the trial court and on appeal. Given DSHS's focus on a *DeShaney* theory, however, we do not consider it bound should it conclude that case law supports a different standard for one or more of the defendants. As discussed hereafter, standards of recklessness and heightened recklessness have been applied by some federal courts. For purposes of reviewing the summary judgment on qualified immunity, the estate's allegation of deliberate and intentional conduct suffices, whatever the proper standard of fault.

*Triplett*, 193 Wn. App. at 526 & n.8. Petitioners should not be able to complain that the Court of Appeals accepted their position in the lower courts, especially since the court left the issue open on remand.<sup>8</sup>

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<sup>8</sup> The circumstances tend to confirm that the deliberate indifference standard is appropriate in this case. The existence of the written habilitation plan requiring arm's length supervision of Ms. Smith while bathing evidences "time to deliberate." *Triplett*, 193 Wn. App. at 522 n.6; *see also Lewis*, 523 U.S. at 851

2. **Ms. Smith's right to be free of life-threatening conduct by a state actor under the circumstances present in this case was clearly established at the time of her death; the level of specificity required for a constitutional right to be deemed clearly established in police pursuit and similar types of cases—involving a balance of competing interests and split-second decision making—is not required in cases such as this one lacking any competing interests or exigent circumstances.**

Petitioners argue that Ms. Smith's constitutional rights are not clearly established because she has no protected constitutional right in the first place. *See* Pet. for Rev., at 20. This argument rests upon their contention that *DeShaney* requires a special relationship or state-created danger in order to state a claim against a state actor, which, as noted above, is incorrect.

Petitioners also argue that the Court of Appeals defined the relevant constitutional right at too high a level of generality, relying primarily on the U.S. Supreme Court's decisions in *Mullenix, supra*, *City & County of San Francisco v. Sheehan*, — U.S. —, 135 S. Ct. 1765 (2015), and *Brosseau v. Haugen*, 543 U.S. 194 (2004) (*per curiam*). *See* Pet. for Rev., at 8 & 17-19. In particular, they contend

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(stating "the [deliberate indifference] standard is sensibly employed only when actual deliberation is practical"; brackets added). Moreover, Petitioners have identified no competing interests or obligations that would justify noncompliance with the habilitation plan. *See Triplett*, at 528-29 (stating "the context of this case does not present competing interests that will be balanced differently depending on the facts"); *Lewis*, at 853 (discussing relevance of "competing obligations").

that they are entitled to qualified immunity because "the constitutional right to supervision while bathing was not established by precedent," and "there was no precedent on the books establishing a constitutional duty to supervise a voluntary resident of a state facility." *Id.* at 19.

However, the cases on which Petitioners rely "do not require a case directly on point." *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 741). Moreover, these cases are inapplicable because they involve hot pursuit by police or similar types of circumstances. Such circumstances require a more specific qualified immunity analysis because police typically must balance competing interests, such as the safety of bystanders or other officers, and must do so on an exigent basis.<sup>9</sup>

"Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual

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<sup>9</sup> See *Mullenix*, 136 S. Ct. at 309 (officer had to decide whether and how to stop fleeing suspect who had threatened to shoot police officer and who was moments away from encountering another officer); *Sheehan*, 135 S. Ct. at 1770-71 (officers had to decide whether to subdue suspect who had threatened them with a knife and barricaded herself in her apartment, or wait for backup at the risk that the suspect could gather more weapons or attempt to flee); *Brosseau*, 543 U.S. at 200 (officers had to decide "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight").

situation the officer confronts." *Mullenix*, at 308 (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001); brackets in original).<sup>10</sup>

*Mullenix*, *Sheehan* and *Brosseau* did not overrule or alter any of the U.S. Supreme Court's precedent on qualified immunity. Under this precedent, the constitutional right in question must only be sufficiently clear that a reasonable official would have understood that what he is doing violates that right. *Mullenix*, at 308 (quotation omitted). No particular level of specificity is sufficient in every instance. *See Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 269 (1997)). "In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary." *Id.* However, in other cases, it is "clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.*<sup>11</sup>

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<sup>10</sup> *See also Brosseau*, 543 U.S. at 201 (stating "this area [i.e., police pursuit] is one in which the result depends very much on the facts of the case"; brackets added); *Flythe v. District of Columbia*, 2016 WL 4506965, at \*6 n.4 (D.D.C., Aug. 26, 2016) (distinguishing *Mullenix*, and endorsing a more general formulation of the clearly established constitutional right in a different context).

<sup>11</sup> *See also Brosseau*, 543 U.S. at 199 (citing *Hope* for the proposition that constitutional "standards can 'clearly establish' the answer, even without a body of relevant case law").

In this case, the Court of Appeals properly concluded that the substantive due process right to be free of life-threatening conduct by a state actor was clearly established at the relevant time. *See Triplett*, 193 Wn. App. at 529-30 (relying on *Slade v. Board of Sch. Dirs. of City of Milwaukee*, 702 F.3d 1027 (7<sup>th</sup> Cir. 2012); *Ross v. United States*, 910 F.2d 1422 (7<sup>th</sup> Cir. 1990); and *Ziccardi v. City of Philadelphia*, 288 F.3d 57 (3<sup>rd</sup> Cir. 2002)). While they take issue with the level of generality of this constitutional right, Petitioners do not contest that the right exists, that it is clearly established, or that it is sufficiently clear to give notice to a reasonable state actor that placing a mentally disabled person with a seizure disorder in a bathtub and leaving that person alone—contrary to express requirements adopted for that person's safety—violates the right.

With a proper understanding of the governing law, it is now possible to address the criteria for discretionary review of the Court of Appeals decision by this Court.

**B. Petitioners do not satisfy the criteria for discretionary review of the Court of Appeals decision by this Court under RAP 13.4(b).**

RAP 13.4(b) sets forth the exclusive criteria for discretionary review of a Court of Appeals decision by this Court:

A petition for review will be accepted by the Supreme Court **only**: (1) If the decision of the Court of Appeals is in conflict

with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(Emphasis added.) Petitioners do not satisfy any of these criteria.

**1. An alleged conflict with federal case law (although there is no such conflict here) is not a basis for review under RAP 13.4(b).**

Petitioners primarily contend that the Court of Appeals' decision conflicts with certain federal case law. *See* Pet. for Rev., at 1-2. As noted above, they misconstrue the federal case law on which they rely, and they largely ignore the authority on which the Court of Appeals based its decision. More importantly, however, a conflict with federal case law, even if such a conflict were to exist, is not a basis for review under the criteria set forth in RAP 13.4(b).

**2. There is no conflict between the Court of Appeals decision and other decisions from this Court or the Court of Appeals, as required for review under RAP 13.4(b)(1) or (2).**

Petitioners attempt to manufacture a conflict by arguing that the Court of Appeals decision in this case conflicts with the U.S. Supreme Court's decision in *Lewis, supra*, which was cited in this Court's decision in *Braam, supra*. *See* Pet. for Rev., at 8 n.7 & 16. There is no conflict because, as noted above, the Court of Appeals

acknowledged the relevant portion of *Lewis* regarding the standard of fault that governs substantive due process claims, adopted Petitioners' position that the deliberate indifference standard applies in this case, and left issue regarding the proper standard of fault open on remand. Petitioners do not argue that the decision below conflicts with any other decision of this Court or the Court of Appeals. There is no basis for review under RAP 13.4(b)(1) or (2).

- 3. There is no "significant question of law under the Constitution of the State of Washington or of the United States" as required for review under RAP 13.4(b)(3) because qualified immunity is a matter of federal common law.**

While the defense of qualified immunity involves consideration of whether the complaint alleges violation of a clearly established constitutional right, the constitutional right at issue here is well-settled and not reasonably susceptible to dispute. The analysis of whether the constitutional right is sufficiently clear to invoke qualified immunity is not itself a constitutional issue. It involves application of federal common law to the particular facts of this case. There is no basis for review under RAP 13.4(b)(3).

4. **There is no "issue of substantial public interest that should be determined by" this Court as required for review under RAP 13.4(b)(4) because the analysis of qualified immunity is (a) fact-dependent—meaning a decision in this case will provide little guidance in future cases; and (b) governed by federal law—meaning that this Court does not have the last word and the precedential effect of a decision will be limited.**

While every case against state actors can be said to involve an element of public interest, the interest must be "substantial" and the issue must be one that "should be decided by" this Court to warrant review under RAP 13.4(b). The issue here is not substantial because it involves application of settled law regarding qualified immunity to the particular facts of this case, and it does not need to be decided by this Court because it is a matter of federal law.

## V. CONCLUSION

Based on the foregoing, the Court should deny the Petition for Review.

Respectfully submitted this 3rd day of October, 2016.

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## **CERTIFICATE OF SERVICE**

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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Signed at Moses Lake Washington on October 3, 2016.

  
\_\_\_\_\_  
Shari M. Canet, Paralegal

# **APPENDIX**

LRPK,  
 Please have staff read + sign.  
 Thanks, Sharlene

6/20/05 1:00 p.m. IDT meeting regarding seizure activity as it relates to bathing.  
 Participants were: Rhonda Eik RN4, Debe Laforce ACM, Sharlene Gentry HPA, Patty Thomas AC3, and Judy Hutchinson QA HPA HRAC. The team reviewed Chronic Nursing Care Plans and Direct Care Flow Sheets related to supervision needed for those with controlled (no seizures in 5 years) and uncontrolled (has had a seizure within 5 years) seizure disorders. The team reviewed each person's seizure history, level of independence with bathing and whether or not medications are taken related to seizures.

| Name:       | Last seizure:   | Seizure Medications:        | Level of Independence: | Plan:   |
|-------------|---|-----------------------------|------------------------|---|
|             | More than 5 years ago                                     | None prescribed             | P to G assistance      | Staff will intermittently check (at least every 5 minutes)  |
|             | More than 5 years ago<br>possible seizure<br>allergy shot | None Prescribed per consent | P to G assistance      | Staff will intermittently check (at least every 5 minutes)  |
|             | Questionable seizures / 7/25/03                           | None                        | G to S assistance      | Staff will intermittently check (at least every 5 minutes)  |
|             | 7/9/02  | Medications are prescribed  | I to S assistance      | Bathing- Provide visual supervision (within arms reach). Showering: Staff will intermittently check (at least every 5 minutes)                      |
|             | None noted in CUR   | Medications are prescribed  | Full assistance        | Shower: Provide visual supervision (within arms reach)<br>No bath due to physical limitations.  |
| Kathy Smith | More than 5 years ago / so seizure activity listed in CUR | Medications are prescribed  | G to S assistance      | Bathing- Provide visual supervision (within arms reach). Showering: Staff will intermittently check (at least every 5 minutes)                      |
|             | 3/8/05  | Medications are prescribed  | Full to G assistance   | Provide constant visual assistance in bath or shower  |
|             | 6/1/04  | Medications are prescribed  | I to S assistance      | Showering: Staff will intermittently check (at least every 5 minutes). No Bath unless he agrees to constant visual supervision (within arms length) |

Exhibit 12

| Name: | Last seizure: | Seizure Medications:       | Level of Independence: | Plan:   |
|-------|---------------|----------------------------|------------------------|---|
|       | 7/10/00       | Medications are prescribed | FP to P assistance     | Visual supervision (within arms length) in both bath or shower. |
|       | 8/8/03        | Medications are prescribed | Full to G assistance   | Visual supervision in bath or shower (within arms length)       |

6/24/05  
 Samuel Ellis  
 D Showalter

R. E. R.

Antony, M.D.

S. Bentley HPA

Jill Chaves

Handwritten initials

Mike Wood

D. Schuch AC-2

(W)

Pam Dunderberg

L. Alderman

Handwritten scribbles

Arthur Woodward

Mona Bowen

6/27/05

~~Handwritten name~~  
 [Redacted]

Rob -  
 Patty

COPY

Death Review on Kathleen [Kathy] Gail Smith

20 June, 2006

Date of Birth: 11 September, 1953

Date of Death: 21 March, 2006 at 1745 [by Dr. Montenegro] and at 1800 [as given by Dr. Sally Aiken, the coroner]

Date of Admission: 3 April, 1967 [about age 14]

History: Kathy was a fifty-two plus year old female with a history of profound mental retardation probably secondary to an undetermined prenatal injury. She weighed 7 pounds, 8 ounces at birth, was delivered with use of forceps. There was no indication of head trauma at the time.

During her stay at Lakeland Village she was found to have or developed: obesity [wt. 172, RBW 130-140], hyperlipidemia, urinary incontinence [during the day], had taken oral contraceptives for years [but none at the time of death]; a long history of severe seizure disorder [seizure-free since about 1989], a long history of alteration of her white blood cells [including increased lymphocytes, possibly related to Divalproex, occasional metamyelocytes but no blasts], elevated platelets, mild iron deficiency anemia [secondary to menorrhagia], coagulopathy [and menorrhagia] secondary to Ibuprofen; was on a self-medication and self-bathing program, had an ORIF for a right bimalleolar fracture, lower back trauma, lumbar scoliosis, dorsal kyphosis, fracture of the ungual tuft of the distal phalanx of the left great toe, cervicitis and persistent vaginitis, cervical dysplasia of HPV origin, cervical biopsy showing large focus of mild squamous dysplasia with papilloma pattern and subsequent cryotherapy; ingrown toenails, ocular refractive error and presbyopia, cystic changes of breasts, left shoulder trauma including contusion of the rotator cuff, degenerative changes of both knees,

Exhibit 13

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fracture of the distal right radius; [shortly thereafter it was decided there was no fracture]; comminuted fracture of the proximal metatarsal, osteopenia of the lumbar spine by bone densitometry, bilateral pronation of feet; cholelithiasis by abdominal ultrasound, a second opinion was obtained but Kathy's mother did not give consent for surgery; burns on thighs, periorbital swelling from suspected allergies/chronic lymphocytosis and subsequent allergy testing demonstrated large reactions to cat dander, tree and weed pollens and had an acute reaction following the testing requiring Benadryl, epinephrine and multiple steroids; she then was considered for extract injection immune therapy but permission was not obtained from her mother; she was treated with Loratidine; hemangioma of the liver and heterogynous echogenicity within the right ovary and ovarian asymmetry by ultrasound, benign follicular cyst of the left ovary; tightness of the Achilles tendon; apical systolic murmur; verbal altercations with peers; multiple cherry angiomas, multiple seborrheic keratoses, scattered benign nevi; cerebral atrophy, macrocephaly, old ischemic changes within and anterolateral to the head of the left caudate nucleus; scattered diverticuli of the colon on colonoscopy; viral warts on eyelids; positive PPD but negative CXR.

Family History: Allergies-no specific information

Medications: Divalproex [despite absence of seizures since February, 1989 this medicine had been continued at the request of Kathy's mother to prevent the recurrence of hard seizures], calcium carbonate, cholecalciferol, Docusate, ferrous sulfate, fish oil capsule, multivitamins/minerals, Niacin Flush Free, Oxybutynin, Psyllium, Acetaminophen, Artificial Tears, Bisacodyl suppository, Loratadine. [date of orders 1/17/06]

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Other Orders: for shower: bench/chair, intermittent check at least every 5 minutes; bathing: visual supervision/within arm's length when in tub

Diet: Regular, general, skim milk, bran muffin or whole wheat bread, low calorie beverage, encourage her to take smaller bites by cueing her verbally as needed. Liquids are described as " thins. " She may have hot dogs/polish sausage. She may have other food if medically/texturally appropriate. Reinforcers have to be low-calorie beverages. No food allergies. K. Jessup, R. D. on 14 June, 2005.

Medical Reports:

10/27/03 Right ankle xray: Healed bimalleolar fractures with internal fixing hardware remaining. Osteoporosis noted. No acute abnormality.

12/9/03 Dr. Schlegel, hematology evaluation: thrombocytosis, unclear etiology; coagulopathy/bruising/menorrhagia likely due to Ibuprofen use. Recommendations: discontinue Ibuprofen.

12/11/03: MRI of head: mild cerebral atrophy and microcephaly; old ischemic changes within and anterolateral to the left head of the caudate nucleus; no acute changes.

1/13/04 Dr. Schlegel: mild iron deficiency anemia secondary to menorrhagia with associated thrombocytosis; menorrhagia likely worsened by Ibuprofen; coagulopathy-increased bleeding time in association with platelet dysfunction from Ibuprofen. Recommend: iron, discontinue the Ibuprofen.

8/26/04 /cholesterol 220, triglycerides 166, HDL 60, LDL 126

9/2/04 Gynecological evaluation: Dr. Richards: menopausal; risk of estrogen/progestin exceed the benefit. Ovarian failure requires increased vigilance for bone loss, progression of risk factors in cardiovascular disease and maintenance of quality of life.

9/22/04 Pap smear negative

10/5/04 Bone density test: borderline osteopenia of the lumbar

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spine/bone mineral density of the left hip is within normal limits.

10/7/04 and 10/21/05 Mammograms normal/benign

10/12/04 Colonoscopy: few scattered diverticuli/otherwise normal colonoscopy of the cecum. K. Gottlieb

1/19/05 Valproic Acid 53 [50-100]

6/29/05 Eye exam: minimal refractive error, mild cataract, no glasses needed

6/30/05 Xray of right wrist: mild degenerative disease; no fracture

7/26/05 Echocardiogram: Normal left ventricular size and systolic function; ejection fraction 65%; normal biatrial dimensions; normal aortic and mitral valve; trace tricuspid regurgitation

11/16/05 unremarkable abdomen examination by xray

11/22/05 VPA level 93

1/12/06 UA normal

1/21/06 Cholesterol 224, Triglycerides 214, LDL 129, HDL 52; hemogram normal except for platelets of 432

1/31/06 Pelvic ultrasound: uterus unremarkable, ovaries not seen; bladder normal; normal endometrium: limited study grossly unremarkable

Influenza Vaccine: 11/3/05

Pneumococcal Vaccine: 4/15/05

Progress Note Review:

4/7/05 Rammed into by another client and fell onto her buttocks without evident trauma

4/10/05 and 4/12/05 and 4/13/05 and 4/15/05 ankles swollen and painful

4/29/05 threatening to hit peers

5/25/05 running in hallway and fell and injured knees

6/18 to 6/25/05 enuresis

6/29/05 fell on buttocks, xrays negative right hand

8/29/05 abdominal pain

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9/12/05 bruise on right elbow  
9/16/05 abdominal pain  
9/24/05 while being helped in bath large bruise noted on left elbow  
9/26/05 right ankle very swollen  
10/11/05 tripped on bathrobe and slippers and fell  
10/28/05-11/01/05 flew to visit mother  
11/01/05 bruise found on right leg  
11/10/05 dysuria  
11/13/05 negative urine  
11/14/05 right sided abdominal pain]  
12/06/05 stomach " hurt "  
12/17/05 abdominal pain, no menses for two months  
12/28/05 trauma to right middle toe  
12/31/05 didn't go bowling because of sore foot; later in day she fell  
on her knees, kicked staff

Events just prior to her death:

1/13/06 screaming and slapping her face  
2/6/07 [sic] She had a verbal altercation and was moved to other side  
of the cottage [93 Apple].  
2/12/06 urinary incontinence  
2/14/06 bruises on left arm  
2/14/06 airplane travel  
3/13/06 Kathy continues to sleep well; gets up to use restroom  
during night 1-2 times; seems to be a lot more vocal since move to the  
93 side when going to the restroom; no incontinence this month.  
3/18/06 While dressing staff noted discolored areas on right hip.  
3/19/06 A small open area noted on right thumb.

3/21/06 @ 1615 a staff member reported Kathy returned home from  
People First and indicated she wanted to eat at the Wrangle Inn. She  
was told to change her clothes and take a shower or bath. At 1630-

1635 she was assisted with setting the water temperature and putting the bubble bath into the water. While the staff member was attending other clients in their rooms, Kathy called to him at about 1700-1705 hours and informed him she was finished. He returned to the bathing Area and told her it was fine to get out of the tub. He returned to assisting the other clients. At 1715 a nurse went into the bathing area and found Kathy lying on right side in bathtub with her face fully submerged. The nurse pulled Kathy's head out of the water and called a medical stat and requested help. Help arrived at 1720 and the two pulled Kathy from the tub and into the grooming area. She was placed on her back and white foamy matter came out of her nostrils. When turned to her side more material came from nostrils and pink tinged sputum from her mouth. Her airway was cleared and rescue breathing was started. There was no pulse and chest compressions were started. Suction apparatus was requested. At 1725 ambu oxygen was started and suctioning was performed but no fluid was removed from the oral cavity. Air was going into the stomach and distending the abdomen.

At 1727 the AED indicated no shock was advised. No pulse was found. At 1728 she was not breathing and the CPR was continued. AT 1730, 1731 and 1734 no shock was advised. At 1735 the abdomen was distending more. At 1738 no shock was advised. At 1739 there was asystole, the pupils were fixed and dilated. At 1745 Dr. Montenegro discontinued the CPR [by phone].

During the secondary assessment about a 2 cm bruise was noted on her right temple above the eyebrow. There was also a hematoma on the dorsum of the right foot along the 4th and 5th metatarsals. At 1727 the ambulance and EMT were contacted and arrived at 1738 hours to assist with the resuscitation. Consent was given by the family for an autopsy.

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Death Certificate:

Cause of death: Asphyxia due to fresh-water drowning

Clinical history of epilepsy/bite mark on tongue

Also slight hemorrhage in mastoid air cells, abundant pulmonary edema with edema fluid cone exiting oral and nasal cavities, frothy fluid in sphenoid sinus, micrencephaly [brain weight 1,000 grams], cholelithiasis/chronic cholecystitis, borderline cardiomegaly [heart weight 410 grams], hemangioma of right liver lobe [benign] and toxicology: blood alcohol negative, caffeine positive, valproic acid 20.5 mg/liter.

Opinion: This 42 year old female was found deceased with her face submerged in the bathtub. She was mentally handicapped. The decedent had a known seizure disorder, though records indicate that she hadn't had a seizure in some time.

Toxicological testing of body fluids removed at autopsy quantitated the concentration of valproic acid at 20.5 mg/L, below typical therapeutic concentrations. Autopsy demonstrated a bite mark on the right side of the decedent's tongue, consistent with a seizure. The death is attributed to asphyxia due to fresh-water drowning in bathtub due to epileptic seizure with incapacitation in bathtub due to clinical history of idiopathic epilepsy. The manner of death is accident.

Sally Aiken, M. D., the Spokane County Medical Examiner's office.

Conclusions:

Kathy's hyperlipidemia and her medications probably had nothing to do with her death. The niacin use could theoretically cause arrhythmias and hypotension. She was taking 800mg at 0800 and 1600 hours and 400mg at 2000 hours for a total of 2000mg.

The urinary incontinence and the Oxybutynin were not likely connected with her death.

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Her gallstones were asymptomatic and unrelated.

Kathy drowned [her face became covered with water] which resulted in suffocation [which hindered free breathing] which lead to asphyxiation [which was a loss of consciousness as a result of too little oxygen and too much carbon dioxide].

Why did her face become covered with water? Did she have a seizure, lose consciousness and fall? Did she slip and fall and strike her head rendering her unconsciousness or dazed and therefore unable to get her face out of the water?

With a decreased valproic acid level of 20.5 [recommended levels 50-100] it is not unlikely Kathy had a seizure. The right side of the tongue was bitten just prior to death which suggests a seizure. Perhaps the injury could have occurred as a result of the fall or trauma to the head region. She had an abrasion of the area near the right eyebrow. There also was an abrasion in the hair line of the right temple.

The valproic acid level was drawn posthumously. The autopsy was performed on March 22, 2006 at 1440 hours and the valproic acid specimen was drawn at that time. Kathy expired at 1800 hours on March 21, 2006. Her next dose of valproic acid would have been given at 2000 hours. She would have been close to her usual lowest evening serum concentration at the time of her death.

The last Valproic Acid level prior to her death was on November 22, 2005 and was 93.

Communication with Dr. Aiken, Coroner's office, indicates that at death most substances cease to be metabolized and she feels the Valproic Acid level they obtained was a true and accurate result which reflected the chemical status of the Valproic Acid at the time of death.

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She had an abrasion on the lateral side of the right foot and a contusion at the base of the foot near the great toe. There was a flap abrasion on the dorsum of the right great toe.

Could she have been standing or trying to stand when she lost control. With these injuries it seems unlikely she was sitting in the tub when she lost consciousness or lost control. She may have struck the side of the tub or soap dish with her head and perhaps could have kicked the faucet with her foot [repeatedly] which could have caused the foot injuries.

The rib fractures appear to have been caused by the resuscitative efforts.

Was the bubble bath material new for Kathy? [Cannot substantiate it was new. It was reported it was a favorite of several of the clients and had been purchased at the Dollar Store]. With her past allergic history and rather significant reaction to allergy testing, could she have had an allergic reaction to the bubble bath? [This would have been possible especially if the bubble bath were completely new to her].

Could the bubble bath have made the tub slippery? There were no traction strips or other non-skid appliqués on the bottom of the tub. The bottom was very smooth.

Was the on/off knob was in place. Often it is removed for certain client's baths to guarantee proper water level and temperature.

Kathy probably was dressed in her robe for the bath and her clothes left in her room.

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The bathroom door was probably open and the privacy curtain was probably drawn across the area providing excellent privacy.

There is a grab rail around the tub which may have been where she struck her head. It seems a little less likely she struck the right side of her head against the upper lip of the tub unless she was sitting. This is a very strong rail in an excellent position. It seems likely that if she simply slipped she would have been able to grab the rail to prevent or at least lessen the severity of the falling activity. If she had a seizure she would have fallen unchallenged. It is possible but less likely she slipped and in falling struck her head. She probably had a loss of consciousness if she had a seizure or she could have sustained a concussion or was dazed and slipped beneath the water as a result of the fall.

She has a history of frequent falls, frequent bruises and abrasions and has been described as "clumsy and klutzy."

Kathy had some physical disability secondary to changes to the right foot, ankle and Achilles tendon. She wore an ankle brace until October 7, 2005. Could this have lead to instability and made it more likely she would fall in the tub?

Her obesity could have added to the difficulty she had in maintaining her balance.

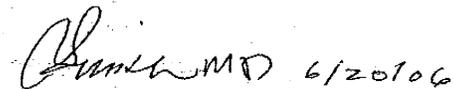
Her move to the 93 side of Apple Cottage was a result of another client's needs and problems and had nothing to do with Kathy [despite the report of a verbal altercation at about the same time]. It did not seem she had any significant behavioral problems at the time.

Page 11-Kathy Smith

She had "self meds." The medication use was very closely observed and recorded. It was nearly impossible for her to have missed any doses of the Valproic Acid because of self medication.

Kathy died as the 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.

  
Barry M. Smith, M. D.

# AHREND LAW FIRM PLLC

October 03, 2016 - 3:49 PM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 93397-9  
**Appellate Court Case Title:** Betty Jean Triplett, et al. v. Washington Dept. of Social and Health Services, et al.

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