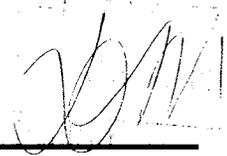


36349-11  
NO. 36349-11



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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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DAVID A. HANNUM and CYNTHIA L. HANNUM,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF LICENSING, LIZ LUCE,  
Director of the Washington Department of Licensing and JOHN and  
JANE DOE,

Respondents.

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

David Hannum sued the Washington Department of Licensing (DOL) and its current director for damages he claims to have sustained as a result of the placement of a notation of a medical certificate requirement by an unknown DOL employee on Mr. Hannum's internal DOL driver's record. Mr. Hannum's claimed damages stem from alleged poor treatment by an officer of the Pasco Police Department and the loss of an opportunity to compete for a substitute school bus driver position at the Pasco School District. His wife joined the lawsuit alleging damages for emotional distress allegedly caused by an officer of the Pasco Police Department, and by the suffering of her husband.

The Hannums filed suit in Thurston County alleging negligence, negligent infliction of emotional distress, and substantive and procedural due process violations, all due to the placement of the notation of a medical certificate requirement on David Hannum's internal DOL record. The case was removed to federal court, where all federal claims were dismissed. After remand on the state claims, and just prior to the hearing on the parties' motions for summary judgment, the Hannums attempted to renew the civil rights claims that had been dismissed by the federal court and add the former director of DOL as a new defendant. The trial court denied the motion to amend, denied the Hannums' motion for summary

judgment, and granted the State's motion for summary judgment—  
dismissing all remaining claims. This appeal followed.

## **II. RESTATEMENT OF ISSUES**

1. Did the trial court properly grant the State's motion for summary judgment and deny the Hannums' motion for summary judgment on the negligence and negligent infliction of emotional distress claims, where, under the public duty doctrine, no duty was owed to the Hannums, and they produced no admissible evidence that the medical certificate notation caused them any damages?

2. Should dismissal of the Hannums' constitutional claims be affirmed because they have not sufficiently briefed the issues to warrant judicial consideration on appeal?

3. Did the trial court properly grant summary judgment in favor of the State and deny summary judgment on the Hannums' state constitutional due process claims, where they did not prove beyond a reasonable doubt that the statute is unconstitutional on its face, or that it was unconstitutionally applied to them?

4. Did the trial court properly deny the Hannums' motion for summary judgment and grant the State's motion for summary judgment on the Hannums' state constitutional due process claims, where they were not entitled to injunctive relief because the inadvertent clerical error had been

corrected by DOL, and because Washington does not recognize a cause of action for money damages for violations of the state constitution?

5. Did the trial court properly deny the Hannums' motion to amend the complaint to add a 42 USC § 1983 claim and a new defendant because the § 1983 claim was barred by *res judicata* in view of the federal court's dismissal of all the § 1983 civil rights claims?

6. Even if the denial of their motion to amend was not barred by *res judicata*, should denial of the Hannums' motion to amend nevertheless be affirmed where the amendment was not timely, and in any event, would have been futile?

7. Did the trial court properly deny the Hannums' request for attorney fees under RCW 4.84.350, the Equal Access to Justice Act (EAJA), since their case was commenced as a tort instead of a petition for judicial review of agency action, as required under the EAJA, and, in any event, they were not the prevailing party?

8. Should the appellate court similarly deny the Hannums' request for fees and costs because there is no basis for awarding them under RAP 18.1?

### III. RESTATEMENT OF FACTS

#### A. Substantive Facts

On October 25, 2001, an administrative error by an unknown DOL employee caused a medical certificate notation reading, “Med 1 Med Cert Exp 10 44 P,” to be placed on David Hannum’s internal DOL driver’s license record. CP at 502. DOL has no record of why or how the notation was made. CP at 502. Further, DOL’s system was not triggered to follow-up with him when no completed medical certificate was received by DOL, so the notation remained on the internal DOL database from October 25, 2001, when it was entered, to March 5, 2005, when DOL removed it. CP at 502.

#### 1. DOL’s Statutory Authority Re: Drivers’ Medical or Mental Conditions

DOL issues driver’s licenses under the authority of Chapter 46.20 RCW. However, DOL may not issue licenses to drivers “who [are] unable to safely operate a motor vehicle . . . due to a physical or mental disability.” RCW 46.20.031(7). To further this mandate, DOL is authorized by statute to request additional medical information from a driver when he or she is suspected of having a physical or mental condition that could affect the person’s ability to drive. RCW 46.20.041(1)(b).

Typically, when a potential mental or physical capacity issue is identified, DOL provides the driver a form to be completed by his or her doctor and returned within 30 days. CP at 501. DOL does not make any findings regarding a person's mental or physical health that results in the deprivation or limitation of driving privileges at this stage.

When the form is provided to the driver, a medical certificate notation indicating "Med 1 Med. Cert Exp. (Date)" is placed on the internal DOL database; this notation is supposed to trigger follow-up by DOL if the person fails to return the medical certificate. CP at 501. If the driver does not comply with this procedure, or the medical information indicates the driver's inability to safely function a motor vehicle, the statute authorizes a driver's interview and then a hearing if the agency seeks to suspend, revoke, or otherwise limit the driver's license. RCW 46.20.322-329. The results of the hearing are subject to review by the superior court. RCW 46.20.334.

If a driver is subject to this requirement, at most the only information that appears on an abstract of the individual's driving record is the word "Medical," regardless of whether the condition has arisen due to a psychiatric or medical condition. CP at 501. Limitations are placed on the type of information that is distributed. CP at 501. Employers and insurance companies can obtain a limited record that

does not show the medical certificate requirement. CP at 501. While law enforcement officers can obtain a “full” record—regardless of driver consent—even a record subject to the medical certificate requirement would only read “Medical,” regardless of whether the certificate requirement arose due to a mental or physical condition. CP at 501.

No record exists at DOL as to who made the entry on Mr. Hannum’s internal DOL record, or why it was made. CP at 502. Mr. Hannum contends that he first learned of the entry when he went to obtain a commercial driver’s license in 2005. CP at 627. He further contends that the notation caused a host of problems. *See, e.g.*, CP at 628-632. However, the record suggests that the Hannums’ problems stem from Mr. Hannum’s behavioral issues, not the medical certificate notation on the internal DOL database.

## **2. Prior Employment at Hanford**

In July 2001 Mr. Hannum was fired from his employment at the Hanford nuclear power facility, allegedly due to performance deficiencies. CP at 444. Following his termination, Mr. Hannum engaged in what an administrative law judge termed “erratic behaviors,” including calling a senior employee late at night, showing up at a senior employee’s home, and attempting to gain access to the office of the president of the company. CP at 444-45. These behaviors, which started in July 2001—

well before the notation was entered in October 2001—resulted in a “Stop Access” order which prohibited his entry at the Hanford facility. CP at 444-45; 502.

### **3. Officer French**

In addition to his employment problems at Hanford, Mr. Hannum had issues with law enforcement. Officer Dawn French of the Pasco Police Department had a number of contacts with Mr. Hannum in the community. CP at 514-15. The first of these contacts occurred in December 2003, when Mr. Hannum came to the Pasco Police Department to report that he was being harassed. CP at 514. He claimed that he was being followed by numerous people—he indicated that he would go out and there would be no one on the road and then later many people would be on the road following him, always in different cars. CP at 514. He stated that when he would go to the post office no one would be there, and then suddenly many people would appear, all trying to help him and asking what he was doing there. CP at 515. Mr. Hannum also stated that he had been told not to say anything about his previous employment at Hanford, and if he did, people would kill him. CP at 515. Further, he stated that he had lost employment in another state in 1997, and nothing had been good since that time. CP at 515.

Mr. Hannum went on to tell Officer French that he had been en route from Work Source (an agency that assists with employment) when another alleged incident of harassment had occurred. CP at 515. Because Officer French was concerned about Mr. Hannum's behavior, she called someone at Work Source; she was told that Mr. Hannum caused concern around the agency because of his behavior and that he was considered "likely to go postal." CP at 522. Based on this information, Officer French had questions regarding whether Mr. Hannum was a threat to himself or others and she requested that staff from the local mental health agency evaluate him. CP at 515. Officer French also conducted a search of a number of police databases. CP at 515. This search revealed the "No Trespass Order" issued by Hanford against Mr. Hannum. CP at 515. She also saw a copy of the DOL driver's license abstract and saw the word "Medical." CP at 516.

Officer French also recalled seeing a notation that indicated the word "Mental," but she does not recall which database showed that notation; she does not believe that it was the DOL driver's license abstract. CP at 515-16. In records subject to a medical certificate requirement, DOL abstracts available to law enforcement in December 2003 stated only "Medical" under the "Restrictions" listing. CP at 516. Regardless of any database checks, Officer French's

concerns about Mr. Hannum arose from her contact with him and the statements he made. CP at 516.

Officer French later had contact with Mr. Hannum in her capacity as a resource officer for the Pasco School District—she was asked to remove him from the premises on more than one occasion because staff were frightened of him. CP at 516.

#### **4. ACCESS Log**

Law enforcement records in ACCESS reflect that Officer French was the only person to review Mr. Hannum’s DOL abstract. ACCESS is a computer-controlled communications system operated by the Washington State Patrol that provides service to 236 law enforcement agencies and approximately 19,000 individual users. CP at 533. Since mid-1997, the ACCESS system has created a log of each inquiry and response that has been processed in its system, showing what requests were received and what information was provided in response. CP at 533. A search of the system showed that information about Mr. Hannum was accessed four times between the period of September 1, 2001, and March 15, 2005. CP at 533. Abstract information from DOL containing the word “Medical” was transmitted only one time through ACCESS—on December 24, 2003—following an inquiry from the Pasco Police Department. CP at 533.

## **5. Pasco School District**

About a year later, in December 2004, Mr. Hannum obtained an abstract of his driver's license record and supplied it to the Pasco School District in his effort to gain employment as a substitute bus driver. CP at 465; 470; 535-36. Consistent with DOL rules, the copy provided to the potential employer did not list any indication of a medical certificate requirement. CP 465; 470.

Mr. Hannum was invited to attend bus driver training provided by the Pasco School District, but claims that he was thrown out of the class after he went to the DOL office on February 18, 2005 and could not obtain a license due to the medical certificate requirement. CP at 112-13. However, school records show he attended training classes at least until March 2, 2005. CP at 466.

Testimony of the course supervisor indicated that when individuals had a problem obtaining a driver's license the school district gave them additional opportunities to gain employment after they resolved the issue and obtained a license. CP at 536. That supervisor stated that he did not see any notation on Mr. Hannum's driver's license record and that he thought Mr. Hannum's problems with his license stemmed from his issues at Hanford. CP at 536-537. He also stated that if Mr. Hannum had successfully resolved the situation he could still have been employed.

CP at 536. However, Mr. Hannum gave Pasco School District Human Resources staff a “difficult time” and then started to act strangely by coming to the driver’s lounge and “hanging out,” even though he had no business at the location. CP at 536-537. After he engaged in those behaviors he was not further considered for employment by the school district. CP at 537.

**B. Procedural History**

This case was filed on May 30, 2006, and was promptly removed to federal court. CP at 5; 18-19. The State’s motion for summary judgment in the federal case was filed on August 16, 2006. CP at 23. The motion was granted in part— all federal claims were dismissed and all state claims were remanded on October 4, 2006. CP at 25-34. The Hannums’ cross-motion for summary judgment and their motion to amend their complaint to add former DOL director Fred Stephens were both denied the same day. CP at 25-34.

Following remand to state court, the State moved for summary judgment because no duty was owed under the public duty doctrine, the Hannums could not establish that the notation caused them any damages and they could not establish any constitutional violations. CP at 481; 499; 526-27. The Hannums filed a cross-motion seeking judgment in their favor on the negligence and constitutional claims. CP at 608-625. On the

eve of the summary judgment hearing, the Hannums again filed a motion to amend the complaint to renew their federal civil rights claims under 42 USC § 1983, and to add the former DOL director, Fred Stephens, as a defendant. CP at 794-803. The trial court granted the State's motion for summary judgment on all claims and denied the Hannums' motion for summary judgment, as well as their motion to amend the complaint. CP at 931-34. This appeal followed. CP at 936-37.

#### **IV. SUMMARY OF ARGUMENT**

The Hannums' negligence and negligent infliction of emotional distress claims fail because no duty was owed to them individually, and there is no exception to the public duty doctrine which would impose such a duty. Specifically, the legislative intent exception to the public duty doctrine does not apply because there is no language contained in Chapter 46.20 RCW that shows intent by the legislature to create a duty in tort to drivers who are suspected of having a physical or mental condition that may limit their ability to safely operate a motor vehicle. Further, no admissible evidence establishes that anyone took or failed to take action against the Hannums because of the inadvertent medical certificate requirement notation on Mr. Hannum's internal DOL records; therefore, they cannot establish that the notation caused them any damages.

The statute, RCW 46.20.041, does not deny due process, either on its face or as applied, because the opportunities for notice and hearing are sufficient in light of the interest that may be deprived. Even if due process was not afforded in this instance, the Hannums were not entitled to injunctive relief because DOL had removed the notation. Furthermore, no statute authorizes recovery of money damages for a violation of the state constitution.

The trial court properly denied the motion to amend the complaint because *res judicata* barred the amendment of the 42 USC § 1983 claim. In any event, adding former DOL director Fred Stephens as a defendant was both untimely and futile.

Finally, since the statute cited by the Hannums does not authorize fees for tort actions, and because they were not the prevailing party, the trial court properly denied the Hannums' request for fees. Because their appellate claims are similarly without merit, the Hannums should not be awarded fees on appeal.

## **V. LAW AND ARGUMENT**

### **A. Standards Of Review**

#### **1. Motion For Summary Judgment**

This Court reviews an order on summary judgment *de novo*; the inquiry is the same as that which is made by trial court. *Cummins v.*

*Lewis County*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006). The elements of negligence include the existence of a duty to the plaintiff, breach of that duty, and injury to the plaintiff proximately caused by the breach. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006). Whether or not the duty element exists in the negligence context is a question of law reviewed *de novo*. *Id.*

A claim of violation of due process may be established on a motion for summary judgment because the issue is a question of law which is reviewed *de novo*. *Hannum v. Friedt*, 88 Wn. App. 881, 886, 947 P.2d 760 (1997); *State v. Campbell*, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995). Constitutional challenges are reviewed *de novo*. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

An appellate court may affirm on any ground supported by the record even if it is not considered or applied by the trial court. *See, e.g., La Mon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989).

## **2. Motion To Amend Complaint**

When a ruling on a motion to amend the complaint is based on the trial court's determination of the law, the standard of review is *de novo*. *Evergreen Freedom Foundation v. Washington Education Assoc.*, 111 Wn. App. 586, 605, 49 P.3d 894 (2002). Here, the trial court's decision to

deny the motion to amend was based on the fact that the federal court had already ruled that a 42 USC § 1983 claim could not go forward as to Fred Stephens. RP at 18. As such, this legal determination is reviewed *de novo*.

**B. Negligence And Negligent Infliction Of Emotional Distress Claims Fail Because No Duty Was Owed And No Admissible Evidence Established Causation**

The negligence and negligent infliction of emotional distress claims were properly dismissed because no duty was owed under the public duty doctrine. The Hannums incorrectly argued that the legislative intent exception applied; however, no statutory language showing a clear legislative intent to create a duty was cited. Further, there is no evidence in the record that the notation on the internal DOL database caused any of the problems of which the Hannums complain. Accordingly, this court should affirm the granting of the State's motion for summary judgment and the denial of the Hannums' motion for summary judgment as to the negligence and negligent infliction of emotional distress claims of both Hannums.<sup>1</sup>

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<sup>1</sup> The negligence and negligent infliction of emotional distress claims are duplicative and stem from the same set of facts. For purposes of the negligence claim, the Hannums assert their damages are emotional distress. This is the same as alleging negligent infliction of emotional distress.

## 1. No Duty Was Owed Under The Public Duty Doctrine

The vitality of the public duty doctrine as the proper focusing tool for determining whether the government owes a tort duty to an individual has been recently reaffirmed by the Washington State Supreme Court. *Osborn v. Mason County*, 157 Wn.2d 18, 134 P.3d 197 (2006); *Cummins*, 156 Wn.2d at 852.

The public duty doctrine simply reminds us that a public entity—like any other defendant—is liable for negligence only if it has a statutory or common law duty of care. And its “exceptions” indicate when a statutory or common law duty exists. “The question whether an exception to the public duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff.” In other words, the public duty doctrine helps us distinguish proper legal duties from mere hortatory “duties.”

*Osborn*, 157 Wn.2d at 27-28 (internal citations omitted).

The public duty doctrine is based on the policy that “legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.” *Taylor v. Stevens County*, 111 Wn.2d 159, 170, 759 P.2d 447 (1988) (citing *Rogers v. Toppenish*, 23 Wn. App. 554, 559, 596 P.2d 1096 (1979)).

Regulatory statutes in particular are appropriately analyzed under the public duty doctrine:

The traditional rule is that a regulatory statute imposes a duty on public officials which is owed to the public as a whole, and that such a statute does not impose any duties

owed to a particular individual which can be the basis for a tort claim. *Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978). The rule is almost universally accepted regardless of the exact nature of the statute relied upon by the plaintiff.

*Baerlein v. State*, 92 Wn.2d 229, 231, 595 P.2d 930 (1979); *accord*, *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988).

Under the public duty doctrine, the State is not liable for its negligent conduct in the regulatory context, even where a duty does exist, unless that duty is owed to an individual and not merely to the general public. *Aba Sheikh*, 156 Wn.2d at 448. In the context of regulatory liability, Washington courts have established four situations in which an actionable tort duty to an individual may arise. These situations are known as the exceptions to the public duty doctrine and consist of (1) legislative intent, (2) special relationship, (3) failure to enforce, and (4) volunteer rescue. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987).

Here, the Hannums claim only that the legislative intent exception to the public duty doctrine creates a duty in tort. However, as argued below, they are incorrect.

## 2. Chapter 46.20 RCW Does Not Contain Language Showing Legislative Intent To Create Tort Duty

The legislative intent exception to the public duty doctrine only applies when the legislature has clearly expressed that an enactment is intended to protect a particular and circumscribed class of persons. *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 930, 969 P.2d 75 (1998). As stated there:

In order for the legislative intent exception to apply, the regulation establishing a duty must intend to identify and protect a particular and circumscribed class of persons, and *this intent must be clearly expressed within the provision—it will not be implied.*

*Id.* at 930 (citing *Baerlein*, 92 Wn.2d at 232; *Johnson v. State*, 77 Wn. App. 934, 938, 894, P.2d 1366 (1995)) (emphasis added).

To determine whether a statute contains a statement of legislative intent for purposes of establishing an exception to the public duty doctrine, courts look at the statute's declaration of purpose and the people or entities, if any, at which the statute is directed. *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 562-63, 104 P.3d 677 (2004). In *Burnett*, the Court held that an emergency management statute focused on protecting the public peace, health, and safety of the people of the state in the event of a disaster did not evidence legislative intent to create a duty actionable in tort for damages that occurred in a flood. *Id.*

Similarly, this Court recently held that statutory language phrased in terms of “promoting safe and adequate care” did not reveal legislative intent to create a tort duty by state nursing home regulators to protect individual nursing home residents. *Donohoe v. State*, 135 Wn. App. 824, 847-48, 142 P.3d 654 (2006). The analysis and discussion in *Burnett* and *Donohoe* accurately captures the holdings of numerous Washington cases which consistently find that legislative phrasing in terms of protecting the “residents” of the State or “promoting the welfare of the people” to be non-actionable under the public duty doctrine and not subject to the legislative intent exception.<sup>2</sup>

The Hannums’ claims are similarly not actionable because the statute involved is intended to protect the public from unsafe drivers. It authorizes a process whereby DOL works to ensure the physical and mental capabilities of drivers on the state’s roads. RCW 46.20.041. The agency does this by requesting that drivers submit information from health care providers, or by allowing drivers to demonstrate their ability to safely operate a motor vehicle. RCW 46.20.041 (1)(a) and (b). Nothing about the plain language of the statute shows intent by the legislature to create a

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<sup>2</sup> See, e.g., *Baerlein*, 92 Wn.2d at 233 (State Securities Act intended to protect the investing public, not individual investors); *Taylor*, 111 Wn.2d at 166 (State Building Code intended to protect the public, not individual occupants); *Stiefel v. City of Kent*, 132 Wn. App. 523, 532, 132 P.3d 1111 (2006) (fire protection codes benefit the public at large, not individual homeowners).

duty in tort to drivers thought to be medically or mentally impaired if the agency completes that process negligently.

In regulating the licensing of drivers in this way, DOL is fulfilling its obligations under Title 46, the Motor Vehicles title of the Revised Code of Washington. The purpose of this title is set forth in RCW 46.01.011, which states:

The legislature finds that the department of licensing administers laws relating to the licensing and regulation of professions, businesses, gambling and other activities in addition to administering laws relating to the licensing and regulation of vehicles and vehicle operators, dealers and manufacturers. The laws administered by the department have the common denominator of licensing and regulation and *are directed toward protecting and enhancing the well-being of the residents of the state.*

RCW 46.01.011 (emphasis added).

The language of this statute shows the legislative intent to protect the public as a whole. There is no specific language anywhere in Chapter 46.20 RCW that shows intent to protect individual drivers. This type of general language—just like that in *Burnett*, including “residents of the state” and the “public”—has consistently been found *not* to be actionable under the public duty doctrine. *Burnett*, 124 Wn. App. at 562-63. And these phrases do not meet the legislative intent exception requirement of clearly expressing intent to identify and protect a particular and circumscribed class. *Id.*

Further, case law has interpreted the plain language of Chapter 46.20 RCW to be a reflection of concern for and an attempt to protect the general travelling public. *See Tumelson v. Todhunter*, 105 Wn.2d 596, 602, 716 P.2d 890 (1986) (recognizing that part of the statute’s purpose in this jurisdiction and others “reflects a common concern of highway safety” in upholding the inadmissibility of the physician’s certificate required by RCW 46.20.041 in a subsequent tort case); *See also State v. Thomas*, 25 Wn. App. 770, 774, 610 P.2d 937 (1980) (holding that service of a suspension notice via mail was sufficient in light of public interest in protecting the general public from unlawfully licensed drivers).

Since the legislative intent exception does not apply, and therefore no duty was owed, summary judgment for the State on the negligence and negligent infliction of emotional distress claims was proper. The Hannums’ cross-motion for summary judgment on liability was not legally sufficient. The trial court’s ruling dismissing the negligence claims in this case should be affirmed.

**3. The Hannums Failed To Present Admissible Evidence That The Notation Caused Damages**

Even if a duty was owed, the Hannums’ negligence and negligent infliction of emotional distress claims fail, because they did not establish with admissible evidence that the inadvertently placed medical certificate

notation proximately caused them any harm. Their self-serving statements that prospective employers took or failed to take action are mere speculation unsupported by the record. Mr. Hannum's statements that he was harassed by police or others because of the notation are further without any basis in fact.

There are two components to proximate causation, (1) cause in fact, and (2) legal causation. *Tyner v. DSHS*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). Cause in fact is the "but for" test where the appellants must prove, but for the defendants' actions in a direct unbroken sequence, they would not have been injured. *Id.* Speculation is insufficient to prove factual causation. *Rasmussen v. Bendotti*, 107 Wn. App. 947, 959, 29 P.3d 56 (2001). Although factual causation is often a jury question, "when the connection between a defendant's conduct and the plaintiff's injury is too speculative and indirect, the cause in fact requirement is not met" as a matter of law. *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992) (citations omitted).

Legal causation is a question of law asking "whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Tyner*, 141 Wn.2d at 82. "[T]he concept of legal cause permits the courts to limit liability, for policy reasons, even though duty and foreseeability concepts

would indicate liability.” *Id.*

**a. The Hannums’ Problems Were Not Caused By The Medical Certificate Notation**

Mr. Hannum claims that he lost the ability to compete for employment and was treated differently by individuals in Pasco because of the medical certificate notation by DOL on his driving record. However, the record is devoid of admissible evidence supporting this claim.

First, there is no proof that anyone saw the medical certificate notation; the only notation that Officer French saw was the word “Medical” under the restrictions heading. And her undisputed testimony was that she did not act in anyway toward Mr. Hannum due to anything she saw on a database; instead, she took action due to his *behavior*. CP at 514-15; 532-34; 537.

Second, the abstract that Mr. Hannum himself supplied to the Pasco School District did not show any medical information. The bus training program supervisor testified that he did not see any notation, and he thought the problem with DOL stemmed from Mr. Hannum’s prior employment at Hanford. CP at 465; 470; 536-37.

Finally, the descriptions of those who encountered him show that it was Mr. Hannum’s *behavior* that caused his problems with finding

employment at Pasco School District. CP at 536-37. The record also shows that problems with an employer caused by his behavior were not new to him. CP at 444-45.

Based on the administrative record developed regarding Mr. Hannum's prior employment at Hanford, he had a history of erratic behavior and odd encounters with people, including showing up at a senior employee's house, calling a senior employee late at night, and trying to get in to the office of the company president uninvited. CP 444-45. Many of these problems pre-dated the placement of the notation, beginning as early as July 2001 and continuing into 2002. CP at 441-458.

Even assuming a duty existed, no evidence in the record supports the claim that the medical certificate notation caused anyone to act or fail to act with regard to employing Mr. Hannum, or in treating him in any particular way that resulted in damage to him. Further, there is nothing in the record to indicate that anything even happened to Mrs. Hannum due to the inadvertent placement of the medical certificate notation on his driver's license record—to suggest otherwise is pure speculation. And speculation cannot establish causation. *Rasmussen*, 107 Wn. App. at 959. Without causation, the negligence and negligent infliction of emotional distress claims of both Hannums fail.

**b. DOL Should Not Be Held Liable In Tort For An Inadvertent Administrative Error**

Assuming that a duty owed was breached does not necessarily mean that the legal causation requirement is satisfied and liability can be imposed. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998).

Legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of the legal liability will be dependent on 'mixed considerations of logic, common sense, justice, policy, and precedent.'

*Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985).

Instead, the focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. *Schooley*, 134 Wn.2d at 478. Legal causation is a question of law that must be decided by the court. *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 204, 15 P.3d 1283 (2001). Here, the Hannums cannot establish legal causation.

Across the state, DOL and its subagents process hundreds, if not thousands, of transactions related to drivers' licenses each day. An

inadvertent clerical mistake that remained undetected for years and caused no harm is not the sort of agency action that should give rise to liability in tort. This is especially true when the agency removed the medical certificate notation as soon as the agency determined that there were no records to substantiate the requirement. CP at 502. Policy considerations do not support imposing liability in these circumstances. Without legal causation the negligence and negligent infliction of emotional distress claims fail; therefore, summary judgment in favor of the State (and against the Hannums) should be affirmed.

**C. No Violations Of The Hannums' State Constitutional Rights Occurred**

Although the Hannums allege violations of due process rights under the Washington State Constitution, these issues are not sufficiently briefed for consideration by the court. Br. of Appellant at 30-35. On that basis alone, it is within the court's discretion to refuse to allow the claims to proceed. Even if these claims go forward, they fail because the Hannums have not established that the statute is unconstitutional on its face, nor have they established that the statute was unconstitutionally applied to Mr. Hannum. Further, even if there was a violation, the notation has been removed, so injunctive relief is not available and no money damages are permitted. As a result, summary judgment in favor of

the State should be affirmed.

**1. The Hannums' Constitutional Claims Are Not Sufficiently Briefed To Allow For Proper Judicial Consideration**

While the Hannums make sweeping allegations about the unconstitutionality of RCW46.20.041, they fail to sufficiently analyze the case law and its application to this case to mount a successful challenge. As this Court said in *Belas v. Kiga*, 135 Wn.2d 913, 920, 959 P.2d 1037 (1998), “[a] statute is presumed constitutional and the parties challenging its constitutionality must demonstrate its unconstitutionality beyond a reasonable doubt. This standard is met if argument and research establish that there is no reasonable doubt that the statute violates the Constitution.” This heavy burden gives rise to the admonition that appellate courts “will not address constitutional arguments which are not supported by adequate briefing.” *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994) (citation omitted).

Here, the Hannums’ brief on appeal fails to approach the standard of briefing worthy of judicial consideration of their constitutional claims. While the brief cites to the Washington Constitution and the seminal due process case of *Mathews v. Eldridge*, it fails to explain how this authority applies to the facts in their case. Instead, the brief merely alleges that the statute is unconstitutional and the Hannums were deprived due process

based on the agency's failure to keep records. No cite to authority is provided for the claim that the agency is required to keep records, or that a failure to do so results in a due process deprivation. Br. of Appellant at 33-34. Additionally, the Hannums make broad sweeping allegations, unsupported by the record, that DOL made a determination that Mr. Hannum is mentally ill. Brief of Appellant at 32. There is neither analysis nor citation to the record to support this claim, nor is there any analysis of the due process interests involved.<sup>3</sup>

In *Fria v. Dep't Labor & Industries*, 125 Wn. App. 531, 535, 105 P.3d 33, *review denied*, 154 Wn.2d 1018, 113 P.3d 1039 (2005), where, as here, the appellant "provide[d] only a theoretical discussion of each constitutional protection he argues the statute violates, without tethering his theory to case law or the facts of his case." The Court of Appeals aptly noted that such inconclusive and unsupported arguments are " 'naked casting into the constitutional sea' [that] do not command judicial consideration and discussion." Citing *In re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8<sup>th</sup> Cir. 1970)). See also *State v. Marintorres*,

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<sup>3</sup> It should be noted that the only citation provided by the Hannums is to their brief below. Br. of Appellant at 32-34. Incorporation by reference to briefs filed below is improper. See *U.S. West Comm., Inc. v. Washington Util. & Transp. Comm'n.*, 134 Wn.2d 74, 111-12, 949 P.2d 1337 (1997) (incorporating lower court briefs not allowed on appeal). Furthermore, the brief below does not help the Hannums here, because citations to that brief are only to argument, *not* citation to legal authority. CP at 622.

93 Wn. App. 442, 452, 969 P.2d 501 (1999) (legal arguments on equal protection not considered where “brief is conclusory and does not identify any specific legal issues or cite any authority.” (citation omitted)).

Given the Hannums’ insufficient briefing on the constitutional due process issues in this case, the trial court’s order of summary judgment should be affirmed.

**2. The Hannums’ Were Not Denied Due Process**

The claim of violation of due process fails even if the Court determines that the issue is sufficiently briefed. The statute is not unconstitutional on its face because it provides sufficient procedural protections before any deprivation of a protected interest occurs. Further, the statute was not applied unconstitutionally because the inadvertent placement of a medical certificate notation did not result in the type of deprivation which requires prior notice.

**a. RCW 46.20.041 Is Not Unconstitutional On Its Face**

The Hannums claim that the statute is unconstitutional because it denied them due process. Statutes are presumed constitutional and the burden is on the party trying to establish unconstitutionality. *Leonard v. City of Spokane*, 127 Wn.2d 194, 197-198, 897 P.2d 358 (1995).

A successful facial challenge to a statute's constitutionality is one where no set of circumstances exists in which the statute, as currently written, can be constitutionally applied. *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282, n.14, 4 P.3d 808 (2000) (citing *In re Detention of Turay*, 139 Wn.2d 379, 417, n. 27, 986 P.2d 790 (1999)).

Article 1, section 3, of the Washington State Constitution states that, "No person shall be deprived of life, liberty, or property, without due process of law." It is well settled that drivers' licenses may not be suspended or revoked "without that procedural due process required by the Fourteenth Amendment." *Dixon v. Love*, 431 U.S. 105, 112, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977) (quoting *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971)); *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 612, 70 P.3d 947 (2003). Though the procedures may vary according to the interest at stake, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)).

Here, RCW 46.20.041 contains due process protections that meet the requirements of *Arroyo-Murillo* and *Mathews*. The statute allows the

driver to demonstrate that he or she has the ability to safely operate a motor vehicle. RCW 46.20.041(1)(a). DOL can also request that the driver provide information from a health care provider. RCW 46.20.041(1)(b). Both of these steps provide notice to the driver that there is a question about fitness to operate a motor vehicle. If DOL intends to take action against the driver's license based on the information obtained, the driver is entitled to an informal driver improvement interview or a formal hearing, as outlined in statute. RCW 46.20.041(4); RCW 46.20.322; RCW 46.20.328. The outcome of these hearings is subject to judicial review. RCW 46.20.334. These provisions provide the meaningful notice and opportunity to be heard that are required for procedural due process.

In light of the interest at stake, the statute contains sufficient protection provided prior to any deprivation such that it is constitutional on its face. Dismissal of the Hannums' facial due process claim should be affirmed.

**b. RCW 46.20.041 Was Not Applied Unconstitutionally**

An "as applied" challenge occurs where a litigant contends that a statute's application in the context of the plaintiff's actions or proposed actions is unconstitutional. *Wash. State Republican Party*, 141 Wn.2d at

282. The Hannums' challenge fails because there was no government decision that resulted in the deprivation of a liberty or property interest.

Due process “imposes restraints on governmental decisions which deprive individuals of liberty or property interests.” *Mansour v. King County*, 131 Wn. App. 255, 263, 128 P.3d 1241 (2006) (citing *Nguyen v. Med. Quality Assurance Commn.*, 144 Wn.2d 516, 522-23, 29 P.3d 689 (2001)). The Hannums argue that due process was required prior to the placement of the notation. However, simply requesting that a driver complete a medical certificate does not implicate due process—only when a governmental decision results in a deprivation is due process required. *Mansour*, 131 Wn. App. at 263.

Here, no governmental decision was made that deprived anyone of a protected interest. Instead, an inadvertent administrative error caused the medical certificate notation to be logged on the internal DOL record where it remained unnoticed for a period of time. Due process in the form of a driver improvement hearing or formal adjudicative hearing would have been provided if a deprivation would result. RCW 46.20.041(4); RCW 46.20.322; RCW 46.20.328. Further, due process would have been provided in the form of judicial review in the event that driving privileges were suspended following either of the types of hearings. RCW 46.20.334.

But no deprivation of a constitutionally protected interest resulted merely from requesting medical information from Mr. Hannum or placing the medical certificate notation on his DOL driver's record, so no due process was required. The dismissal of the "as applied" due process claim should be affirmed.<sup>4</sup>

**3. The Hannums Are Not Entitled To Either Injunctive Relief Or Money Damages For Any Violations Of The State Constitution**

Even if the Hannums could make out a cognizable deprivation of some due process right on the facts of this case, there is nothing to remedy. Injunctive relief is not appropriate here since the agency promptly removed the notation when the error became known. Injunctive relief is prospective and requires proof of current violations. *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 710, 81 P.3d 851 (2003).

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<sup>4</sup> By only a reference in a section heading and without analysis or citation to authority, the Hannums claim a violation of their substantive due process rights. Br. of Appellant at 30. A substantive due process violation generally requires evidence that government abused its power by arbitrarily depriving a person of a protected interest or by basing a decision on an improper motive. *Nieshe v. Concrete School Dist.*, 129 Wn. App. 640-41, 127 P.3d 713 (2005). Furthermore, any deprivation of a "right to earn a living" is analyzed under a rational basis test. *Amunrud v. Board of Appeals*, 124 Wn. App. 884, 887, 103 P.3d 257 (2004). The undisputed evidence is that the medical certificate notation was placed on Mr. Hannum's internal DOL records by mistake, so no improper motive or arbitrariness can be established. CP at 502. And the statute in question survives a rational basis analysis since there is a valid connection between DOL's efforts to ensure that drivers can operate a motor vehicle unimpaired and requesting that drivers provide medical information from a health care provider. For these reasons, even a properly pled substantive due process claim by the Hannums would fail.

Since the error has been corrected, there is nothing for DOL to fix and no injunction should issue.<sup>5</sup>

Moreover, Washington courts have consistently refused to recognize a cause of action in tort for violations of the Washington State Constitution. *Blinka v. Washington State Bar Ass'n*, 109 Wn. App. 575, 591, 36 P.3d 1094 (2001). While the due process clause can be used by an individual to bring a claim for declaratory relief or an injunction in a proper case, “the clause does not, of itself, provide the remedy of reparation.” *Systems Amusement, Inc. v. State*, 7 Wn. App. 516, 518, 500 P.2d 1253 (1972).

In *Blinka*, the appellant asserted a civil cause of action in tort based upon article 1, section 5, of the Washington State Constitution. 109 Wn. App. at 591. The court pointed out that “without the aid of augmentative legislation” indicating an intent to authorize a claim for money damages, no action would lie. *Id.*

No such augmentative legislation supports the Hannums’ claim for money damages here. No statutes or judicial determinations exist which

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<sup>5</sup> Furthermore, the purpose of an injunction “is not to punish a wrongdoer for past actions but to protect a party from present or future wrongful acts.” *Argonic Corp of America v. deBough*, 21 Wn. App. 459, 464, 585 P.2d 821 (1978). Any speculation that an injunction should issue because this will happen again is not supported by the record, since the undisputed evidence is that the medical certificate notation was only placed due to inadvertent clerical error and was promptly corrected when the error was pointed out to DOL. CP at 501.

would establish a constitutional cause of action in favor of the Hannums for money damages against the state for the alleged due process deprivations they claim. Without any statutory authority evidencing intent to allow a constitutional claim under the circumstances outlined here, the Hannums cannot sue the state for money damages for a violation of state constitutional rights, and their claims were properly dismissed by the trial court.

**D. Amendment Of Complaint Was Barred, Untimely And Futile, And Therefore Properly Denied**

On the eve of the summary judgment hearing below, the Hannums moved to amend their complaint to add a 42 USC §1983 claim and a new defendant, former DOL director Fred Stephens. CP at 794-803. The trial court denied the motion to add the claim under 42 USC § 1983, because the federal court had already denied the motion to amend. RP at 18. Further, amendment was not proper because the amendment was untimely and would be futile.

**1. Res Judicata Barred Attempts To Add The Previously-Dismissed Civil Rights Claim**

The Hannums filed the same motion for leave to amend the complaint in federal court on the eve of the summary judgment motion hearings there. CP at 257-61. The federal court denied that motion without prejudice, but the order states that ruling applied only to the

claims *remaining* in the case—the state law claims. On the last page of a nine page order that dismissed all of the federal claims, the court ruled:

The plaintiffs seek to amend their complaint to include Fred Stephens, who was allegedly the Director of the Department of Licensing when the notation was removed from Mr. Hannum’s record. Dkt. 18. Because the court has declined to exercise jurisdiction over the plaintiffs’ *remaining* claims, the motion to amend should be denied without prejudice, allowing the plaintiffs to raise the issue in state court if they so desire.

CP at 34 (emphasis added).

*Res judicata* gives “preclusive effect [to] judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.” *Loveridge v. Fred Meyer, Inc.* 125 Wn.2d 759, 763, 887 P.2d 898 (1995). It is designed to “prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts.” *Id.* For the doctrine to apply, a prior judgment must have a concurrence of identity with a subsequent action in: (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. *Id.*

Here, the Hannums sought to add a federal claim in the state court action despite the fact that the federal court had already dismissed that claim. CP at 30-32; 34. Recognizing the preclusive effect of the prior federal court ruling, the trial court barred amendment. RP at 18. *Res*

*judicata* prohibits the Hannums' attempts to revive their meritless § 1983 claims. The motion to amend the complaint was properly denied and the trial court's order should be affirmed.

**2. Amendment On Eve Of Dismissal Adding Former DOL Director As Defendant Was Untimely When His Identity Could Have Been Known At The Time of Filing The Complaint, And Had Been Known For At Least Eight Months**

Inexcusable neglect, regardless of whether prejudice can be shown, is sufficient ground for denying a motion to amend a complaint to add a new defendant. *Haberman v. WA Pub. Power Supply Sys.*, 109 Wn.2d 107, 173-74, 744 P.2d 1032 (1987), *as amended*, 750 P.2d 254, *appeal dismissed*, 488 U.S. 805 (1988).

In *Haberman*, the trial court denied leave to amend to add defendants on the ground that the appellants there had failed to meet their burden of proving that the proposed additional defendants had been omitted as a result of excusable neglect. *Haberman*, 109 Wn.2d at 173. On appeal they argued that delay, excusable or not, was insufficient to support denial of leave to amend. Instead, they contended that the defendants had the burden of showing prejudice. *Id.*

The *Haberman* court affirmed the trial court's denial of leave to amend, reasoning:

. . . [I]n cases where leave to amend to add additional defendant [sic] has been sought [as opposed to adding new claims], this court has clearly held that *inexcusable neglect alone is a sufficient ground for denying the motion*. Generally, inexcusable neglect exists when no reasons for the initial failure to name the party appears in the record. If the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be held to be inexcusable.

*Haberman*, 109 Wn.2d at 174 (emphasis added) (citations omitted).

The *Haberman* court noted that the appellants were aware of, or should have been aware of, the identities of the defendants they sought to add. Moreover, the appellants provided no information in the record as to why they could not have discovered the identity of the defendants earlier. *Id.* The *Haberman* court concluded that failure to name these defendants originally was the result of inexcusable neglect and affirmed the denial of leave to amend. *Id.* See also *Woodward v. City of Spokane*, 51 Wn. App. 900, 906, 756 P.2d 156, review denied, 111 Wn.2d 1027 (1988) (applying *Haberman* and similarly affirming a denial of leave to amend to add defendants).

Here, the Hannums provided no reason for why they neglected to name Fred Stephens as a defendant at the time the complaint was filed. Their own research, filed in federal court in support of the motion to

amend the complaint there, shows that Fred Stephens was appointed the director of the Department of Licensing in 1998. CP at 816. Minimal additional research would have provided the information regarding when his successor, Liz Luce, was appointed. The Hannums did not need to wait until answers to interrogatories were served to discover this public information.

Furthermore, they provided no explanation as to why they did not move for leave to amend as soon as the case was remanded to the state court in October 2006. By the time they filed their second motion to amend their complaint in late April 2007, the Hannums had known of the identity of the former DOL director for almost eight months. CP 303; 311. The Hannums' failure to diligently determine who the director of DOL was at the time of the incidents they allege in their complaint, and to add him prior to the eve of dismissal of the case, warranted denial of their motion for leave to amend.

**3. Adding Former DOL Director As New Defendant Would Be Futile Because The Hannums' Claims Are Meritless**

In addition to untimeliness, a court may consider the *futility* of amendment. *Haselwood v. Bremerton Ice Arena, Inc.* 137 Wn. App.872, 960, 155 P.3d 952 (2007). Here, adding Fred Stephens as a defendant would be futile. The claims that the Hannums seek to assert against him—

violation of federal civil rights under 42 USC § 1983, violation of state constitutional due process rights, negligence, and negligent infliction of emotional distress—are legally insufficient. Consequently, the trial court’s decision denying the Hannums’ motion to amend the complaint to add a defendant and claims should be affirmed.

**a. Negligence, Negligent Infliction Of Emotional Distress, And State Constitutional Claims Are Legally Insufficient**

For the reasons argued above, the Hannums’ claims of negligence, negligent infliction of emotional distress, and state constitutional claims are legally deficient. Adding Fred Stephens as a defendant does nothing except delay resolution of the legally insufficient negligence, negligent infliction of emotional distress, and state constitutional claims, and the Hannum’s motion to amend was properly denied.

**b. Proposed New Defendant Cannot Be Sued In Official Capacity Under § 1983**

As argued above, the § 1983 claim is barred by *res judicata*. Furthermore, it is legally insufficient. State officials acting in their *official* capacities are not “persons” for purposes of an action for damages under 42 U.S.C. § 1983. *Will v. Michigan State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304 (1989). *See also Lapidus v. Board of Regents*, 535 U.S. 613, 617, 122 S. Ct. 1640 (2002). Moreover, a defendant cannot be held liable

under 42 U.S.C. § 1983 solely on the basis of supervisory responsibility or position. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, n.58, 98 S. Ct. 2018 (1978). Recognizing this authority, the federal district court held:

Because neither the Washington State Department of Licensing nor the Director of the Department are “persons” within the meaning of § 1983, Appellants have not stated a cause of action for money damages under 42 U.S.C. § 1983 against these defendants. The claims under 42 U.S.C. § 1983 should be dismissed.

CP at 30.

Similarly, adding an official or supervisory capacity claim against former DOL Director Stephens would be futile, and denial of leave to do so should be affirmed.

**c. Proposed New Defendant Would Be Entitled To Qualified Immunity If Sued In His Personal Capacity**

Allowing former Director Stephens to be added as a defendant in a *personal* capacity suit under § 1983 would be futile as well. Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). As long as an official could reasonably

have thought his actions to be consistent with the rights he is alleged to have violated, he is entitled to immunity. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

In ruling on the question of qualified immunity for DOL Director Liz Luce and John/Jane Doe, the federal court held:

Here, even if the plaintiffs could successfully allege that placing the notation on Mr. Hannum's record without providing him notice and an opportunity to contest the notation amounts to a violation of his constitutional rights, such rights do not appear to be clearly established, and a reasonable government officer could have concluded that the defendants' behavior towards Mr. Hannum was lawful. The court should therefore hold that Liz Luce and John/Jane Doe would be entitled to qualified immunity.

CP at 32.

The same analysis applies to the actions of the prior DOL director, Fred Stephens. The Hannums have made no allegations of personal participation, a necessary requirement for personal capacity suits. Furthermore, based on the federal court's qualified immunity analysis above, Fred Stephens would be as shielded from suit as are Liz Luce and John/Jane Doe. Amendment of the complaint to allow the addition of Director Stephens and a § 1983 claim would be futile. The trial court properly denied the motion to amend.

The Hannums cite to *Gausvik v. Perez*, 239 F. Supp. 2d 1067, 1099-1100 (E.D. Wn., 2002) *reversed in part* 345 F.3d 813 (9<sup>th</sup> Cir.,

2003), for the proposition that “an official who has failed to prevent a constitutional violation by inadequately training, supervising or investigating his subordinates, or setting policies may be liable under 42 U.S.C. § 1983.” However, the Hannums fail to point out that this applies only to *personal* capacity suits. Even *Gausvik* acknowledges that there is no respondent superior liability under § 1983. *Gausvik*, 239 F. Supp. 2d at 1099 (citing *Taylor v. List*, 880 F.2d 1040, 1045 (9<sup>th</sup> Cir., 1989)). And the Hannums fail to address how a personal capacity suit can go forward given the federal court’s finding that there was no clearly established right, and qualified immunity is appropriate for the DOL director under the facts asserted. CP at 31-32. Accordingly, the motion to amend the complaint was properly denied and the order should be affirmed.

**E. Fees Are Not Authorized For Tort Cases Under RCW 4.84.350, The Equal Access to Justice Act (EAJA)**

The EAJA only applies to judicial review of agency action brought pursuant to RCW 34.05, the Administrative Procedures Act (APA). RCW 84.350(1); *Cobra Roofing Services, Inc. v. Dept. of Labor and Industries*, 157 Wn.2d 90, 101, 135 P.3d 913 (2006). In *Cobra Roofing*, a roofing company sought judicial review of a determination by the Board of Industrial Insurance Appeals that it had repeatedly violated the

Washington Industrial and Safety Health Act. *Id.*, at 94-95. The company argued that there were no limitations in the EAJA to the type of agency action that could be reviewed, so it was entitled to attorney fees expended in the superior court and court of appeals because it was seeking judicial review of action by an agency. *Id.*

The statute, however, defines both “judicial review” and “agency action” with reference to the APA. RCW 4.84.340(2) and (4). The Supreme Court thus read these definitions as a limitation on the types of judicial review of agency action that could qualify a prevailing party to attorney fees. *Cobra Roofing*, 157 Wn. 2d at 101. The Court concluded “attorney fees authorized by the EAJA *do not* apply to judicial review of agency decisions not authorized by the APA.” *Id.* (emphasis added).

The trial court concluded similarly in this case. Since this case was not commenced as a petition for judicial review under the APA, fees were not available. *See* RP at 49-50. Furthermore, the Hannums are not entitled to fees since they were not the prevailing party. As such, the request was properly denied and the order should be affirmed.

**F. The Hannums Are Not Entitled to Fees under RAP 18.1**

The Hannums cite to RAP 18.1 for the authority that they are entitled to fees on appeal since they are seeking to add a claim under 42 USC § 1983. This claim is wholly without merit. Fees are available

for claimants under 42 USC § 1988 when those claimants are *successful* on the merits of their § 1983 claims. But the § 1983 claims that were originally pled were dismissed by the federal court, and *res judicata* bars their attempts to revive them here. Furthermore, for the reasons argued above, the claim is legally deficient. As a result the Hannums cannot be successful on the merits of their federal claims, and their request for fees under RAP 18.1 should be denied.

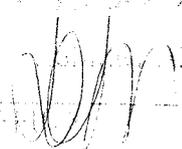
## VI. CONCLUSION

For the foregoing reasons, the State of Washington requests that the trial court orders granting the State's motion for summary judgment, denying the Hannums' motion for summary judgment, denying their motion to amend their complaint, and denying their request for attorney fees be affirmed. The State also requests that the application for attorney fees under RAP 18.1 be denied.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of September 2007.

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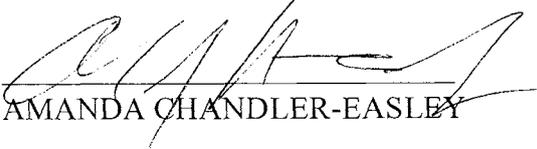
I certify under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding Respondent's Brief And Certificate Of Service was filed by ABC Legal Messenger in Division I of the Court of Appeals at the following address:

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DATED this 28<sup>th</sup> day of September, 2007, at Seattle, WA.

  
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