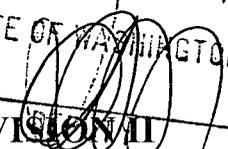


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STATE OF WASHINGTON
BY 

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

**SUNSHINE HEIFERS, LLC, an Arizona limited
liability company,**

Appellant,

vs.

**THE WASHINGTON STATE DEPARTMENT OF
AGRICULTURE; DAN NEWHOUSE, in his capacity as
the Director of the WSDA,**

Respondents.

Appellant's Opening Brief

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I. INTRODUCTION

This appeal results from the Trial Court's denial of Sunshine Heifers, LLC's ("SSH") partial motion for summary judgment and the granting of the Washington State Department of Agriculture's summary judgment motion. This case is ultimately turns on whether or not the Washington State Department of Agriculture ("WSDA") has a duty to owners and interest holders in cattle in which the WSDA inspects and directs sales proceeds to be distributed.

The relevant facts of this case were undisputed at the Trial Court level. In summary, the WSDA performed multiple inspections of cattle in which SSH either owned or had a valid first priority security interest. SSH had leased cattle to the Dana Group, LLC, which was owned and operated by Gary and Donna Sytsma. The Dana Group, LLC, through its owners, began taking SSH's cattle to the Northwestern Livestock Commission Company ("NLCC"), a public livestock auction

house, for the purpose of attempting to sell the cattle at auction. The WSDA, through inspector and employee Tom Groff, inspected SSH's cattle to determine (a) ownership; (b) whether the Dana Group, LLC or the Sytsmas had the authority to sell the cattle; and (c) to whom NLCC should distribute the sales proceeds. Regarding the cattle in question, the WSDA inspector wrongfully and negligently determined that the Dana Group, LLC and/or the Sytsmas had the authority to sell SSH's cattle. Based on this determination, the WSDA inspector instructed NLCC to distribute the cattle sale proceeds to the Sytsmas or their company.

The WSDA, through its inspectors and agents, when performing cattle inspections, take the following actions, have the following authority, and receive the following benefits:

- a. The WSDA inspects each head of cattle that is to be sold at a public livestock market;

- b. During the inspection process, the inspector, in his sole discretion, determines:
- i. Who the owner of the cattle is;
 - ii. Whether the person bringing the livestock to the auction is authorized to sell the cattle;
 - iii. Whether the livestock will be sold;
 - iv. Whether the sales proceeds will be distributed;
 - v. Whether the sales proceeds will be impounded; and
 - vi. To whom the sales proceeds will be distributed.

The WSDA receives substantial compensation, upwards of \$1,000,000.00 annually, for these actions. These actions are taken without the inspector making any attempt to contact the parties, like SSH, who have an interest in the cattle or even own the cattle. This lack of communication is true even in cases when a party (SSH in this case) has a brand on the livestock which is registered with the WSDA.

At the Trial Court level, the WSDA entirely ignored the unique authority and position of a livestock inspector. Instead, the WSDA's sole argument was that it has no duty to SSH (and in turn any owner of cattle which the WSDA inspects) based on the WSDA's reading of the Public Duty Doctrine. SSH's position is that the cattle inspections and the duties of the WSDA provide no benefit or protection to the public and instead only effect the owners and interest holders of the cattle being inspected and sold. As such, the duties of the WSDA inspectors are proprietary in nature, are not covered by the Public Duty Doctrine, and the WSDA is liable for the negligent actions of its employees.

The duties of the WSDA inspectors are extremely broad and unique. The livestock inspectors are making the ultimate decision on the disposition of valuable property belonging to citizens and parties that have no control over the situation. No other agency has this type of power over the personal property

of others. This unique authority and actions go well beyond the typical governmental function and rises to the level of a proprietary function.

II. ASSIGNMENTS OF ERROR

1. Did the Trial Court err in granting summary judgment in favor of Defendants, the WSDA and Dan Newhouse, in his capacity as Director of the WSDA?
2. Did the Trial Court err in denying the partial summary judgment motion of Plaintiff, SSH?
3. Did the Trial Court err in finding, as a matter of law, that the WSDA did not owe a legally recognizable duty to SSH when performing inspections of SSH's cattle prior to sale at a public livestock auction house?
4. Did the Trial Court err in finding, as a matter of law, that the duties of the WSDA in performing livestock inspections at public livestock houses are covered by the Public Duty Doctrine?

5. Did the Trial Court err in finding, as a matter of law, that the duties of the WSDA in performing inspections at public livestock houses are not proprietary in nature?

III. STATEMENT OF THE CASE

3.1 Statement of Facts

a. Summary

This litigation involves the inspection of certain cattle by the WSDA, through its employees/agents which were either owned by SSH or in which SSH had a valid and perfected first priority security interest. Starting in 2008 and continuing into early 2010, SSH's lessee, the Dana Group, LLC and/or its owners, Gary & Donna Sytsma, transported cattle to a public livestock auction (NLCC) in Hermiston, Oregon. The WSDA, through its agents and employees, inspected these cattle, many of which carried SSH's brand. After each inspection was finalized, the WSDA completed certain inspection mastersheets and provided a copy of the mastersheets to the NLCC. The cattle were then

sold with the sales proceeds being distributed to the party listed on the inspection mastersheets – not SSH.

b. SSH's Rights and Background:

On or about July 24, 2008 SSH entered into a Dairy Cow Lease (“**Lease**”) with the Dana Group, LLC. The lessee’s obligations under the Lease were personally guaranteed by Gary & Donna Sytsma, the owners of the Dana Group, LLC. A true and correct copy of the Lease is attached as Ex 1 (CP 206-216) to the Declaration of Jeff Blevins (CP 202-298).

In connection with the Lease, the Dana Group, LLC executed a security agreement (“**Security Agreement**”) under which it granted SSH a security interest in, amongst other things, all of the Dana Group, LLC’s cows (including offspring and replacements). A true and correct copy of the Security Agreement is attached as Ex 2 (CP 217- 221) to the Declaration of Jeff Blevins (CP 202-298). The security interest was given in order to secure the payment and performance of all

obligations of the Debtor to SSH, including the lessee's obligations under the Lease. Id. SSH's security interest was perfected by the filing of a UCC-1 Financing Statement ("UCC-1") with the Department of Licensing on December 22, 2008 (File No. 2008-357-1847-1). A true and correct copy of the UCC-1 is attached as Ex 3 (CP 222-224) to the Declaration of Jeff Blevins (CP 202-298).

The Dana Group, LLC defaulted on its obligations under the Lease and remains in default under the terms of the Lease and Security Agreement. SSH accelerated all amounts due under the Lease and Security Agreement, with the result that as of August 12, 2010, SSH was owed the sum of \$1,558,859.00. Declaration of Jeff Blevins (CP 202-298) at CP 2.

c. WSDA Inspections:

Starting in November of 2008 and continuing into 2010, the Dana Group, LLC and/or its owners, Gary & Donna Sytsma, began moving cattle that were either owned by and branded to

SSH or in which SSH had a valid and perfected first position security interest. The majority of these cattle were moved into the State of Oregon with the intent to sell the cattle at public auction at the NLCC. See the WSDA inspection mastersheets attached as Exs 4 & 5 (CP 225-248) to the Declaration of Jeff Blevins (CP 202-298).

At the time the cattle were moved, each head was inspected by a WSDA inspector pursuant to the requirements of RCW 16.57 et. seq. See the WSDA inspection mastersheets attached as Exs 4 & 5 (CP 225-248) to the Declaration of Jeff Blevins (CP 202-298; see also Deposition Transcript of Tom Groff pg 12 line 11 through 13 line 7 (CP 306-307); and 46 lines 3-10 (CP 315) which is attached to the Declaration of Joshua J. Busey (CP 299-315) as Ex 1. In this case, the inspector was WSDA employee, Tom Groff. See Deposition Transcript of Tom Groff pg 12 line 11 through 13 line 7 (CP 306-307); and 46 lines 3-10 (CP 315) which is attached to the Declaration of

Joshua J. Busey (CP 299-315) at Ex 1. Based on these inspections, the WSDA inspector completed an inspection mastersheet which listed certain information about the cattle, including a column for “consignor.” See the WSDA inspection mastersheets attached as Exs 4 & 5 (CP 225-248) to the Declaration of Jeff Blevins (CP 202-298; see also Deposition Transcript of Tom Groff at pg 33 lines 3-12 (CP 311) which is attached to the Declaration of Joshua J. Busey (CP 299-315) as Ex 1.

These mastersheets were given to the NLCC who then sold SSH’s cattle and disbursed the sales proceeds to the party listed on the mastersheet as “consignor.” Deposition Transcript of Tom Groff at pg 41 line 4 through 43 line 12 (CP 312-314) which is attached to the Declaration of Joshua J. Busey (CP 299-315) as Ex 1. This is the process that is generally followed by the WSDA inspector in all inspections at a public livestock auction house.

After the inspection, the WSDA inspector has the sole discretion to place a hold on the disbursement of the sale proceeds – which is called an impound. Id. If an impound is put in place by the inspector, NLCC must hold the proceeds for a 30 day period while the WSDA inspector attempts to determine ownership of the cattle. Id. During this impound period, the WSDA inspector has the absolute authority and discretion to request back-up documentation or otherwise determine ownership. Id. The public auction house, in this case the NLCC, has no discretion on whether to release the funds or who to pay. Id. In other words, the WSDA, through its inspection process, has the sole authority to determine not only whether the cattle will be sold and whether the party bringing the cattle to auction has the authority to sell the cattle, but when and to whom the sales proceeds will flow. See Id.

For these livestock inspections, the WSDA receives compensation. For each head of livestock inspected, the

WSDA receives a minimum of \$1.10 per head of cattle inspected (if the brand matches a registered brand in the brand book) and up to \$1.60 per head of cattle (if there is no brand or issues with the brand on the head). See WAC 16-610-065; See also deposition transcript of Tom Groff at pg 14 line 16 through 16 line 10 (CP 308-310) attached to the Declaration of Joshua J. Busey (CP 299-315) as Ex 1. The WSDA indicated in its summary judgment pleadings that the WSDA inspectors perform an estimated 600,000 inspections annually. See Defendants' Motion for Summary Judgment (CP 115-131) at 3 lines 1-5 (CP 117). If we use conservative figures and say the WSDA averages \$1.20 per inspection and only inspects 600,000 per year, this amounts to annual receipts from the inspections of at least \$750,000.00. These funds go directly to the WSDA. See Deposition transcript of Tom Groff at pg 14 line 16 through 16 line 10 (CP 308) attached to the Declaration of Joshua J. Busey (CP 299-315) as Ex 1.

Certain of the cattle inspected in our case carried the recorded brand of Sunshine – stylized as SSH. Despite this, the WSDA inspector indicated on its inspection reports that the cattle were owned by either the Dana Group, LLC or its owners, Gary and Donna Sytsma. These inaccurate inspections resulted in certain proceeds from auctions sales being paid to parties other than the cattle’s owner, SSH. See WSDA inspection reports and cancelled checks are attached to the Declaration of Jeff Blevins (CP 202-298) as Exs 4 (CP 225-237) & 6 (CP 249-271).

The following is a non-exclusive list of cattle that were owned by and branded to SSH at the time of inspection, but were inspected by the WSDA inspector as owned either by the Dana Group, LLC or its owners, Gary and Donna Sytsma. The list includes a description of the checks (all of which were issued by Defendant NLCC) written to Gary or Donna Sytsma as a result of each sale, the date of the sale, the number of head

sold and the amount of the check:

Check No.	Date	Head	Amount
75455	01/20/09	8	\$ 2,063.13
75511	01/27/09	8	\$ 4,316.51
75548	02/03/09	7	\$ 4,642.14
75713	02/24/09	7	\$ 3,208.09
75780	03/03/09	3	\$ 1,499.55
75966	03/24/09	1	\$ 113.00
76057	03/31/09	5	\$ 2,913.78
79741	12/22/09	5	\$ 2,380.00 (prorated)
76209	04/14/09	9	\$ 5,438.57 (prorated)
80135	02/09/10	1	\$ 582.50 (prorated)
79925	01/12/09	1	\$ 225.95
Total:		55	\$27,383.22

The line items above that are marked prorated are based on inspection reports and resulting sales that included both the cattle owned by and branded to SSH at the time of inspection

and cattle in which SSH was not the owner, but had a perfected first priority security interest. The amounts shown and head listed are only the cattle which were owned by and branded to SSH. True and correct copies of the applicable WSDA inspection reports and cancelled checks are attached to the Declaration of Jeff Blevins (CP 202-298) as Exs 4 (CP 225-237) & 6 (CP 249-271).

The remaining cattle in question that were brought to the WSDA for inspection by the Dana Group, LLC and/or the Sytsmas were not owned by or branded to SSH. Instead, SSH had a perfected first priority security interest in the cattle. These cattle carried brands that were not recorded with the Director of the WSDA. Despite this, when the WSDA, through its inspector, completed its inspection of these cattle, the inspection reports failed to show the invalidity of the brands. See WSDA inspection reports and cancelled checks are attached to the Declaration of Jeff Blevins (CP 202-298) as Exs

5 (CP 238-248) & 7 (CP 272-298).

Specifically, the cattle in which SSH had a perfected first priority security interest were inspected by the WSDA and checked in under brands which were at no time valid brands registered with the WSDA or the State of Washington. Because the brands in question were not registered, the inspection reports should have indicated that no valid and registered brand existed on the cattle. As a result of the erroneous inspection reports, the auction company, NLCC, issued checks directly to the Sytsmas or other third parties. If the invalidity of the brands was accurately shown, the proceeds from the auction of these cattle would have been impounded by the WSDA and its Director and would have been disbursed according to the statutory procedure under RCW 16.57 et. seq. Instead, the proceeds were distributed to the “owner” listed on the inaccurate and erroneous inspection reports. Id.

The following is a non-exclusive list of the cattle in which

SSH had a perfected first priority security interest that were inspected by the WSDA inspector under invalid and non-existing brands. The list includes a description of the check that was written to parties other than SSH as a result of each sale, the date of the sale, the number of head sold and the amount of the check:

Check No.	Date	Head	Amount
76150	04/07/09	1	\$ 503.06
76151	04/07/09	1	\$ 624.05
76146	04/07/09	2	\$ 1,149.01
76147	04/07/09	1	\$ 617.14
76149	04/07/09	1	\$ 787.30
77386	07/28/09	9	\$ 715.16
78580	09/14/09	4	\$ 2,156.58
79741	12/22/09	3	\$ 1,428.00 (prorated)
80130	02/09/10	3	\$ 1,967.95
80175	02/16/10	4	\$ 2,441.88

80788	04/13/10	8	\$ 5,545.63
76209	04/14/09	14	\$ 8,460.71
78692	09/22/09	5	\$ 1,798.04
78691	09/22/09	2	\$ 598.74
80135	02/09/10	4	\$ 2,330.79
80177	02/16/10	2	\$ 1,645.81
Total		64	\$32,763.65

The line items above that are marked prorated are based on inspection reports and resulting sales that included cattle both owned by and branded to SSH and cattle in which SSH was not the owner, but had a perfected first priority security interest. The amounts shown and head listed are only the cattle in which SSH had a first priority security interest. See WSDA inspection reports and cancelled checks are attached to the Declaration of Jeff Blevins (CP 202-298) as Exs 5 (CP 238-248) & 7 (CP 272-298).

3.2 Procedure of Case

With its Complaint, SSH alleged that the WSDA and its inspectors were negligent with the inspections, including, but not limited to, the inspector's determination that the Dana Group, LLC/Sytsmas had the authority to sell the cattle and the inspector's instruction to NLCC to distribute the sale proceeds to parties other than SSH. See Complaint for Negligence and Breach of Fiduciary Duty (CP 5-102).

The parties filed cross-motions for summary judgment. See Plaintiff's Motion for Partial Summary Judgment (CP 187-188); Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment (CP 189-201); and Defendants' Motion for Summary Judgment (CP 115-131). The sole issue on summary judgment was whether the WSDA owes a duty to SSH when inspecting cattle for auction, making the ownership determination, and instructing the auction company whom to

pay the proceeds. Id.; See also, Memorandum in Response to Defendants' Motion for Summary Judgment (CP 334-347); Reply Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment (CP 367-371); WSDA's Reply in Support of Motion for Summary Judgment (CP) 358-366; and WSDA's Response in Opposition to Plaintiff's Motion for Summary Judgment (CP 326-333). After briefing, the issue regarding the WSDA's duty or lack thereof boiled down to whether the duties of the WSDA in performing inspections are for the good of the public only (and thus covered by the Public Duty Doctrine) or whether the inspections primarily protect private parties like SSH (thus subjecting the WSDA to the negligence standard applicable to all parties performing services). Id.

At a summary judgment hearing on May 2, 2014, the Trial Court entered an Order Granting Defendants' Motion for Summary Judgment. See CP 377-378. The Trial Court also orally denied SSH's motion for partial summary judgment. See

RP at 37 lines 16-21. SSH filed the Notice of Appeal on May 29, 2014. See CP 379-382.

IV. ARGUMENT

4.1 Standard of Review

A decision of the trial court to grant or deny a summary judgment motion is reviewed de novo. Kofmehl v. Baseline Lake, LLC, 177 Wash.2d 584, 594, 305 P.3d 230 (2013). De novo review requires the performance of “the same inquiry as the trial court” and requires this Court to examine the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, in the light most favorable to the nonmoving party, drawing all reasonable inferences in the nonmoving party's favor, to determine if a genuine material issue of fact exists. *Id.*; CR 56(c). Summary judgment is appropriate where there is no material issue of fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

4.2 The WSDA Owes SSH a Duty of Reasonable Care in Conducting Cattle Inspections and the Public Duty Doctrine is Inapplicable.

The general rule is that the State of Washington and its agencies are liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation. RCW 4.92.090. With this statute the legislature abolished the doctrine of sovereign immunity and declared that sovereign immunity for the State in tort actions are no longer desirable or acceptable. See Finch v. Matthews 74 Wash.2d 161, 443 P.2d 833 (1968); See also, Evangelical United Brethren Church of Adna v. State, 67 Wash.2d 246, 407 P.2d 440 (1965).

Despite this, the WSDA argued at the Trial Court level that it does not owe a duty to any party, including SSH, when it conducts cattle inspections. See e.g. Defendants' Motion for Summary Judgment (CP 115-131). When making this argument, the WSDA did not dispute that it conducted the

inspections in question or that SSH either owned the cattle or had a security interest in the same. Further, the WSDA inspector that inspected the livestock in question, admitted that his inspections control (1) whether the livestock will be sold; and (2) if sold, whether the sales proceeds get disbursed or impounded. See Deposition transcript of Tom Groff at pg 41 line 4 through 43 line 12 (CP 312-314) attached as Ex 1 to the Declaration of Joshua J. Busey (CP 299-315). In other words, the WSDA admitted that its inspectors have the absolute and sole authority and discretion to determine not only whether cattle can be sold but when and to whom the sales proceeds are disbursed.

The sole issue is whether or not the Public Duty Doctrine applies to the duties and actions of the WSDA inspectors. If this Court determines that when viewing the facts in the light most favorable to SSH that the doctrine applies as a matter of law, the appeal should be upheld. However, if this Court

determines that the duties of the inspectors protect a private citizen instead of the public at large, this Court should grant SSH's appeal and instruct the Trial Court to enter an order granting SSH's Motion for Partial Summary Judgment.

The "public duty doctrine" is not a broad limit on governmental liability that eliminates duties of the State, but rather is simply a tool used by courts to ensure that governments are not saddled with greater liability than private actors as they conduct the people's business. See Munich v. Skagit Emergency Communication Center, 175 Wash.2d 871, 288 P.3d 328 (2012). When the liability of a government entity is at issue, the public duty doctrine does not always preclude liability for the negligent conduct. Instead, the doctrine only precludes liability when the duty is owed to the public at large. See, Bratton v. Welp (2001) 106 Wash.App. 248, 23 P.3d 19, reversed on other grounds 145 Wash.2d 572, 39 P.3d 959.

The public duty doctrine reflects 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 Wash.2d 159, 170, 759 P.2d 447 (1988). However, the public duty doctrine applies only when the public entity is performing a governmental function. Bailey v. Town of Forks, 108 Wash.2d 262, 268, 737 P.2d 1257 (1987). If the entity is performing a proprietary function, it is held to the same duty of care as a private individual or corporation engaged in the same activity. Dorsch v. City of Tacoma, 92 Wash.App. 131, 135, 960 P.2d 489 (1998). The test for distinguishing governmental from proprietary functions is “whether the act performed is for the common good of all, that is, for the public, or whether it is for the special benefit or profit of the corporate entity.” Hagerman v. City of Seattle, 189 Wash. 694, 701, 66 P.2d 1152 (1937).

Proprietary functions include medical and psychiatric care, Petersen v. State, 100 Wash.2d 421, 671 P.2d 230 (1983), and

operation of a sewage system, Hayes v. City of Vancouver, 61 Wash. 536, 112 P. 498 (1911). Governmental functions covered by the Public Duty Doctrine include the issuance of building permits, Taylor, 111 Wash.2d at 164-65, 759 P.2d 447, and the registration of securities, Hoffer v. State, 110 Wash.2d 415, 422, 755 P.2d 781 (1988).

The critical inquiry in determining whether the “public duty doctrine” applies is an analysis of (a) the actual duties that are performed and the actions of the governmental agency; and (b) the effect it has to the public at large, if any, and the private citizen involved. If the duties and benefits flowing therefrom are for the common good of the public at large, the doctrine applies. If the duties and actions primarily effect the rights of an individual, the doctrine does not apply. Additionally, if there is no quantifiable public benefit, the State should not be protected from liability for the torts of its employees.

Despite this fact driven inquiry, the WSDA, with its

summary judgment pleadings, made a clear attempt to avoid the facts of this case. The WSDA devoted almost no discussion in its brief to the actual duties and actions that are taken by its inspectors while in the field. Instead, the WSDA relied almost entirely on one sentence in RCW 16.57.902, which provides that “This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2003, except for sections 4 and 10 of this act which take effect January 1, 2004.” which has no applicability when one does the slightest analysis to what WSDA inspectors are controlling during the inspection and auction process. See WSDA’s Response in Opposition to Plaintiff’s Motion for Summary Judgment (CP 326-333) at Sections IV(A) & (B); WSDA’s Reply in Support of Motion for Summary Judgment (CP 358-366) at Sections IV(A) & (B). The WSDA took this one sentence (which is nothing more than a broad and general

statement of legislative intent) and argued, without analysis, that brand inspection is simply a normal governmental function.

Id.

The reason for the WSDA's refusal to dig into the facts of this case and the general duties/authority of the WSDA inspectors is that once the broad powers and duties of the inspectors are analyzed, it is clear that the inspections (a) provide no benefit to the public at large; (b) have a direct and substantial effect on the individual/entity that has an interest in the cattle; and (c) provide substantial financial benefit to the WSDA.

- a. **The only benefit or detriment from the inspections flow solely to the individual with an interest in the cattle.**

When inspecting cattle prior to sale at a public livestock market, the WSDA inspectors make a determination of not only whether the livestock can be sold, but whether and to whom the sales proceeds will be distributed. Deposition Transcript of

Tom Groff at pg 41 line 4 through 43 line 12 (CP 312-314) which is attached to the Declaration of Joshua J. Busey (CP 299-315) as Ex 1. When discussing his duties when conducting livestock inspections, the WSDA inspector, Tom Groff, expressly states he believes his duty is to protect the true owner of the cattle. See Deposition transcript of Tom Groff at pg 11 lines 3-8 (CP 305) and pg 14 lines 16-19 (CP 308) attached as Ex 1 to the Declaration of Joshua J. Busey (CP 299-315). Despite this absolute control over the property of third parties, the WSDA, even when there is an impound on the sale proceeds, takes no steps to notify parties that have an interest in the cattle. See Deposition transcript of Tom Groff at pg 29 line 2 through 30 line 13 (CP 356-357) attached as Ex 1 to the 2nd Declaration of Joshua J. Busey (CP 351-357).

In this case, the WSDA, through its employees and agents, inspected the personal property of SSH. With these inspections, the WSDA was not making a determination of

whether the livestock were fit to be sold.¹ Instead, the purpose of the inspections was to make a determination of (a) who owned the cattle is; (b) whether the person bringing the livestock to auction was authorized to sell the cattle; (c) whether the sales proceeds would be disbursed or impounded by the stock yard; and (d) to whom the sales proceeds should be distributed. See Deposition transcript of Tom Groff at pg 11-16, 33, & 41-46 (CP 305-315) attached as Ex 1 to the Declaration of Joshua J. Busey (CP 299-315).

This process and the actions of the WSDA inspectors provide no benefit to the public at large. The general public is not affected in any fashion when SSH's cattle are sold and the proceeds distributed to a third party. Likewise, if the WSDA would have (a) properly determined that the Sytsmas had no

¹ In fact the WSDA admitted during the May 2, 2014 summary judgment argument that the inspection does not determine whether the animal is diseased. Instead the WSDA states that the sole purpose of the inspection is to prevent theft. See RP at 7 line 17 through 8 line 14.

authority to sell SSH's cattle; and (b) impounded the sale proceeds, no benefit would have been conferred to the public at large.

On the other hand, these determinations by the WSDA have a direct and substantial impact on the private entity SSH. When the WSDA negligently performed the inspection and instructed NLCC to distribute the sale proceeds to Sytsma, this had the direct consequence of depriving SSH of its property.

The Public Duty Doctrine is in place to protect the government from liability only when it is performing functions for the benefit of the public at large. However, the inspections in this case and the inspection process overall has zero impact and conveys no benefit on the general public at large. As such, the Public Duty Doctrine is not applicable and the WSDA is liable for the torts of its employees to the same extent as private parties/entities. RCW 4.92.090.

b. The WSDA received a substantial financial benefit from the inspection program.

Presently, the WSDA, through its inspectors, entirely controls the market on livestock inspections. See WSDA's Reply in Support of Motion for Summary Judgment (CP 358-366) at 3 lines 16-18. Stated another way, any person that needs to have livestock inspected is required to go through the WSDA and pay the WSDA a fee for the inspection services. There is no other option. This did not used to be the case. As late as 2010, an owner of cattle was allowed in certain circumstances to use a self-inspection certificate for adequate proof of ownership in a private sale. See WAC 16-610-016.²

The inspection fees received provide the WSDA with a substantial amount of cash flow. The WSDA indicates in its summary judgment pleadings that the WSDA inspectors

²A "self-inspection certificate" is defined as a form prescribed by and obtained from the WSDA director that was completed and signed by the buyer and seller of livestock to document a change in ownership before June 10, 2010.

perform an estimated 600,000 inspections annually. See Defendants' Motion for Summary Judgment (CP 115-131) at 3 lines 1-5. The WSDA receives a minimum of \$1.10 per head of cattle inspected (if the brand matches a registered brand in the brand book) and up to \$1.60 per head of cattle (if there is no brand or issues with the brand on the head). See WAC 16-610-065; See also Deposition transcript of Tom Groff at pg 14 line 16 through 16 line 10 (CP 308-310) attached as Ex 1 to the Declaration of Joshua J. Busey (CP 299-315). If we use conservative figures and say the WSDA averages \$1.20 per inspection and only inspects 600,000 per year, this amounts to annual receipts from the inspections of at least \$750,000.00. These funds go directly to the WSDA. See also Deposition transcript of Tom Groff at pg 14 line 16 through 16 line 10 (CP 308-310) attached as Ex 1 to the Declaration of Joshua J. Busey (CP 299-315).

The WSDA argued that the fact a fee is paid for the inspection is irrelevant to the determination of whether the Public Duty Doctrine applies. See WSDA's Reply in Support of Motion for Summary Judgment (CP 358-366) at pg 5 lines 5-15. However, the fact that the WSDA is performing a service that only benefits (or harms) a private party and is receiving substantial sums of money further evidences that the inspection process is not for the benefit of the public, but is proprietary in nature.

c. The inspection process is not comparable to other accepted public functions.

The WSDA attempted to compare the livestock inspection process to the functions of the Washington State Department of Licensing ("DOL") and a building code inspector, which are both generally accepted governmental functions that have been found to benefit the public at large. See WSDA's Reply in Support of Plaintiff's Motion for Partial Summary Judgment

(CP 358-366) at 4 line 20 through 5 line 5; see also, RP 25 line 17 through 26 line 2. The problem with the WSDA's attempts are that they wholly lack any analysis to the actual actions and duties of a WSDA inspector compared to the duties of the DOL or a building code inspector.

In making this comparison to the DOL, the WSDA states that "the [DOL] is the only person or agency allowed to register and record title to motor vehicles" and that "[n]o person may transfer title to a motor vehicle without complying with the Motor Vehicle Title statute." Id. These statements about the duties of the DOL and transferring titles to motor vehicles are accurate. However, this has nothing to do with the duties and authority of the WSDA inspectors.

The DOL does not perform any inspection of the vehicle in question – this is the primary function of the WSDA. Instead the DOL simply reviews a certificate of title that is brought to it by the legal or registered owner. The DOL also does not

determine (a) whether the party bringing in the title has the authority to sell the vehicle; (b) whether the vehicle will be sold; (c) whether the sales proceeds will be disbursed or impounded; and (d) to whom the sales proceeds will be disbursed. The DOL's function is limited to issuance of certificates of title. These filings generally occur after the sale has taken place and are nothing more than a record keeping function.

The DOL's functions simply do not compare to the duties and authority of the WSDA inspectors. Let us assume that the DOL's duties not only included issuance of certificates of title, but that what actually occurred was that a party, prior to a sale of a motor vehicle, would take the vehicle to the DOL for an inspection. As part of the inspection, the DOL agent would decide in its sole discretion who the owner of the vehicle was. After this agent made this decision, he/she would issue a report to an auction company which told the auction company to (a)

sell the vehicle to a third party bidder (on the same day of the inspection); (b) hold the sale proceeds or distribute the proceeds; (c) whom to distribute the sale proceeds; and (d) pay a portion of the sales proceeds to the DOL as a fee for the inspection. Also, assume that the DOL agent took these actions without ever notifying or even making any attempt to notify the registered and/or legal owner of the vehicle that was listed on the certificate of title. These assumptions would apply equally in a comparison to the duties of a building code inspector. Obviously with these additional facts, the acts of the DOL agent (or a building code inspector) are outside of what would be considered a regulatory or police function.

This is exactly what occurs with the WSDA livestock inspections. The authority and actions of the WSDA inspector go well beyond a simple compliance and regulatory function of the government. Instead, the WSDA's actions move into the realm of proprietary actions which are not covered by the public

duty doctrine. In the absence of the public duty doctrine, the WSDA is treated like any other party performing services in the marketplace.

These assumption may seem absurd, but this is exactly what occurs with the WSDA livestock inspections. The authority and actions of the WSDA inspector go well beyond a simple compliance and regulatory function of the government and are not covered by the public duty doctrine. In the absence of the public duty doctrine, the WSDA is treated like any other party performing services in the marketplace.

The WSDA has full and absolute control over not only the inspection process, but ultimately the ownership of the livestock and the distribution of the sales proceeds. Often times, as is the case with SSH, the WSDA exercises this control without any opportunity for the owner of the livestock to object or otherwise express their opinion. Instead, the owner (SSH) is forced to sit in ignorance while the WSDA decides the ultimate

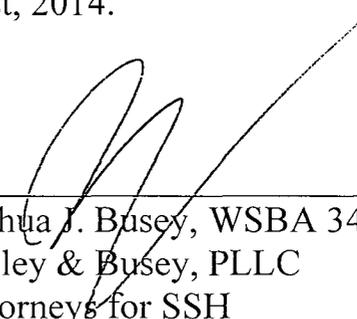
disposition of the owner's property. This relationship is atypical in that it is essentially forced on the owner of the cattle. However, there is no serious dispute that a relationship between the owner of the cattle and the WSDA inspector is present since the inspector takes control of the identification of the cattle, resulting sale, and distribution of proceeds. The owner of the cattle is required to place all of its trust and confidence in the WSDA and inspection process. The WSDA knows that its actions have a direct impact on the rights and interests of the livestock owners and the WSDA is compensated for its actions.

The Trial Court erred in granting the WSDA's summary judgment motion and in denying SSH's summary judgment motion. The Trial Court further erred in finding that the actions of the WSDA inspectors are protected from liability under the Public Duty Doctrine.

IV. CONCLUSION

Based on the forgoing SSH requests that this Court grant its appeal and overturn the Trial Court's order (a) granting the WSDA's motion for summary judgment; and (b) denying SSH's partial motion for summary judgment. SSH requests that this Court send this matter back to the Trial Court with instructions for the Trial Court to enter an order granting SSH's partial motion for summary judgment with the remaining issues set for trial. In the alternative, if this Court feels there are genuine issues of material fact regarding the applicability of the Public Duty Doctrine, SSH requests that this Court send this matter back to the Trial Court for trial on all issues, including the issues of the applicability of the Public Duty Doctrine.

DATED this 21 day of August, 2014.



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DIVISION II

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IN THE WASHINGTON STATE COURT OF APPEALS DIVISION II

SUNSHINE HEIFERS, LLC, an Arizona
limited liability company,

Plaintiff,

v.

THE WASHINGTON STATE
DEPARTMENT OF AGRICULTURE;
DAN NEWHOUSE, in his capacity as the
Director for the WSDA;
NORTHWESTERN LIVESTOCK
COMMISSION CO.; & HERMISTON
LIVESTOCK COMPANY,

Defendants.

Case No. 11-2-02407-2

Court of Appeals No. 46322-9-II

CERTIFICATE OF SERVICE

Under penalty of perjury of the laws of the State of Washington, I hereby state that on this date I deposited in UPS, Next Day Air, a copy of Appellant's Opening Brief in an envelope addressed to the following:

**CERTIFICATE OF
SERVICE**

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6 In addition, on the date I e-mailed a copy of Appellant's Opening Brief to
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