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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29878-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DELORES WEAVER, as Personal Representative
of the ESTATE Of DUANE E. WEAVER,

Appellant,

v.

SPOKANE COUNTY,
a Washington State Municipal Corporation,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PEND OREILLE COUNTY
THE HONORABLE REBECCA BAKER

REPLY BRIEF OF APPELLANT

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I. REPLY IN SUPPORT OF STATEMENT OF FACTS

When Spokane County Deputy Melville stopped Duane Weaver shortly before midnight on Friday, February 8, 2008, Mr. Weaver was “obviously intoxicated,” disoriented, and posed a risk to himself and the cars on Division, who were swerving to avoid him in the dark and freezing conditions. (CP 57-59, 63, 75) Appellant Weaver’s opening brief accurately recited the facts that would allow a reasonable jury to conclude that Mr. Weaver was a “person who appears to be incapacitated or gravely disabled by alcohol,” within the meaning of RCW 70.96A.120(2).

The County’s restatement of the case turns the applicable standard of review on its head by presenting the evidence in the light most favorable to the County. This case was decided on summary judgment, not following a trial at which a trial court’s findings or a jury’s verdict resolved disputed issues of fact. Thus, all facts and all reasonable inferences from those facts, must be viewed in the light most favorable to Delores Weaver, personal representative of Mr. Weaver’s estate, the nonprevailing party. *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010). “Even if the facts are undisputed, there still may be an issue for the trier of fact when conflicting inferences may be

drawn from such undisputed facts.” *Coffel v. Clallam County*, 58 Wn. App. 517, 520, 794 P.2d 513 (1990).

The County’s oft-repeated assertion that each of the allegations in Ms. Weaver’s statement of the case constitutes “a misstatement of fact” ignores this governing standard of review. It also disregards significant undisputed portions of the record. Each of the alleged “misstatements of fact” underscored in the County’s Brief at pages 5 to 9 is addressed below, with quotations from the summary judgment record:

- Weaver was walking unsteadily and had a hard time maintaining his balance. See CP 75 (Weaver “appeared to have a hard time maintaining his balance on the pile of snow, and stepped down into the roadway, continuing to walk north in the outside northbound lane of Division. Traffic at the time was moderate, and several cars had to change lanes to keep from hitting him.”); CP 57 (“whether he stumbled or stepped into the roadway to get off of that, he was kind of weaving side to side up there, goes down into the roadway.”)
- Weaver was obviously intoxicated. CP 75 (“Weaver was obviously intoxicated, as his eyes were bloodshot and watery. His speech was slurred, and he was weaving slightly from side to side as he was standing and talking to me.”) CP 63 (“There wasn’t any question in my mind that [Weaver] was intoxicated”).
- Deputy Melville was concerned for Weaver’s safety. CP 75 (“I told [Weaver] I was concerned for his safety, because he was walking in the lanes of traffic.”); CP 58 (“I didn’t know if he lost his balance or anything like that, so I was concerned at that point.”)

- Weaver posed a threat not just to himself, but to members of the travelling public. CP 75 (“several cars had to change lanes to keep from hitting him”); CP 57 (“There were two cars that I can remember. They were northbound as well. They changed to the middle lane to keep from hitting him. . . .”)
- Weaver was wearing dark clothing, and not dressed appropriately for the weather. CP 78 (Weaver was “wearing dark clothing”); CP 61 (wearing jeans, a shirt, a half-zipped jacket, no hat, no gloves.)
- Weaver had no choice but to walk in the lane of traffic. CP 58 (“Q: So realistically he had to be in the roadway? A: Yes.”)
- Deputy Melville knew Weaver was disoriented. CP 75 (“I asked him where he was headed, and he said ‘Home.’ I asked him where home was, and he said ‘Downtown.’ I told him he was headed the wrong way, and he said ‘I’m going down there,’ and pointed east down Wedgewood.”)
- Deputy Melville acknowledged that walking against traffic would have been of little benefit. CP 61 (Agreeing that “if he does turn to face traffic . . . his ability to avoid oncoming traffic or vehicles would still be hindered compared to somebody who is not intoxicated”)

Ms. Weaver stands by the statement of facts in her opening brief. Properly viewed in the light most favorable to appellant, a jury could find that Mr. Weaver was a person who, in the exercise of reasonable care, should have been taken into protective custody because he appeared to be incapacitated or gravely disabled by alcohol under RCW 70.96A.120(2).

II. REPLY ARGUMENT

A. **The County Owed Mr. Weaver A Duty Of Reasonable Care That Included The Mandatory Duty Under RCW 70.96A.120(2) To Take Into Protective Custody A Person Who “Appears To Be Incapacitated Or Gravely Disabled By Alcohol.”**

1. **The County’s Duty To Enforce RCW 70.96A.120 Is A Question Of Law That Has Been Decided In *Bailey*. Whether The County Breached That Duty Is A Question Of Fact That The Trial Court Should Not Have Decided On Summary Judgment.**

The County erroneously argues that “[p]rior to reaching the question of whether any duty existed, it must first be determined whether . . . Weaver appeared to be incapacitated or gravely disabled” by alcohol under RCW 70.96A.120. (Resp. Br. at 12) The County has it backwards. “The existence of a duty is the threshold question in a negligence action.” *Johnson v. State*, 77 Wn. App. 934, 937, 894 P.2d 1366, *rev. denied*, 127 Wn.2d 1020 (1995); *Caulfield v. Kitsap County*, 108 Wn. App. 242, 250, 29 P.3d 738 (2001). Moreover, the existence of a duty is a legal question that has already been answered by the Supreme Court in *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987), *amended*, 753 P.2d 523 (1988).

The only issue here is a factual one: whether Mr. Weaver “appear[ed] to be incapacitated or gravely disabled by alcohol”

within the meaning of RCW 70.96A.120. This factual issue goes to whether the County breached an enforceable duty of care, and not to the “threshold issue” of the existence of a duty. **Bailey**, 108 Wn.2d at 271 (remanding for trial to allow plaintiff alleging tort claim for breach of duty to take incapacitated driver into custody to “prove that Forks breached its duty and that the officer’s breach proximately caused her injuries”). See **Richland Sch. Dist. v. Mabton Sch. Dist.**, 111 Wn. App. 377, 389, 45 P.3d 580 (2002) (“breach and proximate cause are generally questions of fact for the jury.”), *rev. denied*, 148 Wn.2d 1002 (2003).

Whether a question of the existence of a duty, or its breach, the County concedes that the issue is a factual one: whether “[t]he facts . . . justify application of RCW 70.96A.120(2).” (Resp. Br. at 15) (emphasis added) The dispositive issue is therefore a question that can be resolved only by the trier of fact, unless, and only if, when viewed in the light most favorable to Ms. Weaver, no reasonable juror could find in favor of the appellant. See **Percival v. Brunn**, 28 Wn. App. 291, 622 P.2d 413 (1981) (hospital’s good faith belief that plaintiff was incapacitated by alcohol is question of fact), *rev. denied*, 95 Wn.2d 1019 (1981); **Ramey v. Knorr**, 130 Wn. App. 672, 685, 124 P.3d 314 (2005) (driver’s mental capacity

question of fact for jury), *rev. denied*, 157 Wn.2d 1024 (2006); ***Palmer v. Waterman Steamship Corp.***, 52 Wn.2d 604, 328 P.2d 169 (1958) (extent of intoxication and its effect on the plaintiff's conduct were issues of fact), *cert. denied*, 359 U.S. 985 (1959).

Because the "threshold issue" of duty has already been answered by the Washington Supreme Court, this court should first reject the County's contention that RCW 70.96A.120 does not impose upon the County an actionable duty to take into protective custody an individual who "appears to be incapacitated or gravely disabled by alcohol," before assessing whether "the facts . . . justify application" of this statute. The court should then hold that a reasonable jury could find that Mr. Weaver appeared to be "incapacitated or gravely disabled by alcohol" and that the County's breach of the duty to take Mr. Weaver into protective custody was the proximate cause of his death.

2. RCW 70.96A.120(2) Establishes A Mandatory Duty To Place Into Protective Custody "A Person Who Appears To Be Incapacitated Or Gravely Disabled By Alcohol" For Purposes of The Legislative Intent And Failure To Enforce Exceptions To The Public Duty Doctrine.

RCW 70.96A.120(2) provides that "a person who appears to be incapacitated or gravely disabled by alcohol or other drugs and

who is in a public place . . . *shall* be taken into protective custody.” (emphasis added) The Supreme Court has rejected the County’s argument that RCW 70.96A.120(2) does not impose upon local government a mandatory duty, actionable in tort, to take an individual who appears to be incapacitated or gravely disabled by alcohol into protective custody. **Bailey**, 108 Wn.2d 282. Under **Bailey**, the County’s violation of RCW 70.96A.120(2) is actionable in tort under the “failure to enforce” and the “legislative intent” exceptions to the public duty doctrine.¹

Inexplicably, the County fails to even cite **Bailey** in arguing that the Legislature’s use of the word “shall” in RCW 70.96A.120(2) means “may.” (Resp. Br. at 26-28) According to the County, RCW 70.96A.120(2) allows law enforcement the discretion to either

¹ Division Two recently held that RCW 70.96A.120(2) does not authorize a cause of action for failing to take into protective custody a driver whose car was spotted by another motorist, who called 911 to report that a car was “driving erratically.” **Johnson v. State**, ___ Wn. App. ___, 2011 WL 5345322 (Nov. 8, 2011). The driver, who had been reported missing by her family, was discovered dead in her car in a remote area over one week later. Affirming the dismissal of the estate’s lawsuit, the **Johnson** court held that RCW 70.96A.120(2) had “absolutely no application to the facts of th[e] case,” because the statute “specifically excludes ‘a person who may be apprehended for possible violation of laws relating to driving or being in physical control of a vehicle while under the influence of intoxicating liquor or any drug.’ That Beverly was ‘driving . . . a vehicle’ while apparently intoxicated placed her outside the ambit of RCW 70.96A.120(2).”

detain one who appears to be incapacitated or gravely disabled by alcohol, or to leave such a person to fend for him or herself. In **Bailey**, the Court held that "a police officer has a statutory duty to take into custody a publicly incapacitated individual," and that the City's failure to enforce RCW 70.96A.120(2) was actionable in tort under the "failure to enforce" or "legislative intent" exceptions to the public duty doctrine. 108 Wn.2d at 269-70.² The County's misreading of the plain language of RCW 70.96A.120(2) not only ignores controlling authority, but is also contrary to established principles of statutory interpretation. See **Erection Co. v. Dep't of Labor & Indus. of State of Wash.**, 121 Wn.2d 513, 518, 852 P.2d 288 (1993) (interpreting term "shall" according to its "plain and ordinary meaning It is well settled that the word 'shall' in a statute is presumptively imperative and operates to create a duty.") RCW 70.96A.120 establishes a mandatory duty of care enforceable in tort.

² While three other justices joined Justice Utter's plurality decision, four more justices concurred in the result on the ground that "the facts alleged by Bailey come within an exception to the public duty doctrine." 108 Wn.2d at 271-72 (Durham, J., concurring in the result).

3. The Legislature Expressly Stated Its Intent To Protect A Narrow And Circumscribed Class Of “Alcoholics And Intoxicated Persons” By Providing Them A “Continuum Of Treatment” Services, Including Protective Custody Of No More Than Eight Hours.

While conceding that RCW 70.96A.120 is “narrowly drawn” (Resp. Br. at 18), the County inconsistently argues that RCW 70.96A.120 does not identify a class of persons to be protected that is sufficiently “particular and circumscribed” to impose a duty of care in tort. (*Compare* Resp. Br. at 18-19 and Resp. Br. at 28-32) However, **Bailey** also disposes of the County’s argument that RCW 70.96A.120 “was enacted for the health of the citizens of the state and not created for a particular and circumscribed class of which Weaver was a member.” (Resp. Br. at 31) If, as the **Bailey** Court held, the Legislature enacted RCW 70.96A.120(2) to protect the broad class of the travelling public from the harm caused by apparently incapacitated individuals, 108 Wn.2d at 269, the narrower class of individuals who are in danger of harming themselves by reason of alcohol and drug abuse are surely within the protected class. The Legislature expressly directed the state to protect those members of the public who “appear[] to be incapacitated or gravely disabled by alcohol or other drugs and who

[are] in a public place” by taking them into protective custody of not more than eight hours at which time they must either be referred to treatment or released. RCW 70.96A.120(2).

Even had the *Bailey* Court not already disposed of the County’s argument, this court should reject it because the express legislative intent behind RCW ch. 70.96A is to protect “alcoholics and intoxicated persons” by “afford[ing] a continuum of treatment in order that they may lead normal lives as productive members of society.” RCW 70.96A.010. The Legislature enacted the statute, not to protect the “public at large,” as the County argues, but to provide a “discrete program of alcoholism and other drug addiction services.” RCW 70.96A.011 (Legislative findings).³ See, e.g., *Tyner v. State Dept. of Soc. & Health Services, Child Protective Services*, 141 Wn.2d 68, 78-79, 1 P.3d 1148 (2000) (relying on express statement of purpose in RCW 26.44.010 to determine

³ The Legislature’s express statement of intent and express legislative findings distinguishes this case from *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 930, 969 P.2d 75 (1998) (boating statutes and regulations contain “no express intent to protect the particular and circumscribed class of recreational boaters”); *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 563, 104 P.3d 677 (2004) (Emergency Management Act’s “‘declaration of policy and purpose’ focuses on protecting ‘the *public* peace, health, and safety, and [preserving] the lives and property of *the people of the state*’ in the event of a disaster. RCW 38.52.020(1).” (emphasis and alterations in original)

legislative intent to protect parents from negligent investigation of child abuse; Legislature “recognized the importance of the family unit and the inextricable link between a parent and child.”) While the County focuses on the long-term treatment provisions of the statutory scheme, the eight hour protective custody provision is clearly designed to get incapacitated persons off the street, and to allow them to “dry out” while being evaluated for such treatment.

The County’s next argument – that this Court cannot give effect to the plain language of RCW 70.96A.120 because the statute must be “strictly construed” – is also without merit. The County relies on *Hontz v. State*, 105 Wn.2d 302, 714 P.2d 1176 (1986), (Resp. Br. at 17-22), but ignores that the operative language of the statute has been amended since *Hontz*. See Laws of 2001, ch. 13, § 1; Laws of 1994, ch. 231, § 1. The 2001 amendment to the statute changed the definition of “incapacitated by alcohol” to include a person who is *either* “gravely disabled” or “presents a likelihood of serious harm to himself or herself, to any other person, or to property.” Laws of 2001, ch. 13, § 1; *see also* Final B. Rep. on E.S.B. 5051, 57th Leg., Reg. Sess. (Wash. 2001) (explaining that the purpose of the amendment was to make the definition of “incapacitated” disjunctive). The language relied on by

the County – requiring that a person's “judgment [be] so impaired that he or she is incapable of realizing and making a rational decision with respect to his or her need for treatment” and “constitutes a danger” to himself, another person, or property – is no longer in the statute. (Resp. Br. at 16, 19) Contrary to the County's argument, the statute no longer focuses on the “need for treatment.” This court should reject the County's reliance on repealed language.

In arguing that the statute imposes a “substantial deprivation of freedom,” the County erroneously equates the protective custody requirements of the statute with an arrest or civil commitment. But the statute expressly provides that a “taking into protective custody under this section is not an arrest.” RCW 70.96A.120(2). Further, “[n]o entry or other record shall be made to indicate that the person has been arrested or charged with a crime.” RCW 70.96A.120(2).

Moreover, RCW 70.96A.120 has extensive procedural safeguards to protect against a substantial and erroneous deprivation of liberty, the first of which limits the duration of protective custody to a maximum of eight hours, within which an incapacitated individual must be placed in an “approved treatment program for treatment” or released. RCW 70.96A.120(2). This

eight hour limit substantially undermines the County's argument that detaining someone whose consumption of alcohol renders him incapacitated constitutes a "massive curtailment of liberty." (Resp. Br. at 21) As Deputy Melville admitted, when an officer finds someone who "can't take care of themselves for whether it's mental reasons, drugs, alcohol, or whatever, or their age and in the area that they are, we will do what we can to get them some place safe or where they need to be." (CP 61)

The law requires that within eight hours, an obviously incapacitated person may "be admitted as a patient or referred to another health facility . . . where it appears that such treatment may be necessary." RCW 70.96A.120(3). If not admitted, the person "may be taken to his or her home, if any," and if homeless, "the approved treatment program shall provide him or her with information and assistance to access available community shelter resources." RCW 70.96A.120(5). The statute provides a further safeguard against the erroneous deprivation of liberty by requiring the person's release from treatment unless within "seventy-two hours after admission . . . a petition is filed under RCW 70.96A.140," the involuntary commitment law. RCW 70.96A.120(4).

The involuntary commitment section of the statute, RCW 70.96A.140, imposes a pre-commitment requirement that the person “is chemically dependent and has threatened, attempted, or inflicted physical harm on another and is likely to inflict physical harm on another unless committed.” But that is a condition of “involuntary commitment,” not eight hour protective custody. *In re Labelle*, 107 Wn.2d 196, 203, 728 P.2d 138 (1986) (Resp. Br. at 20), interpreted such an involuntary commitment statute and is therefore inapposite. The *Labelle* Court upheld under a due process challenge the statutory requirements for petitions for involuntary commitment for a period of 14, 90 or 180 days, interpreting the civil commitment statute, RCW 71.05.020, according to its terms and holding that the “gravely disabled” standard was not unconstitutionally overbroad. 107 Wn.2d at 203 (“By the time the State files a petition for 14, 90 or 180 days of involuntary commitment under the gravely disabled standard, the individual will already have been detained in a hospital or treatment center for a period of time.”)

Labelle has nothing to do with the standard for initial detention of up to eight hours for protective custody of persons “gravely disabled by alcohol” under RCW 70.96A.120(2), which

contains its own definition: a person is "gravely disabled" if "as a result of the use of alcohol . . . [he or she] [i]s in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety." RCW 70.96A.020(12). The person need not threaten suicide or the infliction of physical violence on himself or another, as the County argues.⁴ It is enough, as in **Bailey** and in the instant case, for a person to be intoxicated to the point that he or she is in danger of serious physical harm due to inability to provide for his or her own safety. Here, there is sufficient evidence for a reasonable jury to conclude that Mr. Weaver was incapacitated or gravely disabled within the meaning of RCW 70.96A.120(2).

⁴ The County argues that its duty to take a person who appears to be incapacitated or gravely disabled by alcohol into protective custody under RCW 70.96A.120(2) further requires that its officer first determine that the person poses a "substantial risk" of "harm [to] himself or others as evidenced by threats or attempts by him to commit suicide or inflict physical harm on himself or behavior by him that had caused physical harm or fear of physical harm to others . . ." (Resp. Br. at 18) (emphasis added). The County erroneously focuses on the statutory definition of "incapacitated" as requiring a "likelihood of serious harm," but ignores that Deputy Melville was required to take Mr. Weaver into protective custody if he was "incapacitated or gravely disabled." RCW 70.96A.120(2) (emphasis added). Under RCW 70.96A.020(12), a person is gravely disabled if he "[i]s in danger of serious physical harm resulting from a failure to provide for his . . . safety."

The “massive curtailment of liberty” under the civil commitment statute at issue in *Labelle*, 107 Wn.2d at 204, is not at issue here. This court should give effect to the plain language of RCW 70.96A.120(2) and hold that the Legislature intended local law enforcement to place into protective custody those persons who are in a public place and who appears to be incapacitated or gravely disabled by alcohol.

4. The Jury Must Decide Whether Mr. Weaver Appeared To Be Incapacitated Or Gravely Disabled By Alcohol Under RCW 70.96A.120(2).

The trial court erroneously held on summary judgment that Mr. Weaver was not “‘gravely disabled’ (RCW 70.96A.020(12)), much less ‘incapacitated by alcohol’ (RCW 70.96A.020(14)), when the latter is read together with the definition of ‘likelihood of serious harm’ (RCW 70.96A.020(18)(a)),” reasoning that he “was interacting with the officer, responded to his questions, and followed his suggestions.” (CP 158) The trial court’s “findings” on summary judgment do not give proper credence to the evidence in the record that would allow a jury to find that Mr. Weaver appeared not “merely intoxicated,” but “incapacitated” or “gravely disabled.”

The fact that Mr. Weaver was “interacting” with Deputy Melville shows only that he was conscious, not that he was acting

rationality. Mr. Weaver responded to Deputy Melville's questions with contradictory and confusing responses, such as indicating that he was heading "home," five miles away, in the opposite direction from which he was walking, and then gesturing with his chin that he was heading "down there," without ever stating where "down there" was. (CP 58, 60, 75) Moreover, despite the County's contention that Mr. Weaver must have been "headed to a friend's house or somebody he knew down Wedgewood," (Resp. Br. 15), at his deposition, Deputy Melville characterized this conclusion as an "assumption," and nothing more. (CP 60) Mr. Weaver never mentioned "a friend's house," never expressed any familiarity with anyone living on Wedgewood, nor for that matter, did he mention Wedgewood at all. (CP 60)

The County's speculation that Mr. Weaver's responses show a rationally evasive state of mind, cannot eliminate the competing inference that Mr. Weaver appeared irrational, incoherent and disoriented. See *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 319, 111 P.3d 866 (2005) ("only when reasonable minds could reach but one conclusion on the evidence should the court grant summary judgment."), *rev. denied*, 156 Wn.2d 1008 (2006). Contrary to the County's assertion, (Resp. Br. at 7), Mr. Weaver did

not follow the officer's suggestion to stay off Division. Within 90 minutes of Deputy Melville leaving Mr. Weaver wandering through a vacant parking lot, Mr. Weaver was struck and killed on Division. (CP 60, 78)

The County's argument that Ms. Weaver cannot establish that it had "actual knowledge" of a statutory violation is also without merit. Deputy Melville testified that he understood the "community caretaking function" that authorized him to take persons who appear to be incapacitated as a result of alcohol in to protective custody, (CP 60-61), and that he would generally offer assistance if he found "somebody walking down the roadway at this time of year, the conditions the way they are." (CP 60):

[I]f based on our opinion and the circumstance surrounding it, the totality of the circumstances is the term we use, if we think they're in a situation where they're a danger to themselves or to others where they can't take care of themselves for whether it's mental reasons, drugs, alcohol, o[r] whatever, or their age and in the area that they are, we will do what we can to get them some place safe or where they need to be . . .

(CP 61) Whether Mr. Weaver actually appeared to be incapacitated by alcohol to Deputy Melville is a question of fact, particularly given the deputy's conclusion that Mr. Weaver was "obviously intoxicated."

The **Bailey** Court relied not only on the City of Forks' violation of RCW 70.96A.120, but also on the fact that the City's officer had probable cause to believe that the intoxicated individual was violating the criminal law prohibiting driving while intoxicated. 108 Wn.2d at 269 ("the officer allowed Medley to take the wheel of the pickup truck and drive away even though Medley's intoxicated state was apparent to the officer.") Here, too, Deputy Melville believed that Mr. Weaver was violating the criminal and traffic laws involving pedestrian safety. (CP 58, 62, 75) His report alleged that Mr. Weaver was engaged in disorderly conduct based upon the risk that he posed to the travelling public while walking unsteadily in the same direction as oncoming traffic, forcing cars to swerve to avoid him on Division. (CP 58, 75) As in **Bailey**, Deputy Melville's "actual knowledge" of a statutory violation, like other questions of an officer's state of mind, is a question of fact. See **Percival v. Brunn**, 28 Wn. App. 291, 622 P.2d 413 (1981) (for purposes of immunity under RCW 70.96A.120, hospital's good faith belief that plaintiff was incapacitated by alcohol is question of fact).

A jury could find that Mr. Weaver was "obviously intoxicated," posing a threat to traffic and himself, poorly dressed for the subfreezing weather, and incapable of remediating the

hazardous situation in which Deputy Melville found him, and left him. In short, a jury could find that he appeared to be gravely disabled or incapacitated by alcohol, within the meaning of these terms in RCW 70.96A.120 and .020. Because a rational trier of fact could find that Deputy Melville had sufficient knowledge of Mr. Weaver's incapacity from alcohol, as well as violations of traffic safety laws, this court should reverse the trial court's summary judgment order.

B. The Special Relationship Doctrine And Rescue Doctrine Also Establish The County's Duty Of Care Toward Mr. Weaver.

In addition to the "failure to enforce" and "legislative intent" grounds of governmental liability, the "rescue doctrine," and the "special relationship" doctrine provide separate and independent grounds for a jury to find that the County breached its duty of care and is liable to Ms. Weaver for its negligence. The County again employs the wrong standard for review from this summary judgment in ignoring evidence that Mr. Weaver relied upon an express assurance that increased the risk of harm. See *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299-300, 545 P.2d 13 (1975) (affirmative representation that State would convey avalanche warnings increased risk of harm to plaintiffs under "rescue

doctrine"); *Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998) (“special relationship” where plaintiff relied on 911 operator’s statement that officers were responding to scene).

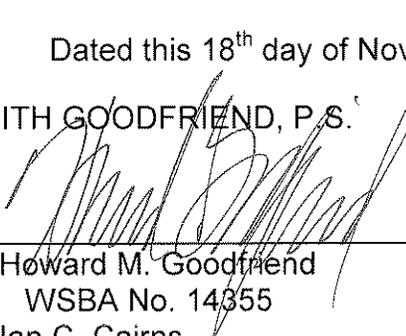
The County concedes that whether Mr. Weaver relied upon its deputy’s assurances is also a factual issue, but argues that “[t]here is absolutely no evidence in the record that . . . Deputy Melville assured Weaver” that he should walk facing traffic or that this instruction would “increase the danger” to Mr. Weaver from oncoming traffic. (Resp. Br. at 38-40) To the contrary, as the evidence quoted from Deputy Melville’s own report and deposition demonstrate, a jury could find that Deputy Melville knew that the “obviously intoxicated” Mr. Weaver posed a threat to himself and the travelling public while walking on Division, and that a reasonable peace officer would have, at a minimum, given him a ride home or taken him to a shelter. (CP 57-59, 61, 63, 75) A jury could also find that Mr. Weaver was struck by a drunk driver after being told by Deputy Melville that if he did not stay off Division, he should walk facing traffic on an icy street that had no sidewalks and heavy traffic after midnight on a weekend night. (CP 58, 60-61, 75) This court should reverse and remand for trial.

III. CONCLUSION

The trial court erred in refusing to interpret RCW 70.96A.120(2) according to its plain language, in ignoring the Supreme Court's decision in **Bailey**, and in viewing the evidence in the light most favorable to the County, rather than to Ms. Weaver, on summary judgment. This court should hold that the County owed Mr. Weaver a duty of reasonable care and remand for a trial on the disputed issues of breach of duty, causation and damages.

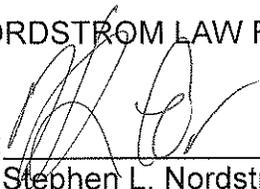
Dated this 18th day of November, 2011.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 18, 2011, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 18th day of November, 2011.



Victoria K. Isaksen