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NO. 66061-6-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION I

SYDNEY ALLRUD, Administrator of the
Estate of Tracey Kirsten Allrud,

Appellant,

v.

CITY OF EDMONDS, et al.,

Respondents.

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BRIEF OF RESPONDENT CITY OF EDMONDS

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 3

 A. FACTS..... 3

 B. PROCEDURAL HISTORY..... 11

III. ARGUMENT 12

 A. LEGAL STANDARD..... 12

 B. THE ESTATE FAILED TO PROVE THE CITY OR SNOCOM OWED ALLRUD A LEGAL DUTY; THUS ITS NEGLIGENCE CLAIM WAS PROPERLY DISMISSED PURSUANT TO THE PUBLIC DUTY DOCTRINE..... 12

 C. THE LEGISLATIVE INTENT EXCEPTION DOES NOT APPLY IN THIS CASE. 14

 1. RCW 71.05.150 Protects All Members Of The Public, Not Just A Particular And Circumscribed Class Of Persons. 15

 2. The Statute Creates Discretionary Authority, Not A Mandatory Legal Duty. 17

 3. RCW 70.05.153 Would Violate The Federal And State Constitutions If It Created A Mandatory Duty To Enter A Home For A Health And Welfare Check No Matter What The Circumstances22

 4. The City Is Entitled To Immunity Under RCW 71.05.120 As The Estate Failed To Produce Any *Admissible* Evidence Of Gross Negligence Or Bad Faith. 24

 D. THE FAILURE TO ENFORCE EXCEPTION DOES NOT APPLY BECAUSE THE AUTHORITY TO TAKE A PERSON INTO CUSTODY FOR MENTAL EVALUATION UNDER RCW 71.05.150 IS DISCRETIONARY – NOT MANDATORY. 28

E. THE RESCUE EXCEPTION DOES NOT APPLY AS THE POLICE WERE NOT CONDUCTING A GRATUITOUS RESCUE.32

F. ALLRUD FAILED TO PRODUCE ANY ADMISSIBLE EVIDENCE THAT THE CITY FAILED TO PROPERLY TRAIN OR SUPERVISE OFFICER FALK. 36

G. THE ESTATE HAS FAILED TO ESTABLISH THAT SNOCOM OWED ALLRUD A DUTY. 38

H. THE ESTATE FAILED TO PROVE THE CITY OR SNOCOM BREACHED A DUTY OWED TO ALLRUD. 39

I. OBJECTION TO CONSIDERATION OF INADMISSIBLE EVIDENCE..... 41

IV. CONCLUSION..... 47

TABLE OF AUTHORITIES

CASES

<u>Atherton Condo. Apartment-Owners Ass'n Bd. v. Blume Dev. Co.</u> , 115 Wn.2d 506, 531, 799 P.2d 250 (1990).....	29, 30
<u>Babcock v. Mason County Fire Dist.</u> , 101 Wn. App 677, 686, 687, 5 P.3d 750 (2000).....	32, 33,34
<u>Babcock v. Mason County Fire Dist.</u> , 144 Wn.2d 774, 785, 30 P.3d 1261 (2001).....	13
<u>Bailey v. Forks</u> , 108 Wn.2d 262, 737 P.2d 1257 (1987).....	30
<u>Barnes v. Washington Natural Gas Co.</u> , 22 Wn. App. 576, 577 fn 1, 591 P.2d 461 (1979).....	43
<u>Betty Y. v. Al-Hellou</u> , 98 Wn. App. 146, 149, 988 P.2d 1031 (1999).....	37
<u>Brown v. MacPherson's, Inc.</u>	33
<u>Brundridge v. Fluor Fed. Servs.</u> , 164 Wn.2d 432, 451, 191 P.3d 879 (2008).....	31
<u>Burmeister v. State Farm</u> , 92 Wn. App. 359, 966 P.2d 921 (1998).....	32
<u>Campbell v. City of Bellevue</u> , 85 Wn.2d 1, 530 P.2d 234 (1975).....	30
<u>Chambers-Castanes v. King County</u>	33
<u>Charbonneau v. Wilbur Ellis Co.</u> , 9 Wn. App. 474, 512 P.2d 1126 (1973).....	31
<u>Donohoe v. State</u> , 135 Wn. App. 824, 142 P.3d 654 (2006).....	30
<u>Dorsch v. City of Tacoma</u> , 92 Wn. App. 131, 134, 960 P.2d 489 (1998).....	15
<u>Elec. Contractor's Assn. v. Riveland</u> , 138 Wn.2d 9, 28, 978 P.2d 481 (1999).....	22
<u>Estate of Davis v. Dep't of Corr.</u> , 127 Wn. App. 833, 840, 841 P.3d 487 (2005).....	24, 25
<u>Forest v. State</u> , 62 Wn. App. 363, 369-70, 814 P.2d 1181 (1991).....	31
<u>Frost v. City of Walla Walla</u> , 106 Wn.2d 669, 724 P.2d 1017 (1986).....	25
<u>Greenwood v. Dep't of Motor Vehicles</u> , 13 Wn. App. 624, 628, 536 P.2d 644 (1975).....	22
<u>Grimwood v. Univ. of Puget Sound, Inc.</u> , 110 Wash.2d 355, 359-60, 753 P.2d 517 (1988).....	12, 36, 42
<u>Halvorson v. Dahl</u> , 89 Wash.2d 673, 676, 574 P.2d 1190 (1978).....	14
<u>Hannum v. Dept. of Licensing</u> , 144 Wn. App. 354, 181 P.3d 915 (2008).....	15, 16, 17
<u>Hansen v. Friend</u> , 118 Wn.2d 476, 479, 824 P.2d 483 (1992).....	13
<u>Hartley v. State</u> , 103 Wn.2d 768, 777, 698 P.2d 77 (1985).....	12

<u>Hash v. Children’s Orthopedic Hosp.</u> , 49 Wn. App. 130, 133, 741 P.2d 584 (1987).....	36, 42
<u>In re Marriage of Simpson</u> , 57 Wn. App. 677, 681-82, 790 P.2d 177 (1990).....	43
<u>In re Recall of Pearsall-Stipek</u> , 141 Wn.2d 756, 767, 10 P.3d 1034 (2000).....	22
<u>J&B Dev. Co, v. King Cy.</u> , 100 Wn.2d 299, 304 669 P.2d 468, 41 A.L.R.4 th 86 (1983).....	13
<u>Joyce v. Dep’t of Corr.</u> , 155 Wn.2d 306, 233, 119 P.3d 825 (2005).....	39
<u>Keller v. City of Spokane</u> , 146 Wn.2d 237, 242, 44 P.3d 845 (2002).....	12, 13
<u>McKasson v. State</u> , 55 Wn. App. 18, 25, 776 P.2d 971, <i>rev. denied</i> , 113 Wn.2d 1026 (1989).....	30
<u>Melville v. State</u> , 115 Wn.3d 34, 793 P.2d 952 (1990).....	39
<u>Niece v. Elmview Group Home</u> , 131 Wn.2d 39, 48, 929 P.2d 420 (1997).....	37
<u>Peck v. Siau</u> , 65 Wn. App. at 294.....	37
<u>Prentice Packing & Storage Co. v. United Pac. Ins. Co.</u> , 5 Wn.2d 144, 164, 106 P.2d 314 (1940).....	42
<u>Ravenscroft v. Wash. Water Power Co.</u> , 136 Wn.2d 911, 929, 969 P.2d 75 (1998).....	15
<u>Ravenscroft v. Water Power Co.</u> , 87 Wn. App. 402, 415-16, 942 P.2d 991 (1997).....	30
<u>Riehl v. Foodmaker, Inc.</u> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	22
<u>Roth v. Kay</u>	33
<u>Seven Gables Corp. v. MGM/UA Entm't Co.</u> , 106 Wash.2d 1, 13, 721 P.2d 1 (1986).....	12
<u>Smith v. State</u> , 59 Wn. App. 808, 814, 802 P.2d 133 (1990) <i>rev. denied</i> , 116 Wn.2d 1012 (1991).....	29, 32
<u>Spencer v. King County</u> , 39 Wn. App. 201, 205, 692 P.2d 874 (1984) <i>rev. denied</i> , 103 Wn.2d 1035 (1985).....	24, 25
<u>State ex rel. Schillberg v. Barnett</u> , 79 Wn.2d 578, 584, 488 P.2d 255 (1971).....	22
<u>State v. Angelos</u> , 86 Wn. App. 253, 255-56, 936 P.2d 52 (1997).....	19
<u>State v. Avery</u> , 103 Wn. App. 527, 532, 13 P.3d 226 (2000).....	21
<u>State v. Clausing</u> , 147 Wn.2d 620, 628, 56 P.3d 550 (2002).....	42
<u>State v. Dempsey</u> , 88 Wn. App. 918, 947 P.2d 265 (1997).....	20
<u>State v. Gocken</u> , 71 Wn. App. 267, 857 P.2d 1074 (1993).....	20
<u>State v. Hopkins</u> , 134 Wn. App. 780, 790, 142 P.3d 1104 (2006).....	31
<u>State v. Johnson</u> , 104 Wn. App. 409, 16 P.3d 680 (2001).....	20
<u>State v. Leupp</u> , 96 Wn. App. 324, 980 P.2d 765 (1999).....	20

<u>State v. Loewen</u> , 97 Wn.2d 562, 568, 647 P.2d 489 (1982).....	19, 24
<u>State v. Lowrimore</u> , 67 Wn. App. 949, 841 P.2d 779 (1993).....	20
<u>State v. Mason</u> , 56 Wn. App. 93, 782 P.2d 572 (1989).....	20
<u>State v. Raines</u> , 55 Wn. App. 456, 778 P.2d 538 (1989), <i>rev. denied</i> , 113 Wn.2d 1036, 785 P.2d 825 (1990).....	21
<u>State v. Roggenkamp</u> , 153 Wn.2d 614, 621, 106 P.3d 196 (2005).....	21
<u>State v. Young</u> , 89 Wn.2d 613, 625, 574 P.2d 1171 (1978).....	21
<u>Taylor v. Stevens County</u> , 111 Wn.2d 159, 165, 759 P.2d 447 (1988)	13, 14, 15, 16, 17
<u>Theonnes v. Hazen</u> , 37 Wn. App. 644, 649, 681 P.2d 1284 (1984).....	42
<u>Washington State Physicians Insurance Exchange & Association v. Fison's Corporation</u> , 122 Wn.2d 299, 344, 858 P.2d 1054 (1993).....	42
<u>Wick v. Clark County</u> , 86 Wn. App. 376, 385, 936 P.2d 1201 (1997).....	13
<u>Yakima County (W. Valley) Fire Protection Dist. No. 12 v. City of Yakima</u> , 122 Wn.2d 371, 381, 858 P.2d 245 (1993).....	22

STATUTES

RCW 10.31.100	18
RCW 10.99.030	18
RCW 13.32A.050.....	18
RCW 26.44.050	18
RCW 38.52.020	34
RCW 46.20.041	16
RCW 46.61.035(4).....	18
RCW 52.02.020	33
RCW 70.05.120	11
RCW 70.05.153	23
RCW 71.05	16, 28
RCW 71.05.010	17
RCW 71.05.120	24
RCW 71.05.150	15, 17, 19, 21, 22, 24
RCW 71.05.150(d)(4).....	19
RCW 71.05.153	15, 22

RULES

CR 56.....	31
ER 702	41
RAP 10.3(5).....	46
RAP 10.3(a)(5).....	43

CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1983..... 23
Article 1, section 7 of the Washington state Constitution 15, 23
Fourth Amendment of the U.S. Constitution 15, 23, 45

I. INTRODUCTION

This case involves balancing a request for a health and welfare check with a person's constitutional right to privacy, to decline medical care, and to be free from searches and seizures without a warrant. Kirsten Allrud (hereinafter, "Allrud") was drinking alcohol and refusing medical and psychological care. Her counselor and family were concerned and requested a health and welfare check because they wanted the police to force Allrud to obtain medical care. Officer Eric Falk of the Edmonds Police Department responded to the call and carefully considered all of the facts and circumstances of the situation.

Officer Falk attempted to contact Allrud by telephone, and by knocking on her door and ringing her doorbell, but she refused to answer, which was consistent with her normal practice. Allrud never called 911, never spoke with the police and did not request any help. Allrud's ex-husband, Michael Faltisco (hereinafter, "Faltisco"), informed Officer Falk that Allrud had refused medical treatment earlier that day. Faltisco said he wanted the police to force Allrud to get medical care. However, after learning Faltisco had already been to the home earlier that day and did not call 911 for emergency aid, the officer did not believe he had sufficient evidence of an imminent threat of serious injury, or legal justification to

enter the home without Allrud's consent. While the officer was telephoning his supervisor for further guidance, Faltisco and his sons drove away with the house key and did not return. Officer Falk tried to call Faltisco on his cell phone, but Faltisco did not answer. Officer Falk left a message advising Faltisco to call 911 if they returned to the house and his sons believed Allrud needed assistance.

When Faltisco returned later after taking his sons to a music lesson, shopping and for dinner; he found Allrud unconscious and called 911 for emergency medical assistance. The emergency personnel were unable to revive Allrud and she died soon thereafter. The medical examiner determined she died as a result of an acute intoxication due to the combined effects of prescription methadone and alcohol.

The Estate alleged the 911 dispatch agency (hereinafter, "SNOCOM") and the City of Edmonds (hereinafter, "the City") were negligent and caused the death of Allrud. However, pursuant to the public duty doctrine, SNOCOM and the City did not owe a legal duty to Allrud to stop her from taking an overdose, or a legal duty to force entry into her home when she was refusing to open the door or accept medical care. In addition, SNOCOM and the City acted properly by dispatching a police officer to Allrud's home, and checking on her welfare to the extent

allowable under the law. The trial court properly granted summary judgment dismissal of all claims and the Estate now appeals.

II. STATEMENT OF THE CASE

A. Facts.¹

At approximately 4:12 p.m. on February 16, 2006, a SNOCOM 911 operator received a call from Diane Kaplan (hereinafter, “Kaplan”), a nurse practitioner, who was requesting a welfare check on her patient, Kirsten Allrud. CP 375. Kaplan advised that Allrud’s ex-husband, Michael Faltisco, had their teenagers’ key to the house and could meet an officer at the house to gain access. CP 396. Kaplan also provided Faltisco’s cell phone number. *Id.* At approximately 4:19, Officer Eric Falk was dispatched to the scene to conduct the welfare check. CP 375.

Officer Falk telephoned Kaplan while driving to the house to get some further information about the situation. CP 363. Kaplan informed Officer Falk that she believed Allrud was not eating or drinking anything other than alcohol. CP 364. She advised Falk that Allrud had been taken to the hospital the prior week for evaluation because she was dehydrated, but she removed her IV and left the hospital on her own. CP 364. Kaplan said she prescribed an anti-depressant medication but Allrud refused to fill

¹ These facts were adopted for the purpose of summary judgment only. Many of these facts are disputed by the Respondents, but were adopted in accordance with the legal standards for summary judgment review, which apply to the appellate court’s de novo review as well.

the prescription. CP 364. Kaplan said Allrud and her ex-husband were both counselors and had two teenage sons. CP 364. Kaplan informed Officer Falk that Allrud was refusing to answer her telephone and did not want anyone's help, which was very hard on the boys. CP 364. Officer Falk requested Allrud's telephone number, which was provided by Kaplan. CP 364.

Kaplan asked for a safety check and she testified "[Allrud] could have been fine, laying in bed, I don't know." CP 72, 31:20-23. Kaplan testified she wanted the officer to "eyeball" Ms. Allrud, but the decision as to whether she needed to go to the hospital was the officer's. CP 73, 36:23 – 37:5.

Officer Falk attempted to call Allrud, but she did not answer her phone. CP 364. He left her a message indicating people were concerned for her welfare and wanted to talk to her. CP 364.

Allrud was formerly married to Michael Faltisco. CP 98. Allrud and Faltisco have two teenage sons: Evan Allrud-Faltisco, who was 15 at the time of the incident, and Dillon Allrud-Faltisco, who was 13 at the time of the incident. CP 98.

Officer Falk arrived at Ms. Allrud's house at approximately 4:33 p.m. CP 375. He knocked on the front door and rang the doorbell.

CP 364. Allrud did not answer the door. CP 364. He walked around both sides of the house and saw the backyard was fenced in. CP 364.

A neighbor, Nita Burkhart, contacted Officer Falk and told him Allrud was home as her car was in the driveway, but said Allrud was antisocial and would not answer her door for anyone. CP 364; CP 357-59. The neighbor informed Officer Falk that Allrud's ex-husband had been to the house two times earlier that day and she had seen him go inside the house. CP 359. She stated the boys seemed bouncy and nothing seemed out of the ordinary as far as the boys were concerned. *Id.* However, she said it was unusual for the ex-husband to go into the house. *Id.*

In the meantime, Faltisco called 911 and told the dispatcher he would go to the house because he had a key. CP 375. He said the police could knock on the door all they wanted, but they would not get Kirsten to answer it. CP 375. This information was provided to Officer Falk via his patrol car computer. CP 375.

Officer Falk soon saw Faltisco pull up in his car in front of Allrud's house. CP 365. Faltisco told Officer Falk the situation was "sad." CP 365. His teenage sons were present with him, but he told them to get back in the car and wait. CP 365. Faltisco said he got a call from Allrud's work saying she needed to return to work or she would lose her job. CP 365. He said she needed to do the right thing and take care of

their boys. CP 365. Faltisco stated Allrud would not eat or drink anything but alcohol, and was refusing medical attention. CP 365; CP 109, 54:9. He stated Allrud had refused medical attention when he was in the house earlier that day. CP 365; CP 109, 55:19-56:2. When Falk asked her how she had been earlier that day, Faltisco told Falk she could speak, and although tremulous, she could walk and had declined the offer to come to their family counseling appointment that day. CP 109, 55:19-56:2. Faltisco said her refusal of help was clear. CP 109, 56:3-10. Faltisco had his sons' key to the house and he wanted Officer Falk to go inside and make Allrud go to the hospital for an evaluation. CP 365. When asked why he didn't call 911 earlier that day, Faltisco said Allrud "clearly" declined to accept medical care. CP 109, 55:19-56:10. Falk asked if Allrud would talk to him and Faltisco said she would but she would not want his help. CP 365. Faltisco stated he wanted someone to force Allrud to receive medical attention and take care of herself. CP 365; CP 109, 54:9-18.

Several statements made during the discussion between Officer Falk and Faltisco from this point onward are disputed. Likewise, the parties dispute some of the discussion between Falk and Kaplan during a subsequent call made to Kaplan by Falk. The Estate alleges Officer Falk challenged and intimidated Faltisco, and prevented him from opening the

door to the house. The Estate alleges Faltisco requested an ambulance be called and Officer Falk stated this was not an emergency. The computer dispatch record shows Officer Falk merely asked the dispatcher to, “Let me know if aid gets dispatched to this address for any reason.” CP 375.

The Estate asserts in its brief – *without citing any evidence in the record* – that Officer Falk interfered in the call and canceled 911 calls, but the actual evidence shows differently. The computer records show no evidence that any 911 calls were canceled. CP 375-76. Ms. Kaplan admitted that Officer Falk never told her that if someone called 911 no one would respond. CP 75, 45:13-15. She testified she does not believe Officer Falk interfered in the situation. CP 75, 45:13-46:8. While they were all outside Allrud’s house, Office Falk told Faltisco the boys could go inside and check on Allrud, but Faltisco said he did not want them to. CP 111, 64:17-65:4. Officer Falk told Kaplan that if the boys went in to the house and called 911, someone could come in and assess Ms. Allrud. CP 75, 44:1-10. Kaplan spoke with Faltisco after Officer Falk told her this. *Id.*

Mr. Faltisco admits he knew that Officer Falk said the boys could call 911 if they needed help. CP 112, 69:22 – 70:5. Faltisco planned to return to the house after Officer Falk left to check on Allrud. CP 113, 70:6-8. He and his sons did return later that night after they went to a

music lesson, shopping, and dinner, and called 911 without any interference from Officer Falk. CP 113-114, CP 376.

It is undisputed that Officer Falk and Faltisco disagreed about whether Officer Falk had sufficient legal justification to enter the house without Allrud's consent and without a warrant. In fact, both Faltisco and Kaplan admit that Officer Falk told them he was concerned about violating Allrud's civil rights in entering her home without her permission when she appeared to be refusing assistance based on what they had told him. Faltisco said Officer Falk became argumentative about whether there were adequate grounds to force his way into the house. CP 110, 60:19-23. Kaplan said Officer Falk seemed stuck on Faltisco being manipulative and wanting to breach Allrud's civil rights by dragging her to the hospital against her wishes. CP 74, 38:4-29:4.

Ms. Kaplan has never been a Designated Mental Health Professional (DMHP) in Washington. CP 66, 9:5-7. However, in her practice, she has called many times to have someone evaluated and involuntarily committed. CP 67, 10:13-20. She admits that DMHPs do not commit someone against their will unless completely convinced the person cannot make the decision for themselves because they are concerned about the person's civil liberties being taken away. CP 67, 12:8-13:9. Kaplan acknowledges that DMHPs go through specialized

training that includes training on civil rights. CP 81, 67:12-69:8. Kaplan has not had this training. *Id.* In her practice, Kaplan often believes someone needs to be taken into custody but the DMHP does not agree and does not commit the patient. *Id.*

On the day of the incident, Faltisco and Kaplan discussed Allrud's situation at the family counseling appointment. CP 107, 47:16-48:4. They talked about the problem of Allrud's refusal to get help. *Id.* Kaplan suggested to Faltisco that they might have to wait until Allrud passed out to call for medical aid so Allrud couldn't refuse treatment. CP 107, 47:16-25. They decided to proceed with the counseling session with the kids, and Kaplan said she would call 911 after the session. CP 107, 48:1-4. Faltisco believed they needed the police to go because he did not believe Allrud would agree to go to the hospital with EMS personnel. CP 107, 48:20-49:6.

It is undisputed that Officer Falk asked Faltisco to remain in front of the house while he called his supervisor to discuss the situation and seek advice about whether he could enter the house without Allrud's consent. CP 366; CP 111, 65:5-21. However, while Officer Falk was on the telephone with his supervisor, Faltisco drove away with his sons and the key to the house without any explanation. CP 366; CP 111.

Officer Falk called Kaplan and told her that Faltisco had driven away while he was talking to his supervisor. CP 366. He said the information they provided did not seem exigent and he would not force his way into the house. *Id.* He said they would enter the house if either one of the teens entered the house and asked police to check on Allrud. *Id.*

Officer Falk called Faltisco on his cell phone and left a message telling him the same thing. CP 366, CP 115, 81:14-22. According to Faltisco, Falk left a “cheery” message stating he would enter the house if one of the teens went in and requested police assistance for his mom. CP 116, 84:1-8.

After driving away from Allrud’s house, Faltisco took his sons to a music lesson, shopping, and for some dinner. CP 113, 73:20 – CP 114, 74:1-23. Faltisco and the boys returned to the house at approximately 6:30 pm and went inside to check on Allrud. CP 117, 86:11-20. Faltisco found her unconscious and called 911 and requested an ambulance at approximately 6:43 pm. CP 376. The ambulance arrived and emergency medical personnel attempted to revive Allrud. CP 356. They found her in full cardiac arrest, but her body was warm to the touch. CP 356. They attempted resuscitation, but at approximately 7:03 pm they determined they could not revive her. CP 356.

The Snohomish County Medical Examiner conducted a death investigation and autopsy. CP 360. Dr. Norman Thlersch concluded Allrud's death was attributed to an acute intoxication due to the combined effects of methadone, ethanol and citalopram. *Id.* Fatty metamorphosis of the liver was also considered to be a contributory cause of death. *Id.*

B. Procedural History.

The Estate filed a complaint alleging negligence against SNOCOM and the City. The Estate alleged a special relationship exception to the public duty doctrine to support her claim that the defendants owed Allrud a legal duty to force their way into her home and take her into involuntary custody. After Defendants filed their motion for summary judgment and conclusively established there was never any privity between Allrud and SNOCOM or the City to create a special relationship, the Estate abandoned this argument, and instead alleged three other exceptions to the public duty doctrine: legislative exception, failure to enforce, and the rescue exception. These were raised for the first time in opposition to summary judgment dismissal. As a result, SNOCOM and the City asserted the defense of immunity under RCW 70.05.120, as well as additional defenses to these new allegations. The trial court ruled these exceptions to the public duty doctrine did not apply in this case, and dismissed all claims on summary judgment. The trial court also denied

the Estate's motion for reconsideration. The Estate now appeals these rulings.

III. ARGUMENT

A. Legal Standard.

Statements of ultimate fact and conclusory statements of fact will not defeat a summary judgment motion. Grimwood v. Univ. of Puget Sound, Inc., 110 Wash.2d 355, 359-60, 753 P.2d 517 (1988). In addition, the party opposing a motion for summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wash.2d 1, 13, 721 P.2d 1 (1986). The party must set forth specific facts rebutting the moving parties' contentions and disclose that a genuine issue as to a material fact exists. Seven Gables, 106 Wash.2d at 13.

B. THE ESTATE FAILED TO PROVE THE CITY OR SNOCOM OWED ALLRUD A LEGAL DUTY; THUS ITS NEGLIGENCE CLAIM WAS PROPERLY DISMISSED PURSUANT TO THE PUBLIC DUTY DOCTRINE.

The required elements to prove negligence are: duty, breach, causation, and injury. Keller v. City of Spokane, 146 Wn.2d 237, 242, 44 P.3d 845 (2002), citing, Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Whether a governmental entity owes a duty in a particular

situation is a question of law. Keller, 146 Wn.2d at 243, citing Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). In a negligence action, in determining whether a duty is owed to the plaintiff, a court must not only decide who owes the duty, but also to whom the duty is owed, and what is the nature of the duty owed. Keller, 146 Wn.2d at 243, citing Wick v. Clark County, 86 Wn. App. 376, 385, 936 P.2d 1201 (1997).

Whether the defendant is a governmental entity or a private person, the duty must be one owed to the injured plaintiff, not to the public in general. J&B Dev. Co. v. King Cy., 100 Wn.2d 299, 304 669 P.2d 468, 41 A.L.R.4th 86 (1983), *overruled on other grounds by Taylor v. Stevens Cy.*, 111 Wn.2d 159, 759 P.2d 447 (1988). This principle of negligence law is called the public duty doctrine. No liability may be imposed for a defendant's negligent conduct unless it is shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general, i.e., a duty to all is a duty to none. Babcock v. Mason County Fire Dist., 144 Wn.2d 774, 785, 30 P.3d 1261 (2001).

There are four exceptions to the public duty doctrine and they include: (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine; and (4) special relationship. *Id.*, at 786. The Estate now argues that the legislative intent, failure to enforce, and rescue doctrine

exceptions apply in this case. However, the trial court properly ruled that none of these exceptions apply.

C. THE LEGISLATIVE INTENT EXCEPTION DOES NOT APPLY IN THIS CASE.

The public duty doctrine rule of non-liability does not apply where the Legislature enacts legislation for the protection of persons of the plaintiff's class. Taylor v. Stevens County, 111 Wn.2d 159, 165, 759 P.2d 447 (1988). In Halvorson v. Dahl, 89 Wash.2d 673, 676, 574 P.2d 1190 (1978) the court stated that "[l]iability can be founded upon a municipal code if that code by its terms evidences a clear intent to identify and protect a particular and circumscribed class of persons."

The Estate alleges that the legislature – through RCW 71.05.150 – created a statutory duty requiring police officers to enter private residences and perform health and welfare checks. Appellant's Brief, p. 23. The Estate argues the City can be held liable under this statute for Officer Falk's decision not to enter Allrud's house without consent. Appellant's Brief, p. 20. There are at least four reasons why the legislative intent exception does not apply in this case.

(1) RCW 71.05.150 was intended to protect all members of the public, not just a particular and circumscribed class of people.

(2) There is no *mandatory* duty for police to take persons with mental disorders into custody under RCW 71.05.153. This is a *discretionary* decision made by police officers.

(3) Construing RCW 71.05.153 as a mandatory duty would be a violation of the Fourth Amendment of the U.S. Constitution and article 1, section 7 of the Washington state Constitution.

(4) The legislature has established immunity for police officers making decisions about whether to take someone into involuntary custody for mental evaluation, and that immunity applies in this case.

1. RCW 71.05.150 Protects All Members Of The Public, Not Just A Particular And Circumscribed Class Of Persons.

The legislative intent exception applies where the terms of a statute evidence a clear intent to identify and protect a particular and circumscribed class of persons. Hannum v. Dept. of Licensing, 144 Wn. App. 354, 181 P.3d 915 (2008), citing Ravenscroft v. Wash. Water Power Co., 136 Wn.2d 911, 929, 969 P.2d 75 (1998). The statutory language must clearly express this intent; a court will not imply it. Ravenscroft, 136 Wn.2d at 930. A court may look to a statute's declaration of purpose to ascertain legislative intent. Dorsch v. City of Tacoma, 92 Wn. App. 131, 134, 960 P.2d 489 (1998), citing Taylor v. Stevens County, 111 Wn.2d 159, 165, 759 P.2d 447 (1988).

In Hannum, the plaintiff claimed that RCW 46.20.041 demonstrated the legislature's intent to protect persons who may have a mental or physical disability or disease that affects their ability to drive. However, the court noted the declaration of intent of the legislature's focus was more general, namely, on the "well-being of the residents of the state." It was not merely on those the Department of Licensing believed suffered from a mental disability or disease that may affect their ability to drive. The Hannum court concluded that RCW 46.20.041 evidenced the legislature's intent to protect the public at large, and accordingly, the legislative exception to the public duty doctrine did not apply.

Similarly, in Taylor v. Stevens County, *supra*, the state Supreme Court held that building codes are designed to protect the safety of the general public, and rejected the argument that they were designed to protect a circumscribed class of building users. The court held the legislative intent exception did not apply.

In this case, the statute at issue is RCW 71.05, involving persons with mental disorders. The legislative intent is far more broad and general than the Estate would have the Court believe:

- (1) To prevent inappropriate, indefinite commitment of mentally disordered persons and to eliminate legal disabilities that arise from such commitment;
- (2) To provide prompt evaluation and timely and appropriate

treatment of persons with serious mental disorders;

(3) To safeguard individual rights;

(4) To provide continuity of care for persons with serious mental disorders;

(5) To encourage the full use of all existing agencies, professional personnel, and public funds to prevent duplication of services and unnecessary expenditures;

(6) To encourage, whenever appropriate, that services be provided within the community;

(7) To protect the public safety.

RCW 71.05.010 (emphasis added). The plain language of the statute demonstrates it is intended to protect the public safety. As such, it was intended to protect all members of the public, not just a particular and circumscribed class of persons as alleged by the Estate. Consistent with the decisions in Hannum and Taylor, the legislature's intent in enacting RCW 71.05.150 is to protect the public at large, not a particular and circumscribed class of people. Accordingly, the legislative exception to the public duty doctrine does not apply.

2. **The Statute Creates Discretionary Authority, Not A Mandatory Legal Duty.**

In past cases, where the court has found the legislative intent exception to the public duty doctrine applied, it was based on a mandatory legal duty placed on a police officer by a statute. See, *e.g.*, RCW

10.99.030 (when a peace officer responds to a domestic violence call and has probable cause to believe that a crime has been committed, the peace officer “shall” exercise arrest powers with reference to the criteria in RCW 10.31.100); RCW 46.61.035(4) (The foregoing provisions “shall not relieve” the driver of an authorized emergency vehicle “from the duty to drive with due regard for the safety of all persons”); RCW 26.44.050 (upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services “must” investigate and provide the protective services section with a report); and RCW 13.32A.050 (a law enforcement officer “shall” take a child into custody...).

Here, the statute that was in effect at the time of the incident did not contain language making it mandatory for officers to take someone into custody for evaluation.² The legislature certainly knows how to create mandatory duties. Yet, here, it used discretionary language:

² The current version of the statute set out below also does not make this action mandatory, but rather, states an officer “may” take a person into custody for evaluation.

(2) A peace officer may take or cause such person to be taken into custody and immediately delivered to a crisis stabilization unit, an evaluation and treatment facility, or the emergency department of a local hospital under the following circumstances:

(a) Pursuant to subsection (1) of this section; or

(b) When he or she has reasonable cause to believe that such person is suffering from a mental disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled.

A peace officer may take or cause a person to be taken into custody and immediately delivered to an evaluation and treatment facility when he has reasonable cause to believe that such person is suffering from a mental disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled.

Former RCW 71.05.150(d)(4) (emphasis added). There is no statutory mandate requiring the officer to take someone into custody for evaluation. In fact, state law makes it clear that an officer must subjectively believe someone needs emergency assistance before he can enter a private residence without a warrant (*i.e.*, pretextual searches are prohibited). State v. Angelos, 86 Wn. App. 253, 255-56, 936 P.2d 52 (1997). The government must show that the searching officer subjectively believed an emergency existed. State v. Loewen, 97 Wn.2d 562, 568, 647 P.2d 489 (1982). Given this subjective requirement, it would not be possible for the legislature to compel police officers to enter private residences without consent or a search warrant if the officer did not believe he had sufficient cause to do so.

In the cases cited by the Estate, the courts recognized that police officers have discretionary authority to enter private residences on an emergency basis if the officer subjectively believes someone inside needs

RCW 71.05.153 (emphasis added).

immediate assistance.³ For example, in State v. Gocken, 71 Wn. App. 267, 857 P.2d 1074 (1993), cited by the Estate, the court discussed the emergency exception to the warrant requirement and stated, “Under that exception, the police **may** conduct a warrantless search...” Gocken at 274-77 (emphasis added).⁴ The court further stated, “When an officer believes in good faith that someone’s health or safety may be endangered...the officer could be considered derelict by not acting promptly to ascertain if someone needed help...” *Id.* The court emphasized that the officer must believe in good faith that someone is in danger. The court did not state officers have a legal duty to conduct safety checks regardless of the circumstances.

In this case, Officer Falk did not believe that he had sufficient basis to enter Allrud’s home without consent or a warrant. The Estate argues, “Officer Falk certainly should have been subjectively convinced that Ms. Allrud might have been inside in need of help.” Appellant’s Brief, p. 38. This conclusory opinion, however, does not change the

³ See, State v. Lowrimore, 67 Wn. App. 949, 841 P.2d 779 (1993); State v. Mason, 56 Wn. App. 93, 782 P.2d 572 (1989), State v. Leupp, 96 Wn. App. 324, 980 P.2d 765 (1999); State v. Johnson, 104 Wn. App. 409, 16 P.3d 680 (2001); State v. Dempsey, 88 Wn. App. 918, 947 P.2d 265 (1997) (search must be motivated, both subjectively and objectively, by a perceived need to render aid).

⁴ The issue in Gocken was whether evidence should be suppressed at a criminal trial because it was obtained after entry into a home without a warrant. The court in that case was merely trying to emphasize the fact that police have discretionary authority to enter homes without a warrant when they believe there is a medical need to do so.

undisputed fact that Officer Falk did not subjectively believe he had enough basis to go in in light of the totality of the circumstances.

The Estate does not cite a single case that has held RCW 71.05.150 creates a mandatory duty to enter private homes. Where no authorities are cited in support of a proposition, the court may assume that after diligent search, counsel has found none. State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978).

The one case cited by the Estate that discusses a duty for law enforcement to perform a welfare check, which was State v. Raines, involved a **domestic violence** charge where there is a statutory duty for officers to take action pursuant to RCW 10.99. State v. Raines, 55 Wn. App. 456, 778 P.2d 538 (1989), *rev. denied*, 113 Wn.2d 1036, 785 P.2d 825 (1990). This is not comparable to the issue in this case as RCW 71.05.150 is a different statute.

Accordingly, the court should rely on the unambiguous language of the statute to determine whether the statute created a mandatory legal duty or discretionary authority. Statutory construction begins by reading the text of the statute or statutes involved. If the language is unambiguous, a reviewing court must rely solely on the statutory language. State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005) (citing, State v. Avery, 103 Wn. App. 527, 532, 13 P.3d 226

(2000)). Corollary to this rule is the principle that “each word of a statute is to be accorded meaning.” *Id.* (citing State ex rel. Schillberg v. Barnett, 79 Wn.2d 578, 584, 488 P.2d 255 (1971)). “[T]he drafters of legislation... are presumed to have used no superfluous words and [the court] must accord meaning, if possible, to every word in a statute.” *Id.* (citing In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000) (quoting Greenwood v. Dep’t of Motor Vehicles, 13 Wn. App. 624, 628, 536 P.2d 644 (1975))).

Where, as here, the statute at issue uses the word “may,” it must be afforded a permissive or discretionary meaning. Elec. Contractor’s Assn. v. Riveland, 138 Wn.2d 9, 28, 978 P.2d 481 (1999) (citing Yakima County (W. Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 381, 858 P.2d 245 (1993)).⁵ The legislature used the term “may” in former RCW 71.05.150 when discussing a police officer’s authority to take a mentally disordered person into custody for evaluation and treatment. After looking at it again, the legislature chose to the word “may” in the language of the current statute. See, RCW 71.05.153.

The language of the statute remains discretionary under the rules of statutory construction, thus, there is no mandatory legal duty for a police

⁵ The legislature is presumptively aware of these cases interpreting the word “may.” See, e.g., Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 94 P.3d 930 (2004). Consequently, there is no reason to believe that the legislature was without knowledge of how its words would be construed by the courts.

officer to enter a private residence and take someone into custody for involuntary evaluation. This is a discretionary decision. As such, the Estate cannot establish a legislative exception to the public duty doctrine.

3. **RCW 70.05.153 Would Violate The Federal And State Constitutions If It Created A Mandatory Duty To Enter A Home For A Health And Welfare Check No Matter What The Circumstances.**

The Estate is essentially arguing that every time a 911 call is made expressing concern about someone, the police have a duty to force entry into their residence to check on them. However, the Estate ignores the Fourth Amendment of the U.S. Constitution; article 1, section 7 of the State Constitution; and the vast body of case law that prohibits police officers from entering a private residence without consent or a court order except under certain extreme circumstances.

The Estate fails to cite any federal or state authority to support its theory that the state legislature can trump the federal and state constitutions by creating a mandatory statutory duty for police officers to enter private residences even when the officers do not believe they have exigent circumstances to do so. Under current state law, not only must a reasonable officer believe there was an emergency situation justifying forced entry (objective requirement), but the police officer making the decision must believe he has legal authority to enter the private home

(subjective requirement). See, State v. Loewen, 97 Wn.2d at 568 (searching officer must subjectively believe an emergency existed). Otherwise, he faces potential criminal liability, civil liability, and punitive damages under 42 U.S.C. § 1983, as well as potentially incurring liability on behalf of the department. This is why the authority to take someone into custody under RCW 71.05.150 is discretionary. Because the statute does not create a mandatory legal duty to enter homes to perform health and welfare checks, the legislative exception does not apply.

4. **The City Is Entitled To Immunity Under RCW 71.05.120 As The Estate Failed To Produce Any Admissible Evidence Of Gross Negligence Or Bad Faith.**

RCW 71.05.120 states, in relevant part:

No...peace officer responsible for detaining a person pursuant to this chapter, nor...a unit of local government...shall be civilly or criminally liable for performing duties pursuant to this chapter with regard to the decision of whether to...detain a person for evaluation and treatment, PROVIDED, That such duties were performed in good faith and without gross negligence.

Accordingly, a peace officer is immune from tort liability in the performance of his duties unless he acted in bad faith or with gross negligence. Estate of Davis v. Dep't of Corr., 127 Wn. App. 833, 840, 113 P.3d 487 (2005) (citing Spencer v. King County, 39 Wn. App. 201, 205, 692 P.2d 874 (1984) *rev. denied*, 103 Wn.2d 1035 (1985), *overruled*

on other grounds by Frost v. City of Walla Walla, 106 Wn.2d 669, 724 P.2d 1017 (1986)).

Gross negligence is that which is substantially and appreciably greater than ordinary negligence. Davis, 127 Wn. App. at 840. Moreover, in Spencer, the court recognized—referring to other jurisdictions—that “gross negligence” generally implies tainted or fraudulent motives. Spencer, 39 Wn. App. at 207-08.

In Davis, the plaintiff alleged a designated mental health professional (DMHP) failed to provide assistance or detain a person with a mental disorder, despite the need to do so. Davis, 127 Wn. App. at 841. The plaintiff’s expert opined the DMHP’s assessment was incomplete and unreasonable. However, the court found this did not rise to the level of gross negligence. *Id.* Further, the court held the statutory immunity applied to bar the claim that the DMHP negligently failed to detain the disabled person. *Id.*

This case is very similar. The Estate alleges Officer Falk and the City were grossly negligent in failing to enter Allrud’s home without her consent and without a warrant and complete a “safety check” of her. The Estate offers multiple conclusory assertions in its briefing and by its purported experts to support this claim, but cites little or no actual evidence in the record to support a factual finding of gross negligence or

bad faith by Officer Falk.⁶ Rather, it is undisputed that Officer Falk responded within minutes of receiving the dispatch; spent a significant amount of time on the call; spoke with Ms. Kaplan on the phone three different times; spoke with Mr. Faltisco at the scene; spoke with Ms. Allrud's neighbor at the scene; called his supervisor to seek guidance; called Mr. Faltisco after he drove off without a word to provide him with additional information; and called SNOCOM to request that he be informed if there were any additional requests for assistance on the call.

The testimonial evidence verifies that Officer Falk asked multiple questions to determine Allrud's current condition, and that he told both Kaplan and Faltisco that he was concerned about protecting Allrud's civil rights and not entering her home without permission. This is evidence of an officer trying to handle a call within the parameters of the law, not someone responding in bad faith or with gross negligence, or refusing to respond at all.

Ms. Kaplan has never been a DMHP in Washington. She admits that DMHPs do not commit someone against their will unless completely convinced the person cannot make the decision for themselves because they are concerned about the person's civil liberties being taken away. Kaplan acknowledges that DMHPs go through specialized training that

⁶ See Defendants' objection to inadmissible evidence at the end of this brief.

includes training on civil rights. In handling her cases, Kaplan admits she often disagrees with the DMHP about whether a patient should be taken into involuntary custody.

On the day of the incident, Faltisco and Kaplan discussed the problem of Allrud's refusal to get medical care. Kaplan even suggested they wait until she passed out so she couldn't refuse treatment. Without a doubt, Kaplan and Faltisco knew Allrud would refuse medical care if given the chance to do so. Faltisco told Officer Falk that Allrud had refused care earlier that day and had been very clear in her refusal. Faltisco admitted that he wanted Falk to force her to get care. Officer Falk knew Faltisco was a social worker who worked at Stevens Hospital, and was aware that Faltisco had been in the house a few hours earlier and had decided not to call 911 for medical assistance for Allrud.

Both the neighbor and Faltisco told Officer Falk that Allrud would not open the door to him, even if she was fine. Officer Falk had serious, legitimate concerns that Allrud would not welcome an unauthorized entry into her home. Since Faltisco had not called 911 earlier in the day when he was in the house, Falk believed that her condition was not exigent enough to justify entry into her home without a warrant or her consent.

There is no evidence in the record to support a finding of tainted or fraudulent motives by Officer Falk. The Estate asserts that Officer Falk

“interfered” in the call, but the actual evidence shows differently. Ms. Kaplan testified Officer Falk never told her that if someone called 911 no one would respond. Kaplan stated she does not believe Officer Falk interfered in the situation. Officer Falk told Kaplan that if the boys went in to the house and called 911, someone would come in and assess Ms. Allrud. Faltisco admits he knew that Falk said the boys could call 911 if they needed help. Faltisco made the decision not to let the teens go into the house and check on Allrud while Falk was still there. Faltisco planned to return to the house after Officer Falk had left to check on Allrud. Faltisco decided to go to a music lesson and shopping and dinner before checking on Allrud. When he and his sons *did* return later, they called 911 without any interference. Thus, there is no evidence that Officer Falk interfered with any action that might have been taken by Faltisco or Kaplan. Because the Estate has not offered admissible evidence approaching its heavy burden to prove gross negligence, it has not established a genuine issue of material fact and the City is entitled to statutory immunity for all actions – or alleged inactions – under RCW 71.05.

D. THE FAILURE TO ENFORCE EXCEPTION DOES NOT APPLY BECAUSE THE AUTHORITY TO TAKE A PERSON INTO CUSTODY FOR MENTAL EVALUATION UNDER RCW 71.05.150 IS DISCRETIONARY – NOT MANDATORY.

The Estate makes the novel argument that the City had a legal duty to enforce RCW 71.05.150 against itself (*i.e.*, against Officer Falk), and failed to do so. However, in addition to liability being precluded by statutory immunity as discussed above, there is no legal duty to enforce RCW 71.05.150 as it does not create a statutory requirement, but rather provides discretionary authority to take someone into involuntary custody for mental evaluation.

Under the failure to enforce exception to the public duty doctrine, a general duty of care owed to the public can be owed to an individual where (1) government agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation; (2) they fail to take corrective action; (3) a statutory duty to take corrective action exists; and (4) the plaintiff is within the class the statute intended to protect. Smith v. State, 59 Wn. App. 808, 814, 802 P.2d 133 (1990) *rev. denied*, 116 Wn.2d 1012 (1991). The plaintiff has the burden of establishing each element of the exception. Atherton Condo. Apartment-Owners Ass'n Bd. v. Blume Dev. Co., 115 Wn.2d 506, 531, 799 P.2d 250 (1990).

Significantly, this exception is construed **narrowly**. Atherton, 115 Wn.2d at 531. In order to invoke this exception, **the statute must contain a specific duty to take corrective action**. See, e.g., Bailey v. Forks, 108 Wn.2d 262, 737 P.2d 1257 (1987) (statute provided police officers “shall” take into custody a person incapacitated by alcohol); Campbell v. City of Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1975) (statute provided building official “shall immediately sever any unlawfully made connection”); Donohoe v. State, 135 Wn. App. 824, 142 P.3d 654 (2006) (The failure to enforce exception does not apply if the statute does not create a mandatory duty by the agency to take specific action to correct a known statutory violation. Such a duty does not exist if the statute vests the agency with broad discretion about whether and how to act. In other words, a specific directive to the governmental employee as to what should be done must be present in the statute.)

Statutes indicating the agency “may” take corrective action, or investing broad discretion in the agency, generally will not meet this requirement. Ravenscroft v. Water Power Co., 87 Wn. App. 402, 415-16, 942 P.2d 991 (1997). For instance, in McKasson v. State, 55 Wn. App. 18, 25, 776 P.2d 971, *rev. denied*, 113 Wn.2d 1026 (1989), the court ruled the Securities Act does not require specific action because it granted broad discretion with the director utilizing the word “may” instead of “shall.”

See also, Forest v. State, 62 Wn. App. 363, 369-70, 814 P.2d 1181 (1991) (similar).

The statute at issue in this case does not contain the language necessary to invoke the failure to enforce exception to the public duty doctrine. It uses the discretionary term “may” instead of “shall.” Accordingly, Plaintiff cannot establish the failure to enforce exception to the public duty doctrine and liability against the City cannot be based on this exception.

In addition, the only evidence that the Estate produces to support its theory that the City failed to enforce a statutory duty to go into Allrud’s home to check on her are inadmissible hearsay opinions taken from an internal police review of this incident commenting on isolated aspects of this case. CP 124-243. This is insufficient to establish a genuine issue of material fact to oppose a summary judgment dismissal. See, Charbonneau v. Wilbur Ellis Co., 9 Wn. App. 474, 512 P.2d 1126 (1973) (hearsay evidence contained within an affidavit in opposition to a motion for summary judgment does not meet the requirements of CR 56 and is not competent); State v. Hopkins, 134 Wn. App. 780, 790, 142 P.3d 1104 (2006) (where the preparation of a report requires the exercise of the declarant’s skill and discretion, the business record exception does not apply); Brundridge v. Fluor Fed. Servs., 164 Wn.2d 432, 451, 191 P.3d

879 (2008) (a business report must not contain conclusions involving the exercise of judgment or discretion or the expression of opinion); Burmeister v. State Farm, 92 Wn. App. 359, 966 P.2d 921 (1998) (plaintiff's counsel cannot authenticate records by attaching them to an affidavit). The hearsay contained in the internal review report is not admissible as a business record and cannot be considered in opposition to summary judgment.

Furthermore, although the Estate cites random, out of context comments made within the internal review, it fails to acknowledge that the ultimate finding of the review was that Officer Falk was exonerated from any potential wrongdoing (CP 205-06), and the department concluded that no policy violation had occurred (CP 242).

E. THE RESCUE EXCEPTION DOES NOT APPLY AS THE POLICE WERE NOT CONDUCTING A GRATUITOUS RESCUE.

The rescue exception to the public duty doctrine is based on the tort theory that if one undertakes to render aid to another or to warn a person in danger, one must exercise reasonable care. Babcock v. Mason County Fire Dist., 101 Wn. App 677, 687, 5 P.3d 750 (2000). Integral to this exception is that the rescuer **gratuitously** assumes the duty to warn the endangered parties of the danger and breaches this duty by failing to warn them. Babcock, citing Smith v. State, 59 Wn. App. 808, 814, 802

P.2d 133 (1990). If a person or agency does not gratuitously assume the duty to rescue, the exception does not apply.

In Babcock, the court held the Fire District did not gratuitously assume fighting the Babcocks' house fire. Babcock, 101 Wn. App at 686. Rather, the Fire District was established for this very purpose – to fight fires and to protect the property of all citizens. *Id.*, citing RCW 52.02.020.

[W]hat [the Babcocks] [are] asking the Court to do is say that as soon as [the firefighting] equipment gets on the road and arrives at a specific location where a fire is taking place, then at that point the rescue doctrine will take the actions of the firefighters outside of the public duty doctrine. And if this were so, the exception would swallow up the rule and there would be no public duty exception for fire companies.

Babcock, 101 Wn. App at 686. The court held the Fire District was statutorily created to fight the fire. Therefore, because it did not gratuitously fight the fire, the rescue doctrine exception did not apply. *Id.*

The cases cited by the Estate in its brief such as Brown v. MacPherson's, Inc., Roth v. Kay, and Chambers-Castanes v. King County all talk about a party's liability for failing to fulfill a "gratuitous" promise to act on someone's behalf. The Estate attempts to get around this required element by arguing on page 30-31 of its brief that Officer Falk "gratuitously" rendered medical aid, but this argument contradicts the Estate's claim that Falk "refused" to act. Further, there is no evidence to

support the conclusory assertion that Officer Falk promised to render aid to Allrud. Rather, the testimonial evidence conclusively establishes that Falk told both Faltisco and Kaplan that he was not going to force his way into Allrud's house; and that if Allrud's sons went into the home and requested help after seeing her, it would be provided.

The applicable statute in this case is RCW 38.52.020. RCW 38.52.020 provides for emergency management by the state, and creation of local organizations for emergency management in the political subdivisions of the state, for many reasons including to protect the public peace, health and safety, and to preserve the lives and property of the people of the state. The Edmonds Police Department was statutorily created by a local government entity to carry out the protection of the public health and safety pursuant to RCW 38.52.020. As such, these services are not performed gratuitously. Rather – just as the Fire District was formed for the purpose of providing statutorily authorized fire services in the Babcock case – the Edmonds Police Department was formed for the purpose of providing statutorily authorized police services. The Estate has failed to prove that the City of Edmonds – or Officer Falk – gratuitously assumed the responsibility to perform a safety check on Allrud.

The Estate also argues that Faltisco and Kaplan refrained from providing assistance to Allrud because they relied on Officer Falk's promise to provide aid. However, the facts do not support this conclusory assertion. Rather, both Faltisco and Kaplan testified that Officer Falk informed them he was not going into the house. Further, they both testified that Falk informed them that they should call 911 for assistance if they entered the house and believed Allrud needed emergency aid. Faltisco testified that he planned to go back to the house to check on Allrud. In addition, it is undisputed that Faltisco *did* in fact enter the house to check on Allrud after he took their sons to a music lesson, shopping and dinner. Finally, Ms. Kaplan testified she does not believe Officer Falk interfered with their ability to call 911 and request assistance.

In sum, the Estate failed to prove the required element that the Edmonds Police Department gratuitously offered to conduct the health and welfare check on Allrud as this was one of the statutory purposes for the police department. Further, the Estate failed to produce admissible factual evidence – as opposed to unsupported conclusory assertions – to prove that Kaplan or Faltisco were relying on Officer Falk to go into the house to check on Allrud, particularly after Falk told them he was not going to enter the house without her consent or a request from her children. As

such, the Estate has failed to demonstrate that the rescue exception to the public duty doctrine is applicable in this case.

F. **ALLRUD FAILED TO PRODUCE ANY ADMISSIBLE EVIDENCE THAT THE CITY FAILED TO PROPERLY TRAIN OR SUPERVISE OFFICER FALK.**

The Estate argues there is an issue of fact as to whether the City properly trained or supervised Officer Falk with regard to safety checks on page 33 of its Brief, but submits no actual evidence regarding the training or supervision of Officer Falk. Conclusory assertions of fact and law are insufficient to oppose a summary judgment motion. Grimwood v. University of Puget Sound, 110 Wn.2d 355, 360, 753 P.2d 517 (1988); Hash v. Children's Orthopedic Hosp., 49 Wn. App. 130, 133, 741 P.2d 584 (1987).

The Estate argues that because neither Officer Falk nor his supervisor went into the house to check on Allrud, there is a genuine issue of material fact as to whether the police department negligently trained or supervised these officers. A master is under a duty to exercise reasonable care to control his servant while acting outside the scope of his employment to prevent him from intentionally harming others or creating an unreasonable risk of bodily harm to them if:

- (a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

Peck v. Siau, 65 Wn. App. at 294 (emphasis added). The employer's duty is limited to foreseeable victims and then only "to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others." Betty Y. v. Al-Hellou, 98 Wn. App. 146, 149, 988 P.2d 1031 (1999), citing Niece v. Elmview Group Home, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). There is no allegation that Officer Falk was acting outside of the scope of his employment, thus the Estate cannot maintain a negligent supervision claim.

Further, the only evidence of the training received by either Officer Falk or his supervisor regarding health and welfare checks produced by the Estate is a reference to one incident in 1994 during Officer Falk's initial police training where his superior advised him to get more information on future calls. Appellant's Brief, p. 18. This is the sum total of its evidence on this issue and it actually proves that Officer Falk did receive training on this subject. The Estate merely concludes the City's

training was negligent because its experts disagree with the way this call was handled. This is not admissible, and it is not sufficient to establish a genuine issue of material fact as to whether the City properly trained its officers. As such, this allegation is rightfully dismissed.

G. THE ESTATE HAS FAILED TO ESTABLISH THAT SNOCOM OWED ALLRUD A DUTY.

The Estate does not directly argue that *any* of the exceptions of the public duty doctrine apply to create a legal duty of SNOCOM to Ms. Allrud. It abandoned its theory that the special relationship applied in its summary judgment opposition, and has failed to demonstrate how any of the other three exceptions to the public duty doctrine apply to SNOCOM. It does not offer any evidence or legal authority to show SNOCOM had any sort of community caretaking or enforcement function. These are purely police functions.

The Estate alleges the 911 operator did not convey critical information to Officer Falk. However, although this might be relevant to the question of breach, it does not establish any legal duty toward Allrud. The court need not consider the issue of breach as the Estate failed to establish that SNOCOM owed Allrud a duty of care.

Further, The Estate does not dispute that Officer Falk spoke to both Ms. Kaplan and Mr. Faltisco and learned all of the information they

deemed relevant to tell him prior to making his decision about whether to enter the house without a warrant. Therefore, the amount of information conveyed by the 911 operator is irrelevant as it ultimately did not affect the decision by Officer Falk. There is no question of fact on this issue.

In truth, the Estate lumps both Defendants together, but never produces any evidence to show the legislative intent exception, the failure to enforce exception, or the rescue doctrine applied to Defendant SNOCOM. As such, the trial court properly granted dismissal of all claims against SNOCOM.

H. THE ESTATE FAILED TO PROVE THE CITY OR SNOCOM BREACHED A DUTY OWED TO ALLRUD.

Assuming the Estate is able to show the City or SNOCOM owed Allrud a legal duty under an exception to the public duty doctrine, it has still failed to produce evidence that any such duty was breached.

The Estate offers the opinion of Lee Libby to claim that Officer Falk “violated” Edmonds Police Department policy when he did not enter the house without a warrant to take Allrud into involuntary custody at Kaplan’s request. Appellant’s Brief, pp. 17-18. However, internal policies do not create legal duties that can lead to a breach of a duty. See Melville v. State, 115 Wn.3d 34, 793 P.2d 952 (1990); Joyce v. Dep’t of Corr., 155 Wn.2d 306, 233, 119 P.3d 825 (2005) (unlike administrative

rules and other formally promulgated agency regulations, internal policies and directives generally do not create law). At best, policies can be considered in determining a standard of care. However, there is no legal authority to support the Estate's argument that a breach of a policy equals a breach of a legal duty. Further, the Estate failed to show any actual policy violation in this case.

Libby wrongfully concludes that Kaplan had "in essence" asked for the officer to take Allrud into custody. CP 249. He points to an Edmonds Police Department policy that states an officer will take someone into custody upon the request of a mental health professional, and concludes that Officer Falk violated this policy because he did not take Allrud into custody. However, this is a misrepresentation of the actual evidence. Ms. Kaplan never asked Officer Falk to take Allrud into custody. She testified she asked for a safety check and "[Allrud] could have been fine, laying in bed, I don't know." Kaplan testified she wanted the officer to "eyeball" Ms. Allrud, but the decision as to whether she needed to go to the hospital was the officer's. Under these facts, the Edmonds PD policy does not even apply. Because Libby's opinion is based on incorrect factual information, it should not be considered and is insufficient to prove breach.

Libby does not provide any information about police procedures for conducting “safety checks;” the recognized standard of care for conducting these checks; the training police officers receive regarding health and welfare checks; or the tactics police officers generally utilize for these checks. He merely gives his personal opinion that Officer Falk should have gone into the house to check on Allrud. This opinion does nothing to help explain police training or procedures that are beyond the understanding of the fact finder as required by ER 702. Libby conveniently ignores the Edmonds Police Department finding which exonerated Officer Falk of any policy violation and instead merely offers his own opinion that Falk acted contrary to their policies. However, even assuming this was true, acting contrary to an internal policy does not establish a breach of a legal duty of care.

Finally, it is undisputed that the SNOCOM dispatcher sent an officer to the call within minutes of receiving it. There is no evidence that the dispatcher was required to take any further action beyond this dispatch. Thus, SNOCOM could not have breached any alleged duty to Allrud.

I. **OBJECTION TO CONSIDERATION OF INADMISSIBLE EVIDENCE.**

The Estate cites to a plethora of hearsay statements in the police reports; factual conclusions by its experts and witnesses; and legal

conclusions by its experts. All of these are inadmissible and insufficient for the purpose of opposing summary judgment dismissal. The City and SNOCOM objected to the trial court's consideration of these materials, and they object to this Court's consideration of these materials as well.

“Each courtroom comes equipped with a ‘legal expert,’ called a judge.” State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002) (*en banc*). Instruction as to “the relevant legal standards” are his or her province alone. *Id.* See also, Theonnes v. Hazen, 37 Wn. App. 644, 649, 681 P.2d 1284 (1984), citing Prentice Packing & Storage Co. v. United Pac. Ins. Co., 5 Wn.2d 144, 164, 106 P.2d 314 (1940) (opinions of expert witnesses are of no weight unless founded upon facts in the case; the law demands that verdicts rest upon testimony, and not upon conjecture and speculation); Washington State Physicians Insurance Exchange & Association v. Fison's Corporation, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993) (legal opinions on the ultimate legal issue before the court are not properly considered under the guise of expert testimony); conclusory assertions of fact and law are insufficient to oppose a summary judgment motion. Grimwood, 110 Wn.2d at 360; Hash, 49 Wn. App. at 133.

In addition, the Estate makes multiple assertions in its opening brief which are not supported by any evidence or any citation to the record. Recitation of facts not supported by the record and outside the

pleadings violates Rule of Appellate Procedure 10.3(a)(5). Barnes v. Washington Natural Gas Co., 22 Wn. App. 576, 577 fn 1, 591 P.2d 461 (1979). Failure to cite to the record for a statement of fact is a failure to comply with the Rules of Appellate Procedure and justifies the court ignoring any such statement of fact. See In re Marriage of Simpson, 57 Wn. App. 677, 681-82, 790 P.2d 177 (1990).

The following examples are just a sampling of the Estate's violation of the rules regarding admissibility of testimony and evidence. In its Opening Brief, the Estate states as follows:

“Mr. Faltisco learned that Officer Falk had told Ms. Kaplan that he would cancel any further calls to 911.” Appellant's Brief, p. 7. The Estate cites CP 112, but this was inadmissible hearsay testimony from Faltisco. There is no citation to any testimony from Ms. Kaplan that Falk even told her this; and in truth, she testified that Officer Falk did not interfere with any 911 calls.

“Officer Falk even went so far as to cancel all future 911 calls to Ms. Allrud's residence.” Appellant's Brief, p. 11. There is absolutely no evidence in the record that Falk canceled any 911 calls.

On page 3, the Estate cites the testimony of Kaplan to describe Allrud's condition. However, Kaplan did not actually see or speak with Allrud. Her testimony was all based on hearsay information she was told

by other people. Thus, her testimony regarding Allrud's condition is no admissible as she did not have personal knowledge regarding this.

On page 4, the Estate alleges that Officer Falk said only a doctor could request a welfare check. However, Kaplan testified that after she told Falk a doctor would not go to the house, Falk told her that the police would go in and check on Allrud if the teens called 911 and asked for assistance. CP 75, 43:24-44:7.

"It is not a surprise that an EMT might defer to a police officer aggressively controlling an alleged crime scene." Appellant's Brief, p. 31. There is no evidence that an EMT was called to the scene while Falk was present, or that Falk gave direction to any EMT.

"Officer Falk's decision not to even look for Ms. Allrud was irrational and grossly negligent..." Appellant's Brief, p. 40. In truth, the evidence shows Officer Falk called Allrud, rang her doorbell, and spoke with her neighbor, Faltisco and Kaplan to determine her location and condition.

"...the officer flatly refused to perform any check." Appellant's Brief, p. 40, fn 9. This assertion is false.

"...Officer Falk certainly was on notice that Ms. Allrud was suffering from a mental disorder and in imminent danger of becoming

gravely disabled.” Appellant’s Brief, p. 12. No citation to the record is provided.

“...Allrud also submitted evidence establishing that the Edmonds Police Department’s own policy manual made a basic standard of conduct to protect life together with community caretaking checks mandatory.” Appellant’s Brief, p. 13. This assertion lacks any citation to the record whatsoever, likely because the policy does not state community caretaking checks are mandatory.

“...the Plaintiff also submitted evidence that the Edmonds Police Department’s failure to properly supervise and train Officer Falk regarding his duties under the involuntary commitment law was another proximate cause of Ms. Allrud’s death.” Appellant’s Brief, p. 19. No citation follows this assertion either.

On page 20, the Estate cites to a declaration from G. Robert Crow who concludes the department did not sufficiently train Falk without referencing any of Falk’s training record or even stating whether his training file was reviewed before Crow reached this conclusion.

In his declaration, Lee Libby references federal search and seizure law (without any citations to actual cases or law) and talks about “numerous” unnamed exceptions to the Fourth Amendment that could

have applied here. CP 251. These are legal conclusions without any factual or legal basis.

Libby opines that Falk failed to perform his duties in a manner “consistent with those of a professional police officer assigned to calls involving mentally troubled persons.” CP 253. However, Libby fails to provide any testimony regarding the alleged standard of care for a professional police officer assigned to this type of call. He fails to cite to any policies or practices of local law enforcement agencies, or any training materials approved by the state Criminal Justice Training Commission, or any case law that describes the way these calls should be handled. His conclusory opinion is completely unsupported by any actual evidence of the standard of care or proper police procedures.

Appellant has chosen to patently disregard the rules in place to ensure the statement of facts supplied to this court is “fair” as required by RAP 10.3(5). The Estate may not rely on misstatements of the facts, hearsay, “facts” lacking any citation to the record, legal or factual conclusions, or inadmissible evidence in establishing its case. The Court should consider only those facts adequately cited to and supported by the admissible record in ruling on this appeal.

IV. CONCLUSION

For the foregoing reasons, the City and SNOCOM respectfully request this Court to affirm the trial court dismissal of the Estate's claims on summary judgment.

DATED this 14th day of February, 2011.

KEATING, BUCKLIN & McCORMACK,
INC., P.S.



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DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct: that on February 14, 2011, I served the **Brief of Respondent City of Edmonds** on the following party of record via ABC Legal Messengers hand delivery:

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DATED this 14th day of February, 2011, at Seattle, Washington.



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