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COURT OF APPEALS  
DIVISION II

06 DEC 12 PM 1:49

STATE OF WASHINGTON

BY 37 JLN  
DEPUTY

No. 35313-0-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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Magdalena Quitarior Vergeson, Appellant

v.

Kitsap County and the City of Bremerton

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B R I E F   O F   A P P E L L A N T

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**ASSIGNMENTS OF ERROR**

1. The trial court erred in granting Summary Judgment for Respondents.

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether there were sufficient facts to take the case to the finder of fact.
2. Whether the Respondents owed a duty to the appellant to remove a quashed warrant from law enforcement systems to prevent her arrest on the quashed warrant.

## STATEMENT OF THE CASE

### A. Statement of Facts.

Plaintiff/Appellant was arrested on an arrest warrant which had been quashed by the Kitsap County Superior Court 157 days previously. Defendants/ Respondents had failed to remove her warrant from the law enforcement computer databases, and she was arrested on the computer information when she was stopped by a Washington State Trooper in Clark County during a routine traffic stop for a broken tail light. CP 120.

Two warrants had issued for the arrest of plaintiff in 1985, for alleged criminal behavior in Kitsap County, CP 107-110, which occurred when she was living in Hawaii. CP 120. Charges of Forgery and UIBC were filed, and a warrant issued, CP 112, on 5/24/1985 in cause 85-1-00325-8. This case was based on investigation by the Bremerton Police department, and Bremerton detectives turned the case over to the Kitsap County Prosecutor for handling. CP 109. She was arrested on the other warrant in cause 85-1-00610-9 when she arrived at Sea-Tac Airport on August 16, 2003. CP 120. She

was brought before the Kitsap County Superior Court on both that cause and on the cause at issue here: 85-1-00325-8. Both Warrants were quashed. CP 113. Ultimately, both charges were dismissed on October 31, 2005, CP 114-117, CP 118, on motion of the prosecutor.

On February 14, 2003, Mrs. Vergeson was driving in Clark County, Washington, when she was stopped for a routine traffic infraction: a broken tail light. CP 120. By performing a routine computer check, it appeared to the officer that Mrs. Vergeson was wanted on the old arrest warrant in cause 85-1-00325-8. He accordingly arrested her, as was his duty. CP 112, 122.

Another Order Quashing both warrants was presented and signed February 17, 2004, in which Judge Laurie made a finding "that warrants previously issued on the same cause should have been, but were not deleted upon dismissal of the cause...." CP 118.

In Kitsap County, when a Superior Court warrant is quashed, the clerk discharges its duty by notifying the warrants division of the Kitsap

County Sheriff's Office. That was timely done in this case. The clerk's notation shows that Pam M. Was notified on 9/10/2003 at 2:38 p.m. CP 113.

Pam M. is Pamela Morris, CP 131, 132, who gave testimony at a deposition on July 24, 2006. CP123. Ms. Morris is a Classification Support Specialist for the Kitsap County Sheriff's Office, assigned to warrants for the past fifteen years. CP 124. She has the job responsibilities to enter, modify, cancel all felony warrants in Kitsap County. CP 125. She is certified by the Washington State Patrol to update and enter information in the NCIC, the National Crime Information Center, and WASIC, the Washington State Information Center. CP 126.

Prior to 1992, Bremerton maintained its own felony warrants. This changed in 1992 with the Kitsap County Sheriff assuming that responsibility, and responsibility for all felony warrants issued in Kitsap County Superior Court, increasing the workload of the warrants division for the Kitsap County Sheriff's Office. CP 127.

Between 1992 and 2005-2006, each municipality in Kitsap County, including the City of Bremerton,

maintained their own old felony warrants from before 1992, and any misdemeanor warrants generated by its own municipal court. CP 128. That system changed in the past year, and Kitsap County now has all felony warrants, even for the municipalities. CP 128. In 2003, when Mrs. Vergeson was arrested on the quashed warrant, Bremerton maintained its own old felony warrants. CP 129.

The general procedure when a warrant is quashed in court is for the clerk to contact Ms. Morris and her office, and the warrant is removed from the system. Sometimes paperwork follows the notification, sometimes it does not. CP 129. In the present case, the clerk notified Ms. Morris on 9/10/03 at 2:38 p.m. CP 113, 130-131. She admitted getting the call that date, and working on the matter to attempt to remove it from the system. CP 132. She recalls doing it that day, and not putting it off until the next day as "that person could get arrested." CP 132. Ms. Morris does not recall whether or not she saw the paperwork from the clerk's office, the document CP 113, until after the lawsuit was filed. CP 133.

To work on the matter, Ms. Morris filled out a quash form with the clerk's name, the cause number and the name. CP 133. She went to pull the warrant (from the file), but there was not one. CP 131. She checked something called I-LEADS, but could not match the cause number. CP 131. She checked the cause number, then did nothing more. CP 133. Despite the fact that the case was a 1985 cause number, Ms. Morris did nothing to see if it came from another agency, CP 134, even though she knew pre-1992 felony warrants were maintained by other municipal agencies. CP 129. She did not think of doing so. CP 136. She never called Bremerton Warrants division to advise the warrant was quashed. Had she thought of it, she would have called them. CP 137. She did not call the prosecutor's office to see where the warrant was generated. CP 138. She did not think of it. CP 138. She did not call the County Clerk back for additional information. CP 139. Had she checked the order quashing the warrant, she would see that Mrs. Vergeson signed the order Lina Vergeson, not Lisa Vergeson, as is in the caption. CP 113. The

order also listed her married name, Magdalina Cuddy, which name Ms. Morris knew from the other warrant. CP 131, 135. Lina is a common nickname for Magdalina. Lisa would not be a common nickname for Magdalina.

The County is blaming the City of Bremerton for the County's inability to find the warrant, as they allege that the Bremerton Police Department "had not entered the cause number for that warrant in any searchable field in the state database." CP 39, CP 54-55. While the County is making that allegation in the affidavit and memorandum, they did not do so in their answer. The County did allege that the injury was the fault of un-named parties, but Bremerton is a named party. CP 27. In their prayer, CP 28, they do ask for a contribution of fault by all named and un-named parties. Bremerton in its answer does not allege comparative fault of others. CP 30-33.

B. Statement of Procedure

A claim was filed with both governmental entities as is required by R.C.W. 4.96.020, and the required time passed, CP 4, 10, 15, before suit was

filed, alleging Ms. Vergeson was damaged by negligence and that her civil rights were violated under 42 U.S.C. §1983, and that a Writ of Mandamus should issue to remove the warrant from the databases. CP 1-7. Timely Answers were filed. CP 8-13, 14-16.

Both the County and the City filed motions for summary judgment. The trial court permitted filing of an amended complaint, again alleging Ms. Vergeson was damaged by negligence and that her civil rights were violated under 42 U.S.C. §1983, and that a Writ of Mandamus should issue to remove the warrant from the databases, CP 17-22. The trial court also granted partial summary judgment as to claims arising out of arrest on the warrant in Kitsap County Cause 85-1-00610-9, but permitting further proceedings for the arrest on the warrant in Cause 85-1-00325-8. CP 81-84. That order is not at issue here. Answers to the Amended Complaint were filed. CP 23-29, 30-33.

Both the County, CP 34-36, and the City, CP 57, filed Second Motions for Summary Judgment, with supporting memoranda, CP 37-51, CP 57-70, and

affidavits. The primary argument raised by both as to the negligence action is that the governmental agency owed only a duty to the public in general as to quashing warrants, and not to the plaintiff/appellant directly, under the Public Duty Doctrine.

The motions were argued on August 9, 2006, and the Hon. Pierce County Superior Court Judge Linda C.J. Lee granted the motions, dismissing the plaintiff/appellant's claims.

A Notice of Appeal was timely filed on September 1, 2006. CP 200.

#### **ARGUMENT & AUTHORITIES**

##### C. Theories of Liability

It should be noted at the outset that, while Ms. Vergeson's damages are *in the nature of* those for which false imprisonment would also lie, liability under a false imprisonment theory requires some intentional act by the tortfeasor. As stated in *Washington Practice*, DeWolf & Allen, Vol 16, §13.11:

In an action for false imprisonment, the plaintiff must prove that the liberty

of his or her person was intentionally restrained....

A mere negligent imprisonment does not satisfy the intent requirement for false imprisonment. Similarly, the accidental imposition of a restraint is not false imprisonment.

Further, there is requirement of some affirmative act to restrain the plaintiff. As stated in W. Prosser, *Torts* § 11, at 47 (4th ed. 1971), cited with approval in Bender v. Seattle, 99 Wn.2d 582, at 592, 664 P.2d 492 (1983).

One who participates in an unlawful arrest, or procures or instigates the making of one without proper authority, will be liable for the consequences; but the defendant must have taken some active part in bringing about the unlawful arrest itself, by some "affirmative direction, persuasion, request or voluntary participation."

For this reason, the present claim is not a claim for unlawful arrest, as Ms. Vergeson was arrested because of the negligence of the defendants when they failed to remove the warrant, not because of any affirmative act. There is no viable claim for unlawful arrest or unlawful imprisonment against the County or against the City, as all affirmative actions to issue the warrant were performed in 1985 in good faith. The true cause of action against

both entities is for negligent failure to clear the warrants from the system after they were quashed by the court, as we have alleged in our original and amended complaints.

We note also at the outset that this appeal does not raise the issue of dismissal of the cause of action brought under 42.U.S.C. §1983, which was conceded also before the trial court. CP 102-103. Likewise, the defendants have assured us that the warrant is no longer in the system, making moot our request for Mandamus, we do not ask for further review of that issue. As to the arrest on a quashed warrant, if there is no remedy for negligence, there is no remedy at all.

Under negligence principles and R.C.W. 4.22.070, fault is proportionate to the percentage of negligence of each party. For this reason, if the County's allegation is true that Bremerton failed to enter the appropriate information in searchable databases, and is therefore also negligent, then Bremerton bears some of the responsibility for the damages suffered by Mrs. Vergeson. Certainly on these facts, Mrs. Vergeson

is fault free, and under R.C.W. 4.22.070, liability will be joint and several, if both defendants are found to be negligent. If Bremerton is dismissed from the suit on summary judgment for bearing no fault, Mrs. Vergeson is not affected, as then the County cannot argue to the finder of fact that there is an empty chair, as that issue has already been decided as a matter of law.

D. Summary Judgment Presumptions

1. *At the trial Court*

While, generally, issues of fact are for trial, Petersen v. State, 100 Wn.2d 421, 436, 671 P.2d 230 (1983), a court may determine an issue of fact if reasonable minds could not differ on the outcome. Dutton v. Washington Physicians, 87 Wn. App. 614, 943 P.2d 298 (1997). Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985), LaPlante v. State, 85 Wn.2d 154, 531 P.2d 299 (1975); Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963).

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to prevail as a matter of law. CR 56(c); Public Employees Mutual Ins. Co. v.

Fitzgerald, 65 Wn. App. 307, 828 P.2d 63 (1992). In determining if summary judgment is appropriate, the court must consider all evidence and inferences in a light most favorable to the non-moving party. Davis v. Niagara Mach. Co., 90 Wn.2d 342, 581 P.2d 1344 (1978). In ruling upon a summary judgment motion, it is the court's duty to consider all the evidence in the record, and where "from this evidence, reasonable men could reach only one conclusion, the motion should be granted." Meissner v. Simpson Timber Co., 69 Wn.2d 949 (1966); accord, Teagle v. Fischer & Porter Co., 89 Wn.2d 149, 570 P.2d 438 (1977).

2. *On Review*

Review of a grant of summary judgment is de novo. Bank of Am. v. David W. Hubert, P.C., 153 Wn.2d 102, 111, 101 P.3d 409 (2004). The same rules which applied to the trial court are to be applied by the reviewing court, and no deference is to be given. Further, de novo review is proper where, as here, the issues presented are questions of law. Andersen v. King County, 158 Wn.2d 1, 138 P.3d 963

(2006). Labriola v. Pollard Gp., Inc., 152 Wn.2d 828, 832, 100 P.3d 791 (2004).

While Judge Lee did not make specific findings for granting the motion, she is not required to do so. There are two possible bases for summary judgment: factual and legal, and each will be discussed in turn.

E. Factual Sufficiency of Negligence Claim

As to factual issues, as stated in Hiatt v. Walker Chevrolet, 120 Wn.2d 57 at 65, 837 P.2d 618 (1992):

The facts [in a summary judgment motion] must be interpreted in the light most favorable to the non-moving party. Where a dispute as to a material fact exists, summary judgment is improper. However, where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment is appropriate. Although a party moving for summary judgment has the initial burden of showing there is no dispute as to any issue of material fact, once that burden is met, the burden shifts to the non-moving party.

There was no serious argument below that Ms. Morris acted in a reasonably prudent manner, and, thus, was not negligent. If there is a duty, it is the duty to exercise ordinary care, or, alternatively phrased, the duty to exercise such

care as a reasonable person would exercise under the same or similar circumstances. Breach is the failure to exercise ordinary care, or, alternatively phrased, the failure to exercise such care as a reasonable person would exercise under the same or similar circumstances. Mathis v. Ammons, 84 Wn. App. 411, 928 P.2d 431 (1996).

Plaintiff was before the Superior Court Judge when the warrant was quashed on September 10, 2003. CP 113. She had every reason to believe that she was free from risk of arrest. Also present was Kitsap County Deputy Prosecutor Kathryn Portteus, WSBA # 27292, who signed the document, and the Kitsap County Clerk's office employee, who was directed by the order to take action and notify law enforcement. The clerk's action was taken, per notation on the order, and at 2:38 p.m., Pam M. was notified of the quashing of the warrant.

Ms. Morris knew that failure to act could result in arrest of the person named in the warrant. For the past fifteen years she has been assigned to the warrants and fugitives division of the Kitsap County Corrections Center. She knew

that she alone had been notified of the quashing of the warrant, and that she alone was in a position to act upon it, and that the clerk would take no further action, having passed the responsibility of removing the warrant from the system to her. Removing warrants from the system was her job. When she could not find the warrant in the system, she did not inquire further, either from the clerk, from the prosecutor, or from other municipal agencies she knew carried warrants of this vintage. Ms. Morris did not go to the clerk's office in the same building to pull the file in investigating details of the warrant, and why she could not find it. She was very busy. CP 137.

In a light most favorable to Mrs. Vergeson, reasonable persons could at least differ as to whether Ms. Morris, and therefore Kitsap County, was remiss in her duty. If reasonable minds might differ on the issue, summary judgment should not be granted.

Not only are there facts from which negligence could be found, indeed, this is a situation in which the doctrine of Res Ipsa Loquitur "the thing

speaks for itself" applies to establish a presumption of negligence of the County. Whether the doctrine of Res Ipsa Loquitur is applicable to a particular case is a question of law. Pacheco v. Ames, 149 Wn.2d 431, 69 P.3d 324 (2003), Zukowsky v. Brown, 79 Wn.2d 586, 592, 488 P.2d 269 (1971); Morner v. Union Pac. R.R. Co., 31 Wn.2d 282, 196 P.2d 744 (1948). To establish a Res Ipsa Loquitur presumption of negligence, the following three things must be established:

"(1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff. Pacheco, supra, at page 436, quoting from Zukowsky, supra.

Those three elements are present here. The evidence is that the plaintiff was arrested on a quashed warrant, which ordinarily would not happen in the absence of negligence. The County never passed the information to the City that the warrant had been quashed, so the quashing of the warrant

remained in the County's exclusive control. Finally, plaintiff did nothing to contribute to her injury and arrest. In this situation, the County can be presumed negligent, even in the absent of specific proof of negligence, which is present in this case.

F. Legal Duty under Negligence Claim

The defense in the negligence action relied primarily on the public duty doctrine, alleging that no duty was owed to Mrs. Vergeson to remove her warrant from the system. CP 39, line 18. They say that the duty to quash Mrs. Vergeson's warrant was a duty owed to all citizens, so Mrs. Vergeson has no remedy to complain of their failure.

Their argument is somewhat shocking on its face, but a deeper examination of the issue is required. The elements of negligence include the existence of a duty to the plaintiff, breach of that duty, and injury to the plaintiff proximately caused by the breach. Whether or not the duty element exists in the negligence context is a question of law that is reviewed de novo. Aba Sheikh v. Choe, 156 Wn.2d 441, 128 P.3d 574(2006).

1. *Public Duty Doctrine - Generally*

There is no longer a defense of sovereign immunity, which was waived in R.C.W. 4.96.010. This statute does not create new causes of action, but it removes the liability barrier of the principle of sovereign immunity. Garnett v. Bellevue, 59 Wn. App. 281, 796 P.2d 782 (1990).

Under the public duty doctrine, the State is not liable for its negligent conduct even where a duty does exist unless the duty was owed to the injured person and not merely the public in general. Aba Sheikh v. Choe, 156 Wn.2d 441, 128 P.3d 574 (2006).

2. *Public Duty Doctrine - Does that analysis even apply?*

Before the public duty doctrine is even examined it makes sense to first determine whether that framework should even be applied. Is this an analysis through which every claim against government must pass? Would it apply to an automobile accident? Must it be applied if a person fell on wet floors at the county courthouse? If an officer shot a subject by accident, the officer thinking the officer held a taser instead

of a firearm, must a duty be established by first looking at the exceptions to the public duty doctrine? If an officer negligently knocks over an elderly woman on the sidewalk, breaking her hip, does the public duty framework apply at all?

R.C.W. 4.96.010 appears to answer that question:

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation.... [emphasis added].

Because government's duties are so much broader than those of ordinary citizens, a number of cases have dealt with allegations of vicarious liability, where suit is brought for some failure of government to act to protect and prevent a harm done by some other person or some other calamity, or even forces of nature. The public duty doctrine has been judicially created to examine the claims of vicarious liability for such harm, and establishes the boundaries of negligence at the periphery of government responsibility.

In examining the public duty doctrine, the first inquiry is to look at the nature of the duty owed. We submit that the duty to quash Mrs. Vergeson's warrant was not a duty owed to the general public at all, but was owed directly to Ms. Vergeson. The Defendants argue that government owes the public a duty to quash warrants generally and remove them from law enforcement databases, but that argument is a bit disingenuous. They could as easily argue that law enforcement officers owe the public a duty not to crash into members of the public with their vehicles, or that police owe the public a duty generally not to negligently shoot them. While those propositions are true, they also owe each person on the road a direct duty not to injure them, and owe a direct duty to persons not to negligently shoot them, and actions for negligence may be brought when they fail in that duty.

The warrant at issue here was of personal interest to no one but Mrs. Vergeson. No person was affected by the warrant, except for Mrs. Vergeson. The warrant was like a heat seeking

missile, aimed a Mrs. Vergeson, and targeting her alone. As Kitsap County's employee, Ms. Morris, stated, if she did not take action right away, "that person could get arrested." CP 132.

Mrs. Vergeson's claim is in no way one of vicarious liability, a happenstance of a general failure of government. Her claim is direct, and her loss is directly foreseeable from Ms. Morrison's failure to act as a reasonable person would have done. This was a duty owed to Mrs. Vergeson, not to the public in general. Accordingly, we submit that application of the Public Duty Doctrine, and its exceptions, is not appropriate here.

As we have said, the Public Duty Doctrine defines the periphery of tort law, where vicarious liability is alleged for failure to prevent harm from some other person or calamity. Examination of public duty doctrine cases illustrates this point. Aba Sheikh v. Choe, 156 Wn.2d 441, 128 P.3d 574 (2006) (DSHS owes no duty to protect the public from the criminal acts of dependent children). Taylor v. Stevens County, 111 Wn.2d 159; 759 P.2d

447 (1988) (government owes duty to no individual injured by failure to enforce building code and zoning laws). Osborn v. Mason County, 157 Wn.2d 18, 134 P.3d 197 (2006) (Sheriff duty to warn the public of sex offender creates no cause of action for rape and murder by sex offender.) Cummins v. Lewis County, 156 Wn.2d 844, 133 P.3d 458 (2006) (911 call does not create duty to rescue from heart attack) Honcoop v. State, 111 Wn.2d 182, 759 P.2d 1188 (1988) (Disease eradication program does not create a duty to prevent loss of cattle to disease.) Bailey v. Forks, 108 Wn.2d 262, 737 P.2d 1257 (1987) (relating to failure to stop a known drunk driver from injuring plaintiff). 1515-1519 Lakeview Blvd. Condo. Ass'n v. Apt. Sales Corp., 146 Wn.2d 194, 43 P.3d 1233 (2002) (Suit for negligent grant of a permit to prior owner barred by Public Duty Doctrine) Babcock v. Mason County Fire Dist., 144 Wn.2d 774, 30 P.3d 1261 (2001) (Firefighters not liable for failing to save burning property).

Not one of these published cases addresses the routine auto accident. Not one of these cases

addresses a slip and fall injury. In such injuries, there is no question that the duty violated was owed directly to the injured party, as here. In such cases, as here, we submit it is inappropriate to overlay Public Duty Doctrine analysis to simple issues of negligence.

The public duty doctrine has been significantly questioned. Please see Justice Chambers concurring opinion in Babcock v. Mason County Fire Dist., 144 Wn.2d 774, at 795, 30 P.3d 1261 (2001), and his concurring opinion, joined by two other Justices, in Cummins v. Lewis County, 156 Wn.2d 844, 133 P.3d 458 (2006). These concurring opinions recognize the genesis of the public duty doctrine, and its growth and development to address new facts. They question further perpetuation of the doctrine, as unnecessary to just resolution of the claims, and as contrary to R.C.W. 4.96.010. It is helpful to also recognize that the exceptions as so far developed and discussed below would not permit suit for even auto collisions, and slip and fall liability, further illustrating why they are inappropriate for the current analysis.

3. *Even under the Public Duty Doctrine analysis, Appellant's claim is not barred, as all four articulated exceptions are present.*

Both Defendants rely on the public duty doctrine to try to have this action dismissed. They allege that they owed no duty to the plaintiff, and that their obligation to quash the warrant is owed only to the general public, so that if they negligently fail to quash a warrant for her arrest, and she is arrested on the quashed warrant, she has no remedy. Both entities acknowledge that the public duty analytical framework law has four exceptions: 1) Legislative Intent in an enactment identifying and protecting particular persons, Bailey v. Forks, 108 Wn.2d 262, 737 P.2d 1257 (1987); 2) Failure to Enforce Exception, where there is actual knowledge of a violation of statute, and a failure to enforce the statute where there is a statutory duty to do so, to the particular harm of one in the class the statute is designed to protect, Bailey v. Forks, 108 Wn.2d 262, 737 P.2d 1257 (1987); 3) Special Relationship Exception, in which there is direct contact between the plaintiff and the public official and

assurances given by the official, on which the plaintiff justifiably relies, to her detriment, Taylor v. Stevens County, 111 Wn.2d 159, 168, 759 P.2d 447 (1988); and 4) the rescue doctrine exception, under which there is liability for failure to exercise reasonable care after assuming a duty to aid or warn an individual of an identified threat, Brown v. Macpherson'S, Inc., 86 Wn.2d 293, 545 P.2d 13 (1975).

We submit that all four exceptions are present here. Only one is needed.

*i. Legislative Intent Exception.*

While the statutes pertaining to warrants, R.C.W. 10.31.010 et seq<sup>1</sup>, do not address specifically the obligation to quash them, they do enumerate the situations in which warrantless arrests are permitted, none of which apply here. Further, the Federal and State constitutions set

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These statutes have their origin in the 1881 code, and have seen little amendment since that time. Nor have they kept up with technology, as 10.31.060 broke ground by permitting telegraph and teletype verification of warrants. There appears to be no specific authorization of NCIC and WACIC databases.

out the required standards for government conduct and rights retained by citizens.

The Fourth Amendment to the United States Constitution reads as follows:

Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A similar provision under the Washington State Constitution is Article 1 § 7, which reads:

Invasion of private affairs or home prohibited. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Where the freedom from unreasonable searches and seizures is constitutionally guaranteed by both the Federal and State Constitutions, there is a clear expression of legislative or public intent to protect plaintiff from unauthorized warrantless arrests. It is not at all a general duty, the breach of which caused her harm, it was the constitutional duty not to take away her liberty that was breached by failure to remove the warrant

from the law enforcement databases. The warrant was in her name, not in the name of the public in general. Plaintiff falls directly in the protected class, to be protected from this specific harm. Ms. Morris understood the risks of arrest to the named person if she failed to act promptly.

*ii. Failure to Enforce Exception.*

Here, a Superior Court ordered the warrant quashed. "Quash" is defined by *Merriam-Webster's Collegiate Dictionary, Tenth Ed.* as "to nullify, esp. by judicial action," and "to suppress or extinguish summarily and completely." The prosecutor present and the clerk present, both employees of the defendant County, were aware that the warrant needed to be quashed. The directive to do so was passed along to Pam Morris, an employee of the Sheriff's Office, as described below. She has the awareness that if she fails to act on the quash order, plaintiff runs the risk of arrest on the quashed warrant. There is a clear duty to act, and to enforce the court's simple and unambiguous order. The plaintiff is the only one in the class

to be protected, and suffered harm because the warrant was not removed from the databases.

*iii. Special Relationship Exception.*

Plaintiff was in the courtroom when the warrant was quashed. She and the County deputy prosecutor signed the quash order. CP 113. The prosecutor present and the clerk present, both employees of the defendant County, were both addressing the plaintiff's future liberty, and no one else's. Plaintiff should be able to rely on the assurances in the order that law enforcement was notified. That she did so is shown by the fact that she did not bring back to the court repeated requests to quash the warrant, assuming that the obligations made in the courtroom would be fulfilled. She could not have known that they failed to remove her from the databases, as only law enforcement has access to those databases. She justifiably relied on law enforcement to do so, to her detriment. Chambers-Castanes v. King County, 100 Wn.2d 275, 286, 669 P.2d 451 (1983) held as follows:

an actionable duty to provide police services will arise if, (1) there is some

form of privity between the police department and the victim that sets the victim apart from the general public [citations omitted], and (2) there are explicit assurances of protection that give rise to reliance on the part of the victim [citations omitted]. The term privity is used in the broad sense of the word and refers to the relationship between the police department and any "reasonably foreseeable plaintiff."

Mrs. Vergeson was certainly a reasonably foreseeable person to be adversely affected by her arrest.

*iv. Rescue Exception.*

Plaintiff was in the courtroom when the warrant was quashed. The prosecutor present and the clerk present, both employees of the defendant County, undertook to act to alleviate her peril of subsequent arrest. While they acted and fulfilled their role, passing along the quash instructions to Ms. Morris, the County as a whole failed to act to quash the warrant, and it remained in the law enforcement databases, and plaintiff was thus harmed. Simply put, the County failed to exercise reasonable care after assuming the duty to remove the warrant from the databases.

G. City Liability Issues

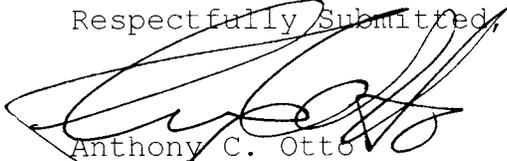
While most of our argument has been focused on the County's responsibility, as discovery revealed the County's failure to even notify Bremerton of the warrant, the County has alleged that the City was responsible, by failing to enter the warrant cause number in any searchable database. CP 39, CP 54-55.

**CONCLUSION**

We ask that the court reverse the summary judgment as to the respondent County, and remand for further proceedings on Appellant's negligence claim. As to the City of Bremerton, if the court finds that the County's argument of Bremerton's fault has merit, and that Bremerton shares fault with the County, we ask that the court reverse the summary judgment as to the City of Bremerton, and remand for further proceedings on Appellant's negligence claim. If the court finds no merit in the County's argument of Bremerton's fault, we ask that the court uphold the Summary Judgment as to Bremerton, with a specific finding on remand of the

claim against the County that the City has no fault  
under R.C.W. 4.22.070.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Anthony C. Otto', is written over the text 'Respectfully Submitted,'.

Anthony C. Otto  
WSBA 11146  
Attorney for Appellant

No. 35313-0-II

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Magdalena Quitarior Vergeson, Appellant

v.

Kitsap County and the City of Bremerton

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**C E R T I F I C A T E O F S E R V I C E**

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein

On the date given below I caused to be served in the manner noted copies of Brief of Appellant upon the following designated counsel:

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DATED this 11<sup>th</sup> day of December, 2006, at Port Orchard, Washington.

  
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Karen Alfano