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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

M. GWYN MYLES, individually and as Personal Representative of the
Estate of WILLIAM LLOYD MYLES, deceased.

Appellant/Cross-Respondent,

STATE OF WASHINGTON, a governmental entity; JOHN DOE
EMPLOYEE(s) and JANE DOE EMPLOYEE(s), employees of the
STATE OF WASHINGTON; CLARK COUNTY; a municipality; JOHN
DOE EMPLOYEE(s) and JANE DOE EMPLOYEE(s), employees of
CLARK COUNTY; CARLOS VILLANUEVA-VILLA and JANE DOE
VILLANUEVA-VILLA, husband and wife, and the marital community
composed thereof; and R.H. BRUSSEAU and JANE DOE BRUSSEAU,
husband and wife, and the marital community composed thereof,

Respondents/Cross-Appellants.

CLARK COUNTY CAUSE NO. 09-2-00347-9

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENT OF ERRORS

A. ASSIGNMENT OF ERRORS

1. The trial court erred in granting Defendant, Clark County's Motion for Summary Judgment.
2. The trial court abused its discretion when it reversed its decision on reconsideration and granted Defendant, Clark County's Motion for Summary Judgment.
3. The trial court erred in granting Defendant, Washington State Patrol and Trooper Brusseau's Motion for Summary Judgment.
4. The trial court abused its discretion when it reversed its decision on reconsideration and granted Defendant, Washington State Patrol and Trooper Brusseau's Motion for Summary Judgment.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Did the trial court err as a matter of law by granting Defendant, Clark County's Motion for Summary Judgment when genuine issues of material fact exist requiring a trial?
2. Did the trial court abuse its discretion when it reversed its initial decision of October 7, 2016 and granted Clark County's Motion for Summary Judgment on reconsideration pursuant to CR 59(a)(7) and in violation of Clark County Superior Court LR 59?
3. Did the trial court err as a matter of law by granting Defendant, Washington State Patrol and Trooper Brusseau's Motion for Summary Judgment when genuine issues of material fact exist requiring a trial?

4. Did the trial court abuse its discretion when it reversed its initial decision of October 7, 2016 and granted Washington State Patrol and Trooper Brusseau's Motion for Summary Judgment on reconsideration CR 59(a)(7) and in violation of Clark County Superior Court LR 59?

II. STATEMENT OF CASE

A. PROCEDURAL HISTORY

1. On January 20, 2009, Plaintiff Myles filed a complaint in Clark County Superior Court naming three (3) defendants, Clark County, Washington State Patrol/Trooper Brusseau and Washington Department of Corrections. (CP 1)
2. On April 24, 2009, Washington State Patrol and Trooper Brusseau filed their Answer. (CP 1382)
3. On May 8, 2009, Clark County filed their Answer. (CP 1394)
4. On January 22, 2016, both Clark County and WSP/Brusseau filed separate Motions for Summary Judgment. (CP 110) and (CP 138)
5. On August 10, 2016, Myles filed her Responses to both Clark County and WSP/Brusseau's Motions for Summary Judgment. (CP 492) and (CP 177)
6. On August 23, 2016, WSP/Brusseau filed a Reply Memorandum. (CP 969)

7. On August 24, 2016, Clark County filed a Reply in Support of Motion for Summary Judgment. (CP 1021)
8. On August 25, 2016, Plaintiff Myles filed a Declaration of Ronald W. Greenen Re: Exhibits to Plaintiff's Responses to both Clark County and WSP/Brusseau's Motions for Summary Judgment. (CP 1201) and (CP 1184)
9. On September 27, 2016 in open court, Judge Gregory Gonzales denied both Clark County and WSP/Brusseau's Motions for Summary Judgment. (RP 40)
10. On October 7, 2016, Orders denying both Clark County and WSP/Brusseau's Motions for Summary Judgment were entered. (CP 1232)
11. On October 17, 2016, both Clark County and WSP/Brusseau filed separate Motions for Reconsideration. (CP 1241) and (CP 1264)
12. On October 27, 2016, Plaintiff Myles filed Responses to both Defendants, Clark County and State of Washington/Brusseau's Motions for Reconsideration. (CP 1295) and (CP 1284)
13. On November 29, 2016, WSP/Brusseau filed a Reply Memorandum in Support of Motion for Reconsideration. (CP 1345)
14. On November 29, 2016, Plaintiff Myles filed a Supplemental Response to both Clark County and WSP/Brusseau's Motions for Reconsideration. (CP 1327) and (CP 1309)

15. On December, 30, 2016, Judge Gonzales reversed his October 7, 2016 decision and granted both Clark County and WSP/Brusseau's Motions for Summary Judgment on Reconsideration. (RP 110)

16. On December 30, 2016, the Order on Defendant, Clark County's Motion for Reconsideration was entered. (CP 1357) The Order on Reconsideration and Dismissal of Washington State Patrol and Trooper Brusseau was also entered on December 30, 2016. (CP 1354)

B. STATEMENT OF FACTS.

Appellant's husband, William Lloyd Myles was killed by a drunk driver, Carlos Villanueva-Villa on January 27, 2006. Mr. Villanueva-Villa was charged with one count Vehicular Homicide, one count Hit and Run (Death), and one count Driving While License Suspended or Revoked in Clark County Superior Court (CP 492 at 647).

Following her husband's death, Appellant learned that that Carlos Villanueva-Villa had received two (2) additional drunk driving charges in the two (2) month period preceding her husband's death. These charges included a DUI arrest on November 26, 2005 (CP 492 at 608) and a second DUI arrest on December 23, 2015 (CP 492 at 621), both of which were on warrant status when he killed Mr. Myles as a result of his failure to appear at his arraignment hearings

held on December 5, 2005 (CP at 492 at 620, 658) and December 29, 2005. (CP 492 at 635, 659)

At the time of Mr. Villanueva-Villa's second DUI arrest on December 23, 2005, the arresting officer, Trooper Robert Brusseau of the Washington State Patrol (WSP) discovered that a warrant was pending from his first DUI arrest. Pursuant to protocol, Trooper Brusseau called Washington State Patrol dispatch to confirm whether the warrant was still a valid warrant. Trooper Brusseau was informed by dispatch that Clark County Jail would not "confirm the warrant". (CP 492 at 27-35, 131-133, and 633) Trooper Brusseau completed his arrest for the second DUI but did not arrest Mr. Villanueva-Villa on the first DUI warrant because the jail refused to confirm the validity of the warrant.

On January 27, 2006, 35 days after his second DUI charge, Mr. Villaneuva-Villa drove drunk once again, his third time in three months, and killed William Lloyd Myles. (CP 492 at 647)

Following his conviction for the death of Mr. Myles, Mr. Villanueva-Villa was subsequently arraigned in Clark County District Court on the two prior DUI charges on February 21, 2006. (CP 492 at 778 and 781) At that time, Clark County District Court Judge imposed the following conditions:

No Alcohol or Drugs
Antabuse monitoring
Breath/Urine Testing

Bail of \$10,000 and Supervised Release/Antabuse if Medically Able &
Random UA's and BA's
(CP 492 at 778 and 781)

Subsequent to her husband's death, Appellant learned that the Clark County Jail regularly refuses to confirm misdemeanor warrants when the jail reaches a certain capacity and is not accepting misdemeanor offenders into the jail. It is common knowledge that when the county advises dispatch that a warrant cannot be confirmed that this usually means the jail is full. Jail employees are aware of this practice, Washington State Patrol dispatch officers are aware of this practice, and law enforcement officers are aware of this practice.
(CP 492 at 27-35, 131-133)

IV. ARGUMENT

A. STANDARD OF REVIEW

1. **Summary Judgment.** Appellate courts review decisions on motions for summary judgment de novo. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); Central Washington Bank vs. Mendelson-Zeller, 113 Wn.2d 346, 351, 779 P.2d 697

(1989); Hontz vs. State, 105 Wn.2d 302, 714 P.2d 1176 (1986). The moving party bears this burden of proof. LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). A material fact is one upon which the outcome of the litigation depends. Barrie v. Hosts of Am, Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980). In determining whether there are factual issues, the court must construe all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990) and Lamon v. McDonnell Douglas Corp., 91 Wash.2d 345, 349, 588 P.2d 1346 (1979). A summary judgment motion must be denied unless it appears beyond doubt that plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. Corrigal v. Ball & Dodd Funeral Home, Inc., 89 Wn.2d 959, 577 P.2d 580 (1978).

2. Motion for Reconsideration

A decision on summary judgment is customarily reviewed de novo but the case at bar involves the granting of summary judgment following a motion for reconsideration, which involves mixed questions of both law and fact.

Washington courts have stated that the grant or denial of a motion for reconsideration is within the sound discretion of the trial court and will be

overturned only upon an abuse of discretion. Bringle v. Lloyd, 13 Wash.App. 844, 848, 537 P.2d 1060 (1975). A trial court abuses its discretion when it exercises that discretion on untenable grounds or for untenable reasons. In re Marriage of Scanlon v. Witrak, 110 Wash.App. 682, 686, 42 P.3d 447, *review denied*, 147 Wash.2d 1024, 60 P.3d 92 (2002).

B. CLARK COUNTY'S MOTION FOR SUMMARY JUDGMENT

1. The Trial Court Erred By Granting Clark County's Motion for Summary Judgment on Reconsideration When Issues of Material Fact Existed for Trial

Clark County filed its Motion for Summary Judgment on January 22, 2016. (CP 110). The trial court initially denied the motion finding that material issues of fact existed for a jury to consider. (RP 64, L6-11, RP 65, L13-22, RP 72, L6 to RP 73, L2 and RP 73, L4-22) The order denying Clark County's motion was filed on October 7, 2016. (CP 1232) and stated only what evidence the court relied on in reaching its decision initial decision denying Summary Judgment. There were no findings of fact or conclusions of law entered. The court's findings were limited to the oral record of September 27, 2016. (RP 40). The Order Denying Summary Judgment was entered on October 7, 2016. (CP 1232) Clark County then filed a Motion for Reconsideration on October 17, 2016 and a hearing was scheduled for December 2, 2016. (CP 1241) The court allowed oral argument on the Motion For Reconsideration on December 2, 2016 (RP 75) and

rendered its ruling on December 30, 2006 at which time it reversed its initial ruling and granted Clark County's Motion for Summary Judgment. (RP 110)

In its Motion for Summary Judgment, Clark County made the following arguments:

- a. That Plaintiff's Claim Against the County for Regulatory Liability Under RCW 70.48.071 is Precluded By the Public Duty Doctrine.
- b. That the County Had No Duty to Prevent Villanueva-Villa From Committing Criminal Acts.
- c. That Plaintiff's Claim Against the County is Precluded by Discretionary Immunity.
- d. That Plaintiff's Claim Fails for Lack of Evidence to Show Proximate Cause Between Villanueva-Villa the Collision with Myles a Month Later.

(CP 110-114)

Clark County argued that the Public Duty Doctrine shielded it from liability in this matter because law enforcement is a government regulatory function. Any negligent performance of such regulatory function does not create a liability to individual members of the public citing Georges v. Tudor, 16 Wn. App 407, 556 P.2d 564 (1976) and Johnson v. State, 164 Wn. App. 740, 265 P.3d 199 (2011). (CP 115). However, as argued by Appellant in her Response to Clark County's Motion for Summary Judgment filed on August 10, 2016, liability to an individual person or a class of persons by law enforcement may be found if

an exception to the public duty doctrine applies. (CP 492) There are four (4) exceptions to the public duty doctrine which permit liability if certain conditions are met, specifically (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine; and (4) special relationship citing Gorman v. Pierce County, 176 Wn. App. 63, 75, 307 P.3d 795 (2013). In response to Clark County's Motion for Summary Judgment, Appellant argued that the failure to enforce exception and the special relationship exception applied in this matter. (CP 505-523)

1.1 **Failure to Enforce Exception**

Under the failure to enforce exception, a government's obligation to the general public becomes a legal duty owed to an individual if: (1) the government entity has a duty to enforce a statute, (2) the government entity has actual knowledge of a statutory violation, (3) the government entity fails to take corrective action, and (4) the plaintiff is within the class the statute protects. Bailey v. Forks, 108 Wash.2d 262, 268, 737 P.2d 1257 (1987). Courts must construe the failure to enforce exception narrowly. Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wash.2d 506, 531, 799 P.2d 250 (1990). The statute must create a mandatory duty to take specific action to correct a violation. Forest v. State, 62 Wash.App. 363, 369, 814 P.2d 1181 (1991). Such a duty does not exist if the statute vests the public official with broad discretion. Forest at 370.

Appellant offered the following argument to show that the four (4) elements of the failure to enforce exception had been met in this case:

1.1.1 **Duty to Enforce Statute**

Clark County had a mandatory duty to arrest Villanueva-Villa on the DUI warrant and book him into the Clark County Jail. State of Washington v. Twitchell, 61 Wn.2d 403, 378 P.2d 444 (1963). In Twitchell, the court cites RCW 36.28.010 which describes the duties of a sheriff as a statute creating such mandatory duty. RCW 36.28.010, General Duties, in pertinent part states:

The sheriff is the chief executive officer and conservator of the peace of the county. In the execution of his or her office, he or she and his or her deputies:...

...(3) Shall execute the process and orders of the courts of justice or judicial officers, when delivered for that purpose, according to law;

(4) Shall execute all warrants delivered for that purpose by other public officers, according to the provisions of particular statutes;...

Twitchell at 447.

The word “shall” appears under RCW 36.28.010 (3) and (4) rendering it a mandatory duty to execute court orders and this includes warrants. Clark County argued that its discretionary authority to establish jail standards is a complete defense to its policy of disregarding valid arrest warrants. Clark County may have the discretion to refuse to accept jail offenders with misdemeanor warrants into the jail based on various booking levels but it does not allow them choose whether

or not to arrest a misdemeanor offender with a valid warrant as a means of controlling jail population.

1.1.2 **Actual Knowledge of Violation of Statute**

As stated in Appellant's response, Villanueva-Villa's warrant was entered into Clark County's records system on December 7, 2005 indicating the warrant was valid and in place at that time. (CP 492 at 620, 635 and 1124) Despite Clark County's inability to confirm the warrant on the night of December 23, 2005, the same warrant was served on Villanueva-Villa on February 18, 2006 while he was incarcerated in the Clark County Jail for killing Mr. Myles further indicating its existence and validity. (CP 492 at 638) Clark County never argued a lack of knowledge regarding the warrant at issue in this case.

1.1.3 **Failure to Take Corrective Action**

Clark County failed to take corrective action on December 23, 2005 when it refused to confirm the existence of the warrant. While Villanueva-Villa was in the physical custody and control of the Washington State Patrol on a second DUI charge, Clark County arbitrarily refused to confirm the warrant due to the jail booking levels in place on that date. By refusing to confirm the warrant, Clark County ignored its statutory duty to arrest Villanueva-Villa and execute the process and orders of the courts according to law. Law enforcement had an immediate opportunity to serve the warrant on Villanueva-Villa but failed to do so

because of a policy Clark County has created in order to avoid the booking process and control jail space.

Material issues of fact exist as to who was responsible for serving the warrant. Clark County contends it is up to the arresting officer to serve the warrant. (CP 492 at 784-786, Anderson depo p. 16-18, and 790, Shea depo p. 20-21) According to Clark County, Trooper Brusseau was responsible for requesting the jail hold Villanueva-Villa in custody that night and that it was his responsibility as the arresting officer to bring Villanueva-Villa to the jail for booking and processing. Clark County's witnesses, Mike Anderson and Richard Bishop testified that the jail will make an exception to the booking restrictions if mitigating circumstances exist, but that it is up to the arresting officer to request that such an exception be made. (CP 492 at 784-786, Anderson depo p. 16-18 and 787-789, Bishop depo p. 20-21, and CP 39 at 42 and 50) Trooper Brusseau testified that he did not know such a request was an option. (CP 492 at 761-762, Brusseau depo p. 17)

In its oral ruling on September 27, 2016, the trial court found that there was a considerable amount of finger pointing between Clark County and its Co-Defendants, WSP/Brusseau when it came to determining who was responsible for serving the warrant on Villanueva-Villa. (RP 67, L5 to RP 68, L24, RP 69, L21-22)

The trial court further acknowledged that ignoring court orders when the jail is at capacity was a factual and material question and issue. (RP 64, L9-11)

1.1.4 Myles is Within the Class the Statute Protects

In its oral ruling on reconsideration, the trial court reversed its initial decision and found that no duty existed between Clark County and Myles because Myles was not in the class of persons the statute was meant to protect. (RP 118, L 6-18). The protected class prong of the failure to enforce exception was the only issue the trial court based its reversal on when it granted Clark County's Motion for Summary Judgment on reconsideration (RP 118, L 6-18) Once the trial court ruled on the issue of duty, no other issues were addressed. (RP 118, L 11-15)

The warrant in question was issued on December 5, 2005 as a result of Villanueva-Villa's failure to appear at his arraignment on the DUI charge he received on November 26, 2005. (CP at 492 at 620, 658) Washington Courts have ruled that DUI statutes are in place to protect specific members of the public, particularly users of public streets and highways, "from accidents caused by intoxicated drivers." Bailey v. Forks, 108 Wn.2d 262 at 1261. In Bailey, the court expressly stated that Ms. Bailey, as a passenger on a motorcycle, came within the class that RCW 70.96A.120(2) and RCW 46.61.515 were expressly intended to protect. The Court and the Legislature recognized the importance of

public policy interests inherent in the effective removal of drunken drivers from the roads and the concomitant problem of deciding who should bear the costs for injuries and deaths caused to innocent motorists. Citing Heinemann v. Whitman Cy., 105 Wash.2d 796, 718 P.2d 789 (1986); Dickinson v. Edwards, 105 Wash.2d 457, 716 P.2d 814 (1986); Hartley v. State, 103 Wash.2d 768, 698 P.2d 77 (1985); Laws of 1986, chs. 87, 153; Laws of 1985, chs. 101, 302, 352 and 407. In Bailey, The Court found that Ms. Bailey was undoubtedly a member of the class to be protected under Washington's DUI laws and further stated that when a governmental agent knows of the violation, a duty of care runs to all persons within the protected class, not merely those who have had direct contact with the governmental entity. Citing Campbell v. Bellevue, 85 Wash.2d 1, 530 P.2d 234 (1975). When statutes intend to insure the safety of the public highways, a governmental officer's knowledge of an actual violation creates a duty of care to all persons and property who come within the ambit of the risk created by the officer's negligent conduct. Citing Mason v. Bitton, 85 Wash.2d 321, 325-26, 534 P.2d 1360 (1975). While the fact pattern in this case may not be identical to Bailey, the Court did find that an injured driver on public roads is a member of the class to be protected by DUI laws. The facts of a case do not change the identity of the individuals or class of persons which the DUI laws are meant to protect. Mr. Myles was a member of the same class to be protected as Ms. Bailey.

1.2 Special Relationship Exception

Clark County argued that it had no duty to prevent Villanueva-Villa from harming Mr. Myles. (CP 110 at 120-121). As a general rule, there is no duty to prevent a third party from intentionally harming another unless a “special relationship” exists between the defendant and either the third party or the foreseeable victim of the third party’s conduct. Donohoe v. State, 135 Wn. App 824, 142 P.3d 654, citing Restatement of Torts § 315. However, Washington Courts have imposed liability on government agencies for the negligent acts of a third person when a special relationship existed and a duty to protect those who might be endangered as a result of that third person’s behavior existed. Petersen v. State, 100 Wn.2d 421, 671 P.2d 230 (1983). In Petersen, the court recognized the State's duty "to take reasonable precautions to protect anyone who might foreseeably be endangered . . ." Petersen, at 428. Mr. Myles was a foreseeable victim who deserved protection from harm based on Villanueva-Villa’s history of disregard for the law and continued use of alcohol while driving on public roads and highways. Courts have also held under Restatement § 302B, that a duty to third parties may arise in the limited circumstances where an actor’s own affirmative act creates a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. Robb v. City of Seattle, 176 Wn.2d 427, 434, 295 P.3d 212 (2013).

The warrant at issue in this case explicitly ordered law enforcement to take Villanueva-Villa into custody. (CP at 492 at 620, 658) This order created a “take charge” relationship between Mr. Villanueva-Villa and all law enforcement officers, including the Clark County Sheriff’s Office, and imposed a duty upon them to arrest Villanueva-Villa on December 23, 2005 when he was in the direct custody and control of law enforcement, specifically Trooper Brusseau of the Washington State Patrol when he stopped him on the second DUI offense. Clark County asserted that they had no control over Villanueva-Villa because he was never booked into jail. (CP 110 at 121). Trooper Brusseau had the Defendant in his custody when he contacted Clark County to confirm the status of the warrant. Trooper Brusseau had the ability to immediately arrest him on the warrant. It was due to the actions of Clark County in refusing to confirm the warrant that he was released and never booked into the jail. The jail had or would have had a “take charge” relationship had it not ignored its duty to confirm the warrant and allow the arrest of Villanueva-Villa. Once law enforcement had Villanueva-Villa in custody, there was a duty to take reasonable precautions to protect against reasonably foreseeable dangers or the dangerous propensities Villanueva-Villa posed given his two DUI charges within a one month period. Joyce v. State, Dept. of Corr., 155 Wn.2d 306, 310, 119 P.3d 825 (2005), (quoting Taggart v. State, 118 Wn.2d 195, 217, 822 P.2d 243 (1992)). Clark County knew or should

have known that this defendant would likely drink and drive again and likely cause bodily harm to others if not controlled. The trial court agreed in both of its rulings that such harm was foreseeable and could have been prevented had Villanueva-Villa been arrested and had stricter conditions been imposed. (RP 73, L9 to RP 74, L6 and RP 100, L12 to RP 102, L23)

Even absent a special relationship between Clark County and Villanueva-Villa, the courts have found that a duty to take action or protect a Plaintiff exists in cases involving misfeasance or affirmative acts, where the actor's prior conduct, whether tortious or innocent, may have created a situation of peril to the other. The foreseeability and magnitude of the risk created by the actor justifies imposing a duty under Restatement § 302B comment e. Parilla v. King County, 138 Wn. App. 427, 157 P.3d 879 (2007). The actions of Clark County not confirming Villanueva-Villa's warrant status for the purpose of saving jail space was an affirmative act which resulted in the creation of a high degree of risk of harm and exposure of danger to others, and specifically in this case, to Mr. Myles.

1.3 **Discretionary Immunity Under Public Duty Doctrine.**

Clark County argued that discretionary immunity shields them from liability since it was performing a governmental function in adopting and implementing jail policies to deal with jail overcrowding. Prioritizing which offenders are held in jail when the jail population reaches a certain limit is not

what occurred in this case. Clark County simply ignored court ordered warrants and based on the evidence presented at summary judgment, the trial court found that the practice of ignoring court orders when the jail is at capacity was a factual and material question and issue. (RP 64, L 6-11)

The jail overcrowding policy in effect in 2005 did not grant Clark County the authority to refuse to confirm warrants and avoid the booking process. Clark County offered testimony from Richard Bishop, the current Chief Deputy overseeing the Corrections Branch of the Clark County's Sheriff's Office. In his declaration filed January 26, 2016, Chief Bishop stated that on December 23, 2005, the jail had a bed capacity of 744 inmates and there were 772 inmates in the jail on that night. (CP 39-40). Chief Bishop testified that the jail had a written overcrowding policy in place since 1995 which has been amended several times over the years to correspond to changes in jail capacity. (CP 39 at 41-42). He testified that a copy of the policy in effect in December 2005 could not be located but the policy in 2007 was similar to the 2005 policy with the only difference being related to the levels of overcrowding. (CP 39 at 41). The policy referenced by Mr. Bishop was dated May 1, 2007. (CP 39 at 46 - 51). Mr. Bishop testified the jail capacity was at 772 on December 23, 2005. At that time the jail had a bed capacity to hold 745 inmates. (CP 39 at 40) Based on the 772:745 ratio, the jail

was over capacity on that night. Under the 2007 policy, this would presumably put the booking level at Level “D” or Level “E”, which states as follows:

Booking Level “D”

When the Clark County Jail has between 795 and 804 inmates, by the official daily count, the jail will use the following standards:

- Misdemeanant arrests will be **booked and released** by the jail or placed on a sobriety hold up to 12 hours for offenses involving intoxication... (CP 39 at 48) [Emphasis added]

Booking Level “E”

When the Clark County Jail has more than 805 inmates, by the official daily count, the jail will use the following standards:

- Misdemeanant arrests will be **booked and released** by the jail or placed on a sobriety hold up to 12 hours for offenses involving intoxication. The jail will process all misdemeanor offenders whose offenses are identified under policy 05.08.040 Booking & Early Release Exclusions list. ... (CP 39 at 48) [Emphasis added]

Policy 05.08.04 allows exceptions or additions to the exclusions involving a particular case or early release or booking restriction to be approved by at least the on-duty jail supervisor. (CP 39 at 49).

Neither of these booking levels grants Clark County the authority to refuse to confirm warrants. The policy specifically states misdemeanants will be “booked and released”. In addition, this 2007 policy conflicts with discovery received by Appellant from Clark County stating the booking level on December 23, 2005 was at Level “B” further creating issues of material fact. (CP 492 at 683, CP 1021 at 1100, 1104-1105 and 1109).

Gary Lucas, the elected Sheriff of Clark County during 2005-2006 and author of the booking restrictions testified in his deposition that based on the restrictions in place on the night at issue, had Villanueva-Villa been brought in with the new DUI he would most likely have been booked and released with the pending warrant on the first DUI. (CP 1021 at 1077, Lucas depo p. 22-27 and CP 1021 at 1025-1026)

The policies Chief Bishop and Sheriff Lucas described in their testimony were not followed on December 23, 2005. It was common knowledge among law enforcement and jail employees that Clark County would not confirm warrants when the jail was at or near capacity. Trooper Brusseau himself testified that it was common policy for Clark County to refuse to confirm warrants when the jail was at a certain capacity level. (CP 131 at 133) The WSP dispatcher who called to confirm Villanueva-Villa's warrant on the night of December 23, 2005 offered the same testimony. (CP 27-36)

Connie Peasley worked in the Clark County Sheriff's Office record department in November 2005 and testified that on days when certain booking restrictions were in place, they were told which misdemeanor warrants to confirm and which misdemeanor warrants not to confirm. (CP 492 at 785) Terian McCracken worked in warrants and jail records in 2005 and testified that there were certain restrictions on confirming warrants depending on the jail level. If the

jail was at a Level E, they would stop confirming certain warrants. (CP 1021 at 1057, McCracken depo pg. 15-16) The conflicting testimony as to jail policy and what exactly occurred on the night of December 23, 2005, as well as the jail capacity level on that night are all issues of material fact.

1.4 Proximate Cause.

To prove negligence against Clark County, Appellant must show that Clark County (1) had a duty to the plaintiff, (2) that the duty was breached, (3) that the breach proximately caused Mr. Myles's injuries; and (4) that an injury actually occurred. Smith v. City of Kelso, 112 Wn. App. 277, 48 P.3rd 372 (2002) citing Hertog v. City of Seattle, 138 Wash.2d 265, 275, 979 P.2d 400 (1999). Whether a duty exists is a question of law. Hertog at 275. The existence of a duty to an individual is the threshold legal issue in a negligence case. LaPlante v. State, 85 Wn.2d 154, 531 P.2d 299 (1975).

In its initial ruling on September 27, 2016, the trial court found that the first three elements for a prima facie negligence case had been met, which left the final element of proximate cause to presumably be decided by a jury or trier in fact. (RP 70, L14-19). The trial court then reversed its decision on reconsideration and found that no duty existed to Mr. Myles based on the class to be protected element. (RP 118, L6-L10) However, no further issues were

reconsidered by the trial court following its ruling on lack of duty. (RP 118, L6-18)

Appellant presented evidence showing the likelihood that Villanueva-Villa could have been incarcerated or had conditions imposed to prevent him from drinking on January 27, 2006. In its oral ruling of September 27, 2016, the trial court found that it was not too speculative for a jury to find that Villanueva-Villa could have been in jail on January 27, 2006 when he killed Mr. Myles. (RP 73) Villanueva-Villa was charged with DUI on November 26, 2005 and ordered to appear at his first arraignment hearing on December 5, 2005. (CP 492 at 619) A warrant for his arrest was issued on December 5, 2005 for failure to appear at the arraignment. (CP 492 at 608-619 and at 620) Villanueva-Villa was arrested again 27 days later for DUI on December 23, 2005. (CP 492 at 621) It is foreseeable that he would not show up for the second DUI arraignment hearing and that he would drink and drive again. Based on his criminal history, his total disregard for the law, and the conditions imposed by the District Court Judge on February 21, 2006 (CP 492 at 778 and 781), it is more likely than not that he would have been in jail and/or ordered to refrain from alcohol use and driving.

Villanueva-Villa had a prior criminal history including failures to appear, a bail jump and a failure to comply with conditions of his community supervision. (CP 492 at 538-607). Based on his criminal history and given his warrant status

on the first DUI, it is foreseeable that Villanueva-Villa was not going to appear at his second DUI arraignment hearing and that he was likely to drink and drive again.

Breach and proximate cause are generally fact questions for the trier of fact. However, if reasonable minds could not differ, these factual questions may be determined as a matter of law. Sherman v. State, 128 Wash.2d at 183, 905 P.2d 355 (1995). There are two elements to proximate cause, cause in fact and legal causation. Cause in fact is generally left to the jury. Questions of fact are not appropriately determined on summary judgment unless one reasonable conclusion is possible. Hartley v. State of Washington, 103 Wn.2d 768, 698 P.2d 77 (1985). Legal causation rests on policy considerations as to how far the consequences of Clark County's acts should extend. Legal liability depends on considerations of logic, common sense, policy and precedent. Hartley citing King v. Seattle, 84 Wash.2d at 250, 525 P.2d 228 (quoting 1 T. Street, Foundations of Legal Liability 100, 110 (1906)).

Based on the evidence provided, it is not too incredible to establish a legal obligation owed to Mr. Myles and a causal relationship between Clark County's actions and the death of Mr. Myles and the court initially agreed. (RP 73)

As to legal causation, the trial court found that logic, common sense, justice and policy all dictated material fact in question as to whether Villanueva-Villa would have been in custody on December 23, 2005. (RP 72, L 6 to RP 73,

L2). The trial court further found that Plaintiff (Myles) met the prima facie evidence to allow this matter to go forward with respect to the existence of material fact which determines the outcome of the case. RP 73, L 4-22)

The function of a summary judgment proceeding is to determine whether or not a genuine issue of fact exists, not to determine issues of fact. State ex rel. Zempel v. Twitchell, 59 Wn.2d 419,367 P.2d 985 (1962). As stated throughout his oral ruling of September 27, 2016, Judge Gonzales stated that material issues of fact existed in this case. (RP 64, L6-11, RP 65, L13-22, RP 72, L6 to RP 73, L2 and RP 73, L4-22) The issue of Clark County's legal authority to refuse to confirm warrants and avoid the booking process as required by jail policy is a genuine issue of material fact for trial. The issue of whether Villanueva-Villa would have been incarcerated or booked and released on January 27, 2006 when he killed Mr. Myles and the issue of whether the court would have imposed conditions upon Villanueva-Villa which would have prevented him from drinking and driving on January 27, 2006 are genuine issues of material fact for trial to be determined at trial. The trial court stated that these issues were not too speculative for a jury to consider. (RP 73)

2. The trial court abused its discretion when it reversed its initial decision of October 7, 2016 and granted Clark County's Motion for Summary Judgment on reconsideration.

Clark County filed a Motion for Reconsideration pursuant to CR 59(a) on October 17, 2016 requesting that the court reconsider its ruling denying its Motion for Summary Judgment or in the alternative, certifying the issues decided for immediate appeal under CR 54(b) or RAP 2.3 (b)(4).

In its Motion for Reconsideration, Clark County argued that the court's decision to deny its Motion for Summary Judgment was contrary to law under CR 59(a)(7) because (1) the County is entitled to discretionary immunity; (2) there is no basis for recognizing an actionable duty that was owed to Plaintiff by the County under the public duty doctrine; and (3) as a matter of law no act or omission by the County was the proximate cause of the collision between Villanueva-Villa and Myles on January 27, 2006. (CP 1241 at 1243).

The issues Clark County brought before the court for reconsideration were as follows:

1. That the County was immune from liability based on its authority to adopt and implement a jail overcrowding policy.
2. That incarcerating individuals who have been convicted and/or accused of crimes is clearly a basic governmental program and that setting a policy prioritizing which individuals will be held in jail is essential to realizing this policy.

3. That as a matter of law no act or omission by the County was a proximate cause of the collision between Villanueva-Villa and Myles on January 26, 2006.

(CP 1241 at 1243)

Each of these issues were previously argued in the summary judgment proceedings. (CP 110 at 115-118 and 122-123 as to discretionary immunity and jail policy making, CP 110 at 123-127 as to proximate cause) Clark County repeated its case by arguing that it had immunity under its authority to create jail overcrowding policies, that it owes no duty to Mr. Myles, and that it is protected under the public duty doctrine. This is the same argument presented at summary judgment upon which the trial court based its oral findings and denied summary judgment. (RP 40). Clark County offered no additional evidence or alternative argument and should not be allowed to reargue facts and theories previously decided simply because they disliked the decision the trial court rendered. There was no new evidence or authority offered on reconsideration to support the change in the trial court's ruling. Judge Gonzales himself stated that the facts were similar but that he would take a more discerning look. (RP 110, L 16-19)

A motion for reconsideration should not be used as a vehicle for a second chance to argue a party's case. CR 59 does not permit a party to "propose new theories of the case that could have been raised before entry of an adverse decision". Wilcox v. Lexington Eye Institute, 130 Wn.App. 234, 241, 122 P.3d

729 (2005) citing JDFJ Corp. v. Int'l Raceway, Inc., 97 Wash. App. 1, 7, 970 P.2d 343 (1999).

CR 59(a) outlines nine specific grounds for a motion for reconsideration. Clark County specifically cites CR 59(a)(7) as the basis for its motion which states that “there is no evidence or reasonable inference from the evidence to justify the decision or that it is contrary to law”. In its oral ruling of September 27, 2016, the trial court explicitly found that there was sufficient evidence which it based its decision. (RP 72, L 6 to RP 73, L2 and RP 73, L 4-22) The reversal of the trial court’s decision did not void any of the trial court’s findings other than with respect to the issue of duty. The trial court essentially allowed Clark County to have a second chance to argue its case and then reversed its decision.

The trial court also allowed the motion despite the fact it was not timely heard, which Appellant objected to at the December 2, 2016 hearing. (RP 40) CR 59(b) controls the time and contents of a motion on reconsideration and states:

A motion for new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, **to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise.** A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based. [Emphasis added]

The trial court rendered its oral decision on September 27, 2016. (RP 40). The Order Denying Summary Judgment was entered October 7, 2016. (CP 1232)

Clark County filed its Motion for Reconsideration on October 17, 2016. The hearing on the County's motion was held on December 2, 2016 which was well over the 30 day time frame required by CR 59(b). (RP 80) There was no Order or direction of the court granting an extension of the hearing. Counsel for WSP and Trooper Brusseau stated on the record that it was the court's assistant who set the date and time for the hearing but no Order of extension was entered. (RP 108, L 19-25)

In addition, the court's decision on reconsideration fails to meet the requirements of Clark County Superior Court's Local Rule 59, New Trial, Reconsideration, and Amendment of Judgments, which states as follows:

(b) Time for motions; contents of motions. A motion for new trial or reconsideration shall be served and filed not later than 10 days after the entry of the judgment or order in question. The opposing party shall have 10 days after service of such motion to file and serve a response, if necessary. No reply will be permitted. The moving party shall provide copies of the motion (and response, if any) to the Judge. **No oral argument shall be permitted without express approval of the court. The court shall issue a writing ruling on the motion.** [Emphasis added]

There is nothing on the record to show that the court expressly authorized oral argument yet allowed it in open court on December 2, 2016. LR 59 states that oral argument must be with express approval of the court. The Judge made no formal Order on the record stating that oral argument would be allowed.

There was also no written ruling following the trial court's Order on reconsideration as required under LR 59.

The trial court made extensive findings in its oral ruling of September 27, 2016 when it denied Clark County's Motion for Summary Judgment. Because Washington case law does not allow a motion for reconsideration for the purpose of giving the parties a second chance to argue their case, and the fact that Washington state Court Rules and the local rules of the trial court were not properly followed, the court abused its discretion in hearing this motion on reconsideration and granting the relief requested therein.

C. WASHINGTON STATE PATROL/TROOPER BRUSSEAU

1. The trial court erred by granting Washington State Patrol and Trooper Brusseau's Motion for Summary Judgment on reconsideration when issues of material facts existed.

Washington State Patrol and Trooper Brussueau (hereinafter referred to as "WSP") filed a Motion for Summary Judgment on January 22, 2016. (CP 138)

The following issues were presented:

- a. Did Trooper Brusseau Have a Mandatory Duty to Arrest, Detain, and Incarcerate Mr. Villanueva-Villa?
- b. Did Trooper Brusseau Have a Mandatory Duty to Serve a Warrant on Mr. Villaneuva-Villa?
- c. Was Trooper Brusseau's Conduct the Proximate Cause of the Vehicle Collision 36 days later?
(CP 138 at 142)

WSP and Trooper Brusseau argued that no duty was owed to Myles because it was immune under the Public Duty Doctrine. (CP 138 at 144-156) As argued above with regard to Clark County, the courts recognizes four (4) exceptions to the public duty doctrine which impose liability upon a government agency and if any one of these exceptions apply, a duty to Myles exists as a matter of law. At least two (2) of those exceptions apply to WSP and Trooper Brusseau in this case, specifically the failure to enforce exception and the special relationship exception.

1.2 **Failure to Enforce Exception**

Appellant offered evidence satisfying all four (4) factors necessary for the failure to enforce exception to apply to WSP in this case. (CP 492 at 505-523)

1.2.1 **Duty to Enforce Statute**

The duty owed to Myles must be a mandatory duty and not subject to discretion in order for the failure to enforce exception to apply. Forest v. State, 62 Wash. 684, 814 P.2d 1181 (1991) citing McKasson v. State, 55 Wash.App. 18, 776 P.2d 971. Government must have a mandatory duty to take a specific action to correct a statutory violation. Smith v. Kelso, 112 Wn.App 277, 282, 48 P.3d 373 (2002). A specific directive to the governmental employee as to what should be done must be present in the statute. Ravenscroft v. Water Power Co.,

87 Wn.App. 402, 415, 942 P.2d 991 (1997). Such a duty does not exist when the government agent has broad discretion about whether and how to act. Id.

The duty of law enforcement officers to execute warrants is a mandatory duty, not a discretionary one. RCW 36.28.010 (3) and (4). The duties of the Sheriff also apply to the Washington State Patrol. RCW 43.43.030. A warrant shall be directed to all peace officers in the state and shall be executed only by a peace officer. Wash. Crim. R. Ltd. Jur. 2.2(d)(1), The definition of “peace officer” includes Trooper Brusseau and the Washington State Patrol. RCW 36.28.010.

All law enforcement officers are commanded to arrest a defendant under a court ordered warrant and to bring that defendant before a court of law. A judge issues a warrant commanding any peace officer to “apprehend the person named therein, wherever he or she may be found in this state, and to bring him or her before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant”. RCW 36.28.010. The statute is not ambiguous as to the duty of law enforcement agencies and offers no discretionary authority to ignore or circumvent the warrant process.

The public duty doctrine will not shield law enforcement agencies from tort liability because an arrest on an outstanding warrant is mandatory, not discretionary. Seattle University Law Review, Volume 26, No. 4, Spring 2003 by Judge Philip J. Van de Veer, District Court Judge in Pend Oreille County, Washington.

The warrant at issue in this case was ordered by Clark County District Court Judge Kelli Osler on December 5, 2005. The warrant was date stamped by the Clark County Sheriff's Department on December 7, 2005. A WACIC/NCIC control number of C513792 was assigned on December 11, 2005. CP492 at 620, 635 and 1124). The warrant was located by WSP dispatcher, Carey Salzsieder who found the warrant on Washington State's criminal information system on December 23, 2005. (CP 27-36) The warrant was a valid warrant on December 23, 2005 and Brusseau had a duty to abide by the Court's order and bring Villanueva-Villa to the jail for service of the warrant.

The WSP argued it had no duty to arrest Villanueva-Villa on the DUI warrant because Clark County would not verify the warrant. Just because one law enforcement agency violates its statutory duty, does not give immunity to other law enforcement agencies who follow suit. Two wrongs don't make a right. The WSP is just as negligent as Clark County for refusing to execute the warrant in this case.

1.2.2 Actual Knowledge of Violation of Statute

Trooper Brusseau received actual knowledge of the existence of Villaneuva-Villa's warrant from WSP dispatch. (CP 492 at 27-35, 131-133, and 633) Brusseau also knew that the jail would not accept Villaneuva-Villa into the jail because of the booking restrictions at the jail that night. Trooper Brusseau did not have discretion to refuse to execute the warrant based on Clark County's refusal to confirm the warrant. Officer Brusseau testified that it is common practice for Clark County to refuse to confirm warrants when the jail is at a certain capacity. (CP 492 at 27-35, 131-133) He had knowledge of Villanueva-Villa's prior DUI and the pending warrant based on information he received from the WSP dispatcher and from the Department of Licensing document and hole punched driver's license Villanueva-Villa handed Brusseau indicating his prior DUI arrest just one month earlier. (CP 131 at 132) He knew the warrant was valid but failed to execute the warrant as required by law using the umbrella of Clark County's policy of not confirming warrants when the jail is at capacity. He still had a duty to take Villanueva-Villa to the jail for booking regardless of whether he would have been released.

In its oral ruling of September 27, 2016, the trial court found that there was evidence that Trooper Brusseau failed to take Villanueva-Villa in on the warrant. (RP 73).

1.2.3 Failure to Take Corrective Action

By refusing to arrest on the warrant, Trooper Brusseau failed to uphold his statutory duty to arrest and commit all persons who break the peace, or attempt to break it, and all persons guilty of public offenses. RCW 36.28.010(1) Brusseau neglected to execute the process and Orders of the courts of justice or judicial officers, when delivered for the purpose, according to law. RCW 36.28.010(3) and (4) WSP does not have the discretionary power to ignore warrants of any kind, whether felony warrants or misdemeanor warrants, for the purpose of jail overcrowding. Brusseau had first hand knowledge that Clark County was avoiding its own “book and release” policy by not confirming the warrant that night. (CP 131 at 133) He had an immediate opportunity to hold Villanueva-Villa and serve the warrant but chose to go along with Clark County’s illegal policy.

The totality of the circumstances should be considered when an officer releases a defendant for any reason, whether it be a new arrest or in connection with a valid warrant. Under Wash. Crim. R. Ltd. Jur. 2.1(b)(2), when an officer arrests a person under a misdemeanor or gross misdemeanor charge, the officer shall consider the following factors:

(2) Release Factors. In determining whether to release the person or to hold him or her in custody, the peace officer shall consider the following factors:

(i) whether the person has identified himself or herself satisfactorily;

(ii) whether detention appears reasonably necessary to prevent imminent bodily harm to himself, herself, or another, or injury to property, or breach of the peace;

(iii) whether the person has ties to the community reasonably sufficient to assure his or her appearance or whether there is substantial likelihood that he or she will refuse to respond to the citation and notice; and

(iv) whether the person previously has failed to appear in response to a citation and notice issued pursuant to this rule or to other lawful process. [Emphasis added]

Officer Brusseau did not take into consideration the totality of the circumstances when he cited and released Villanueva-Villa on the second DUI charge and refused to execute the warrant on the first DUI charge. In fact, Clark County contends that it was up to Officer Brusseau to request that they hold Villanueva-Villa in custody that night. (See Appellant's Brief at p. 13) Clark County placed the blame and responsibility of bringing Villanueva-Villa to the jail for booking and processing on the warrant upon Brusseau. (See Appellant's Brief at p. 13) Clark County stated they will make an exception to the booking restrictions if mitigating circumstances exist, but that it is up to the arresting officer to request that an exception be made. (See Appellant's Brief at p. 13).

Officer Brusseau had knowledge of the valid warrant, had knowledge of the Clark County's practice of ignoring valid warrants, had knowledge that Villanueva-Villa had a propensity to drink and drive, and had knowledge that Villanueva-Villa failed to appear at his last arraignment hearing just one month

prior, thus the warrant. Officer Brusseau failed to apply the above release factors when he cited and released Villanueva-Villa that night in clear contradiction of Washington's criminal rules. Officer Brusseau had the opportunity to protect the public, specifically Mr. Myles, from Villanueva-Villa by means of both the execution of the valid warrant and also under the new DUI arrest.

The reasoning or justification for Trooper Brusseau's failure to take corrective action by ignoring the warrant is a factual question for a jury to decide. In the trial court's ruling, the judge pointed out that a material issue of fact existed as to whether Trooper Brusseau was excused from liability for failing to arrest on the warrant because of Clark County's refusal to acknowledge or confirm the warrant. (RP 65, L 13-22)

1.2.4 Plaintiff is Within the Class the Statute Was Designed to Protect

As argued above with regard to Clark County, Mr. Myles was a user of public streets and highways. He was within the class of persons DUI statutes in the state of Washington were designed to protect "from accidents caused by intoxicated drivers." Bailey v. Forks, 108 Wn.2d 262 at 1261 citing Heinemann v. Whitman Cy., 105 Wash.2d 796, 718 P.2d 789 (1986); Dickinson v. Edwards, 105 Wash.2d 457, 716 P.2d 814 (1986); Hartley v. State, 103 Wash.2d 768, 698 P.2d 77 (1985); Laws of 1986, chs. 87, 153; Laws of 1985, chs. 101,

302, 352 and 407. The legislature enacted DUI statutes to protect users of public highways like Mr. Myles from accidents caused by intoxicated drivers. When a governmental agent knows of the violation, a duty of care runs to all persons within the protected class, not merely those who have had direct contact with the governmental entity. Bailey citing Campbell v. Bellevue, 85 Wash.2d 1, 530 P.2d 234 (1975) and Mason v. Bitton, 85 Wash.2d 321, 325-26, 534 P.2d 1360 (1975).

In its ruling on December 30, 2016, the trial court focused its entire order for reconsideration on this one prong of the failure to enforce exception. As stated above with regard to Clark County, in Bailey, the court found Ms. Bailey was within the class protected by DUI laws as a user of public roads and highways. Mr. Myles deserves the same classification in this case. (See Appellant's Brief at p. 14-15)

1.3 Special Relationship Exception

The other exception to the public duty doctrine applicable to WSP in this case is the "special relationship" exception. As cited above, as a general rule, there is no duty to prevent a third party from intentionally harming another unless a "special relationship" exists between the defendant and either the third party or the foreseeable victim of the third party's conduct. Donohoe v. State, 135 Wn. App 824, 142 P.3d 654, citing Restatement of Torts § 315. A duty to third parties may arise in the limited circumstances where an actor's own affirmative act

creates a recognizable high degree of risk of harm to others through such misconduct, which a reasonable man would take into account. Robb v. City of Seattle, 176 Wn.2d 427, 434, 295 P.3d 212 (2013).

If a reasonable person reviewed the evidence offered in this case, specifically the fact that Villanueva-Villa had been charged with two DUI's within one month, that he failed to appear at his first DUI hearing, that he had a prior criminal history including failures to appear, a bail jump and a failure to comply with conditions of his community supervision, and given his warrant status, it is plausible that a reasonable person would foresee that Villanueva-Villa was not going appear at his second DUI arraignment hearing and that he was likely to drink and drive again and the trial court agreed. (RP 72, L 6 to RP 73, L2) The actions of both Clark County and WSP by ignoring DUI arrest warrants undermine the criminal justice system and threaten public safety.

As previously argued, Washington Courts have imposed liability on a government agency for the negligent acts of a third person when a special relationship existed and a duty to protect those who might be foreseeably endangered as a result of that third person's behavior. Petersen v. State, 100 Wn.2d 421, 671 P.2d 230 (1983). The court recognized the State's duty "to take reasonable precautions to protect anyone who might foreseeably be endangered . .

." Petersen at 428. WSP had full control over Villanueva-Villa on December 23, 2005. WSP chose to ignore the court ordered warrant and released him.

Trooper Brusseau was faced with a driver charged with a second DUI arrest within a month of his last arrest and a warrant for arrest from that DUI one month earlier. The warrant specifically ordered law enforcement to take Villanueva-Villa into custody, to hold him and to bring him before a court of law. The warrant created a "take charge" relationship between Mr. Villanueva-Villa and all law enforcement officers, which includes WSP. Trooper Brusseau himself admits to having a "take charge" relationship with Villanueva-Villa for a "brief period of time on the night and early morning hours of December 23-24-2005." (CP 1264 at 1273). Brusseau was in clear violation of jail policies and the rules governing service of court ordered arrest warrants when he conceded to the wrongful actions of Clark County.

The "take charge" relationship, as set forth in the Restatement (Second) of Torts, § 319, is one of those special relationships contemplated in § 315. "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Once the take charge relationship is established, the actor "has a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the

dangerous propensities of the third party. Joyce v. State, Dept. of Corr., 155 Wn.2d 306, 310, 119 P.3d 825 (2005), (quoting Taggart, 118 Wn.2d at 217).

2.1 Trooper Brusseau's Conduct Was Not A Legal Proximate Cause of Any Injury

WSP denies that the conduct of Trooper Brusseau was the proximate cause of harm to Myles and that the detention of Villanueva-Villa on the night of December 23, 2005 would not have prevented the death of Mr. Myles on January 27, 2006. The WSP argued that it is speculative to suggest that Villanueva-Villa would have remained in custody for 36 days. In fact, the WSP claimed that Villanueva-Villa would have been arraigned the next morning and released. (CP 131 at 133) (CP 138 at 157- 160)

Whether Mr. Villanueva-Villa was released or would have been in jail on the night that Mr. Myles was killed are facts for a jury to decide. As stated above with regard to Clark County, breach and proximate cause are generally questions that are left for the trier of fact.” (See Appellant’s Brief at p. 22-25) A reasonable jury could conclude that had Villanueva-Villa been arrested on the warrant on December 23, 2005 and brought before a Judge on not one but two DUI charges and his failure to appear at the first hearing, in addition to his probation violations, that he very well could have been incarcerated in the Clark County jail on January 27, 2006 when he killed Mr. Myles and/or had certain

conditions of release imposed upon him to prevent him from drinking alcohol.

When looking at all of the evidence in this case, the trial court agreed that proximate cause existed. (RP (RP 72, L 6 to RP 73, L2 and RP 100, L12 to RP 102, L23)

The warrant in question which Clark County would not confirm on December 23, 2005 was eventually “confirmed” and served on Villanueva-Villa on February 15, 2006 while he was incarcerated in the Clark County Jail for killing Mr. Myles. (CP 492 at 638). An arraignment hearing followed in Clark County District Court on February 21, 2006 before the Honorable Judge John P. Hagensen and the following conditions were set:

- Breath/Urine Testing
- Antabuse monitoring
- No alcohol or drugs
- Bail set at \$10,000.00
- Supervised release
- Antabuse if medically able.

(CP 492 at 778 and 781)

These exact same conditions were set by Judge John P. Hagensen on Villanueva-Villa’s second DUI of December 23, 2005, which Villanueva-Villa also failed to appear at and a second warrant was issued. (CP 492 at 778 and 781)

As a result of the WSP’s refusal to execute the warrant, the Court never had an opportunity to review any additional circumstances involved with this

defendant in order to impose the most appropriate sanctions against Villanueva-Villa and also to secure his appearance in court. In making a determination to release a defendant and secure his or her appearance at subsequent hearings, the court considers the likeliness of the accused to appear, and if the court feels assurances are necessary it has the authority to place the accused under the custody of another, place restrictions on travel, association or housing during the period of release, require a bond, secured or unsecured, require the accused to return to custody or be placed on electronic monitoring or any other condition deemed reasonable to assure the appearance of the accused at future hearings. CrR 3.2, RELEASE OF ACCUSED,(b) (1) through (6).

Regardless of whether Villanueva-Villa remained incarcerated on January 27, 2006, the supervision requirements and alcohol related restrictions imposed by the District Court on February 21, 2006 would have at least been in place at that time which would have prevented Villanueva-Villa from drinking alcohol, which would have ultimately prevented the alcohol related death of Mr. Myles. To say that it is likely that Villanueva-Villa would not have been incarcerated on the night of January 27, 2006 when Mr. Myles was killed or that these court ordered restrictions would not have been imposed is speculative and would infer that all other facets of the legal process involving the local Courts, local law enforcement

and community corrections would have all failed to protect the community from this offender.

The evidence showed that Villanueva-Villa had a propensity to ignore the law. His two DUI arrests within 35 days of each other and failures to appear posed a serious risk to public safety yet his arrest warrant was ignored in order to save time and jail beds. The issue of whether Villanueva-Villa would have been in jail or not on the night he killed Mr. Myles or what conditions may or may not have been imposed preventing him from drinking and driving involve several factors which are genuine issues of material fact which a jury or a trier-of-fact must determine. Based on the facts of this case, reasonable minds could differ. The trial court agreed that there are sufficient facts to bring this matter before a jury in order to determine whether Villanueva-Villa would have been in jail that night. (RP 73, L9 to RP 74, L6 and RP 100, L12 to RP 102, L23).

2. The trial court abused its discretion when it reversed its initial decision of October 7, 2016 and granted Washington State Patrol and Trooper Brusseau's Motion for Summary Judgment on reconsideration

On September 27, 2016, the trial court denied WSP/Brusseau's Motion for Summary Judgment. (RP 40). The Order Denying Summary Judgment was entered on October 7, 2016. (CP 1232) On October 17, 2016 WSP filed a

Motion for Reconsideration pursuant to CR 59(a). On reconsideration, WSP presented the following issues:

1. The State of Washington and Trooper Brusseau Owed No Duty to the Plaintiff.

WSP and Brusseau argued on reconsideration the differences in the fact patterns between the case at hand and Bailey. (CP 1264 at 1266). The Bailey case was previously briefed by WSP on summary judgment. (CP 138 at 150-155) WSP argued on reconsideration that no duty was owed to Myles under Bailey as the facts of the cases differed and the situation the officer faced in Bailey was not comparable to the situation that Brusseau faced with Villanueva-Villa. WSP and Brusseau further mentioned that the collision in Bailey took place on the same night versus 35 days later as with Myles. (CP 1264 at 1266-1268) As argued above with regards to Clark County, Appellant did not cite the Bailey case solely for the purpose of establishing the Trooper's duty but to also show that the court found Ms. Bailey was within the class protected by DUI laws as a user of public roads and highways and that Mr. Myles deserved the same classification regardless of the situational facts or when the collision took place. (See Appellant's Brief at p. 14-15). This argument is duplicative as it was made by WSP and Brusseau on summary judgment. (CP 1264 at 1266-1269).

2. Even Assuming the Existence of a Duty, There is No Evidence to Support a Finding of Proximate Cause.

WSP and Brusseau argued its position on proximate cause in its Motion for Reconsideration. (CP 1264 at 1269-1273) Again, this argument is duplicative as WSP and Brusseau previously argued proximate cause on summary judgment. (CP 138 at 157-160) WSP and Brusseau offered the same argument as to cause in fact and legal cause by stating that Appellant has failed to meet her burden of proof by providing evidence from which a jury could conclude that Villanueva-Villa would have remained in jail on the night of January 27, 2006. Appellant reaffirms its position as argued against Clark County in that the order and conditions imposed by Clark County District Court on February 21, 2006, coupled with the defendant's history, is evidence of what would have likely occurred had Villanueva-Villa been brought in on the warrant on December 23, 2005. (Appellant's Brief at p. 23-25) WSP and Brusseau argued that it is speculative to state that Villanueva-Villa would have still been in jail on December 23, 2005 and completely dismisses the court ordered conditions that were imposed upon him in an attempt to keep him from drinking alcohol. It is not too far of a reach that a jury would find that the court would have imposed the same conditions as it did once Villanueva-Villa was finally served with the warrant. (CP 492 at 638) Again, as the trial court indicated in its September 27,

2016 oral ruling, these are all are issues of material fact for a jury to determine at trial. (RP 64, L6-11, RP 65, L13-22, RP 72, L 6 to RP 73, L2, and RP 100, L12 to RP 102, L23)

WSP and Brusseau offered no new evidence or new legal theories to support the change in the trial court's ruling and were simply allowed to argue its case again. As stated earlier with Clark County's Motion for Reconsideration, the courts do not allow a party a second chance to argue a case. There must be specific issues presented to show that the court erred in its decision. (See Appellant's Brief at p. 27-28) The trial court abused its discretion in allowing the parties to have a second shot at arguing their summary judgment motions on reconsideration which resulted in the trial court completely ignoring its prior findings and reversing its decision.

Finally, the same technical issues exist with WSP and Brusseau's Motion for Reconsideration as with Clark County's motion. The hearing was set for December 2, 2016, which was well over the 30 day time frame required by CR 59(b). There was no order or direction of the court granting an extension of the hearing. (See Appellant's Brief at p. 28-29)

In addition, oral argument was allowed at the December 2, 2016 hearing. There is no record where the court expressly authorize oral argument. Clark County LR 59. (See Appellant's Brief at p. 29)

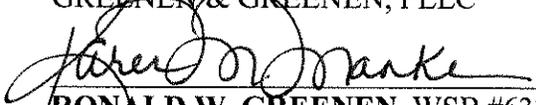
VI. CONCLUSION

Appellant has offered sufficient evidence to show that genuine issues of material fact exist in this matter requiring a trial. For the reasons discussed above, this Court should reverse the Orders of Summary Judgment granted to Clark County and to Washington State Patrol and Trooper Brusseau on Reconsideration and remand the case back to the Superior Court for a trial on the merits.

RESPECTFULLY SUBMITTED this 10th day of June, 2019.

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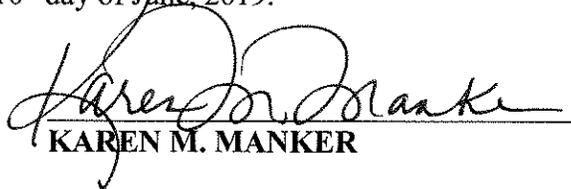
I hereby certify that on June 10, 2019, I served the foregoing APPELLANT'S OPENING BRIEF by electronic mail and also by regular US Mail to the following:

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by serving a copy thereof by certified by me a such, by email and also in a sealed envelope, by regular US Mail to said offices at their regular address as noted above.

Dated this 10th day of June, 2019.


KAREN M. MANKER

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