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Division II  
State of Washington  
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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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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.

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

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**APPELLANT/CROSS-RESPONDENT'S REPLY BRIEF**

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## I. INTRODUCTION

Appellant Myles reasserts her request that the Appellate Court reverse the trial court's orders granting Summary Judgment on Reconsideration to Respondent, Clark County and to Respondents, Washington State Patrol and Trooper Robert Brusseau, both orders having been entered on December 30, 2016.

**1.1 Clark County.** Respondent, Clark County continues to portray this case as a jail policy issue. The County claims that the County was simply following jail policy when it failed to enforce the arrest warrant for Carlos Villanueva-Villa's arrest on December 23, 2005. The County has offered absolutely no evidence to show that the Clark County Sheriff's Office had the authority to disregard an active, valid misdemeanor arrest warrant as a means of controlling jail population. Jail population should have no impact on the enforcement of any type warrant, misdemeanor or felony. In 2005, Jail overcrowding issues required Clark County to decide which offenders should be housed in the jail and which offenders should be released when the jail is at a certain capacity. This decision was supposed to be based on jail overcrowding policies and the booking restrictions in place at that time yet the decision to hold or release Villanueva-Villa on December 23, 2005 was essentially determined by Clark County Jail's records department while the Washington State Patrol had

Villanueva-Villa in custody on the side of the road on a non-related charge. Clark County did not even consider the prior crime or why the warrant had been issued and they did not inquire into any of the circumstances surrounding Villanueva-Villa's current/new arrest. The County simply refused to confirm the warrant because the jail was at capacity and the warrant was labeled as a "misdemeanor" warrant. Such refusal lead to the release of Carlos Villanueva-Villa, a two-time drunk driver who failed to appear at both his arraignment hearings following two DUI arrests within one month of each other, and who remained free to drink and drive without any court intervention or conditions imposed. Villanueva-Villa remained free until January 27, 2006 when he was driving drunk and killed William Lloyd Myles.

**1.2 Washington State Patrol/Trooper Brusseau.** Respondent Washington State Patrol (WSP) and Trooper Brusseau argue that WSP had no liability in this case because the Trooper followed protocol for Villanueva-Villa's second DUI arrest on December 23, 2005. The contested issue in this case is the fact that the Trooper accepted Clark County's refusal to confirm the arrest warrant from Villanueva-Villa's first DUI arrest and did nothing to ensure that he would appear in court on the outstanding warrant. WSP was fully aware of Clark County's policy of ignoring warrants when the jail was at capacity. By acquiescing to this "policy" of refusing to enforce warrants, WSP contributed to

Villanueva-Villa's release without any court intervention or conditions of release. As police officers, the WSP is required to arrest offenders with active warrants and to consider specific legal factors prior to releasing an offender.

Clark County and WSP chose to save the time of law enforcement personnel over the safety of drivers using public roads. As a result of this unauthorized practice of ignoring arrest warrants, Villanueva-Villa was set free to continue to drink and drive without any restrictions or preventative measures in place to ensure driver safety. These two law enforcement agencies were required to arrest Villanueva-Villa on the warrant and bring him to the Clark County Jail for booking. Negligence exists in this case because both agencies refused to arrest Villanueva-Villa on 12/23/2005 for the outstanding DUI/FTA warrant and in doing so, failed to follow Clark County Jail policy in order to save time and resources involved in the jail booking process.

## **II.**

### **REPLY ARGUMENT – CLARK COUNTY**

#### **A. Appellant's Position – Respondent, Clark County**

##### **1. Clark County Owed An Actionable Duty to Myles.**

Clark County had a general duty to enforce the arrest warrant. RCW 36.28.010. Clark County also had a general duty to take corrective action and

follow jail standards of operation. RCW 70.48.071. The warrant itself states that an arrest is mandatory duty. (CP 1041 at 1044) These general duties of law enforcement can lead to an actionable duty to Myles if the facts show law enforcement performed an affirmative act which placed an individual in peril or increased the risk of harm. Mr. Myles death was caused by direct actions taken by Clark County in refusing to confirm the arrest warrant for Villanueva-Villa on the night of December 23, 2005. Clark County had a duty to refrain from directly causing harm to another through affirmative acts of misfeasance. Beltran-Serrano v. City of Tacoma, 442 P.3d 608, 615 (2019) citing Robb v. City of Seattle, 176 Wn.2d 427, 295 P.3d 212 (2013) and Coffel v. Clallam County, 47 Wn. App. 397, 403, 735 P.2d 686 (1987) (recognizing that, “if the officers do act, they have a duty to act with reasonable care”).

Several witnesses testified or submitted declarations stating that it was common knowledge that the jail refused to confirm warrants when the jail was at capacity. Jail employees were aware of this practice, WSP dispatch officers were aware of this practice, and law enforcement officers were aware of this practice. Trooper Brusseau of the WSP testified in his Declaration 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 and CP 692 at 694) Carey Salzsieder, the WSP dispatcher who called to confirm the warrant on the night of December 23,

2005 offered the same testimony in her Declaration. (CP 27 at 28 & 29 and CP 697 at 698 & 699) Connie Peasley, who worked in the Clark County Sheriff's Office records department in November 2005 testified in her Declaration 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 479-481 and CP 785-787) Terian McCracken, who worked in warrants and jail records in 2005 testified that there were certain restrictions for confirming warrants depending on the jail level. If the jail was at a Level E, they would stop confirming certain warrants. (CP 482, *McCracken depo pg. 15-16*) Clark County's own witness and author of Clark County's jail policy, former Sheriff Gary Lucas testified that jail policy required the offender be brought to the jail and booked and then once booked, that offender could be released depending on the restrictions in place at that time. (CP 1021 at 1076, *Lucas depo p. 22-27*, and CP 1021 at 1025-1026) If the jail was at a Level D, an offender would be booked and released. (CP 1077, *Lucas depo p. 25, L.3-8*)

Clark County affirmatively acted when it made the decision to refuse to confirm the warrant for Villanueva-Villa's arrest without considering the circumstances of the new arrest or the basis for the warrant itself which clearly stated that it was a warrant for DUI and failure to appear. (CP 1041 at 1044) These acts were in direct conflict with jail policy. Clark County's own employee,

Kelly Roberson, a warrants supervisor, verified in her Declaration that the warrant was in existence on December 23, 2005. (CP 1041 at 1042). Despite its existence, the jail refused to confirm the warrant when WSP Dispatcher, Carey Salszieder called to verify. (CP 27 at 28 and CP 697 at 698)

The foreseeability of harm and the magnitude of risk and exposure of danger to others created by Clark County and WSP justifies imposing a duty.

Parilla v. King County, 138 Wn. App. 427, 157 P.3d 879 (2007) citing Restatement § 302B comment e.

**2. Public Duty Doctrine**

As previously argued by Appellant in her Response to Clark County's Motion for Summary Judgment, general duties of law enforcement can lead to an actionable duty under the Public Duty Doctrine if an exception to the doctrine applies. (CP 492) citing Gorman v. Pierce County, 176 Wn. App. 63, 75, 307 P.3d 795 (2013). Appellant argued that the failure to enforce and special relationship exceptions applied in this matter. (CP 505-523) Clark County denies that either of these exceptions apply to Appellant's claims.

**a. The Failure to Enforce Exception Applies**

Appellant has shown that the following elements of the failure to enforce exception have been met: (*App. 's Brief p. 10-14*) 1) Clark County had a duty to

enforce the statute. State of Washington v. Twitchell, 61 Wn.2d 403, 378 P.2d 444 (1963). In Twitchell, citing RCW 36.28.010. 2) Clark County had actual knowledge that the warrant existed as confirmed by Kelly Roberson, the warrants supervisor (CP 1041) and (CP 639 ), 3) Clark County failed to take corrective action by refusing to facilitate the arrest of Villanueva-Villa on the warrant; and 4) Myles is within the class the statute protects citing Bailey v. Forks, 108 Wash.2d 262, 268, 737 P.2d 1257 (1987).

**b. The Special Relationship Exception Applies**

Appellant has also shown that a special relationship existed between Clark County and Mr. Myles. *See App. 's Opening Brief at 38-41*. Clark County had a duty to take reasonable precautions to protect those who might be endangered as a result of Villanueva-Villa's behavior. Petersen v. State, 100 Wn.2d 421, 671 P.2d 230 (1983). Clark County created a high degree of risk of harm to foreseeable victims, specifically Myles as a user of public roads, when it refused to confirm the warrant. Robb v. City of Seattle, 176 Wn.2d 427, 434, 295 P.3d 212 (2013) citing Restatement § 302B. Once Trooper Brusseau had Villanueva-Villa in his physical custody, both he and Clark County had a duty to take reasonable precautions to protect drivers from the reasonably foreseeable dangers that Villanueva-Villa posed. 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). Trooper Brusseau and Clark County knew or should have known that Villanueva-Villa was likely to cause harm to others if not controlled. Restatement (Second) of Torts § 315 and 319.

3. **Even Without an Exception Liability Can Still Be Found For Negligent Law Enforcement Activities.**

Clark County argues that Appellant must show that her claim falls under one of four exceptions to the public duty doctrine in order to bring suit based on a governmental function. This is not necessarily true. Even if there is no exception to the public duty doctrine applicable to this case, Clark County can still be found liable for its negligent law enforcement activities. This Court has recently ruled that liability for an officer's actions can be found even where no public duty doctrine exception directly applies. Beltran-Serrano v. City of Tacoma, 442 P.3d 608, 615 (2019) citing Garnett v. City of Bellevue, 59 Wn.App. 281, 286-287, 796 P. 2d 782 (1990) The public duty doctrine does not preclude liability if a law enforcement officer's actions are not associated with the performance of the general duty of policing. Garnett at 286. Clark County was not "policing" when it refused to confirm the warrant. There has been argument that Clark County was performing "general duties of policing" when it refused to confirm the warrant. What occurred in this case was not "policing" at all as required under

Washington law or Clark County jail policy. Clark County, through its jail records department was not enforcing the law, nor was it keeping the peace when this negligent act occurred. Clark County was implementing its own internal, unauthorized, time-saving practice of refusing to confirm misdemeanor warrants in order to avoid the booking process when the jail was at capacity. This act does not fall under any law enforcement policy or procedures. In fact, the deposition testimony and sworn affidavits by WSP Trooper Robert Brusseau, WSP Dispatcher, Carey Salzsieder and the depositions and declarations of other Clark County employees revealed that law enforcement agencies were fully aware of this common practice the County used when dispatch called in to confirm a warrant. (Salzsieder at CP 27 and CP 697), (Brusseau at CP 131 and CP 692), (Peasley at CP 479 and CP 785) and (McCracken at CP 482). This negligent use of authority was in clear violation of jail policy, which required all warrants to be served and the defendant brought in for at least booking. As a direct result of this ongoing, unauthorized practice, a two-time drunk driver who failed to appear at two DUI arraignment hearings was once again allowed back on to public streets to drink and drive again without any court intervention or restrictions in place. Clark County cannot use jail policy as a defense to their actions when refusing to confirm warrants and refusing to bring offenders to the jail for booking was not part of that policy. Clark County's actions were based solely on made up rules

which they apparently created to save time and avoid the booking process. A booking and release process which could take an hour or two according to Trooper Brusseau. (CP 39 at 42) Such actions are not an acceptable or legal form of general policing.

In the Beltran opinion, the Court stated that an enumerated exception is not always necessary to find that a duty is owed to an individual and not to the public at large. The Court identified the public duty doctrine as a “focusing tool” to ensure the government is not held liable for torts owed solely to the general public. Beltran *Id.* at 614, citing Munich v. Skagit Emergency Commc’ns Ctr., 175 Wn.2d 871, 878-879, 288 P.3d 328 (2012). The officer involved in the Beltran case came in direct contact with the victim, Cesar Beltran-Serrano. Beltran-Serrano was a homeless man who was shot several times by a Tacoma Police Officer after a social contact escalated into the use of deadly force. Police officers owe a duty of reasonable care and failure to follow accepted practices in certain situations can satisfy the elements necessary to find negligence. Beltran *Id.* at 609. Although there was no direct contact with Myles, Clark County’s actions were well outside the scope of their legal authority and were in clear violation of law enforcement “accepted practices” when enforcing arrest warrants and the jail’s book and release or cite and release policies. Such Clark County failed to consider the danger and foreseeable harm Villanueva-Villa posed to other drivers

or the circumstances surrounding the DUI/FTA warrant itself or that the arrest on 12/23/2005 was Villanueva-Villa's second DUI arrest in a month. Wash. Crim. R. Ltd. Jur. 2.1(b)(2)

**4. Application of Bailey**

Clark County argues that Appellant's application of Bailey is misguided. Clark County states that Bailey only applies if a mandatory duty to take an offender into protective custody exists. Although Clark County was required to accept Villanueva-Villa for booking, Appellant main purpose for citing the Bailey case was to show that Myles was also a member of the class of persons to be protected by DUI laws. As stated by Appellant in her opening brief at p. 14-15, 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. The Bailey court found that Bailey, as a driver on public streets and highways, came within the class DUI laws were intended to protect. The duty of care runs to all persons within that protected class, including Myles, not merely those who have had direct contact with the governmental entity. Therefore, no direct contact between Myles and Clark County or WSP was required. Campbell v. Bellevue, 85 Wash.2d 1, 530 P.2d 234 (1975). When the intent of a statute is to ensure safety on public roads and highways, an officer's knowledge of a violation creates a duty of care to all

persons and property who come within the scope of the risk created by that officer's negligent conduct. Mason v. Bitton, 85 Wash.2d 321, 325-26, 534 P.2d 1360 (1975). If Bailey was a member of the class the legislature intended to protect by implementing DUI laws, then Mr. Myles was also a member of that protected class regardless of the factual differences in each case.

##### 5. Actionable Duty

Clark County argues that law enforcement has considerable discretion when making an arrest for misdemeanor crimes and it is only when a statute specifically mandates an arrest for a particular crime that a duty arises. The basis for this action is not whether law enforcement had the discretion to arrest or not arrest Villanueva-Villa for a misdemeanor crime. This action is based upon law enforcement's refusal to arrest Villanueva-Villa on a failure to appear warrant for a prior crime, not a new misdemeanor charge. Law enforcement officers have a mandatory duty to serve a warrant. There is no discretionary language within the statute or within the warrant document itself. (CP 1041 at 1044) RCW 36.28.010 (3) and (4), and RCW 43.43.030. See also Wash. Crim. R. Ltd. Jur. 2.2(d)(1). There is also nothing in the jail overcrowding policy authorizing Clark County to refuse to confirm warrants. The Clark County Sheriff himself who authorizes the policy could not cite any authority. (CP 1021 at 1076, *Lucas depo p. 23, L7-11*). Sheriff Lucas testified that the offender is booking at the jail and released or cited

and released in the field and that both practices included giving the offender a hearing date to appear on the outstanding warrant. (CP 1047 at 1079, *Lucas depo p. 46, L17 to p. 47, L14*)

**6. Clark County Does Not Have Discretionary Immunity**

Respondent Clark County claims it has discretionary immunity based on the County's authority to implement and enforce jail overcrowding policies. Clark County was not implementing or enforcing any provision of the jail policy when it ignored Villanueva-Villa's arrest warrant. Clark County's action was based on its own made-up policy to avoid the booking process. In fact, jail policy required that Villanueva-Villa be booked. Once booked, Clark County would then decide whether to house him in the jail or release him with a new court date to appear on the warrant. The decision to release is based on the jail population at the time, or at the discretion of the jail officer in charge. No where in the jail overcrowding policy does it state that ignoring warrants is allowed as part of this process. In addition to his testimony cited above, Gary Lucas advised Appellant Myles directly that it was Clark County's policy to always confirm warrants. Sheriff Lucas states in a letter to Appellant Myles that it is the "Sheriff's Office policy to transport the arrestee to the jail where they will be booked and depending on the charges alleged in the warrant and jail population, the individual will be held for court the next judicial day, or assigned a new court date and

released.” “It is Clark County Sheriff’s Office policy and desire that anyone arrested on a warrant is booked into the jail.” See *Letter from Sheriff Lucas to Gwyn Myles dated June 5, 2007* at attached as Exhibit 16 to *Deposition of Gary Lucas* (CP 793 and CP 1120)

Clark County attempts to persuade the Court that it has discretionary immunity because of the booking restrictions in place on the night of December 23, 2005. Again, it is Clark County’s refusal to enforce an arrest warrant which gives rise to liability in this case, not the booking restrictions for new misdemeanor arrests. Clark County states that the authority to adopt such a policy is not for the court to second guess. As Appellant continues to repeat, the adoption and implementation of the jail policy is not in question. At issue is Clark County’s failure to enforce the law and follow its own jail policy. Without legal authority, Clark County has created and maintained its own set of rules in order to save time and avoid the booking process. This practice is not part of any discretionary decision making authorized within jail policy. Numerous witnesses have testified to the contrary and the fact that Villanueva-Villa was cited and released on the second DUI charge is irrelevant.

**7. Proximate Cause**

Appellant has offered admissible evidence to show that Villanueva-Villa’s confinement on the night of December 23, 2005 could have continued until

January 27, 2006, the date of Mr. Myles's death. His bail was revoked on the second DUI failure to appear as evidence by his no bail warrant issued on December 30, 2005. (CP 39-61 at 58). The conditions of his release once the warrant was finally served (after he killed Mr. Myles) included no alcohol or drugs, Antabuse monitoring, breath/urine testing. (CP 39 at 58 and CP 492 at 781, *District Court Docket Re: 12/23/2005 DUI*). Even if Villanueva-Villa was able to post bail, some form of alcohol restrictions would have been in place as evidenced by the conditions that were ultimately imposed by Clark County District Court Judge Hagensen. (CP 492 at 778 to 781, *District Court Docket Re: 11/26/2005 DUI*)

a. **Legal Causation**

Clark County compares this case to Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1988). The Hartley case was based on a failure to revoke a person's driver's license. A government agency revoking a driver's license and law enforcement arresting an offender on a criminal warrant do not form the same type of relationship. There is no similarity between the government action in Hartley and the actions of law enforcement in the present case. Still, in Hartley, the court found that duty and legal causation can be intertwined and in the case of an injury caused directly by a third party such a relationship can attribute to legal causation. *Id.* at 784. Refusing to confirm a valid arrest warrant as a means of

controlling jail population without any legal authority caused injury in this case. It is this action which makes Clark County vulnerable to liability in this case. The trial court found that it was not too incredible to establish that a legal obligation was owed to Mr. Myles or that a causal relationship between Clark County's actions and the death of Mr. Myles existed. (RP 73)

**b. Cause in Fact**

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) Based on the conflicting testimony throughout this case, there is more than one reasonable conclusion possible. That conclusion should be reached by a jury or trier of fact in this matter. In Hartley the court stated that legal liability depends on considerations of logic, common sense, policy and precedent. citing King v. Seattle, 84 Wash.2d at 250, 525 P.2d 228 (quoting 1 T. Street, Foundations of Legal Liability 100, 110 (1906). Prior to reversing its decision, 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).

**8. Inadmissible Evidence**

Clark County Superior Court Judge Greg Gonzales never ruled on the admissibility of any specific documents. Counsel for Appellant, Ronald Greenen signed an Affidavit as to his personal knowledge of the authenticity of the exhibits attached to Plaintiff's Response to Defendant Clark County's Motion for Summary Judgment noting that many of the documents were admissible under ER 201 and ER 901. A document may be authenticated by "appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances. ER 901(b)(4). A certification by counsel, who also is an officer of the court, authenticating copies of documents which are on file with the Clark County Superior Court's Clerk's Office, the same court where the current action is pending, is sufficient to support a finding that the matter in question is what its proponent claims. Judge Gonzales had the discretion to determine what evidence would be allowed and the authority to take judicial notice of certain facts. (ER 201).

Clark County specifically objects to CP 537-663 and 778-83 as not properly authenticated or admitted, which Appellant addresses as follows:

**a. Clerk's Papers 538-607 (also offered at CP 223-292).**

These documents are copies of pleadings filed in Clark County Superior Court regarding a prior charge of Villanueva-Villa for felony bail jump and

vehicle prowl, which occurred three (3) years prior to the DUI's at issue in this action. These are public court records displaying the clerk's date stamp showing the date each pleading or document was filed with the court and also bearing the clerk's sub-numbers. These documents are not prejudicial to Respondent, Clark County nor to Respondent, Washington State Patrol and Trooper Brusseau and no claim of prejudice has been made by either Respondent.

**b. Clerk's Papers 608-619 (also offered CP 293-319):**

These documents are copies of court documents and reports concerning Villanueva-Villa's November 26, 2005 DUI arrest, which includes the BAC reading and report, arrest reports, Citation and the FTA warrant at issue in this case. These documents were obtained through a public records request made by Appellant's counsel to Respondent, Clark County's own Public Disclosure Department. *See Declaration of Ronald W. Greenen* (CP 1184 and CP 1201). As an officer of the court, Appellant's counsel filed a declaration certifying the authenticity of these documents based on a public records request he personally made to a records employee of Clark County.

In addition, these documents are admissible under ER 801 (2). The Citation issued for Villanueva-Villa's first DUI on 11/26/2005, the BAC Report, DUI Arrest Reports and Narrative Case Report were all documents signed by WSP Trooper Peterson Stock, an officer employed by Respondent, WSP, who is a

party to this action. (CP 608-618) and (CP 293-301). The Vancouver Police Department's Narrative Report included with these documents was addressed directly to WSP Trooper Stock and was incorporated as part of his entire report. (CP 617) and (CP 303)

The Citation issued for Villanueva-Villa's second DUI on 12/23/2005, as well as the DUI Reports and BAC reading, are all documents signed by Respondent, WSP Trooper Brusseau himself, also a party to this action. (CP 306-313) and (CP 621-631)

Clerk's Paper 305, which was also offered as Clerk's Paper 620 is a copy of the warrant at issue in this case, which was also introduced by Clark County as Exhibit "D" to the *Supplemental Declaration of John Nicholson* (CP 1047) as Exhibits 17 and 18 to the Deposition of Gary Lucas (CP 1047 at 1122 to 1124) and also by *Declaration of Kelly Robertson* (CP 1040 -1044).

c. **Clerk's Papers 621-635 (also offered at CP 306-316):**

These documents are copies of court documents and reports concerning Villanueva-Villa's December 23, 2005 DUI arrest, which includes the BAC reading and report, arrest report, citation, WSP's CAD log and FTA warrant. Again, these documents were obtained through a public records request made by Appellant's counsel to Respondent, Clark County's own public disclosure department. *See Declaration of Ronald W. Greenen* (CP 1184 and CP 1201) and

were statements created by parties to this action as referenced in the preceding paragraph b. above.

The WSP Cad Log which outlines the events that occurred during Villanueva-Villa's December 23, 2005 arrest is also a document prepared by Respondent, WSP, a party to this action (CP 632) and (CP 317). The Cad Log was offered by WSP as part of the Declaration of Carey Salzsieder (CP 27 at 31-36)

Respondent, Clark County offered similar evidence via the *Declaration of Ric Bishop*, Deputy Chief of the Clark County Sheriff's Office, by filing copies of the District Court Dockets for both of Villanueva-Villa's DUI arrests, which display this information including the Citation, BAC levels, issuance of the FTA warrants, arraignments, conditions and sentencing information for both of Villanueva-Villa DUI arrests. (CP 39 at 53-61)

**d. Clerk's Papers 636-647 (also offered at CP 321-332):**

These documents are a court documents filed in Clark County Superior Court on 2/16/2006 regarding Villanueva-Villa's prior felony bail jump/vehicle prowling charge (Cause No. 01-1-01383-1), which again, are not prejudicial to either Respondent in this matter and no claim of prejudice was made by either Respondent. These documents were obtained by a public records request made to Respondent, Clark County's own Public Disclosure Department and were

authenticated by Appellant's counsel. *See Declaration of Ronald W. Greenen* (CP 1184 and CP 1201).

e. **Clerk's Papers 648-652 (also offered as CP 333-337):**

These documents are copies of the Information and Probable Cause Affidavit for Clark County Superior Court Cause No. 06-1-00235-1 which was the charging information for the vehicular homicide (DUI), hit and run, driving while suspended charges against Villanueva-Villa following the death of Mr. Myles. *Exhibit C to the Declaration of John R. Nicholson* offered by Respondent, Clark County, is a copy of Plaintiff's pre-lawsuit tort claim filed with the County prior to Appellant initiating the wrongful death action in Clark County Superior Court. (CP 64 at 99-107) This Claim Form was signed by Appellant, Mary Gwyn Myles and directed to Clark County Risk Management Division on October 23, 2008. Mrs. Myles's signature on the claim form was notarized. The claim form includes details about Villanueva-Villa's two (2) DUI arrests, as well as the collision with William Lloyd Myles on January 27, 2006 and includes statements made by Appellant Myles as to Villanueva-Villa's intoxication on all three (3) dates of arrest. In addition, the Probable Cause Sheet in support of the charging information for the vehicular homicide/DUI and hit and run charges against Villanueva-Villa was prepared by the Clark County Sheriff's Office as the arresting agency. (CP 650) and (CP 336)

**f. Clerk's Papers 653-663 (also offered at CP 338-349):**

These documents are copies of various warrants served upon Villanueva-Villa that were provided by Clark County Sheriff's Office Public Disclosure Department following a records request by Appellant's Counsel. *See Declaration of Ronald W. Greenen* (CP 1184 – CP 1200). Again, these documents were provided by Respondent, Clark County's own Public Disclosure Department and include the warrant at issue in this case previously offered by Clark County via the testimony of Sheriff Gary Lucas and warrant supervisor, Kelly Roberson. See *Exhibit "D"* to the *Supplemental Declaration of John Nicholson* (CP 1047) as Exhibits 17 and 18 to the Deposition of Gary Lucas (CP 1047 at 1122 to 1124) and also by *Declaration of Kelly Robertson* (CP 1040 -1044).

**g. Clerk's Papers 778-783 (also offered as CP 413-418):**

These documents are the exact same two (2) District Court Dockets offered by Respondent, Clark County as *Exhibit B and Exhibit C* to the *Declaration of Ric Bishop* (CP 39-63 at 52 and 57), both of which display court entries concerning Villanueva-Villa's DUI charges of November 26, 2005 and December 23, 2005. (CP 778-83)

In addition, Clark County offered excerpts from the depositions of several witnesses which were also offered by Appellant Myles, specifically:

- a. Steve Shea deposition of 3/30/16

- b. Terian McCracken deposition of 8/2/16
- c. Carey Salzsieder deposition of 3/25/16
- d. Gary Lucas, deposition of 4/5/16 and included exhibits 10-18 to the deposition
- e. Jackie Webster deposition of 3/30/16
- f. Daniel Schaub deposition of 3/30/16
- g. Deposition of Richard Bishop of 3/30/16 and included exhibit 1 to his deposition.
- h. Deposition of Robert Brusseau of 3/31/16

*See Supplemental Declaration of John R. Nicholson (CP 1046 to 1059)*

The majority of records offered by Appellant were also offered by Respondents, Clark County and Washington State Patrol, or were offered in response or rebuttal to records offered by both Respondents. Respondents opened the door by introducing the same or similar evidence to which Appellant is allowed the opportunity to respond or rebut. Respondents cannot now object to evidence they themselves offered. Although Respondents' objections to the admissibility of documents were never ruled upon, the decision to allow evidence is up to the discretion of the trial court judge. State v. Wafford, 199 Wn.App. 32, 397 P.3d 926 (2017). In Wafford, the court ruled that the decision to admit evidence lies within the discretion of the trial court and cannot be overturned absent abuse of discretion. Citing State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). An abuse of discretion exists " [w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons ... ." citing State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

The range of discretionary choices is a question of law, and the judge abuses his or her discretion if the discretionary decision is contrary to law. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). A party may open the door to otherwise inadmissible evidence by introducing evidence that must be rebutted [199 Wn.App. 37] in order to preserve fairness and determine the truth. Citing State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). A party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence." Citing State v. Jones, 144 Wn.App. 284, 298, 183 P.3d 307 (2008) (quoting 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 103.14, at 66-67 (5th ed. 2007)).

The Orders on Reconsideration, which were prepared and presented by Respondents, Clark County and WSP Brusseau, respectively, do not specify which evidence the trial court judge relied on in making his ruling. (CP 1357 and CP 1354) It is at the judge's discretion to admit or deny evidence subject to relevancy. In making a determination, the judge is not bound by the Rules of Evidence except those with respect to privileges. ER 104(a) and (b). The Judge may also take judicial notice of certain facts. ER 201.

Judge Gonzales never ruled on Respondents' objections and the final orders entered do not address the admissibility of any specific evidence or portions of the record. Neither Respondent requested that the court rule on their prior objections when the final orders were entered. As argued herein, the trial court has broad discretion as to the admissibility of evidence and the evidence Appellant offered was both critical to the outcome of the case and tied to the elements of the claims against both of these Respondents.

9. **Summary Judgment in Favor of Respondent, Clark County Should be Reversed**

If Clark County is found to have discretionary immunity based on the authority to implement jail policy and the booking restrictions in place on the night of December 23, 2005, then the disputed facts surrounding the issue of those booking restrictions and the fact that the policy in 2005 cannot be produced, are sufficient to survive summary judgment. Clark County has offered conflicting evidence regarding the procedure for confirming warrants and what the actual jail overcrowding policy and booking restrictions were on December 23, 2005.

a. **Procedure for Confirming Warrants.** Conflicting testimony has been offered as to whether it was policy to always confirm warrants or whether employees were instructed not to confirm warrants when an inquiry was made when the jail was full. Terry McCracken, a County employee, testified in

her deposition that it was customary to confirm all local warrants “if there in there”, including misdemeanor warrants but they would not always confirm out of county warrants. But if the jail was at a Level “E” then they would stop confirming warrants. See excerpts from *Terri McCracken deposition attached as Exhibit “B” to Supplemental Declaration of John R. Nicholson* (CP 1046 at 1059, McCracken depo p. 14, L-17 to p. 15, L-21) *The Declaration of Kelly Roberson*, Clark County Warrants Supervisor confirmed that the Villanueva-Villa’s warrant was indeed “in there” on 12/23/2005. (CP 1041-1044)

Jennifer Bell, CCSO records supervisor in 2005, testified that all warrants are confirmed. *Bell depo, p. 15, L19 to p.16, L12.* (CP 492 at 793).

Even more conflicting is the testimony of Nancy Druckenmiller, a current employee of CCSO, who worked in records in 2005, who testified that is was only “out of county” warrants that were not confirmed based on booking levels.

*Druckenmiller depo, p. 14, L11 to p. 15, L19 (CP 492 at 797)*

Former Sheriff Gary Lucas testified in his deposition that Clark County either has a warrant or it doesn’t have a warrant and that he has no knowledge of the sheriff’s office not confirming warrants. See excerpts from *Deposition of Gary Lucas attached as Exhibit “D” to Supplemental Declaration of John R. Nicholson* (CP 1046 at CP 1079, Lucas depo p. 39, L17-18) Sheriff Gary Lucas also testified that regardless of the booking restrictions, the warrant is still served

on the individual either at the jail or in the field and the offender is giving a new citation and court date to appear before the court on the warrant. See excerpts from *Deposition of Gary Lucas attached as Exhibit "D" to Supplemental Declaration of John R. Nicholson* (CP 1047 at 1079, Lucas depo p. 46, L-17 to p. 47, L14) This is in direct conflict with the testimony offered by WSP's witnesses, Trooper Brusseau and Dispatcher Salzsieder who stated it was common practice for Clark County to ignore misdemeanor warrants. (CP 131 and CP 692) and (CP 27 and CP 697).

Additionally, in the Letter from Sheriff Lucas to Appellant Myles dated June 5, 2007, Sheriff Lucas states that it is the Sheriff's Office policy to transport the arrestee to the jail where they will be booked and depending on the charges alleged in the warrant and the jail population, the individual will either be held for court the next judicial day or assigned a new court date and released. See *Exhibit 16 to Deposition of Gary Lucas* (CP 1120 and CP 1121)

**b. Jail Policy.** Chief Ric Bishop stated in his Declaration that they do not have a copy of the jail policy for 2005 but offered a copy of the jail policy for 2007 as a reference stating it was essentially the same as 2005 with the exception that jail populations had increased. (CP 29-61 at CP 41) Bishop stated that in 2005, the policy would have been to cite and release misdemeanor offenders if the jail population was 772. The "level" applicable to a population of

772 cannot be confirmed since Clark County did not have a copy of the 2005 policy.

In his deposition, Sheriff Lucas' testimony was also based on a copy of a 2007 jail policy. (CP 1113).

In the deposition of Chief Deputy Ric Bishop, the jail policy which his testimony was based upon was undated. See *Exhibit "1" to Bishop Deposition* (CP 1021 at 1147)

In Clark County's Responses to Co-Defendant, State of Washington's First Interrogatories and Requests for Production, Clark County states that a signed copy of the 2005 policy cannot be located. See *Exhibit "13", Deposition of Gary Lucas*. (CP 1021 at 1101)

The fact that a copy of the 2005 policy is not available for the purpose of confirming what level of restrictions were in place based on the alleged jail population of 12/23/2005 is a material issue of fact and is essentially the basis for Clark County's entire defense in this action.

c. **Booking Levels on 12/23/2005.** The following testimony regarding the actual booking levels on the night of December 23, 2005 is also conflicting:

i. The Clark County Shift Log for 12/23/2005 shows the highest head count on that date was **784**. (CP 1108). See also *Exhibit*

"12" to the Deposition of Gary Lucas which also shows the head count at **784** and is marked as **Level "B"**. (CP 1021 at 1099)

ii. The head count shown on the Population and Booking Level Summary Report for 12/23/2005 shows a head count of **772**. *Exhibit "13" to Gary Lucas Deposition* (CP 1021 at 1101) . This conflicts with the Clark County Shift Log in the preceding paragraph.

ii. The same Population and Booking Level Summary Report for 12/23/2005 as above but provided by Clark County in Response to Discovery Requests made by Co-Defendant, WSP, showed a head count of **772** as above but the booking **Level "B"** on this document had been crossed out and replaced with a **handwritten "D"**. See *Exhibit "13" to Gary Lucas Deposition* (CP 1021 at 1104)

Sheriff Gary Lucas had no explanation as to why the record appeared to be altered in WSP/Co-Defendant discovery requests. Lucas depo p. 52, L17 to p. 54, L6, (CP 1021 at 1082).

iv. Sheriff Lucas also had no explanation why Jackie Batties' letter to Appellant's counsel dated 10/22/2007 advised that the jail was accepting prisoners on December 23, 2005. See Lucas depo p. 51, L19 to p. 52, L15 (CP 1021 at 1084) and *Exhibit 10 to Lucas Depo.* at CP 1095.

v. Page 6 of *Clark County's Responses to Co-Defendant, State of Washington's Requests for Admissions to Defendant, Clark County*, states that the head count was "**772**" on December 23, 2005. (CP 1021 at 1094)

vi. Page 6 of *Clark County's Responses to Co-Defendant, State of Washington's First Interrogatories and Requests for Production* states that the head count was "**784**" on December 23, 2005. (CP 1021 at 1103)

vii. The *Declaration of Ric Bishop* states that the population of the jail was at "**772**" on December 23, 2005. (CP 39-61 at CP 40).

Clark County's entire defense, which WSP and Trooper Brusseau have also relied on, is centered on the jail overcrowding policy and the booking restrictions in place on the night of December 23, 2005. These booking restrictions are based on the jail population on a particular day. According to both Respondents, jail policy authorizes the County to book and release misdemeanor arrests when the jail population reaches a certain level. However, the policy does not address their authority to ignore or refuse to confirm misdemeanor warrants. In addition, a copy of the policy in 2005 cannot be located to verify exactly what those policies were in 2005 in order to determine the population (head count) applied to each level in 2005. The evidence provided by Clark County for the head count at the jail on 12/23/2005 differs between 772 and 784 as set forth above. What the jail policies were in 2005 and what the head count of the jail was on 12/23/2005 are material issues of fact that must be determined at trial.

**d. Conflicting Testimony Re: Arresting Officer**

Clark County witnesses have made statements that the ultimate decision to arrest on a misdemeanor warrant is up to the arresting officer. The decision of whether or not to bring Villanueva-Villa to the jail for processing was at the hands of WSP Trooper Brusseau. It was up to Trooper Brusseau to request an exception to the booking restrictions in place that night, whatever those restrictions may have been. (CP 39 at 42). A book and release request to the Sergeant on duty at

the jail must come from the arresting officer. *Lucas depo pg. 24, L1 – p.25, L2* (CP 1021 at 1076-1077).

In it's *Responses to Defendant State of Washington's First Interrogatories and Requests for Production to Co-Defendant, Clark County*, CCSO states that it was Trooper Brusseau's responsibility to bring Villanueva-Villa to the jail for booking and processing on the warrant. (CP 177 at 385, 390)

Deputy Mike Anderson testified that the CCSO will always make an exception to the booking restrictions if mitigating circumstances exist, but it's up to the arresting officer to request that an exception be made. *Anderson depo, p. 17, L25 to p. 18, L19.* (CP 177 at 406) Deputy Anderson also testified that it is up to the arresting officer to serve the warrant, not the jail. The arresting officer goes down and retrieves the warrant and serves it on the individual. *Anderson depo, p. 14, L7 to p. 16, L21* (CP 177 at 405)

Chief Deputy Ric Bishop testified that exceptions can be made to the booking restrictions at the arresting officer's discretion. The arresting officer must give a reason and the decision is then made upon the interest of public policy. *Bishop depo, p. 29, L6 to p. 30, L8* (CP 177 at 409).

Steven Shea, the Jail Sergeant in 2005 testified that the arresting officer on a new crime is responsible for serving the warrant by bringing the individual

down to the jail for booking. *Shea depo, p.19, L21 to p. 21, L4* (CP 177 at 411-412)

Jennifer Bell, CCSO records supervisor in 2005, testified that it was up to the officer's discretion to bring the individual to the jail or not. The officers are advised of the jail level and they [CCSO] always expect the officers to come down to the jail and cite and release the individual. *Bell depo, p. 15, L19 to p.16, L12* (CP 492 at 793)

Trooper Brusseau disagreed that it was his responsibility to request the exception and serve the warrant. *Brusseau depo, p. 24, L7-19* (CP 177 at 369)

WSP Dispatcher Salzsieder's testimony also conflicts with the CCSO's position stating that an officer is unable to serve the warrant or bring the individual to jail when the County refuses to confirm the warrant or refuses to book the individual. *Salzsieder depo, p. 12, L 23 to p. 13, L13* (CP 177 at 375-376)

Based on the above conflicting testimony and the fact that both Respondents have based their defense on the theory that they have discretionary immunity under the jail's overcrowding policies and booking restrictions, it is clear that issues of material fact exist in this case which require the matter to be remanded back to Superior Court for further proceedings.

#### **10. Trial Court's Initial Rulings of 9/27/2016 and 10/7/2016**

In its initial ruling denying summary judgment, the trial court acknowledged that ignoring court orders when the jail is at capacity was a factual and material question and issue. (RP 64, L9-11) Whether Trooper Brusseau was excused from liability for failing to arrest on the warrant was also acknowledged as a material issue of fact. (RP 65, L13-22). What conditions were imposed upon Villanueva-Villa to keep him from drinking alcohol were also a material issue of fact. 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). The trial court indicated in its September 27, 2016 oral ruling, that these were all 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)

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)

#### **11. Reconsideration**

All issues on reconsideration were previously argued by Clark County 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) There was no additional evidence or alternative argument offered. Washington courts have ruled that a motion for reconsideration should not be used as a vehicle for a second chance to argue a party's case, which is exactly what Clark County did. Judge Gonzales himself stated that the facts were similar but that he would take a more discerning look. (RP 110, L 16-19) Clark County should not have been allowed a second shot at arguing their case. 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).

Furthermore, Appellant still feels that the motion for reconsideration was not timely. CR 59(b) states that the motion is to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. As Appellant stated in her opening brief, 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. Regardless of what the judicial

assistant offered Respondents for hearing dates, there was no Order of extension entered by the Judge as required by the Rule. (RP 108, L 19-25)

Clark County Superior Court's Local Rule 59(b) which required the Judge to issue a writing ruling allowing oral argument was also not followed. Even absent a formal order, there is nothing on the record to show that the court authorized oral argument. The court simply allowed it to happen with no express authority.

As outlined in Appellant's Opening Brief, the trial court abused its discretion by giving the Respondents a second chance to argue their case. In addition, Washington's Court Rules and Clark County's Local Rules were not properly followed. (*See App. Opening Brief at p. 26-30*)

### **III.**

#### **REPLY ARGUMENT - WASHINGTON STATE PATROL AND TROOPER BRUSSEAU**

##### **A. Appellant's Position – Respondent, WSP/Brusseau**

##### **1. The Public Duty Doctrine Does Not Bar Plaintiff's Claims Against WSP/Brusseau**

##### **a. The Failure to Enforce Exception Also Applies to WSP/Brusseau**

Appellant has offered evidence satisfying all four (4) factors necessary for the failure to enforce exception to apply to WSP in this case, specifically that a

duty existed, WSP had knowledge of that duty, WSP failed to take corrective action, and Myles was as a member of a protected class. (CP 492 at 505-523)  
*(See App. Opening Brief at pg. 31-37) See also Response to Defendant, WSP and Brusseau's Motion for Summary Judgment, (CP 177 at 189-202)*

The duty of law enforcement officers to execute warrants is a mandatory duty, not a discretionary one. RCW 36.28.010 (3) and (4). See also 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. Judge Van de Veer addressed the very issue before this Court in his law review stating that the public duty doctrine does not shield law enforcement agencies from tort liability because a mandatory duty exists where warrants are concerned.

The duties of the Sheriff 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. As a peace officer, Brusseau had a duty to abide by the Court's order and bring Villanueva-Villa to the jail for service of the warrant or cite and release Villanueva-Villa with a court date to appear on the warrant. *(Lucas depo. at pg. 46, L-17 to Pg. 47, L-14 at CP 1079)*

There was testimony as to WSP/Brusseau's knowledge of the warrant which was located by WSP dispatcher, Carey Salzsieder on December 23, 2005. (CP 27-36 and CP 697) The dispatcher advised Brusseau of the warrant. Brusseau also had knowledge of the jail's policy of not confirming warrants and that they would not accept Villanueva-Villa because of the booking restrictions at the jail that night. (CP 131 and CP 692) He also 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)

Trooper Brusseau failed to take correction action as required by law and the warrant itself. 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) (CP 1041 at 1044). Brusseau also failed to consider the release factors set forth under Wash. Crim. R. Ltd. Jur. 2.1(b)(2), specifically section (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. Villanueva-Villa's failure to appear was clearly stated on the warrant itself. (CP 1041 at 1044)

Officer Brusseau had knowledge of the valid warrant, had knowledge of Clark County's practice of ignoring valid warrants, had knowledge that Villanueva-Villa had a propensity to drink and drive which was evidenced by 2 DUI charges in less than one month, had knowledge that Villanueva-Villa failed to appear at his first DUI arraignment hearing, thus the basis for the FTA warrant. Officer Brusseau had the opportunity to protect the public and Mr. Myles from the dangers Villanueva-Villa posed by means of the executing at the time of the new/second DUI arrest.

**b. The Special Relationship Exception Also Applies to WSP/Brusseau**

As argued in Appellant's opening brief, 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, 428, 671 P.2d 230 (1983). (*App. Brief p. 38-41*) See also *Response to WSP/Brusseau's Motion to Summary Judgment* (CP 177 at 203-208) Trooper Brusseau had in his custody a driver charged with his second DUI arrest within a month and a warrant for arrest on the first DUI. The history behind the warrant and circumstances of the second arrest created a "take charge" relationship between Villanueva-Villa and Trooper Brusseau. 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 a take charge relationship is established, WSP had the duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of Villanueva-Villa. Joyce v. State, Dept. of Corr., 155 Wn.2d 306, 310, 119 P.3d 825 (2005), (quoting Taggart, 118 Wn.2d at 217). Trooper Brusseau had a duty to take charge of Villanueva-Villa while he was in Brusseau’s direct control and custody in order to protect Myles from the reasonably foreseeable danger that Villanueva-Villa’s posed due to his propensity to drink and drive and ignorance of judicial orders to appear before the court.

**c. WSP/Brusseau Does Not Have the Discretion to Disregard Warrants**

There has been no evidence or authority offered to support WSP’s claim of discretion when serving arrest warrants. (*See App. Reply Brief at 13-14, and 25-27*) The testimony from former Sheriff Gary Lucas is clear that a warrant must still be served regardless of the jail population. Trooper Brusseau was required to bring Villanueva-Villa down to the jail for booking. The jail would

either hold him or release him depending on jail capacity at that time. If he was released, he would be given a citation to appear before the court on the warrant. If he was cited and released in the field, he would also be issued a court date on the warrant. The legal authority and testimony offered in this case clearly supports the duty of Trooper Brusseau to serve the warrant on Villanueva-Villa. WSP/Brusseau offers Bellingham Bay Imp. Co. v. City of New Whatcom, 20 Wash. 53, 59-60, 54 P. 774, aff'd, 20 Wash. 231, 55 P. 630 (1898) in support of their claim of having such discretionary authority. The Bellingham Bay case has nothing to do with law enforcement or the authority of law enforcement to ignore warrants or orders of the court. The case applied to executive officers in general and reinforced the power of the judiciary and authority vested in judges. Bellingham Bay at 60. Respondent attempts to apply this case to police officers as having some quasi-judicial power but the court did not specifically state that such power is vested unto law enforcement when specifically charged with a duty to enforce the court's orders.

WSP/Brusseau is confusing the issue by stating that law enforcement officers have the authority to make an arrest or not make an arrest. Again, as Appellant has repeatedly stated, the issue in this case is not the discretionary authority of an officer to make a new arrest. The issue in this case pertains solely as to whether law enforcement has the authority to ignore or refuse to arrest and

serve an arrest warrant, which is a judicial order commanding that officer to bring the offender before the Court, which Washington law and opinions of the Washington judiciary have stated is mandatory.

**d. An Exception to the Public Duty Doctrine is Not Always Required to Find Negligence**

As stated in previously herein, the exceptions to the Public Duty Doctrine do not all need to be met in order to find negligence against law enforcement. Brusseau acted with full knowledge that Clark County was not following proper warrant procedure. As with Clark County, WSP/Brusseau had a duty to execute the arrest warrant. WSP appears to be piggybacking on Clark County's defense by using the jail policy as a defense for not enforcing the warrant. Neither Clark County nor Washington State patrol have asserted any statutory or policy authority where it specifically states that they can refuse to confirm or arrest on a warrant. Trooper Brusseau admitted his knowledge of Clark County's procedure for not confirming warrants and the reasoning behind it. (CP 131 and 692) Trooper Brusseau acquiesced to this policy regardless of its legality or the circumstances of the warrant. As testified by Clark County's own employees, Brusseau had the ability to bring Villanueva-Villa in for booking. (*See App. Reply Brief at 30-32*) He disregarded the jail's policy as well as the factors of release

under Wash. Crim R. Ltd. Jur. 2.1(b)(2) and should be equally held responsible for the failure to arrest Villanueva-Villa.

## **2. Proximate Cause**

Again, as previously argued in this case as to Respondent Clark County, Appellant offered evidence that Villanueva-Villa could have remained in custody for at least 36 days or that alcohol related conditions would have at least been imposed for at least 36 days following his arrest on December 23, 2005. The District Court Judge who ultimately arraigned Villanueva-Villa on both DUI charges imposed preventative conditions related to alcohol, specifically breath/urine testing and Antabuse monitoring. Whether bail would have been posted by Villanueva-Villa is a moot defense since he was already incarcerated for the death of Myles when these conditions were set. (CP 492 at 638). Even he was able to be released, Villanueva-Villa would have been supervised, and such supervision would have included the monitoring of his alcohol use. (CP 492 at 778 and 781) .

Whether Villanueva-Villa would have been in jail or released on the above conditions is a genuine issue of fact for a jury or trier of fact to decide. It is reasonable that based on all of the testimony and evidence offered in this case that a jury could find proximate cause existed. As stated earlier, trial court agreed

prior to reversing its decision, that several issues of material facts exist in this case. (RP 72, L 6 to RP 73, L2 and RP 100, L12 to RP 102, L23)

**B. Summary Judgment Was Not Appropriate As To Respondent, WSP/Brusseau**

Both Defendants/Respondents placed the blame on each other in the early stages of litigation. The trial judge noted there was “finger pointing” between Co-Defendants. (RP 63) Appellant has shown that the jail policy is silent when it come to the authority of law enforcement to ignore active arrest warrants. The County’s surmounting testimony claims that it was up to Brusseau to request bring Villanueva-Villa in on the warrant and request an exception to those booking restrictions, which is opposite of what WSP has been arguing during the tenure of this case. WSP originally stated that even if the Brusseau asked for an exception, Villanueva-Villa would not have been booked based on jail population that night. (CP 131 at 133 and CP 692 at 694)

The main questions at issue in this case are 1) Why wasn’t Villanueva-Villa booked and released? and 2) Why was Villanueva-Villa’s arrest warrant completely ignored by both law enforcement agencies? Over and over we have heard testimony that that there is a definitive process for serving an arrest warrant regardless of jail overcrowding policies and jail population booking restrictions but no one involved in this case appears to have followed that process. Both

Respondents appear to suggest they are immune from liability because jail policy allows such immunity and the procedure for the second DUI arrest was properly followed. It is and always has been Appellant's claim that it was the warrant process for the first DUI that was not followed properly. What the policies and procedures were 2005 is in clear conflict based on the testimony herein. (*See App. 's Reply Brief at p. 25-32*)

Finally, both respondents are now arguing that there is no evidence that Villanueva-Villa was even under the influence of alcohol at the time he killed Mr. Myles. Although, the threshold issue within summary judgment proceedings is whether or not there was a duty to Myles, Appellate can prove there was alcohol involved in Myles' death at trial. The intoxication prong to the vehicular homicide charge did not just magically appear on the information. The prosecutor had to show probable cause in order to go forward with any of those charges. (CP 333-337 and CP 647-652) The Clark County Sheriff's Office itself was in charge of the investigation into Myles' death and submitted the probable cause affidavit. (CP 336 and CP 651). Investigative reports for the Myles investigation were also offered as part of discovery requests in the present action. (CP 492 at 710) Villanueva-Villa's plea bargain in the vehicular homicide case, which was reduced and removed the DUI prong, was an obvious tactical move by his defense counsel due to his other two (2) prior DUI charges. This is evidenced by

Villanueva-Villa's guilty plea to the other two DUI's which was entered subsequent to his conviction for the Myles vehicular homicide. The date his guilty pleas were entered (June 8, 2006) was stated in the District Court Dockets offered by Clark County, which was after his conviction in the Myles matter as the sentences were ordered to run consecutively with his felony. (CP 59 and CP 60) In addition, Appellant herself stated in her notarized Tort Claim form served upon Clark County in this matter that alcohol was a factor in her husband death, which again was offered by Respondent, Clark County. (CP 64-107 at 99)

This is a summary judgment proceeding not a trial. The evidence offered in summary judgment need only raise a question of material fact not prove the entire case by a preponderance of the evidence.

**C. Reconsideration**

Appellant incorporates the same argument and authority in reply to WSP/Brusseau's Responsive Brief regarding the court's order on reconsideration as set forth herein as to Respondent, Clark County, herein. *See App.'s Reply Brief at p. 33-35.*

As with Clark County, WSP and Brusseau argued the same issues on reconsideration as it did on summary judgment. 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 a second time. There must be specific

issues presented to show that the court erred in its decision. (*See App. 's Opening Brief at p. 44-47*) The trial court abused its discretion in allowing both parties to have a second shot at arguing their summary judgment motions which resulted in the trial court completely ignoring its prior findings and reversing its decision.

The same technical issues existed with WSP and Brusseau's Motion for Reconsideration as with Clark County's motion. The time frame for hearing required by CR 59(b) was not followed and there was no order granting an extension. (See Appellant's Opening Brief at p. 28-29 and p. 47). As with Clark County, oral argument was allowed without express authorization from the court as required by Clark County Local Rule 59. (*See App. 's Opening Brief at p. 29*).

**D. Inadmissible Documents**

Appellant incorporates the same argument and authority in reply to WSP/Brusseau's claim of inadmissible documents as set forth herein as to Respondent, Clark County, herein. *See App. 's Reply Brief at p. 16-25*.

Again, both Washington State Patrol and Clark County presented orders to the court which they each respectively drafted. Neither Order was specific as to exactly what evidence the judge relied on in making his rulings. As argued in Appellant's response to Clark County, the trial judge has the discretion to admit evidence. Ronald Greenen, an officer of the court authenticated the evidence. On summary judgment, the proponent need only make a prima facie case showing

authenticity. Rule 56(e)'s authentication requirement is met if the proponent can show proof sufficient for a reasonable fact-finder to find in favor of authenticity. The rule does not limit the type of evidence allowed to authenticate a document, it merely requires some evidence sufficient to support a finding that the evidence is what the proponent claims it to be. Int'l Ultimate Inc. v. St. Paul Fire & Martin Ins. Co., 122 Wn. App. 736, 745-46, 87 P.3d 774 (2004).

Furthermore, ER 904(a)(6) allows a party to authenticate documents with guarantees of trustworthiness. Records from the same jurisdiction bearing the same court's clerk's date stamp are certainly trustworthy. It would have been quite costly for Appellant to obtain certified copies of every single document on file in the associated cases, which were within the same jurisdiction as the case at issue.

#### **IV. CONCLUSION**

Both Defendant/Respondents in this case have claimed immunity based on discretionary authority to refuse to arrest an offender with an outstanding warrant. Both Respondents have attempted to use jail overcrowding policies to support such authority, yet nothing in the policy relates to the service of an arrest warrant. In fact, there has been no actual determination of what that policy actually stated in 2005 since a signed and dated copy from 2005 cannot be found. Clark County created it's own made up policy of not confirming warrants as a means of saving

law enforcement time by avoiding the booking process. WSP and Brusseau had knowledge of this made up policy and followed along despite lacking any legal authority. There has been overwhelming testimony in this case that the jail's actual policy is either to cite and release in the field or to book and release at the jail, with both requiring the issuance of a future court date to appear on the warrant. There has been absolutely no legal showing that Clark County or WSP/Brusseau had the authority to ignore a warrant or refuse to arrest on a warrant in lieu of these actual policies.

Based on the above argument and authority, Appellant requests that the Appellate Court reverse the trial court's orders granting Defendant, Clark County Motion for Summary Judgment and Defendant, Washington State Patrol and Trooper R.H Brusseau's Motion for Summary Judgment based upon the fact that there are genuine issues of material fact in dispute in this case which require further proceedings before a trier of fact.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of October, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2019, I submitted the foregoing REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT for service 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: October 10, 2019

  
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**October 10, 2019 - 1:29 PM**

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