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NO. 49889-8-II

COURT OF APPEALS FOR 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,

v.

STATE OF WASHINGTON, et al.,

Respondent/Cross-Appellants.

BRIEF OF RESPONDENT/CROSS APPELLANT CLARK COUNTY

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I. INTRODUCTION

This is an appeal from an order granting summary judgment in a case arising out of a fatal traffic collision. On January 27, 2006, while driving his vehicle William Myles was broadsided by Carlos Villanueva-Villa, a co-defendant in this matter.[1] Villanueva-Villa later pleaded guilty to one count of vehicular homicide and one count of hit and run. Mr. Myles' spouse, Gwyn Myles, filed this lawsuit on behalf of herself and her husband's estate. In addition to Villanueava-Villa, Myles sued Clark County ("the County"), the Washington State Patrol ("WSP"), and WSP Trooper R.H. Brusseau,[2] asserting they were negligent for failing to jail Villeanueva-Villa when he was stopped for driving under the influence ("DUI") thirty-five days earlier on December 23, 2005. Summary judgment in favor of the County should be affirmed, because it owed no actionable duty, it is entitled to discretionary immunity for implementing and following a jail overcrowding policy, and there was no evidence its conduct was a proximate cause of the collision.

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[1] Villanueva-Villa never appeared or filed an answer in this case.

[2] Myles also sued the Washington State Department of Corrections ("DOC") in this matter based on a theory of negligent supervision. This court previously accepted discretionary review of the trial court's denial of DOC's summary judgment motion and reversed, holding it had no duty to prevent Villanueva-Villa from harming Myles. *Myles v. State, et. al.*, No. 49928-2-II (Wash. App. July 24, 2018).

II. COUNTER-STATEMENT OF ISSUES

> Was summary judgment in favor of the County proper, because (1) it owes no actionable duty under the public duty doctrine; (2) it is entitled to discretionary immunity where its liability is premised on the implementation and enforcement of a jail overcrowding policy; and (3) there is no evidence its conduct on December 23, 2005 was a proximate cause of the collision between Villanueva-Villa and Myles thirty-five days later on January 27, 2006?

III. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

The trial court erred to the extent it considered and relied upon inadmissible evidence, over the County's objections, which was offered by Myles to oppose the County's motion for summary judgment.

IV. COUNTER-STATEMENT OF THE CASE

WSP Trooper Brusseau contacted Villanueva-Villa in his vehicle on December 23, 2005 for driving while impaired. CP 97. Trooper Brusseau then contacted WSP communications to run warrants on Villanueva-Villa. *Id*. Trooper Brusseau spoke with WSP Communications Officer Cary Salzseider, who notified him Villanueava-Villa had an additional active warrant for failing to appear on a prior DUI charge. CP 132-33. However, she also informed Trooper Brusseau the County could not accept Villanueva-Villa into the jail that evening. CP 28-29. Other than Ms. Salzseider's log, which indicates the jail could not confirm on the warrant,[3]

[3] Myles and numerous witnesses in this matter often use the term "confirming" a warrant without defining precisely what they mean. As the jail's Chief Civil Deputy Steven

there is no record of the call; the County could not identify which jail staff person she spoke with. CP 1079-80, 1125-26. However, it is undisputed that the jail was overcrowded that evening and booking restrictions were in place. CP 41-42.

Because the capacity of the County jail is limited, jail administrators have adopted policies prioritizing the booking of inmates during periods of overcrowding. CP 40-41. A jail overcrowding policy, adopted and implemented by the Chief Jail Deputy based on authority delegated from the Sheriff, has been in place since at least 1995. *Id*. The policy has been amended numerous times over the years as the jail's capacity has increased. *Id*. Depending upon the number of inmates in the jail at a given time, the policy governs which types of offenders will be booked and the circumstances under which current inmates will be released. CP 41. On December 23, 2005, the jail was at level "D" under its overcrowding policy, which meant law enforcement were requested to cite and release

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Shea explained, in general "confirming" a warrant means verifying that the warrant is valid and that the original warrant physically exists in the jail's records department. CP 1055. However, when some witnesses have referred to the County "not confirming" on a warrant, they simply mean that booking restrictions are in place at the jail that prohibit it from keeping a particular individual in custody due to overcrowding, even though a valid warrant is outstanding. CP 1063. Ms. Salzseider testified in her deposition that she would generally make two calls to inquire whether the jail would incarcerate someone based on a warrant: the jail itself would be called to verify whether it had space, but the jail records department would be called to confirm the validity of a warrant. CP 1072. She stated she would generally only call the jail's records department if she first verified that the jail had space to book an individual on a particular warrant. *Id*.

misdemeanor arrestees, subject to certain exceptions not applicable here.[4]

On January 27, 2006, over a month after Trooper Brusseau's encounter with Villanueva-Villa, Myles' hit-and-run collision with Villanueva-Villa occurred. CP 12-13. Villanueva-Villa subsequently pleaded guilty to one count of vehicular homicide and one count of hit and run. CP 14. While the County accepts Myles' allegation that Villanueva-Villa was convicted of these crimes, there is nothing in the record before this Court to establish he was consuming alcohol or otherwise intoxicated on the night of his collision with Myles.

The length of time between Trooper Brusseau's encounter with Villanueva-Villa on December 23, 2005 and Villanueva-Villa's subsequent hit-and-run collision with Myles on January 27, 2006 was thirty-five days. The Clark County Jail maintains data regarding the average length of stay for all offenders who are booked each year. CP 43. In 2005, the average length of stay for was 17.49 days. *Id.* In 2006, the average length of stay was 18.12 days. *Id*. Importantly, these numbers reflect the average length

[4] In December 2005, a jail head count was made every morning. CP 896. Booking restriction levels were assigned, as outlined in the County's overcrowding policy, from level "A" to level "E" based upon the jail population levels determined from the head count. CP 872-73. On the morning of December 23, 2005, the booking restriction was level "D," meaning misdemeanor offenders would not remain incarcerated at the jail unless they met certain exceptions. CP 856, 858. Those exceptions did not include DUI's.CP 871. If a law enforcement officer wished for the County to "book and release" a misdemeanant offender during such a period of overcrowding or if exceptional circumstances justified an exception to booking restrictions, the officer was permitted to make a request to the Jail Sergeant on duty. CP 42; *See also* CP 49 (Sergeant is responsible for "booking exceptions").

of stay for all booked offenders, including those who committed more serious felony offenses. *Id*.

The court eventually set bail for Villanueva-Villa on the two DUI charges that preceded his hit-and-run with Myles. CP 42-43. For each of those charges bail was set at $10,000 for a total amount of $20,000 in bail. CP 42-43, 53-61. Criminal defendants in Clark County are able to secure bail bonds by posting an amount equal to ten percent (10%) of the bail set by the court. CP 42. Thus, even if Villanueva-Villa had been jailed for the two DUI offenses on December 23, 2005, he would been released on bail if he had been able to secure approximately $2,000 for a bond. CP 43.

The County, WSP, and Trooper Brusseau filed their summary judgment motions in this matter on January 22, 2016. CP 110-28; 138-74. In response to the County's summary judgment motion, Myles filed thirty-six unauthenticated exhibits, many of which were also hearsay, as attachments to her opposition brief. CP 537-817.[5] The County objected to the inadmissible documents. CP 1022-23. Myles then filed a declaration by her attorney attempting to cure the lack of any evidentiary foundation. CP 1201-15.[6] While some of the exhibits were discovery responses and

[5] Myles filed many of the same unauthenticated exhibits to his brief in opposition to the summary judgment motion of WSP and Trooper Brusseau. CP 222-491.

[6] A similar declaration was filed by Myles' attorney in an attempt to cure the same problems with the unauthenticated exhibits attached to Myles' brief in opposition to the summary judgment motion filed by WSP and Trooper Brusseau. CP 1184-1200.

depositions from this case, others were not properly authenticated by counsel. The County reiterated its objections to those documents at the summary judgment argument on August 29, 2016. RP 1-2.[7] On October 7, 2016, the trial court initially denied the summary judgment motions filed by the defendants. CP 1232-36. On October 17, 2016, the defendants timely filed motions for reconsideration. CP 1421-61, 1264-83. The trial court heard oral arguments on the motions to reconsider on December 2, 2016. RP 75-110. On December 30, 2016, the trial court reconsidered its earlier denial and granted the summary judgment motions. CP 1354-61.

V. ARGUMENT

A. Standard of Review

Review of a summary judgment motion is *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301(1998). Summary judgment is appropriate if, viewing all facts in the light most favorable to the non-moving party, there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987); CR 56(c). A factual dispute is material if the outcome of the case depends upon it. *Hash v. Children's Orthopedic Hosp. & Med. Center*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). Summary

[7] Specifically, exhibits 1-15, 26, and 27 to Myles' summary judgment opposition brief were not discovery responses, depositions, or other documents properly authenticated by Myles' attorney. CP 537-663, 778-83.

judgment in favor of a defendant is appropriate where a plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)).

1. This Court May Affirm Summary Judgment Based on Any Ground Supported by the Record

The appellate court may affirm the trial court's decision granting summary judgment on any ground supported by the record. *Pac. Marine Ins. Co. v. Dept. of Revenue*, 181 Wn. App. 730, 737, 329 P.3d 101 (2014); *see also* RAP 9.12. Here, the trial court correctly found the County owed no duty, but summary judgment is also required based on additional grounds raised by the County. Given this Court's review is *de novo*, it should also affirm based on the County's discretionary immunity and the lack of any showing that its conduct was a proximate cause of the collision between Villanueva-Villa and Myles.

2. This Court Should Decline to Consider Inadmissible Documents Relied Upon by Myles

Affidavits or declarations opposing summary judgment must (1) be made on personal knowledge; (2) set forth facts as would be admissible in evidence; and (3) show that the affiant is competent to testify on the matters

contained therein. CR 56(e); *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). "A court may not consider inadmissible evidence when ruling on a motion for summary judgment." *King County Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). Thus, unauthenticated or hearsay documents are insufficient to overcome a motion for summary judgment. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 139, 331 P.3d 40 (2014). Significantly, much of the evidence Myles relied upon in the trial court is inadmissible. While the trial court did not directly rule on the County's objections to these documents, given this Court's review is *de novo* it should decline to consider or rely upon this inadmissible evidence.[8] For the reasons discussed below, even if the Court accepts the unauthenticated and inadmissible documents Myles relies upon, summary judgment was properly granted.

B. Summary Judgment in Favor of the County Should Be Affirmed, Because It Owed No Actionable Duty to Myles

The threshold requirement in a tort lawsuit against the government is the existence of a duty of care which runs to the plaintiff. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). The existence of a duty is always a question of law for the court. *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128

[8] Specifically, the records at CP 537-663 and 778-83 were not properly authenticated or admitted. For purposes of its cross-appeal on this issue, the County adopts the same arguments set forth by Respondent/Cross-Appellant State of Washington in its opening brief at pp. 47-50 and incorporates them by reference.

P.3d 574 (2006); *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988). Government tort duties for police power and regulatory programs are limited in order to prevent broad liability from discouraging such programs, which benefit the public. *Taylor*, 111 Wn.2d at 170. This limitation on police and regulatory liability is generally known as the "public duty doctrine." Law enforcement is a government regulatory function protected by the doctrine. *See, e.g., Johnson v. State*, 164 Wn. App. 740, 265 P.3d 199 (2011). "Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that 'the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one.)'" *Taylor*, 111 Wn.2d at 163 (quoting *J&B Dev. Co. v. King County*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983)). In general, a plaintiff must show that her claims fall under one of four narrow exceptions to the doctrine in order to bring suit based on a governmental function.[9] The only exceptions Myles has ever raised in this case are the special relationship and failure to enforce exceptions.

[9] The four exceptions to the public duty doctrine are: (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine; and (4) special relationship. *Gorman v. Pierce County*, 176 Wn. App. 63, 75, 307 P.3d 795 (2013).

1. The Failure to Enforce Exception Does Not Apply

Myles first claims a duty existed under the failure to enforce exception. The elements of this exception are:

> (1) Governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation;
> (2) They fail to take corrective action;
> (3) There is a statutory duty to do so; and
> (4) The plaintiff is within the class the statute intended to protect.

Honcoop v. State, 111 Wn.2d 182, 190, 759 P.2d 1188 (1988); *Smith v. State*, 59 Wn. App. 808, 814, 802 P.2d 133 (1990). All four elements of the exception must be met, and the plaintiff has the burden of establishing each element. *Atherton Condo Ass'n v. Blume*, 115 Wn.2d 506, 531, 797 P.2d 250 (1990). The failure to enforce exception is construed narrowly. *Id*. To satisfy this exception, Myles must identify a statute that imposes a mandatory duty on the County to take a specific corrective action rather than one that affords broad discretion. *Smith v. City of Kelso*, 112 Wn. App. 277, 284, 48 P.3d 372 (2002); *Forest v. State*, 62 Wn. App. 363, 369, 814 P.2d 1181 (1991) (citing *McKasson v. State*, 55 Wn. App. 18, 25, 776 P.2d 971 (1989)); *see also Fishburn v. Pierce County*, 161 Wn. App. 452, 469, 250 P.3d 146 (2011).

In her opening brief on appeal, the only statute Myles relies upon to argue this exception for purposes of claiming a County duty is RCW

36.28.010. However, over the course of the litigation her theory has changed, and she previously cited several other statutes as the basis for her claim against the County. For example, in her complaint Myles alleged the County owed a duty under RCW 70.48.071, which directs correctional institutions to adopt and implement jail standards. CP 15. In response to the County's summary judgment motion, she also cited RCW 70.96.120(2), and more specifically she relied on the Washington Supreme Court's decision interpreting that statute in *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987). CP 510-11. Myles also previously claimed duties were created based on an internal jail recordkeeping policy. CP 515. None of these various statutes or policies, each of which is addressed in turn below, create an actionable duty under the public duty doctrine.

a. RCW 36.28.010 Does Not Create an Actionable Duty

Myles contends both the County and WSP have duties based on RCW 36.28.010, a statute entitled "general duties," which describes the general duties of the office of the County Sheriff. However, Washington courts have already held this statute does not give rise to any actionable duty under the public duty doctrine. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 284, 669 P.2d 451(1983). "The public duty doctrine recognizes that the duties of public officers normally are owed only to the general

public. Generally, the statutory duty of officers to provide police protection, *see* RCW 36.28.010, and the common law duty of municipalities to provide police protection is owed to the public at large and is unenforceable as to individual members of the public." *Coffel v. Clallam County*, 47 Wn. App. 397, 402, 735 P.2d 686 (1987) (emphasis added). "[A municipality's] statutorily imposed obligation to provide police services, enforce the law, and keep the peace . . . have always been, and will continue to be, nonactionable duties owed to the public at large." *Beltran-Serrano v. City of Tacoma*, 442 P.3d 608, 615 (2019). Just as in the trial court, Myles fails even to address these controlling cases. As a matter of law, under both *Chambers-Castanes* and *Coffel*, RCW 36.28.010 sets forth only general duties that are owed to the public. The County owes no actionable duty to Myles individually under this statute.

b. RCW 70.48.071 Does Not Create an Actionable Duty

In her Complaint Myles asserted the County's liability arouse out of adopting inadequate standards of jail operation, as required by RCW 70.48.071. CP 15. This statute does not create an actionable statutory duty, because it does not require that local governments take a specific action, but rather affords broad discretion to adopt standards. *Forest*, 62 Wn. App. at 369(citing *McKasson*, 55 Wn. App. at 25); *see also Fishburn*, 161 Wn. App.

at 469. The statute is analogous to the ordinance at issue in *Smith*, which required a city's engineer to "prepare minimum installation, material, design and construction standards" related to its approval of plats. *Smith*, 112 Wn. App. at 283 (citing Kelso Municipal Code § 13.04.516). There the plaintiffs claimed that the potential for landslides, which had destroyed their homes, would have been detected but for the city's negligence. *Id.* at 280. This Court held that because the specific design and construction standards lie within the city engineer's discretion, the ordinance created no duty to enforce specific requirements and therefore no actionable tort duty. *Id*. at 284. The same is true of RCW 70.48.071.

c. RCW 70.96A.120(2) and *Bailey v. Town of Forks* Do Not Create an Actionable Duty

Myles' reliance below upon the Washington Supreme Courts' decision in *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987), which found the existence of a duty under the facts of that case based on a municipality's failure to enforce RCW 70.96A.120(2), is misguided. In *Bailey*, a Forks police officer ordered a bar patron, whom he encountered causing a disturbance in public, to drive his vehicle home despite being obviously intoxicated and legally unfit to drive. *Id*. at 264. Immediately after this encounter, the bar patron caused an accident in which the plaintiff was seriously injured. *Id*. at 269. Accepting as true all facts as alleged in

the Complaint on a CR 12(b)(6) motion, the court held that the officer violated RCW 70.96A.120(2), which imposes a mandatory duty to take obviously intoxicated persons causing public disturbances into "protective custody." RCW 70.96.120(2)(emphasis added).

Neither *Bailey* nor RCW 70.96A.120(2) has any application to the County in the case at bar. RCW 70.96.120(2) specifically exempts "a person who may be apprehended for possible violation of laws relating to driving or being in physical control of a vehicle while under the influence of intoxicating liquor or any drug" from the statute's requirements. This is precisely why Villanueva-Villa was apprehended by Trooper Brusseau. Thus, by its express language the statute does not apply to the undisputed facts of this case.

Additionally, RCW 70.96.120(2) is directed to peace officers who encounter "a person who <u>appears</u> to be <u>incapacitated or gravely disabled</u> by alcohol and who is in a <u>public place</u> . . .." RCW 70.96.120(2)(emphasis added). No County officer was in a position to observe Villanueva-Villa or make any determination about him being either "incapacitated" or "gravely disabled." Further, it is undisputed that Trooper Brusseau left Villanueva-Villa with his sister at her private residence, not in a "public place."

The statute also makes clear that the "protective custody" that is sometimes mandated under its provisions is "not an arrest." RCW

70.96.120(2). Here, no employee of the County encountered Villanueva-Villa to determine whether "protective custody" was necessary, and no request for "protective custody" under the statute was ever made. At most, an inquiry was made to the County about whether it would keep Villanueva-Villa in the jail based on an arrest for DUI and/or an outstanding warrant for the same misdemeanor offense. Again, the statute expressly exempts this situation from its requirements. There is consequently no basis for holding that the County owed a duty under RCW 70.96.120(2) or *Bailey*.

d. Other Criminal Statutes Cited by Myles Below Do Not Create Actionable Duties

Nor did any of the other statutes related to Villanueva-Villa's DUI's require that he be arrested or jailed. RCW 46.61.502(2) provides that DUI is a gross misdemeanor. RCW 10.31.100 states that law enforcement officers "may arrest" someone if there is probable cause to arrest for a gross misdemeanor. "Generally, where an officer has legal grounds to make an arrest he has considerable discretion to do so." *Donaldson v. Seattle*, 65 Wn. App. 661, 670, 831 P.2d 1098 (1992). Only when a statute specifically provides that arrest for a particular crime is mandatory does a duty to arrest arise. *Id*.

e. Internal County Recordkeeping Policies Do Not Create Actionable Duties

Although she has apparently abandoned the argument on appeal, below Myles also argued that the County had a duty based on an internal County directive, Chapter 02.03.030, which sets forth procedures for recordkeeping relating to warrants. CP 515. It is well settled that internal policies and directives do not create independent tort duties. *Joyce v. State*, 155 Wn.2d 306, 324-25, 119 P.3d 825 (2005); *Melville v. State*, 115 Wn.2d 34, 39-40, 739 P.2d 952 (1990); *Oliver v. Cook*, 194 Wn. App. 532, 540-42, 377 P.3d 265 (2016). Only a statute or regulation that has the force of law gives rise to such a duty. *Oliver*, 194 Wn. App. at 540-42. The County's record-keeping policy is an internal County procedure that is not created pursuant to a legislative delegation of authority. Hence, the warrants record-keeping policy does not give rise to an actionable tort duty by the County.

2. The Special Relationship Exception Does Not Apply

Myles also relies on the special relationship exception to argue for the existence of a County duty. Specifically, Myles claims the County had a "take charge" relationship with Villanueva-Villa.[10] However, in order for a duty to be premised on this exception, the defendant's "take charge"

[10] "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." Restatement (Second) of Torts § 319 (1965).

relationship with the third person must be "definite, established, and continuing" in nature. *Taggart v. State*, 118 Wn.2d 195, 219, 822 P.2d 243 (1992)(quoting *Honcoop v. State*, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988)); *Husted v. State*, 187 Wn. App. 579, 586, 348 P.3d 776 (2015). For example, the Department of Corrections owes a duty to exercise reasonable care in supervising parolees to protect others from reasonably foreseeable dangers engendered by their dangerous propensities. *Taggart*, 118 Wn.2d at 448-49. Similarly, such a relationship exists between a state psychiatrist and his or her patients, such that the psychiatrist must take reasonable precautions to protect third persons who might be endangered when the patient presents a reasonably foreseeable risk of serious harm. *Petersen v. State*, 100 Wn.2d 421, 428, 671 P.2d 230 (1983).

In contrast, where the government's relationship with an offender is limited in nature, no "take charge" relationship exists. *Couch v. Dept. of Corrections*, 113 Wn. App. 556, 54 P.3d 197 (2002)(no take charge relationship giving rise to duty based on collection of legal financial obligations). "Under the Restatement, a jail's duty in a take charge relationship is limited to controlling violent inmates during incarceration, not preventing all foreseeable future crimes." *Binschus v. State*, 186 Wn.2d 573, 578, 380 P.3d 468 (2016).

The Washington Supreme Court's decision in *Binschus* makes clear that a jail only has a duty to control inmates when they are in the jail's custody. *Id*. Myles' argument is that the County should have assumed a take-charge relationship with Villanueva-Villa, which it never did. She further asks the court to find that this relationship – had it been formed – would have continued indefinitely. This is insufficient as a matter of law. Villanueva-Villa was arrested, but he was never physically presented to the County or booked into the jail. Thus, the County had no relationship with him, much less one that could be described as "definite, established, and continuing" in nature.

Additionally, under *Binschus*, a jail only has a duty to control the actions of "violent inmates" when they are in its custody. *Id.* at 578. While the record in this case suggests Villanueva-Villa was reckless, it does not indicate he was violent. The County had no "take-charge" relationship with Villanueva-Villa, but even if it did, controlling the type of reckless behavior at issue is outside the scope of any such duty.

3. The County Did Not Engage in Any Affirmative Act Giving Rise to an Actionable Duty

Myles is also misguided in citing *Parilla v. King County*, 138 Wn. App. 427, 147 P.3d 879 (2007), to argue the County owed an actionable duty. In *Parilla*, a public bus driver pulled his bus over on the side of Martin

Luther King, Jr. Way in Seattle and then exited it with the engine running while a visibly erratic passenger was on board. *Id*. at 430. The passenger then drove the bus away, colliding with several other vehicles. *Id*. Relying on Restatement (Second) of Torts § 302B (1965), the Court of Appeals held that these facts gave rise to a duty, because the bus driver's affirmative conduct created a high degree of risk of harm. *Id*. at 438-39.

Unlike in *Parilla*, in this case there was no "affirmative act" by the County creating an unreasonable risk of harm to Myles. This crucial distinction was recognized by the Washington Supreme Court in *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013). In *Robb*, two Seattle police officers stopped two individuals, Samson Berhe and Raymond Valencia, on suspicion of burglary. *Id*. at 430. The officers observed three to five shotgun shells on the ground, but they did not question the suspects or pick the shells up. *Id*. One of the suspects, Berhe, was released after the police did not find stolen property on his person. *Id*. Minutes later, Berhe returned to the scene, retrieved the shotgun shells, and soon thereafter shot and killed the plaintiff, Michael Robb. *Id*. Valencia later admitted that he and Berhe had stolen ammunitions and guns during the course of a burglary a few days earlier. *Id*. at 430-31. As the court in *Robb* explained:

> The difference between this case and *Parilla* is the distinction between an act and an omission. This distinction is explained in Restatement § 314 comment c:

> The origin of the rule lay in the early common law distinction between action and inaction, or "misfeasance" and "non-feasance." In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence liability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.

> Thus, under § 314, an actor might still have a duty to take action for the aid or protection of the plaintiff 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. Liability for nonfeasance (or omissions), on the other hand, is largely confined to situations where a special relationship exists.

Robb, 176 Wn.2d at 436 (quoting Restatement (Second) Torts § 314, comment c (1965)).

In *Parilla*, the bus driver did not merely fail to act – he committed an affirmative act by leaving the bus with its engine running, which exposed other motorists to a new immediate risk of harm. Here, there was no affirmative act by any County employee exposing Myles to Villanueva-

Villa's reckless driving, and at most the allegations against an unknown and unidentified County employee are omissions rather than affirmative acts. Failing to jail Villanueva-Villa did not create any new risk which was not already present. Neither § 302 B nor *Parilla* has any application here.

C. Summary Judgment in Favor of the County Should Be Affirmed, Because It Has Discretionary Immunity

The undisputed facts here show Villanueva-Villa was not jailed on December 23, 2005, because booking restrictions were in place pursuant to a jail overcrowding policy implemented by high-level County executives. The County has discretionary immunity to any liability arising out of its adoption and implementation of this policy.

The Washington Supreme Court established the framework for determining whether discretionary immunity attaches to a decision in *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965). The test to be applied has four factors:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Id. at 255. "If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and non-tortious, regardless of its unwisdom." *Id*. As explained below, all four elements are satisfied and, despite Myles' assertions, there are no material issues of fact.

1. Discretionary Immunity Applies to Preclude County Liability Where Myles' Theory is Premised on the County's Implementation and Enforcement of a Jail Overcrowding Policy

Myles does not brief or analyze any of the above factors in her opening brief. The only *Evangelical* factor she challenged in response to the County's summary judgment motion was the fourth – whether the County had the authority to adopt and implement the overcrowding policy at issue. To dispute this element, Myles relied on a 1982 Attorney General opinion, which opined based on the state of the law at that time that a County jail did not have the authority to refuse to accept inmates ordered into its custody based on the violation of State Jail Commission custody care standards relating to overcrowding. 1982 AGLO No. 25.[11] However, RCW

[11] Attorney General opinions are not binding on the court and may be disregarded. *Branson v. Port of Seattle*, 115 Wn. App. 695, 699, 63 P.3d 830 (2003); *City of Pasco v. Dept. of Ret. Sys*., 110 Wn. App. 582, 592 fn. 11, 42 P.3d 992 (2002) (citing *Davis v. King County*, 77 Wn.2d 930, 934, 468 P.2d 679 (1970) and *Kasper v. Edmonds*, 69 Wn.2d 799, 420 P.2d 346 (1966)).

70.48.071, which Myles cites in her own Complaint, was enacted after the non-binding 1982 opinion Myles relied upon:

> All units of local government that own or operate adult correctional facilities shall, individually or collectively, adopt standards for the operation of those facilities no later than January 1, 1988. Cities and towns shall adopt the standards after considering guidelines established collectively by the cities and towns of the state; counties shall adopt the standards after considering guidelines established collectively by the counties of the state. These standards shall be the minimum necessary to meet federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff, and specific state and federal statutory requirements, and to provide for the public's health, safety, and welfare. Local correctional facilities shall be operated in accordance with these standards.

RCW 70.48.071 (emphasis added). This statute was enacted in 1987 as part of legislation that abolished the Corrections Standards Board (formerly known as the State Jail Commission). Laws of 1987 ch. 462 §§ 17, 20. Under RCW 70.48.017, in 2005 the County had not merely the statutory authority, but a statutory directive, to adopt the overcrowding policy at issue. "[I]f the method for exercising a municipal power is not specifically prescribed, *the mode or means* by which a municipality may exercise powers granted by the legislature will not be strictly construed." *Branson v. Port of Seattle*, 152 Wn.2d 862, 871, 101 P.3d 67 (2004) (emphasis in original).

Importantly, the "federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff," which RCW 70.48.071 requires local governments to account for when adopting jail standards, includes the Eighth Amendment. A jail or prison must take care to avoid significant overcrowding, or else it will be in violation of the Eighth Amendment's prohibition on cruel and unusual punishments. *See Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978).

The other elements of discretionary immunity, which Myles never challenged on summary judgment, are also clearly met. Incarcerating individuals who have been convicted and/or accused of crimes is clearly a basic governmental program. Given the problem of overcrowding – the number of individuals who may be incarcerated surpasses the limited capacity of the jail – setting a policy prioritizing which individuals will be held in jail is essential to realizing this policy. The policy-setting at issue requires the County to use its expertise to use its limited resources expeditiously by prioritizing the incarceration of more serious criminals. The County's overcrowding policy was adopted after a careful weighing of the inherent risks. The discretionary decision-making process inherent in adopting this policy, which required that the County prioritize its limited

resources to incarcerate certain offenders over others during periods of overcrowding, is not a matter that the court should second guess.

Myles suggests the County did not follow its overcrowding policy, because Villanueva-Villa was simply cited and taken to his sister's residence rather than being physically brought to the jail for purposes of a "book and release." However, the policy plainly contemplates that where an arestee would be "booked and released" due to the booking restrictions in place as a result of overcrowding, a "book and release" is merely an option but not required:

> BOOK AND RELEASE OPTION
>
> - Law enforcement may request that arrests, which normally would not be brought to the jail as a result of the booking restrictions, be processed as a Book and Release.
>
> These requests would be for, but not limited to:
>
> - Additional data collection for investigative purposes
> - To diffuse a potentially violent situation by removing the subject from the scene
> - When leaving the subject at the scene is not in the best interest of the parties involved.
> - Requests for Book and Releases, and approvals, will be made to the Jail Duty Sergeant.
> - Book and Release will be used for all class C Felons, released from jail, pursuant to level E guidelines.

CP 50. Under the policy, Villanueva-Villa could have been "booked and released" if a law enforcement officer made a request to the sergeant on duty at the jail, but these requests are the exception rather than the rule. Nothing about Trooper Brusseau's encounter with Villanueva-Villa on

December 23, 2005 suggest any of the above reasons for requesting a "book and release" were present. Whether Villanueva-Villa was "booked and released" or simply never booked in the first place is immaterial to any issue in this case. In either scenario, Villanueva-Villa would not have been incarcerated pending arraignment. In an case, citing and releasing him to a family member's home was consistent with and not contrary to the County's overcrowding policy.

2. There Is No Genuine Issue of Material Fact Regarding the Overcrowding Levels at the Clark County Jail on December 23, 2005

Myles disingenuously claims there were fact questions about the booking levels in the Clark County jail on December 23, 2005. Appellants' Opening Brief, p. 20. The County's answers to Myles' discovery requests seeking the inmate count and booking level unambiguously state the inmate count and booking levels on that date and that the booking restrictions were at "level D". CP 666. A print-out from the County's jail information system was also provided in response to a request for production. CP 683. The County's answers to the discovery requests make clear that because the print-out was printed not in 2005 but in 2010 after the instant lawsuit was filed, the print-out showed level "B" rather than "D," because it "reflects

current policies and procedures." CP 666.[12] Myles has offered no testimony nor other evidence disputing the booking level at the jail on the night in question.

D. Summary Judgment in Favor of the County Should Be Affirmed, Because there is No Evidence its Conduct Was a Proximate Cause of the Fatal Collision Between Myles and Villanueva-Villa

Summary judgment in favor of all defendants was also required, because any evidence that their conduct was a proximate cause of the collision between Mr. Myles and Villanueva-Villa is completely lacking. Proximate cause is divided into two elements: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). "'Cause in fact' refers to the actual, 'but for,' cause of the injury, i.e., 'but for' the defendant's actions the plaintiff would not be injured." *Schooley v. Pinch's Deli Market, Inc*., 134 Wn.2d 468, 951 P.2d 749 (1998). "Legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant's acts should extend." *Hartley*, 103 Wn.2d at 778. Here, there was no evidence presented by Myles that jailing Villanueva-Villa on December 23, 2005 would have resulted in his continued incarceration over five weeks later when the January 27, 2006

[12] The Chief Jail Deputy explained that the inmate counts that correspond to the different overcrowding levels has changed over time, because the capacity of the jail has increased. CP 40-41. The increase in the jail's capacity over time explains why the inmate count corresponding to Level "D" was not the same in 2010 as it was in 2005.

hit-and-run collision occurred. Additionally, there is no legal causation as a matter of law.

Myles provided no evidence showing the accident would not have occurred but for the County's failure to accept Villanueva-Villa into jail based on a DUI arrest that occurred many weeks before. "To defeat summary judgment, a showing of proximate cause must be based on more than mere conjecture or speculation." *Garcia v. State*, 161 Wn. App. 1, 15, 270 P.3d 599 (2011). The plaintiff must establish more than that the defendant's breach of a duty "might" have caused the plaintiff's injury. *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001). The cause of an injury is speculative "'when, from a consideration of all the facts, it is as likely that it happened from one cause as another." *Moore v. Hagge*, 158 Wn. App. 137, 148, 241 P.3d 787 (2010)(citations omitted).

In a series of cases where the government's liability has been premised on its failure to jail or incarcerate an individual, Washington courts consistently have required that the plaintiff come forward with evidence that the individual's confinement would have continued until the time of the event giving rise to the plaintiff's injury in order to satisfy the element of proximate cause. *Bell v. State*, 147 Wn.2d 166, 178-79, 52 P.3d 503 (2002); *Smith v. Dept. of Corrections*, 189 Wn. App. 839, 852, 359 P.3d 867 (2015); *Hungerford v. Dept. of Corrections*, 135 Wn. App. 240, 245,

139 P.3d 1131 (2006); *Estate of Bordon v. Dept. of Corrections*, 122 Wn. App. 227, 243-44, 95 P.3d 764 (2004). As the Court in *Bordon* held:

> We hold that some evidence of a direct link between DOC's negligence and the harm to a third party is necessary to survive a CR 50 motion in negligent supervision cases. In previous cases, the nature of that evidence has varied. It has included expert testimony about how judges rule in particular proceedings, factual evidence that the very nature of the negligence led to an offender's release, testimony of the sentencing judge, or expert testimony that the State's negligence directly caused the injury. Causation evidence could also include statistical evidence about what judges do in similar cases. While we agree that expert testimony is not always required, some evidence establishing causation must be presented to survive a CR 50 motion. That evidence must allow a jury to determine causation without resorting to speculation.

Bordon, 122 Wn. App. at 243-44; *see also Sheikh*, 156 Wn.2d at 447 (noting standard for a CR 50 motion "mirrors that of summary judgment."). Here, Myles came forward with no such admissible evidence to establish that if Villanueva-Villa had been jailed on December 23, 2005 he would have been incarcerated on January 27, 2006, over a month later. There is no material distinction between this case and any of the cases above, where proximate cause was determined to be absent as a matter of law.

Instead of coming forward with evidence of causation, Myles makes completely speculative arguments by pointing to pre-trial conditions that were imposed on Villanueva-Villa by a court <u>after</u> he had been charged with vehicular homicide. Obviously, the same facts and circumstances would

not have been before a court on December 23, 2005, and thus Myles' argument concerning what pre-trial release conditions, if any, would have been imposed on Villanueva-Villa by the court at that time is pure conjecture.[13] A judge would have had to decide what pre-trial conditions, if any, would be imposed on Villanueva-Villa, but Myles offers no testimony or evidence about what actions a judge would have taken under the circumstances that existed at the relevant time.

More importantly, even if the court makes the unsupported assumption that specific pre-trial release conditions would have been imposed on Villanueva-Villa if he had been jailed on December 23, 2005, multiple other layers of guessing are required to arrive at a finding of causation. Whether Villanueva-Villa would have complied with such conditions, whether he would have been caught if he violated them, and what sanction, if any, he would have received for the violations are all further exercises in guesswork. Myles' speculative arguments are akin to the expert testimony proffered by the plaintiffs in *Bordon* that increased supervision of an offender results in lower recidivism, which was rejected

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[13] The constitutional rights of pre-trial releasees significantly restricts a court's ability to set pre-trial conditions of release: "If the trial court determines that the accused is not likely to appear if released on personal recognizance, the trial court must impose the least restrictive conditions that reasonably ensure that the individual will appear for later court dates." *State v. Rose*, 146 Wn. App. 439, 448, 191 P.3d 439 (2008) (emphasis added)(holding that a trial court may not impose UAs as a standard condition for pretrial releases).

by the Court as unsupported. *Bordon*, 122 Wn. App. at 247. Here, Myles did not even come forward with this type of speculative expert testimony.

Myles' assertion that drug or alcohol-related conditions of release would have prevented the collision in this case is entirely speculative for an additional reason. Nothing in the record before this Court reflects that Villanueva-Villa was intoxicated at the time of the January 27, 2006 collision or that drug or alcohol use contributed to it.[14] Without such evidence, there is no evidentiary basis to accept Myle's unfounded claim that drug or alcohol-related conditions of release would have had any preventative effect on the accident at all.

"[I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred." *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999)(quoting *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d

[14] Myles cites only to the information against Villanueva-Villa filed in Clark County Superior Court, which alleges three criminal counts: (1) vehicular homicide; (2) hit and run; and (3) driving while license suspended or revoked in the second degree. CP647-48. One of several alternative allegations in support of the vehicular homicide charge was that Villanueva-Villa's blood alcohol concentration was 0.08 or greater. CP 647. However, this statement in an information was only an allegation by a prosecuting attorney. The record does not contain any admissible evidence establishing Villanueva-Villa's intoxication on January 27, 2006, nor does it show that intoxication was a necessary element of the vehicular homicide and hit-and-run charges for which he was eventually convicted.

564 (1947)). Myles' claim cannot proceed to a jury on this theory, because a jury could not find the existence of proximate cause without resorting to pure speculation. Given this Court's review is *de novo*, it should affirm summary judgment based on the complete absence of evidence of cause-in-fact.

Further, all of the admissible evidence makes clear that Villanueva-Villa would not have remained in jail at the time of the collision. As explained by Ric Bishop, Chief Deputy overseeing the Jail, the average length of stay in the jail during the relevant time period for <u>all</u> types of offenders (even those who were arrested for much more serious felony offenses) was 17-18 days, much less than the 35-day time period between the date of Villanueva-Villa's arrest and the date of his collision with Mr. Myles. CP 43. Mr. Bishop further explained that the bail for Villanueva-Villa's two outstanding DUI arrests were set at $10,000 each, and that a bail bond can generally be secured by posting 10% cash for the amount of bail. CP 43-44. There is no evidence that Villanueva-Villa would have been unable to post the nominal amount of bail. The contention that Villanueva-Villa would have remained in Jail for over a month under these circumstances is thus not merely speculative, it runs contrary to all evidence before the Court.

Even if the evidence of cause-in-fact were not completely lacking, the court should determine that legal causation is absent. In this respect, this case is analogous to *Hartley*, in which the plaintiffs sued the State and a County for alleged negligent failure to revoke a driver's license due to his being habitual traffic offender. *Id*. at 769. The Washington Supreme Court accepted that the plaintiffs could establish that the defendants' failure to revoke the license was a cause-in-fact of the accident, but it concluded that it could not be the legal cause:

> [N]either the State nor County falls within these boundaries of legal causation, even assuming the validity of plaintiffs' factual allegations. Johnson's drunk driving was cause in fact and the legal cause of Mrs. Hartley's tragic death. This is not to say that there cannot be more than one party who is legally liable; but here the failure of the government to revoke Johnson's license is too remote and insubstantial to impose liability for Johnson's drunk driving.

Id. at 784 (citations omitted); *see also Johnson v. State*, 68 Wn. App. 294, 300 841 P.2d 1254 (1992) (holding no legal causation where King County allegedly negligently released perpetrator from jail one week before drunk driving accident resulted in death of victim).

The same analysis that the court utilized in *Hartley* and *Johnson* should govern the court's analysis of legal causation here. If the Court accepts Myles' supposition that Villanueva-Villa was drunk at the time of the collision, Villanueva-Villa's drunk or reckless driving was the cause of

the collision that killed Myles. Especially considering the many missing links in the causal chain between Villanueva-Villa not being jailed and the collision that he was involved in five weeks later, as a matter of policy this Court should hold that the connection between the County's failure to jail him on an occasion over a month before the collision took place is far too tenuous and insubstantial to impose liability on it for Villanueva-Villa's conduct. Doing so necessarily puts the jury in the position of speculating about issues, such as the imposition of pre-trial conditions and the manner in which courts sanction violations of those conditions, which are beyond its common understanding. As a matter of policy, finding legal causation exists here effectively imposes liability on the County for the future crimes of any misdemeanants who are not incarcerated by the County due to a jail overcrowding crisis. Allowing liability to attach in these situations would have detrimental and far-reaching effects. Hence, even if Myles had articulated some non-speculative theory of cause-in-fact, her claims should nevertheless be rejected on legal causation grounds.

E. The Trial Court's Decision to Reconsider its Earlier Denial of Summary Judgment Was Well Within its Discretion

Last, Myles' argument that the trial court did not have the authority to reconsider its initial ruling denying the defendants' motions for summary judgment is without merit. A denial of summary judgment is not final and

has no *res judicata* effect. *Zimny v. Lovric*, 59 Wn. App. 737, 739, 801 P.2d 259 (1990); *Johnson v. Rothstein*, 52 Wn. App. 303, 305, 759 P.2d 471 (1988). Thus, it is "subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all the parties." *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 300, 840 P.2d 860 (1992). A motion for reconsideration is reviewed for an abuse of discretion. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons. *Id.*

The defendants' motions to reconsider were timely filed within ten days of the earlier summary judgment order. CR 59(b). Myles was permitted to file a response to the motions to reconsider, and the trial court heard oral argument from counsel for all parties before giving its decision. The defendants and the trial court followed the procedures of CR 59 to the letter.

Myles contends the trial court's orders granting the motions to reconsider are not valid because the oral argument and/or decision by the trial court occurred more than thirty days after the summary judgment orders were entered, and no written order of the court expressly authorized this delay.[15] Citing Clark County Superior Court Local Rule 59, Myles

[15] The rule provides, "A motion for . . . reconsideration shall be filed not later than 10 days after the entry of the . . . order . . . The motion shall be noted at the time it is filed,

makes a similar complaint that the trial court allowed oral argument on the defendants' motions without entering a written order expressly authorizing it.[16]

As defense counsel pointed out during oral arguments on the motions for reconsideration, the court's judicial assistant scheduled the hearing, not defense counsel. RP 108. CR 59 authorizes a hearing on a motion for reconsideration to take place beyond the thirty-day time period set forth in the rule if the court so directs. CR 59(b). Plainly, by having its judicial assistant set the hearing at such a time and then going forward with the hearing, the trial court implicitly did so direct. Likewise, the trial court allowed oral argument on the motions to reconsider, as the local rule permits it to do. Neither CR 59 nor Clark County Local Rule 59 require the trial court to enter a written order to reflect its implied decisions on these minor procedural issues. It is well settled that trial courts have the inherent authority to manage their calendars, dockets, and proceedings. *See, e.g.*, *State v. Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113 (2012). The motions for reconsideration were appropriately considered and decided under CR 59.

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to be heard or otherwise considered within 30 days after the entry of the . . . order . . . unless the court directs otherwise." CR 59(b) (emphasis added).

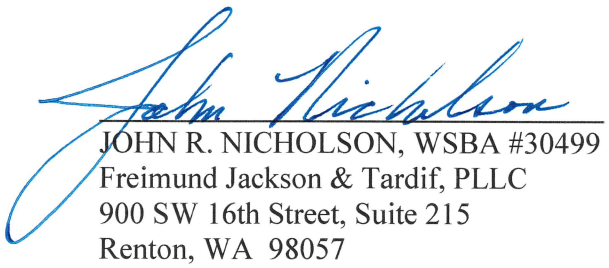
[16] The local rule provides, "No oral argument shall be permitted without express approval of the court." Clark County Local Rule 59 (b).

VI. CONCLUSION

For all the forgoing reasons, the trial court's order granting summary judgment in favor of the County should be affirmed. The trial court correctly found the County owed no duty under the framework of the public duty doctrine. Summary judgment was also required because the County is entitled to discretionary immunity and there is no evidence its conduct was a proximate cause of the collision between Villanueva-Villa and Myles.

RESPECTFULLY SUBMITTED this 9th day of August, 2019.

FREIMUND JACKSON & TARDIF, PLLC



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CERTIFICATE OF SERVICE

On said day below, I electronically served a true and accurate copy via the Washington State Appellate Court's Portal the ***Brief of Respondent/Cross-Appellant Clark County*** to the following parties:

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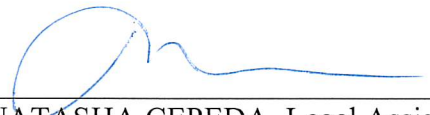
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of August, 2019, at Olympia, Washington.



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