

FILED
Court of Appeals
Division II
State of Washington
8/9/2019 9:33 AM

NO. 49889-8

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

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

Appellant,

v.

STATE OF WASHINGTON, et al.,

Respondents.

**BRIEF OF RESPONDENTS/CROSS-APPELLANTS
STATE OF WASHINGTON AND ROBERT BRUSSEAU**

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I. INTRODUCTION

This case concerns the authority and discretion vested in the Washington State Patrol (WSP) when fulfilling its duty to protect the public at large from misdemeanor offenders. Plaintiff M. Gwyn Myles, individually and on behalf of her deceased husband, William Myles, sued WSP and Washington State Trooper Robert Brusseau (collectively State Defendants), after Mr. Myles died in a motor vehicle collision caused by Carlos Villanueva-Villa on January 27, 2006. Thirty-five days prior to that collision, Brusseau had arrested and cited Villanueva-Villa for driving under the influence, separated him from his vehicle, and, after being informed the county jail would not accept him for booking, transported him to his sister's residence. At that time, Villanueva-Villa had an unconfirmed misdemeanor warrant for failure to appear.

Summary judgment in favor of State Defendants should be affirmed when they neither owed Mr. Myles any individualized and actionable tort duty nor were the proximate cause of his death. The exceptions to the public duty doctrine relied on by Plaintiff – failure to enforce and special relationship – do not apply to create a duty here. In addition, State Defendants did not owe Mr. Myles a common law duty to control Villanueva-Villa at the time of the collision on January 27, 2006. Further, Plaintiff cannot establish that the conduct of State Defendants proximately

caused Mr. Myles' death five weeks after Brusseau arrested Villanueva-Villa. Summary judgment was thus properly granted.

Finally, State Defendants cross-appeal and assign error to the trial court's erroneous consideration of inadmissible hearsay evidence submitted by Plaintiff in opposition to State Defendants' summary judgment motion. The trial court abused its discretion in considering that hearsay and it should not be considered by this Court in reviewing the issues on appeal. State Defendants note that if this Court affirms summary judgment on any of the previous bases, it is unnecessary to address this cross-appeal.

II. COUNTER-STATEMENT OF ISSUES ON APPEAL PERTAINING TO STATE DEFENDANTS

1. Was summary judgment appropriate where the Washington Supreme Court has previously held that RCW 36.28.010 does not create a private duty to individuals in tort and therefore the failure to enforce exception to the public duty doctrine does not apply? (Plaintiff's Issue No. 3)
2. Was summary judgment appropriate where the undisputed facts show no privity existed between State Defendants and William Myles and therefore the special relationship exception to the public duty doctrine does not apply? (Plaintiff's Issue No. 3)
3. Was summary judgment appropriate where State Defendants did not have a common law duty to control the actions of Carlos Villanueva-Villa five weeks after his DUI arrest on December 23, 2005? (Plaintiff's Issue No. 3)
4. Was summary judgment appropriate where Plaintiff failed to create a question of material fact that Brusseau's conduct proximately caused Mr. Myles' death five weeks after

Villanueva-Villa's initial arrest? (Plaintiff's Issue No. 3)

5. Did the trial court appropriately exercise its discretion under CR 59(a) in granting State Defendants' motion for reconsideration? (Plaintiff's Issue No. 4)

III. ASSIGNMENT OF ERROR AND ISSUE ON STATE DEFENDANTS' CROSS APPEAL

Did the trial court err in considering, over State Defendants' timely objections, inadmissible hearsay evidence offered by Plaintiff, *i.e.*, unauthenticated and uncertified documents alleged to be copies of official records, in opposition to State Defendants' motion for summary judgment?

IV. COUNTERSTATEMENT OF THE CASE

A. Brusseau Arrests Villanueva-Villa for DUI and Requests a Driver's License Check

On December 23, 2005, at 11:00 p.m., Washington State Trooper Robert Brusseau stopped driver Carlos Villanueva-Villa for speeding. CP 132. Brusseau contacted Villanueva-Villa, the vehicle's only occupant, and noticed the strong odor of intoxicants. Villanueva-Villa produced his driver's license, in which a hole had been punched, as well as a form indicating he had previously been arrested for driving under the influence of alcohol (DUI) on November 26, 2005. CP 132. Villanueva-Villa appeared highly intoxicated and admitted he had consumed "two beers." CP 132. Brusseau asked Villanueva-Villa to exit the vehicle and performed field sobriety tests, which Villanueva-Villa failed. CP 132.

Brusseau placed Villanueva-Villa under arrest for DUI, moved Villanueva-Villa's vehicle into a parking stall in a restaurant parking lot, and radioed the WSP Communications Center. CP 132. Brusseau requested the dispatcher run a driver's license check on Villanueva-Villa which, in turn, triggered a warrants search. CP 132.

B. Brusseau Learns of and Seeks to Confirm Villanueva-Villa's Outstanding Misdemeanor Warrant

WSP dispatcher Carey Salzsieder performed a warrants check, which revealed Villanueva-Villa's outstanding arrest warrant for failure to appear in court in connection with a prior November 26, 2005 DUI charge. CP 28. Brusseau requested Salzsieder to have the Clark County jail verify the warrant and ask if the jail would accept Villanueva-Villa for booking on the warrant. CP 28, 133. Jail staff informed Salzsieder that they would not confirm the existence of the warrant and that they would not accept Villanueva-Villa for booking that night. CP 28. Salzsieder documented and conveyed the information to Brusseau. CP 28, 32, 35, 133.

On the night of December 23, 2005, the Clark County jail inmate population was 772, which was 27 inmates in excess of its maximum bed capacity. CP 40. It was not unusual for the Clark County jail to be overcrowded and for the jail to refuse to accept persons arrested for misdemeanor offenses or wanted on misdemeanor warrants in order to

reserve capacity for felony warrants or other required bookings. CP 133, 28-29. Indeed, the jail had developed a written overcrowding policy, which created a tiered system of booking restrictions that depended upon the relative level of overcrowding on a given day. CP 40, 825-28.

At the booking level in place on December 23, 2005, individuals charged with misdemeanor DUI and misdemeanor warrant for failure to appear would generally not be booked into the jail. CP 40-42. Under the overcrowded conditions existing on December 23, 2005, law enforcement could, under certain circumstances, make a direct request to the jail's sergeant on duty to make an exception to the general booking restrictions, which, if granted, would result in the "book and release" of such individuals at the jail. CP 42. This exception generally was made for combative individuals. CP 762, 841, 864-865, 910. Villanueva-Villa was compliant and non-combative with Brusseau. CP 133.

Even assuming that an exception had been sought and granted, multiple witnesses testified that a misdemeanor DUI offender, such as Villanueva-Villa, would have been booked and released. CP 133 (Brusseau); 813 (Clark County Sheriff's Office employee Jennifer Bell), 840-41, 852-53, 865 (Clark County Sheriff Gary E. Lucas); 921-22 (Clark County Sheriff's Office Chief Civil Deputy Steven Shea).

C. Brusseau Transports Villanueva-Villa for Testing at WSP, Cites Him for DUI, and Transports Him to His Sister's Residence Five Weeks Before the Death of Mr. Myles

After being advised that the jail would not confirm Villanueva-Villa's warrant or agree to book him on the warrant, Brusseau followed standard protocol and transported Villanueva-Villa to the WSP office for blood alcohol content (BAC) testing. CP 133. There, he read Villanueva-Villa his rights and the implied consent warnings for the breathalyzer test; Villanueva-Villa signed the consent form at 11:38 p.m. CP 133. The test yielded a reading over the presumed limit for intoxication. CP 133. Brusseau charged Villanueva-Villa with DUI, followed WSP procedures by transporting him to his sister's residence, and issued him a citation to appear in court six days later. CP 32, 133, 305. Villanueva-Villa's vehicle remained secured at the restaurant parking lot. CP 132-33.

Plaintiff alleges that 35 days later, on January 27, 2006, while Villanueva-Villa was under the influence of unspecified intoxicants, he caused the motor vehicle collision that caused the death of Mr. Myles. CP 12-13. Hearsay evidence submitted by Plaintiff indicates that Villanueva-Villa was ultimately convicted of vehicular homicide in connection with that accident. CP 332, 335, 413. However, no admissible evidence in the record establishes he was under the influence of alcohol (or other intoxicant) at the time. The criminal information charges Villanueva-Villa *in the*

alternative under each statutory provision of vehicular homicide relating to intoxication, reckless driving, and disregard for the safety of others. CP 332; RCW 46.61.520(1). Neither the Probable Cause Sheet nor court docket showing the conviction identifies intoxication as the basis for the conviction. CP 335, 413.

D. Procedural History

In 2009, Plaintiff filed a wrongful death lawsuit, alleging negligence by State Defendants, the Department of Corrections, Clark County, and Carlos and Jane Doe Villanueva-Villa.¹ CP 1-3. In 2016, State Defendants moved for summary judgment because (1) they had no duty to Mr. Myles in connection with the DUI arrest of Villanueva-Villa on December 23, 2005, and (2) no act or omission of State Defendants proximately caused the death of Mr. Myles.² CP 138. In opposition, Plaintiff submitted hundreds of pages of unauthenticated documents, purporting to be copies of official records of various types, to which State Defendants objected as inadmissible hearsay. CP 222-491, 971-975. After hearing oral argument, the trial court denied State Defendants' motion.³ CP 1232. In its written

¹ Plaintiff obtained an order of default against Carlos and Jane Doe Villanueva-Villa and, following the mandate from this Court, the trial court dismissed the Department of Corrections. *See Myles v. State*, No. 49928-2-II, 2018 WL 3546786 (Wash. Ct. App. July 24, 2018) (unpublished), *review denied sub nom. Myles v. Dep't of Corr.*, 192 Wn.2d 1004, 430 P.3d 259 (2018).

² Clark County likewise moved for summary judgment. CP 110.

³ The trial court also denied Clark County's motion. CP 1232.

order, the trial court indicated it had considered the unauthenticated records. CP 1233-34.

Pursuant to CR 59(a), State Defendants timely moved for reconsideration of the order, asserting that it was not supported by the evidence and contrary to law.⁴ CP 1264-74. The trial court heard argument and, four weeks later, orally ruled on the motion and entered a written order granting the motion for reconsideration.⁵ CP 1354. In its oral ruling, the trial court stated that “reasonable minds can only reach one conclusion under these facts that Trooper Brusseau acted reasonable under the circumstances and did not breach any duty to the public at large and to Mr. Myles specifically.” VRP 117. In addition, the trial court had determined, upon reconsideration, that, “[o]n the issue of Trooper Brusseau’s conduct there are no facts in dispute and . . . Trooper Brusseau did not breach any common law duty or statutory duty and acted reasonable at all times under the circumstances.” VRP 117. Further, the trial court determined “that Mr. Myles was not within the class the legislation intended to protect, that there was no duty to Mr. Myles, [and] that the facts do not support this court imposing a duty upon Trooper Brusseau at the time and date of his arrest of

⁴ Clark County also moved for reconsideration under CR 59. CP 1241.

⁵ The trial court similarly granted Clark County’s motion for reconsideration and granted Clark County summary judgment. CP 1357.

Villanueva-Villa.” VRP 118. This appeal and State Defendants’ cross-appeal followed.

V. STANDARDS OF REVIEW

A. The Decision to Grant State Defendants’ Motion for Summary Judgment Is Reviewed *De Novo*

Summary judgment is appropriate when “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014); CR 56(c). “The appellate court engages in the same inquiry as the trial court, with questions of law reviewed *de novo* and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party.” *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

The moving party bears the burden of showing that there is no genuine issue of material fact. If this burden is satisfied, the nonmoving party must present evidence demonstrating a material fact. Summary judgment is appropriate if the nonmoving party fails to do so. *Walston*, 181 Wn.2d at 395-96. “A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation’s outcome.” *Youker v. Douglas Cty.*, 178 Wn. App. 793, 796, 327 P.3d 1243 (2014).

B. The Decision to Grant State Defendants’ Motion for Reconsideration Is Reviewed for Abuse of Discretion

Upon the presentation of newly discovered evidence or case law, the trial court may exercise its discretion to reconsider issues previously raised in a summary judgment motion. *State v. Scott*, 92 Wn.2d 209, 212, 595 P.2d 549 (1979). A timely filed motion for reconsideration preserves the underlying summary judgment for review on appeal. RAP 2.4(c)(3); *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990).

CR 59(a) lists the available grounds for reconsideration of a trial court's order. The grounds pertinent to State Defendants' motion for reconsideration are: (1) there is no evidence or reasonable inference from the evidence to justify the decision, CR 59(a)(7); (2) the decision is contrary to law, CR 59(a)(7); and (3) substantial justice has not been done, CR 59(a)(9). The trial court's ruling on a motion for reconsideration will not be disturbed absent a manifest abuse of discretion. *State v. Henderson*, 26 Wn. App. 187, 190, 611 P.2d 1365 (1980).

VI. ARGUMENT ON APPEAL

The trial court correctly granted State Defendants summary judgment because Plaintiff cannot establish they owed any actionable duty to Mr. Myles in particular, as opposed to the public at large, in connection with the DUI arrest of Villanueva-Villa on December 23, 2005. Furthermore, even if the Plaintiff could establish the existence of such a

duty, Plaintiff cannot establish that State Defendants' conduct proximately caused the death of Mr. Myles 35 days later.

The two exceptions to the public duty doctrine urged by Plaintiff, failure to enforce and special relationship, do not apply here. *See* App. Br. at 31-41. The failure to enforce exception, which is narrowly construed, does not apply because (1) RCW 36.28.010, the statute relied on by Plaintiff, which concerns the duty to execute warrants, protects the public at large and not any subclass of individuals; (2) that duty is inherently discretionary; (3) no warrant was ever confirmed or delivered to Brusseau for execution; and (4) Brusseau took corrective action. *See Halleran v. Nu W., Inc.*, 123 Wn. App. 701, 714, 98 P.3d 52 (2004). In addition, the special relationship exception does not apply because no privity existed between State Defendants and Mr. Myles, and no express assurance was ever given to Mr. Myles. *See, e.g., Munich v. Skagit Emergency Commc'n. Ctr.*, 175 Wn.2d 871, 879, 269 P.3d 328 (2012).

State Defendants also did not owe Mr. Myles a common law duty. Washington courts have, in some cases, imposed a duty under the common law based on a special relationship between the defendant and a third-party tortfeasor. One such relationship, commonly known as the "take charge" relationship, requires the existence of a "definite, established and continuing relationship" between the defendant and another over whom the

defendant has some degree of control. *See* Restatement (Second) of Torts § 319 (1965). No Washington appellate court has previously found a take charge relationship to exist between an arresting officer and a criminal offender nor, as a matter of policy, should this Court. In any event, State Defendants did not have a duty to control Villanueva-Villa after Brusseau delivered him to his sister's residence.

Finally, Plaintiff also cannot establish proximate causation. Even if duty and breach could be established on the part of State Defendants, no reasonable person could conclude that Brusseau's failure to bring Villanueva-Villa to Clark County jail for service of a misdemeanor warrant, which Clark County had not confirmed, was a cause-in-fact of Mr. Myles' death 35 days later. To reach such a conclusion, the trier of fact would have to speculate that Villanueva-Villa would have remained in jail for at least five additional weeks. That is not allowed. Plaintiff also cannot establish legal causation given the extended length of time – and potential for intervening events – between Brusseau's release of Villanueva-Villa into the custody of his sister and the motor vehicle collision 35 days later. State Defendants will address each of these bases for affirmance in turn.

A. The Public Duty Doctrine Bars Plaintiff's Claims and Neither the Failure to Enforce nor the Special Relationship Exception Applies

Plaintiff's negligence claims against State Defendants fail as a

matter of law because State Defendants owed no duty to Mr. Myles in connection with the arrest of Villanueva-Villa on December 23, 2005. In order to prevail in an action for negligence, a plaintiff must establish (1) the existence of a duty owed to him, (2) breach of that duty, and (3) injury to the plaintiff proximately caused by the breach. *Estate of Bordon ex rel. Anderson v. State, Dep't of Corr.*, 122 Wn. App. 227, 235, 95 P.3d 764 (2004). The threshold determination, therefore, is whether *any duty* is owed to the plaintiff in the first place. *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 163, 163, 759 P.2d 447 (1988). The existence of a duty is a question of law. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). If the defendant owes no duty, the action fails as a matter of law. *See, e.g., Stenger v. State*, 104 Wn. App. 393, 399, 16 P.3d 655 (2001).

Whether State Defendants owed a duty to Mr. Myles turns on whether they owed a duty to him particularly, as opposed to the public at large. *See Osborn v. Mason Cty.*, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006). When the defendant in a negligence action is a governmental entity, the public duty doctrine requires the plaintiff to establish the duty breached was owed to him or her in particular, as opposed to the public in general. *Munich*, 175 Wn.2d at 878. This “basic principle of negligence law” is often paraphrased as “a duty to all is a duty to no one.” *Osborn*, 157 Wn.2d at 27.

“The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.” *Taylor*, 111 Wn.2d at 170-71 (citation omitted). Public officials should not be dissuaded from carrying out duties intended to benefit the public in general due to potential exposure to liability. *Id.*; see also *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 561-62, 104 P.3d 677 (2004), as amended (Jan. 25, 2005).

An individualized tort duty may arise from a statutory duty where one of the following exceptions to the public duty doctrine applies: (1) failure to enforce; (2) special relationship; (3) legislative intent; and (4) volunteer rescue. *Donohoe v. State*, 135 Wn. App. 824, 834, 142 P.3d 654 (2006). Plaintiff argues the first two exceptions permit the imposition of liability on State Defendants. App. Br. at 31-41. Plaintiff is wrong.

1. **RCW 36.28.010 does not create an actionable duty under the failure to enforce exception**

Plaintiff argues that the failure to enforce exception applies to Brusseau’s failure to serve an arrest warrant upon Villanueva-Villa under RCW 36.28.010. App. Br. at 32. The failure to enforce exception applies when: (1) there is a mandatory statutory duty to take corrective action; (2) governmental agents responsible for enforcing the statute possess actual knowledge of its violation; (3) they fail to take corrective action; and (4) the

plaintiff is within the class the statute intended to protect. *Halleran*, 123 Wn. App. at 714. This exception is narrowly construed. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990).

Plaintiff points to the duties set forth under RCW 36.28.010(3) and (4) as the basis for the exception in this case. App. Br. at 32. Her reliance on RCW 36.28.010, however, fails because: (a) the Washington Supreme Court has held that the duties imposed under RCW 36.28.010 “are owed to the public at large and are not enforceable as to individual members of the public,” *See Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983); (b) the general duties set forth under RCW 36.28.010 are inherently discretionary; (c) no confirmed warrant was ever delivered to Brusseau for service upon Villanueva-Villa and therefore Brusseau did not possess actual knowledge of any statutory violation; and (d) Brusseau did not fail to take corrective action when he cited Villanueva-Villa, separated him from his vehicle and transported him to his sister’s residence.

a. The duties imposed under RCW 36.28.010 are owed to the public in general, not to individuals

RCW 36.28.010 provides county sheriffs with authority to (1) “arrest and commit to prison all persons who break the peace... and all persons guilty of public offenses ... (3) ... execute the process and orders

of the courts of justice or judicial officers, when delivered for that purpose, according to law; (4) ... execute all warrants delivered for that purpose by other public officers, according to the provisions of particular statutes; ... [and] (6) ... keep and preserve the peace in their respective counties....” Appx. at 2. Plaintiff argues that RCW 36.28.010 imposes identical duties on the WSP by way of RCW 43.43.030. App. Br. at 32.

The Washington Supreme Court has previously examined the issue of individual liability for the breach of duties enumerated under RCW 36.28.010. In *Chambers-Castanes*, the Court considered whether RCW 36.28.010 creates a statutory duty to provide police protection and, if so, whether that duty is enforceable as to individuals:

Appellants contend law enforcement agencies have a statutory duty to provide police protection (see RCW 36.28.010 requiring that the sheriff and deputies ‘[s]hall keep and preserve the peace’ and ‘arrest ... all persons who break the peace, or attempt to break it’) and that municipalities have a common law duty to provide such protection. While this may be true in a broad sense, we have consistently held that absent a clear legislative intent or clearly enunciated policy to the contrary, *these duties are owed to the public at large and are unenforceable as to individual members of the public.*

100 Wn.2d at 284 (emphasis added; internal citation omitted). The Court unequivocally held that RCW 36.28.010 does *not* create duties enforceable as to individual members of the public. *Id.* at 284.

This Court reached a similar conclusion in *Walters v. Hampton*, 14

Wn. App. 548, 543 P.2d 648 (1975), where it examined potential civil liability under a statute similar in function to RCW 36.28.010 – former RCW 35.24.160 (1965), which described generally the powers and duties of a city police chief. There, the court noted that former RCW 35.24.160 “evidences a legislative intent to protect individual interests of every person to the extent those interests correspond to the rights and privileges to which all persons are entitled as members of the community in general.” *Id.* at 551. The court stated that “[i]t is also well established that no civil liability ensues from the failure of government agents to enforce the law.” *Id.* at 554-55 (citations omitted). The court, however, recognized that an exception existed where a special relationship arises between an individual and the government such that a duty to use due care in performing duties normally owed to the public in general becomes a duty owed to a particular individual or his class. *Id.*

The policy recognized in *Chambers-Castanes* “is consistent with the majority of jurisdictions that have addressed this question.” 100 Wn.2d at 285. Most notably, the United States Supreme Court examined the history of the law pertaining to a sheriff’s civil liability for breach of ministerial duties over 150 years ago in the case of *South v. Maryland*, 59 U.S. (18 How.) 396, 15 L. Ed. 433 (1855). The Supreme Court concluded that no private cause of action existed against a sheriff for failure to keep and

maintain the peace, as the sheriff's duty to keep the peace is one that is owed the public generally and "punishable by indictment only." *Id.* at 403.

The Tennessee and Texas Courts of Appeal agree. In *Hurd v. Woolfork*, 959 S.W.2d 578 (Tenn. Ct. App. 1997), the plaintiff sued a county sheriff for the wrongful death of a woman killed by an individual named in an arrest warrant that had been delivered ten days prior but had not yet been served. *Id.* at 581. The Tennessee court held that no exception to the Tennessee public duty doctrine applied and that a "sheriff's duty to keep the peace ... includes the execution of arrest warrants and is a public duty, 'not owed to any individual in particular.'" *Id.* Similarly, in *Munoz ex rel. Martinez v. Cameron Cty.*, 725 S.W.2d 319 (Tex. Ct. App. 1986), the plaintiffs alleged that the sheriff's failure to execute a warrant received approximately one month earlier resulted in their mother's death. *Id.* at 319-20. Holding that the plaintiffs' action was barred by the public duty doctrine, the Texas court noted it could find "no case in which a sheriff or other law enforcement officer has been held liable for personal injury damages for failure to execute a criminal warrant of arrest." *Id.* at 321. As these cases demonstrate, the duty of law enforcement to keep the peace is a general duty owed to the public at large and not to the individual.

Plaintiff, however, points to the case of *State v. Twitchell*, 61 Wn.2d 403, 378 P.2d 444 (1963), which does not support her argument. *See App.*

Br. at 11. The issue before the Court in *Twitchell* concerned the validity of *a grand jury's indictment* of the sheriff after he permitted a house of prostitution to remain open within the county. 61 Wn.2d at 407-08. *Twitchell* did not create or discuss any actionable duty *in tort*, based on a failure to arrest or otherwise, under RCW 36.28.010. *Id.* at 406-07. To the contrary, *Twitchell* underscores that the duties under RCW 36.28.010 are enforceable only by *the State*, rather than by private individuals. This point was highlighted by the Texas court in *Munoz, supra*, when it noted that the purpose of the arrest warrant is “to bring the accused lawbreaker to court to answer for the commission of an alleged offense *and is not to prevent future crimes from occurring.*” *Munoz*, 725 S.W.2d at 322 (emphasis supplied). In other words, the duty to serve an arrest warrant under RCW 36.28.010 does not run to any protected class; it is a duty owed to the State itself.

Plaintiff's additional reliance on *Bailey v. Town of Forks*, 108 Wn.2d 262, 269, 737 P.2d 1257, 1260 (1987), *amended*, 753 P.2d 523 (1988), is misplaced. *See* App. Br. at 37-38. In *Bailey*, the Washington Supreme Court held that the plaintiff, injured by an incapacitated driver who, shortly before, had been ordered by police to leave the area near a local lounge, came within the class of persons that RCW 70.96A.120(2) and RCW 46.61.515 (1979) were intended to protect. *Id.* at 269. RCW 70.96A.120(2), which has since been repealed, mandated that individuals

incapacitated by alcohol in a public place be taken into protective custody and *specifically did not apply* to DUI violations. The Court in *Bailey* did not hold that motor vehicle occupants fall within a class of persons the legislature intended to protect under RCW 36.28.010, the statute at issue in this case. In fact, *Bailey* did not address RCW 36.28.010 at all. This is an important distinction because, whereas a protected class is identifiable under RCW 70.96A.120(2), no such class is identifiable under RCW 36.28.010. *See also Weaver v. Spokane Cty.*, 168 Wn. App. 127, 275 P.3d 1184 (2012) (affirming summary judgment when plaintiff failed to show an individual duty owed to a decedent under RCW 70.96A.120).

Although the standard used to determine if a statute identifies a class of persons under the *failure to enforce* exception is less stringent than what is used to identify a “particular and circumscribed class of persons” for the *legislative intent* exception,⁶ the failure to enforce exception nevertheless requires the identification of *some* class of persons the statute was intended to protect. Whereas in *Bailey* and other cases where the failure to enforce exception applied,⁷ there has been *some* such identifiable subset of

⁶ *See, e.g., Waite v. Whatcom Cty.*, 54 Wn. App. 682, 688, 775 P.2d 967 (1989); *Halleran*, 123 Wn. App. at 713.

⁷ *See e.g., Waite*, 54 Wn. App. at 688 (as “occupants or users” of a building, the plaintiffs were within the class of persons intended to be protected by the building code); *Coffel v. Clallam Cty.*, 58 Wn. App. 517, 524, 794 P.2d 513, 517 (1990) (statutes prohibiting violent and destructive invasion of property rights were designed to protect plaintiffs, whose building and contents were destroyed by third parties).

individuals, there is no such identifiable subset entitled to protection under RCW 36.28.010, since the statute is intended to protect the public at large.

As Division I has previously noted, “[t]he relationship of police officer to citizen is too general to create an actionable duty. Courts generally agree that responding to a citizen’s call for assistance is basic to police work and not special to a particular individual.” *Torres v. City of Anacortes*, 97 Wn. App. 64, 74, 981 P.2d 891 (1999). Without an identifiable subset of the public that is subject to the protection of RCW 36.28.010, Plaintiff cannot establish the protected class element of the exception. Because the exception is narrowly construed, and because this required element is missing, the failure to enforce exception does not apply in this case.

b. The duties imposed under RCW 36.28.010 are inherently discretionary

The failure to enforce exception also requires the existence of a mandatory statutory duty to take specific corrective action. *Halleran*, 123 Wn. App. at 714. Such a duty does not exist if the government agent has broad discretion about whether and how to act. *Id.*

RCW 36.28.010 outlines the general duties of county sheriffs and is phrased in very broad terms. Plaintiff focuses in particular on the duty to execute an arrest warrant and maintains that Brusseau’s purported failure to arrest Villanueva-Villa on the warrant subjects State Defendants to liability

for the subsequent death of Mr. Myles. App. Br. at 32-33. However, the duty to serve a warrant, like the other duties listed under RCW 36.28.010, is imbued with considerable discretion and, therefore, cannot be considered “mandatory” for the purposes of the failure to enforce exception.

The fact that RCW 36.28.010 states what the county sheriff “shall” do is not dispositive. Use of the word “shall” does not *automatically* create a mandatory duty.⁸ For instance, this Court has previously held that a city ordinance providing that the city engineer “shall” prepare design and construction standards was not specific enough to create an enforceable duty to individual homeowners because “the specific design and construction standards lie within the city engineer’s discretion.” *Smith v. City of Kelso*, 112 Wn. App. 277, 284, 48 P.3d 372, 376 (2002). In other words, regardless of the ordinance’s phrasing, because substantial discretion was *inherent* in such a broad mandate, the Court found that the ordinance did not create any duty to enforce specific requirements. *Id.* As with the city engineer ordinance, so, too, is RCW 36.28.010 discretionary.

Further, to the extent that Plaintiff relies on *Twitchell*, it is distinguishable. *See* App. Br. at 11. *Twitchell* was a criminal case against a

⁸ *See, e.g., Walters*, 14 Wn. App. at 551. (“While it is true use of the word ‘shall’ in a statute generally imposes a nondiscretionary duty, the word has been found to be permissive. Thus it is always necessary to interpret a statute to effectuate the intention of the legislature.” (Citation omitted.)).

sheriff, in which the Court noted that the sheriff had a mandatory duty to make a complaint of any violation of the criminal law which came to his knowledge and to arrest and commit any person who broke the peace. 61 Wn.2d at 408. *Twitchell* did not examine potential liability in tort and is not controlling here.

The Washington Supreme Court long ago recognized the discretion inherent in the service of a warrant in *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):

That they [certain administrative or executive officers] do, in some degree, act judicially, is true, and so does every officer, from the governor to constable, who is invested with discretionary powers, -for the governor, when he issues a requisition for a fugitive from justice, decides many things, *and the constable, when he executes a writ or a warrant, exercises a discretion*; but no one of these officers exercises judicial judgment in the sense that a court or judge does.

Id. at 776 (emphasis added.) Accord, *Davis v. State*, 257 A.2d 112, 116, 691 N.Y.S.2d 668, 671 (1999) (“whether an issued warrant is to be executed is indeed compulsory; *it is the time frame and manner in which it is executed that entail discretionary judgment*”) (emphasis added).

In addition, as noted above, in *Walters*, this Court examined the discretionary nature of former RCW 35.24.160 (1965), a statute similar in function to RCW 36.28.010. 14 Wn. App. 548. Like its county sheriff

counterpart, former RCW 35.24.160 (1965) also used the word “shall” in describing the police chief’s duties: “The chief of police shall prosecute before the police justice all violations of city ordinances which come to his knowledge.” *Id.* at 550-51; Appx. at 4. The plaintiff argued this imposed a mandatory duty on the police chief to prosecute his assailant for his past firearms violations and that the chief’s failure to do so caused or contributed to the plaintiff’s injuries. *Id.* at 649. The court then discussed the discretion inherent in the performance of the duties of the police chief:

His duty to prosecute ‘all violations of city ordinances which come to his knowledge’ clearly involves an initial determination by him that an ordinance has been violated. Once he decides the law has been broken, he must then determine whether the admissible evidence is sufficient to establish a prima facie case [...] *Such initial determinations are inherently discretionary, and no serious contention can be made that a police chief must institute prosecutions on the basis of every complaint received by his department.*

Id. at 552 (emphasis added). The court next considered the policy implications of holding the police chief liable in tort for failure to prosecute:

Were we to hold a police chief’s failure to prosecute every alleged violation of a city ordinance exposes a municipality to civil liability in tort, *we would be placing ourselves in a position of having to determine how limited police resources are to be allocated.* This is neither a traditional nor appropriate role for the courts to assume. Moreover, such a holding would, in effect, *make the City an insurer against every harm imposed by a criminal act where the police had some prior knowledge that criminal activity might be afoot.*

Id. at 553 (emphases added; internal citation omitted). Based on these considerations, the Court concluded that the duty to prosecute under former RCW 35.24.160 (1965) “involves basic policy discretion at the executive level, essential to the realization of basic governmental objectives.” *Id.* at 554. *See also Donaldson v. City of Seattle*, 65 Wn. App. 661, 670, 831 P.2d 1098 (1992) (noting that, “[g]enerally, where an officer has legal grounds to make an arrest he has considerable discretion to do so”).

Plaintiff, however, contends that the delivery of Villanueva-Villa’s arrest warrant to the Clark County Sheriff not only created a duty in the sheriff’s office to execute the warrant, but also created a co-extensive duty upon all law enforcement, including State Defendants, pursuant to RCW 43.43.030. That statute provides that, “[t]he chief and other officers of the [WSP] shall have and exercise, throughout the state, such police powers and duties as are vested in sheriffs and peace officers generally, and such other powers and duties as are prescribed by law.” Appx. at 3. The implication of Plaintiff’s argument would be that the WSP has a *mandatory* duty to execute all warrants ostensibly delivered *to the sheriff of each county in the State*. Such a duty would place an unmanageable burden upon the WSP given the number of outstanding warrants that exist at a given time.

According to the Seattle University Law Review article cited by Plaintiff, as of August 2002, there were over 235,000 active misdemeanor

and gross misdemeanor warrants in the State of Washington.⁹ If a mandatory duty were imposed upon the WSP to execute each warrant once it was delivered to its respective county (on threat of tort liability), that would make the WSP an insurer against every harm caused by a criminal act and would amount to a judicial determination of the proper allocation of the limited resources of an executive state agency. No such legislative intent can be implied to RCW 43.43.030. *See, e.g., Walters*, 14 Wn. App. at 553.

For these reasons, Brusseau had considerable discretion in deciding the manner and time to pursue execution of Villanueva-Villa's unconfirmed warrant. Accordingly, in the absence of a mandatory duty to take specific corrective action, the failure to enforce exception does not apply.

c. Brusseau did not have actual knowledge of a statutory violation under RCW 36.28.010

The failure to enforce exception further requires actual knowledge of a statutory violation by the governmental agent responsible for enforcing it. *Halleran*, 123 Wn. App. at 714. No such knowledge exists here for two reasons. First, the Clark County jail did not confirm the existence of Villanueva-Villa's outstanding warrant flagged in the electronic warrants check. CP 28. Without confirmation of the warrant, Brusseau did not

⁹ Hon. Philip J. Van De Veer, *No Bond, No Body, and No Return of Service: The Failure to Honor Misdemeanor and Gross Misdemeanor Warrants in the State of Washington*, 26 Seattle U. L. Rev. 847, 852 (2003); *see also* App. Br. at 33.

possess *actual* knowledge of its existence. At best, he possessed information that an outstanding warrant *might* have been delivered to the sheriff. The Washington Supreme Court has explicitly rejected constructive knowledge of a violation in the context of the failure to enforce exception. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 532-33, 799 P.2d 250 (1990).

Second, before RCW 36.28.010 creates any duty to execute a warrant, process, or order, the statute requires the same to be “delivered” to the sheriff “for that purpose.” RCW 36.28.010(3), (4). Here, there is no evidence in the record that Villanueva-Villa’s outstanding warrant was ever delivered to Brusseau by Clark County, to whom it was allegedly issued. Without delivery of the warrant to Brusseau, no duty existed under RCW 36.28.010 (or RCW 43.43.030) for him to execute the warrant. And without a duty, there can be no violation. Accordingly, Plaintiff also failed to meet this element of the failure to enforce exception.

d. Brusseau took corrective action

The final element of the failure to enforce exception is a failure to take corrective action. *Halleran*, 123 Wn. App. at 714. Plaintiff contends that Brusseau failed to take corrective action “[b]y refusing to arrest on the warrant,” in derogation of his “statutory duty to arrest and commit all persons who break the peace, or attempt to break it, and all persons guilty

of public offenses. App. Br. at 35 (citing RCW 36.28.010(1)). Plaintiff is incorrect. Brusseau unquestionably took corrective action in this case.

Here, after pulling Villanueva-Villa over and observing his intoxicated state, Brusseau took him into custody, requested a license check, sought to confirm Villanueva-Villa's outstanding warrant with the county, separated him from his vehicle and transported him to WSP, tested his BAC, issued him a DUI citation ordering him to appear in court, and then transported him to his sister's residence. Brusseau, in other words, took *multiple* corrective actions in response to the situation, including attempting to confirm the existence and delivery of the warrant. Although State Defendants were informed that Clark County would not confirm the warrant or accept Villanueva-Villa into jail due to overcrowding, it simply cannot be said that they failed to take corrective action. Since Plaintiff has entirely failed to satisfy any prong supporting the failure to enforce exception, it cannot be the basis for imposing an actionable tort duty on State Defendants.

2. The special relationship exception to the public duty doctrine does not apply where no express assurance was given

Plaintiff also maintains that the special relationship exception to the public duty doctrine applies to these facts. App. Br. at 38-41. Plaintiff, however, conflates the special relationship exception to the public duty doctrine with the distinct body of precedent relating to common law duties

arising from special relationships. *See id.* (citing *e.g.*, Restatement (Second) of Torts §§ 315, 319 (1965), and *Robb v. City of Seattle*, 176 Wn.2d 427, 434, 295 P.3d 212 (2013)).¹⁰ Under the exception, a special relationship between a government's agents and a plaintiff may give rise to an actionable duty only if there is: (1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the general public; (2) an express assurance given by the public official; and (3) justifiable reliance on the assurance by the plaintiff. *See, e.g., Munich*, 175 Wn.2d at 879. Because none of these three elements exists under the facts of this case, the special relationship exception to the public duty doctrine is inapplicable.

There is no evidence of any contact or privity between State Defendants and Mr. Myles. The fact that Mr. Myles was a member of the public whom law enforcement officers are charged to protect, without anything more, is insufficient to create a special relationship for purposes of the public duty doctrine. *See, e.g., Chambers-Castanes*, 100 Wn.2d at 285; *Cummins v. Lewis Cty.*, 156 Wn.2d 844, 854, 133 P.2d 458 (2006). There is also no evidence State Defendants made an express assurance to Mr. Myles that he relied on to his detriment. *See Cummins*, 156 Wn.2d at 856. Since Plaintiff fails to satisfy any prong supporting the special

¹⁰ This body of law is separately discussed by State Defendants *infra* in Part VII.B.

relationship exception, it cannot be the basis for imposing an actionable tort duty on State Defendants.

B. State Defendants Did Not Have a Common Law Duty to Control the Actions of Villanueva-Villa 35 Days After His Release

Outside of the public duty doctrine, Washington courts have sometimes looked to the common law to hold one party responsible for the acts of third-party tortfeasor where a special relationship existed between them. These cases generally rest on the duty of the defendant to *control* the third-party tortfeasor. *See, e.g., Taggart v. State*, 118 Wn.2d 195, 219, 822 P.2d 243 (1992); *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983). No such common law duty applies in this case, however, when Brusseau did not have authority or ability to control Villanueva-Villa five weeks after their encounter.

1. Restatement §§ 315 and 319 apply only where there is a definite, established, and continuing relationship, which did not exist here

Petersen was the first Washington case to recognize the existence of a special relationship pursuant to the Restatement (Second) of Torts § 315 (1965). Section 315 states the general rule of non-liability for the acts of another, but it also provides two exceptions when:

- (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

- (b) a special relation exists between the actor and the other which gives to the other a right to protection.

In *Peterson*, the Court relied upon § 315 as the basis for holding that a psychiatrist had “a duty to take reasonable precautions to protect anyone who might foreseeably be endangered by [his patient’s] drug-related mental problems.” 100 Wn.2d at 428. The Washington Supreme Court later clarified this holding in *Binschus v. State*, 186 Wn.2d 573, 380 P.3d 468 (2016). There, the Court explained that, in *Petersen*, “a psychiatrist failed to adequately control a patient” “as the psychiatrist chose to release the patient rather than seeking additional involuntary confinement.” *Id.* at 582. The focus, in other words, was on control.

Subsequently, in *Taggart*, the Supreme Court expanded this special relationship to include parole officers and their parolees and held that liability may be imposed under § 315 *only* where a “definite, established and continuing relationship between the defendant and the third party” is established. 118 Wn.2d at 219. The *Taggart* Court also examined that relationship in the context of Restatement § 319, which describes the “take charge” relationship:

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.

Id. (emphasis added). The Court held that “a parole officer takes charge of the parolees he or she supervises despite the lack of a custodial or continuous relationship.” *Id.* at 223. Thus, parole officers “have a duty to protect others from reasonable dangers engendered by parolees’ dangerous propensities.” *Id.* at 224. Again, the *Binschus* Court recently clarified this holding and explained: “the take charge duty described in Restatement § 319 as a ‘duty to control’ is, indeed, a duty to *control*. We did not previously, and do not today, expand it to a general duty to prevent a person from committing criminal acts in the future.” 186 Wn.2d at 580-81 (emphasis in original).

Since *Petersen* and *Taggart*, the requirement of a “definite, established and continuing relationship between the defendant and the third party” persists, as does the focus on control. *See, e.g., Sheikh v. Choe*, 156 Wn.2d 441, 448-49, 128 P.3d 574 (2006); *Binschus*, 186 Wn.2d at 579. In *Binschus*, the plaintiffs sought to hold a county jail liable for crimes committed by a former inmate that occurred well after the inmate left that jail and long after the county had the duty (or ability) to supervise him. *Id.* at 575. The plaintiffs contended that “the take charge duty imposes a broad duty to ‘to use reasonable care to protect against reasonably foreseeable dangers [the offender] posed.’” *Id.* at 579. The Court recognized that, “[i]n theory, this could include all reasonably foreseeable dangers, even those

that might occur long after the take charge duty has ended.” The Court rejected such a broad interpretation of § 319 and held that “a jail’s duty in a take charge relationship is limited to controlling violent inmates during incarceration, not preventing all foreseeable future crimes.” *Id.* at 577-79.

In each case in which liability has been imposed upon a government agent as the result of a “take charge” relationship, the relationship was a *continuing* one. *See, e.g., Joyce v. State, Dep’t of Corr.*, 155 Wn.2d 306, 320, 119 P.3d 825 (2005) (take charge relationship extended to community corrections officers and offenders); *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 281, 979 P.2d 400 (1999) (take charge relationship extended to city probation counselors and their probationers). When there is no continuing relationship, there is no “take charge” relationship. *See Husted v. State*, 187 Wn. App. 579, 589, 348 P.3d 776 (2015).

In *Husted*, the plaintiffs sought to hold the Department of Corrections liable for acts of an offender after he absconded from supervision. *Id.* at 580-81. When the offender failed to report for supervision four days after release from custody, a Department officer immediately requested a warrant for his arrest and attempted to ascertain his whereabouts. *Id.* at 581. However, before he could be apprehended, the offender committed a murder approximately fifteen weeks later. *Id.* at 581. The plaintiffs in *Husted* argued that the take charge relationship continues

even after an offender is on warrant status. Division I rejected this argument and held that the “take charge” relationship terminated once the offender absconded from supervision and a warrant was issued for his arrest (at least until the offender was apprehended). *Id.* at 590. Division II subsequently agreed with the decision in *Husted* in *Smith v. Dep’t of Corr.*, 189 Wn. App. 839, 849, 359 P.3d 867, 872 (2015).

Here, neither Brusseau nor the WSP had a “continuing” relationship with Villanueva-Villa. Notably, the “take charge” relationship has not previously been applied to an *arresting police officer* by a Washington appellate court and it would be inappropriate to do so here. The brief encounter between Brusseau and Villanueva-Villa did not meet the basic requirements for the establishment of a duty under § 319. Although it is true that Brusseau had control over Villanueva-Villa during the brief period of time in which he was in his custody, that relationship ended once Brusseau eliminated the dangers presented by Villanueva-Villa on the evening of December 23, 2005, by separating him from his vehicle and releasing him into the custody of his sister with a citation to appear in court six days later. As the court held in *Husted*, the take charge relationship ends once the ability to monitor and control an offender’s behavior ends. *See id.* at 588.¹¹

¹¹ For an arrestee to be detained more than 48 hours, there must be a judicial determination of probable cause. *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed 2d 49 (1991).

2. **Restatement § 302B applies only where a “new risk” is created and State Defendants did not do so**

In addition to §§ 315 and 319, Plaintiff also relies upon *Robb v. City of Seattle* for the principle that “[a] duty to third parties may arise in the limited circumstances where an actor’s own affirmative act creates a recognizable high degree of risk of harm to others through such misconduct, which a reasonable man would take into account.” App. Br. at 39 (citing 176 Wn.2d at 434). *Robb* is inapposite.

In *Robb*, the decedent’s estate sought to hold the city liable for his death after city police failed to collect shotgun shells found at the scene of a *Terry* stop in connection with a burglary. 176 Wn.2d at 430. The estate asserted that the city should be liable under Restatement § 302B, which provides that “[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.” *Id.* at 434. The Court held that, while § 302B *may* create an independent duty to protect against the criminal acts of a third party where the actor’s own affirmative act creates or exposes another to the recognizable high degree of risk of harm, the police officer’s failure to pick up the shotgun shells was not an affirmative act as contemplated by the Restatement. *Id.* at 429-30.

As the Court further explained, liability under § 302B contemplates the creation of “a new risk,” rather than passively permitting an existing peril to persist. *Id.* at 437-38. The Court rejected imposing liability under § 302B for nonfeasance, noting that doing so could cause law enforcement to “incur liability whenever it takes control of a situation where there is a recognizable high degree of risk of harm that it ultimately fails to eliminate. . . . A high degree of risk is inherent in their work.” *Id.* at 438.

The peril of placing a law enforcement officer at perpetual risk of tort liability where no special relationship exists and the officer has done nothing to *increase* the overall risk to the public has been recognized in other jurisdictions that have rejected imposing liability based on the “relationship” between an arresting officer and arrestee. *See, e.g., Ruf v. Honolulu Police Dep’t*, 89 Haw. 315, 324–25, 972 P.2d 1081, 1090–91 (1999); *Leake v. Cain*, 720 P.2d 152, 161 (Colo. 1986).

In *Ruf*, the Supreme Court of Hawaii considered whether the a police department could be held liable for the rape and murder of a young girl after it had arrested and released the perpetrator a month prior when it failed to discover his outstanding arrest warrants. 89 Haw. at 318. The plaintiff sought to state a claim under Restatement § 319. *Id.* In rejecting the plaintiff’s theory, the court first noted that the majority of other jurisdictions to recognize exceptions to the general rule of non-liability for police for

failure to provide protection have done so “*only* where the police have either themselves *increased the risk of harm to the injured party* or have somehow formed a *special relationship with the injured party—and not with the defendant.*” *Id.* at 329 (emphases added). The court was particularly concerned with “the effect that tort liability for overly hasty release is likely to have on individuals detained by the police” and declined to recognize a claim for relief for “negligent release” by police under § 319 in light of the constitutional rights at stake. *Id.* at 322, 324, 327, 329.

The Supreme Court of Colorado applied similar reasoning in *Leake*, where the court held that police officers’ duty to control a disruptive and intoxicated individual at a party existed only for the time that they had restrained him, and ended when they released him into the custody of his brother. 720 P.2d at 161. Therefore, the officers could not be held liable for his actions later that night when he struck multiple pedestrians with his vehicle. *Id.* Significantly, the court noted that “the officers did not assume a duty to the respondents’ decedents, induce reliance, *or create a peril or change the nature of an already existing risk.*” *Id.* (emphasis added).

3. This Court should reject an expansion of common law duty to include “negligent release” claims

In this case, it is Brusseau’s release of Villanueva-Villa after his DUI arrest that underpins the Plaintiff’s claims against State Defendants. A

review of cases from other jurisdictions shows that actions for “negligent release” are generally disallowed where, as in this case, (1) no special relationship existed between the defendants *and injured party* and (2) no additional risk or peril was created by the actions of the defendants. *See, e.g., Ruf*, 89 Haw. at 327; *Leake*, 720 P.2d at 161. The fact that Brusseau did briefly detain Villanueva-Villa should not be a decisive factor in this case, because the rule suggested by Plaintiff would create perverse results where the officer who makes an initial arrest (i.e., takes corrective action) is held liable, but the officer who decides to take no action at all is not. *See Pierson v. Ray*, 386 U.S. 547, 555, 87 S. Ct. 1213, 1218, 18 L. Ed. 2d 288 (1967) (remarking, “a policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does”). This Court should be mindful about requiring police officers to choose between liability for releasing a misdemeanor motorist with orders to appear in court and liability for unconstitutional detention.

Here, Brusseau’s control over Villanueva-Villa – and any attendant “take charge” relationship – ended when Villanueva-Villa was cited and released into his sister’s custody that night. No appellate court in this state has previously held a law enforcement officer or agency liable for a “negligent release” following an arrest. This Court should not be the first. As

the Supreme Court noted in *Binschus*, an expansion of the duty under § 319 to prevent a person from committing criminal acts in the future would be contrary to the language and logic of § 319. *Binschus*, 186 Wn.2d, at 581. Such an expansion of the duty under § 319 would also be at odds with the majority of jurisdictions having considered the issue.

For these reasons, the court should reject Plaintiff's request to expand liability under § 319 to apply to Trooper Brusseau's release of Villanueva-Villa where Brusseau arrested and cited him for DUI, sought to book him, was advised the jail would not accept him, separated him from his vehicle, drove him to his sister's residence and left him there with instructions to appear in court six days later. Under these circumstances, any "special" or "take charge" relationship that may have existed between Brusseau and Villanueva-Villa on December 23, 2005, surely terminated before Villanueva-Villa's motor vehicle collision with Mr. Myles some 35 days later. Under these circumstances, State Defendants had no common law duty and summary judgment in their favor should be affirmed.

C. Brusseau's Conduct Was Not a Proximate Cause of Mr. Myles' Death

Even if Plaintiff could prove an actionable tort duty, she still cannot establish that the conduct of Brusseau and WSP proximately caused the death of Mr. Myles. A cause is proximate only if it is both (1) a cause in

fact and (2) a legal cause. *Gail v. McDonald Indus.*, 84 Wn. App. 194, 207, 926 P.2d 934 (1996). Neither is present in this case.

1. **Speculation does not establish that Brusseau’s conduct was a cause in fact of Mr. Myles’ death**

Cause in fact refers to the “but for” consequences of an act; *i.e.*, the physical connection between an act and an injury. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). There must be evidence that the defendant’s conduct produced injury to the plaintiff in a direct, unbroken sequence under circumstances, where the injury would not have occurred “but for” the defendant’s conduct. *Id.*; *see also* WPI 5th Ed. 15.01. Cause in fact “does not exist if the connection between an act and the later injury is indirect and speculative.” *Estate of Bordon v. Dep’t of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004). It is reversible error to deny summary judgment where speculation is required to find factual causation. *Id.* at 240; *Rasmussen v. Bendotti*, 107 Wn. App. 947, 959, 29 P.3d 56 (2001).

To withstand summary judgment, it is not enough to say that some event or series of events might have or could have caused an injury. *Miller v. Likins*, 109 Wn. App. 140, 146-47, 34 P.3d 835 (2001). Thus, to have sustained her burden on cause-in-fact, Plaintiff needed to come forward with admissible evidence from which jurors could conclude that, had Brusseau brought Villanueva-Villa to the Clark County jail on the night of

December 23, 2005, he would have been booked into and held in the jail for the next five weeks. *See, e.g., Estate of Bordon*, 122 Wn. App. at 246-47; *Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 254, 139 P.3d 1131, 1137 (2006); *Smith*, 189 Wn. App. at 852. Plaintiff cannot so do here without resorting to *substantial* speculation.

First, jurors would have to speculate that Villanueva-Villa would have been booked into jail had Brusseau delivered him there on December 23, 2005. Given the testimony that the jail made exceptions to the booking restrictions only when an arresting officer demonstrated that the arrestee was combative, CP 762, 841, 864-65, 910, and the evidence that Villanueva-Villa was cooperative, CP 133, making an exception here was unlikely. A jury would next have to speculate that, had the jail accepted Villanueva-Villa for booking, he would *not* have been booked and released the same night as the evidence shows. CP 133, 813, 840-41, 852-53, 865, 921-22, 966. Next, a jury would need to further speculate that if Villanueva-Villa had been held in jail overnight, he would *not* have been released by the court the following day under CrR 3.2, which presumes release of an accused in noncapital cases. Appx. at 15. Finally, a jury would need to further speculate that, had this series of less-than-probable outcomes occurred, Villanueva-Villa then would have *remained incarcerated* for an additional five weeks. The law prohibits this type of guesswork by jurors.

Plaintiff points to unauthenticated court documents from a February 21, 2006, court proceeding *after* Villanueva-Villa had been charged with felony vehicular homicide of Mr. Myles. App. Br. at 42 (citing CP 778, 781).¹² Plaintiff suggests that the supervision and alcohol-related conditions allegedly imposed on Villanueva-Villa after the death of Mr. Myles would have been imposed five weeks earlier had Villanueva-Villa been brought before a judge at that time and would have prevented the “alcohol related death of Mr. Myles.” App. Br. at 43. This is rank speculation and requires several additional assumptions by the jury, including that: (1) Villanueva-Villa would have remained compliant with such supervision and alcohol-related restrictions had they been earlier ordered by the court and (2) the terms of supervision and restrictions would have been sufficient to ensure that he would not have been intoxicated on January 27, 2006. Moreover, while the inadmissible hearsay evidence submitted by Plaintiff indicates that Villanueva-Villa was convicted of vehicular homicide, CP 332, 335, 413, nothing in that evidence or elsewhere in the record establishes that he was under the influence of alcohol at the time of the collision.

Speculation as to a hypothetical outcome, without supporting evidence, has previously been rejected by this Court in *Smith*, 189 Wn. App.

¹² These documents, which are unauthenticated and inadmissible hearsay, are also the subject of State Defendants’ cross-appeal discussed *infra* in Part VIII.

at 852, where the court determined it was “pure speculation” that an offender on community custody would have been in jail for almost four months had the Department of Corrections reported his earlier violations. Furthermore, Washington courts have specifically held that any inference that the tortfeasor would have been confined in jail in a negligent supervision case must be supported by a witness qualified to testify to such a theory. *Id.* at 851 n.9; *Estate of Bordon*, 122 Wn. App. at 246-47.

Plaintiff asks to be permitted to present these same speculative theories to establish that, had Villanueva-Villa been presented to the jail for service of the warrant on December 23, 2005, he would have been incarcerated on January 27, 2006. This Court should decline Plaintiff’s invitation and apply well-established precedent requiring non-speculative and admissible evidence in order to find proximate cause.

2. **Brusseau’s conduct was not a legal cause of Mr. Myles’ death**

Even if factual causation could somehow be proven, legal cause is lacking. Legal causation “requires a determination of whether liability should attach as a matter of law, given the existence of cause in fact.” *Braegelmann v. Snohomish Cty.*, 53 Wn. App. 381, 384, 766 P.2d 1137 (1989). This determination involves “mixed considerations of logic, common sense, justice, policy and precedent.” *Id.* at 384-85. Legal

causation is based on policy determinations as to how far the consequences of a defendant's acts *should* extend. *Hartley*, 103 Wn.2d at 779.

In *Hartley*, the plaintiff sought to hold the state liable for a drunk driver whose license should legally have been revoked. The Court held that the state's failure to earlier revoke the license was "too remote and insubstantial" to impose liability for his drunk driving and that the proximate cause of the resulting death was the drunk driving itself. *Id.* Similarly, in *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 15 P.3d 1283 (2001), the Court found legal cause lacking where the plaintiff sought to hold a rental car company liable for an accident that occurred in a stolen vehicle the day after the company left the keys in the vehicle overnight:

At a minimum, the remoteness in time between the criminal act and the injury is dispositive to the question of legal cause in this case... *Even if it were negligent for Budget to leave the keys inside of its minivan, 'the responsibility for such negligence must terminate at some time in the future....'* One who fails to remove the keys from his or her vehicle should not be 'answerable in perpetuity for the criminal and tortious conduct of others....'

Id. at 205-06 (emphasis added; internal citations omitted).

The actions of Brusseau on December 23, 2005, are too remote from the actions of Villanueva-Villa five weeks later to impose liability on State Defendants. This is particularly true where Brusseau attempted to determine if there were outstanding warrants for Villanueva-Villa and inquired

whether the jail would detain him. When informed the jail would not accept him, Brusseau separated him from his vehicle and released him with a citation to appear in court. CP 32, 133, 305. In addition, there is no evidence in the record establishing that Villanueva-Villa's vehicular homicide of Mr. Myles was alcohol-related. And the length of time between Brusseau's release of Villanueva-Villa and the collision – 35 days – weighs against legal causation.

This Court should not determine that Brusseau incurred what would amount to perpetual liability, extending indefinitely for Villanueva-Villa's future drunk driving conduct. To impose liability on State Defendants in this case would be contrary to established principles concerning how far liability should extend. Because there is no legal causation in this cause, summary judgment should be affirmed.

D. State Defendants Timely Pursued Reconsideration and the Trial Court Appropriately Granted Summary Judgment

The trial court, having initially erroneously denied State Defendants summary judgment, properly exercised its discretion under CR 59(a) to correct its decision following State Defendants' timely motion for reconsideration. Nonetheless, Plaintiff argues that the hearing on State Defendants' motion for reconsideration was improper because the trial court permitted State Defendants "to have a second shot at arguing their

summary judgment [motion] on reconsideration” and it was heard outside of the 30-day period prescribed by CR 59(b). App. Br. at 47 (citing *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005)). *Wilcox* is inapposite because State Defendants’ motion for reconsideration was limited to the same theories raised in their motion for summary judgment. In *Wilcox*, the plaintiff asserted entirely new theories in her motion for reconsideration not previously raised in her initial response to the defendants’ motion to dismiss. On appeal, the court held that the plaintiff’s motion was properly denied because CR 59 “does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision.” *Id.* at 241.

Plaintiff’s objection to the timeliness of the hearing is also misplaced. *See, e.g., Singleton v. Naegeli Reporting Corp.*, 142 Wn. App. 598, 604–05, 175 P.3d 594 (2008). In *Singleton*, the trial court noted the plaintiff’s motion for reconsideration for a hearing 35 days after the court’s initial order. *Id.* at 604. The defendant argued that was untimely under CR 59(b). Division II rejected the defendant’s untimeliness argument and held that CR 59(b) “authorizes trial courts to establish noting dates for reconsideration motions that are different than those set in the rule.” The Court also noted that the drafters intentionally used the language “unless the court *directs* otherwise,” as opposed to “*orders* otherwise,” “to provide

flexibility that would permit the clerk of the court to adjust the scheduling of hearings when conflicts arise.” *Id.* at 604-05. *See also In re Marriage of Estes*, 84 Wn. App. 586, 595, 929 P.2d 500 (1997) (“[CR 59(b)] expressly authorizes the trial court to vary the time for hearing the motion.”).

Finally, this Court is not limited to a review of only the lower court’s order on the motion for reconsideration. “[A]n appeal from an order on a motion for reconsideration... allows review of the propriety of the final judgment itself.” *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 492, 183 P.3d 283, 287–88 (2008), *abrogated on other grounds by Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 393 P.3d 776 (2017). The judgment in favor of State Defendants should be affirmed.

VII. ARGUMENT ON CROSS-APPEAL

A. Multiple Records Relied on by the Trial Court Are Inadmissible and Should Not Be Considered

If this Court affirms summary judgment on any of the previous bases, it is unnecessary to address this argument on cross-appeal. In opposition to State Defendants’ motion for summary judgment, Plaintiff introduced 34 exhibits through the sworn declaration of Plaintiff’s counsel. CP 1184-1198.¹³ State Defendants objected to several of these exhibits, including: Exhibits 1-8 (CP 222-303) and 12-15 (CP 319-48),

¹³ The exhibits identified in the declaration are located at CP 222-491.

unauthenticated and uncertified records of various government agencies pertaining to past alleged charges and convictions of Villanueva-Villa; Exhibits 24 (CP 412) and 25 (CP 415),¹⁴ Clark County District Court dockets; and Exhibits 29 (CP 467) and 30 (CP 469), unauthenticated and uncertified records of the Clark County Sheriff's Office. *See* CP 971-975, 993; VRP 1–3. The trial court reserved ruling on these objections, VRP 3, but ultimately considered all 34 exhibits in ruling on State Defendants' motion. CP 1234, 1354-55. The standard of review for trial court evidentiary decisions, including those made on summary judgment proceedings, is for abuse of discretion. *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 372, 901 P.2d 1079, 1081 (1995).

Plaintiff argued these records were admissible under ER 201 and 901. CP 1184-1198. Evidence Rule 201 governs judicial notice of adjudicative facts. A judicially noticed fact must “not [be] subject to reasonable dispute.” ER 201(b). An adjudicative fact is not subject to judicial notice unless it is either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready

¹⁴ State Defendants objected to Exhibit 24 in their summary judgment reply brief (CP 993) and also at the hearing (VRP 1 – 3). State Defendants referred to Exhibit 24 as Exhibits “26” and “27” at the hearing because the same documents were introduced in a separate, though substantially similar, declaration submitted by Plaintiff in opposition to Clark County's motions as Exhibits 26 and 27. *See* CP 1201, 1211.

determination by resort to sources whose accuracy cannot be reasonably questioned. Appx. at 10.

The records submitted by Plaintiff include purported court records from prior criminal cases and records of various other government agencies. These are generally not admitted under ER 201. Although a court may take judicial notice of court records in the same case, courts generally do not take judicial notice of court records from a different case under ER 201. *Swak v. Dep't of Labor & Indus.*, 40 Wn.2d 51, 53-54, 240 P.2d 560 (1952); *In re Coday*, 156 Wn.2d 485, 501, 130 P.3d 809 (2006).

Plaintiff contends that judicial notice may be taken of these documents because they were obtained via public records requests. VRP 3. Plaintiff conflates the requirements for the admission of public records as exceptions to hearsay under ER 801(8) and RCW 5.44.040 with the requirement for judicial notice under ER 201 that a particular fact be “capable and accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” The records identified above do not meet the criteria of ER 201(b).

In addition, CR 56(e) requires affidavits to be made “on personal knowledge” and show “affirmatively that the affiant is competent to testify to the matters stated therein” and that “sworn or certified copies” of documents referenced in an affidavit “shall be attached thereto or served

therewith.” Appx. at 9. Hearsay evidence in a declaration is not competent evidence under CR 56(e). *Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 477, 512 P.2d 1126 (1973). Conclusory allegations, which are not founded on facts, cannot be considered on a summary judgment motion. *Orion Corp. v. State*, 103 Wn.2d 441, 461-62, 693 P.2d 1369 (1985). *See also Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 367, 966 P.2d 921, 925 (1998) (a police report “authenticated” by a party’s attorney rather than the reporting officer was inadmissible). Further, these records are inadmissible under CR 44(a)(1), ER 901, 902, RCW 5.44.010, and .040 because they are unauthenticated. Appx. at 11-14. They are also irrelevant and inadmissible under ER 402, because they purport to show release restrictions imposed after Villanueva-Villa was charged with manslaughter. *See* CP 971-975; Appx. at 21.

The trial court abused its discretion in considering the records identified above. This Court should not consider them in reviewing summary judgment in favor of State Defendants.

VIII. CONCLUSION

For all the foregoing reasons, the trial court’s order granting summary judgment to State Defendants should be affirmed.

RESPECTFULLY SUBMITTED this 9th day of August, 2019.

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APPENDIX

MYLES v. STATE OF WASHINGTON, et al.

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7-8	RCW 46.61.515 (1979 version)
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12	ER 902
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14	RCW 5.44.040
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RCW 46.61.520**Vehicular homicide—Penalty.**

(1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:

(a) While under the influence of intoxicating liquor or any drug, as defined by RCW **46.61.502**; or

(b) In a reckless manner; or

(c) With disregard for the safety of others.

(2) Vehicular homicide is a class A felony punishable under chapter **9A.20** RCW, except that, for a conviction under subsection (1)(a) of this section, an additional two years shall be added to the sentence for each prior offense as defined in RCW **46.61.5055**.

[**1998 c 211 § 2**; **1996 c 199 § 7**; **1991 c 348 § 1**; **1983 c 164 § 1**; **1975 1st ex.s. c 287 § 3**; **1973 2nd ex.s. c 38 § 2**; **1970 ex.s. c 49 § 5**; **1965 ex.s. c 155 § 63**; **1961 c 12 § 46.56.040**. Prior: **1937 c 189 § 120**; RRS § 6360-120. Formerly RCW **46.56.040**.]

NOTES:

Effective date—1998 c 211: See note following RCW **46.61.5055**.

Severability—1996 c 199: See note following RCW **9.94A.505**.

Effective date—1991 c 348: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1991." [**1991 c 348 § 5**.]

Severability—1973 2nd ex.s. c 38: See note following RCW **69.50.101**.

Severability—1970 ex.s. c 49: See note following RCW **9.69.100**.

Criminal history and driving record: RCW **46.61.513**.

Ignition interlocks, biological, technical devices: RCW **46.20.710** through **46.20.750**.

Suspension or revocation of license upon conviction of vehicular homicide or assault: RCW **46.20.285**, **46.20.291**.

West's Revised Code of Washington Annotated
Title 36. Counties (Refs & Annos)
Chapter 36.28. County Sheriff (Refs & Annos)

West's RCWA 36.28.010

36.28.010. General duties

Effective: July 26, 2009

[Currentness](#)

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

- (1) Shall arrest and commit to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses;
- (2) Shall defend the county against those who, by riot or otherwise, endanger the public peace or safety;
- (3) Shall execute the process and orders of the courts of justice or judicial officers, when delivered for that purpose, according to law;
- (4) Shall execute all warrants delivered for that purpose by other public officers, according to the provisions of particular statutes;
- (5) Shall attend the sessions of the courts of record held within the county, and obey their lawful orders or directions;
- (6) Shall keep and preserve the peace in their respective counties, and quiet and suppress all affrays, riots, unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they may call to their aid such persons, or power of their county as they may deem necessary.

RCW 43.43.030

Powers and duties—Peace officers.

The chief and other officers of the Washington state patrol shall have and exercise, throughout the state, such police powers and duties as are vested in sheriffs and peace officers generally, and such other powers and duties as are prescribed by law.

[1965 c 8 § 43.43.030. Prior: 1933 c 25 § 2; RRS § 6362-60.]

NOTES:

General authority law enforcement agency: RCW 10.93.020.

West's RCWA 35.24.160
WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 35. CITIES AND TOWNS
MISCELLANEOUS CITY AND TOWN PROVISIONS OTHER THAN TITLE 35
CHAPTER 35.24—THIRD CLASS CITIES

35.24.160. Chief of police and police department

1965 Main Volume Historical Notes

Main Volume Text

35.24.160. Chief of police and police departmentThe department of police in a city of the third class shall be under the direction and control of the chief of police subject to the direction of the mayor. The chief of police shall prosecute before the police justice all violations of city ordinances which come to his knowledge. He shall have charge of the city prisons and prisoners and of any chain gang which may be established by the city council. He may pursue and arrest violators of city ordinances beyond the city limits.His lawful orders shall be promptly executed by deputies, police officers and watchmen. Every citizen shall lend him aid, when required, for the arrest of offenders and maintenance of public order. With the concurrence of the mayor, he may appoint additional policemen to serve for one day only under his orders in the preservation of public order.He shall have the same authority as that conferred upon sheriffs for the suppression of any riot, public tumult, disturbance of the peace, or resistance against the laws or the public authorities in the lawful exercise of their functions and shall be entitled to the same protection.He shall perform such other services as may be required by statute or ordinances of the city.He shall execute and return all process issued and directed to him by lawful authority and for his services shall receive the same fees as are paid to constables.

RCW 70.96A.120

Treatment programs and facilities—Admissions—Peace officer duties—Protective custody.

(1) An intoxicated person may come voluntarily to an approved treatment program for treatment. A person who appears to be intoxicated in a public place and to be in need of help, if he or she consents to the proffered help, may be assisted to his or her home, an approved treatment program or other health facility.

(2) Except for a person who may be apprehended for possible violation of laws not relating to alcoholism, drug addiction, or intoxication and except for 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 and except for a person who may wish to avail himself or herself of the provisions of RCW 46.20.308, a person who appears to be incapacitated or gravely disabled by alcohol or other drugs and who is in a public place or who has threatened, attempted, or inflicted physical harm on himself, herself, or another, shall be taken into protective custody by a peace officer or staff designated by the county and as soon as practicable, but in no event beyond eight hours brought to an approved treatment program for treatment. If no approved treatment program is readily available he or she shall be taken to an emergency medical service customarily used for incapacitated persons. The peace officer or staff designated by the county, in detaining the person and in taking him or her to an approved treatment program, is taking him or her into protective custody and shall make every reasonable effort to protect his or her health and safety. In taking the person into protective custody, the detaining peace officer or staff designated by the county may take reasonable steps including reasonable force if necessary to protect himself or herself or effect the custody. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime.

(3) A person who comes voluntarily or is brought to an approved treatment program shall be examined by a qualified person. He or she may then be admitted as a patient or referred to another health facility, which provides emergency medical treatment, where it appears that such treatment may be necessary. The referring approved treatment program shall arrange for his or her transportation.

(4) A person who is found to be incapacitated or gravely disabled by alcohol or other drugs at the time of his or her admission or to have become incapacitated or gravely disabled at any time after his or her admission, may not be detained at the program for more than seventy-two hours after admission as a patient, unless a petition is filed under RCW 70.96A.140, as now or hereafter amended: PROVIDED, That the treatment personnel at an approved treatment program are authorized to use such reasonable physical restraint as may be necessary to retain an incapacitated or gravely disabled person for up to seventy-two hours from the time of admission. The seventy-two hour periods specified in this section shall be computed by excluding Saturdays, Sundays, and holidays. A person may consent to remain in the program as long as the physician in charge believes appropriate.

(5) A person who is not admitted to an approved treatment program, is not referred to another health facility, and has no funds, may be taken to his or her home, if any. If he or she has no home, the approved treatment program shall provide him or her with information and assistance to access available community shelter resources.

(6) If a patient is admitted to an approved treatment program, his or her family or next of kin shall be notified as promptly as possible by the treatment program. If an adult patient who is not incapacitated requests that there be no notification, his or her request shall be respected.

(7) The peace officer, staff designated by the county, or treatment facility personnel, who act in compliance with this chapter and are performing in the course of their official duty are not criminally or civilly liable therefor.

(8) If the person in charge of the approved treatment program determines that appropriate treatment is available, the patient shall be encouraged to agree to further diagnosis and appropriate voluntary treatment.

[1991 c 290 § 6; 1990 c 151 § 8; 1989 c 271 § 306; 1987 c 439 § 13; 1977 ex.s. c 62 § 1; 1974 ex.s. c 175 § 1; 1972 ex.s. c 122 § 12.]

NOTES:

Severability—1989 c 271: See note following RCW 9.94A.510.

RCW 46.61.515 (1979)

Driving or being in physical control of motor vehicle while under the influence of intoxicating liquor or drugs—Penalties—Alcohol or drug problem, treatment—Suspension or revocation of license—Appeal

(1) Every person who is convicted of a violation of section 1 or 2 of this 1979 act shall be punished by imprisonment for not less than one day nor more than one year, and by a fine of not more than five hundred dollars. The person shall, in addition, be required to complete a course at an alcohol information school approved by the department of social and health services. One day of the jail sentence shall not be suspended or deferred unless the judge finds that the imposition of the jail sentence will pose a risk to the defendant's physical or mental well-being. Whenever the mandatory jail sentence is suspended or deferred, the judge must state, in writing, the reason for granting the suspension or deferral and the facts upon which the suspension or deferral is based.

(2) On a second or subsequent conviction under section 1 or 2 of this 1979 act within a five year period a person shall be punished by imprisonment for not less than seven days nor more than one year and by a fine not more than one thousand dollars. The jail sentence shall not be suspended or deferred unless the judge finds that the imposition of the jail sentence will pose a risk to the defendant's physical or mental well-being. Whenever the mandatory jail sentence is suspended or deferred, the judge must state, in writing, the reason for granting the suspension or deferral and the facts upon which the suspension or deferral is based. If such person at the time of a second or subsequent conviction is without a license or permit because of a previous suspension or revocation, the minimum mandatory sentence shall be ninety days in jail and a two hundred dollar fine. The penalty so imposed shall not be suspended or deferred.

In addition to any nonsuspendable and nondeferrable jail sentence required by this subsection, the court shall sentence a person to a term of imprisonment not exceeding one hundred eighty days and shall suspend but shall not defer the sentence for a period not exceeding two years. The suspension of the sentence may be conditioned upon nonrepetition, alcohol or drug treatment, supervised probation, or other conditions that may be appropriate. The sentence may be imposed in whole or in part upon violation of a condition of suspension during the suspension period.

(3) There shall be levied and paid into the highway safety fund of the state treasury a penalty assessment in the minimum amount of twenty-five percent of, and which shall be in addition to, any fine, bail forfeiture, or costs on all offenses involving a violation of any state statute or city or county ordinance relating to driving a motor vehicle while under the influence of intoxicating liquor or being in actual physical control of a motor vehicle while under the influence of intoxicating liquor: Provided, That all funds derived from such penalty assessment shall be in addition to and exclusive of assessments made under RCW 46.81.030 and shall be for the exclusive use of the department for driver services programs and for a state-wide alcohol safety action program, or other similar programs designed primarily for the rehabilitation or control of traffic offenders. Such penalty assessment shall be included in any bail schedule and shall be included by the court in any pronouncement of sentence.

(4) Notwithstanding the provisions contained in chapters 3.16, 3.46, 3.50, 3.62, or 35.20 RCW, or any other section of law, the penalty assessment provided for in subsection (3) of this section shall not be suspended, waived, modified, or deferred in any respect, and all moneys derived from such penalty assessments shall be forwarded to the highway safety fund to be used exclusively for the purposes set forth in subsection (3) of this section.

(5) The license or permit to drive or any nonresident privilege of any person convicted of either of the offenses named in section 1 or 2 of this 1979 act shall:

(a) On the first conviction under either such offense, be suspended by the department for not less than thirty days: Provided, That the court may recommend that no suspension action be taken;

(b) On a second conviction under either such offense within a five year period, be suspended by the department for not less than sixty days;

(c) On a third or subsequent conviction under either such offense within a five year period, be revoked by the department.

(6) In any case provided for in this section, where a driver's license is to be revoked or suspended, such revocation or suspension shall be stayed and shall not take effect until after the determination of any appeal from the conviction which may lawfully be taken, but in case such conviction is sustained on appeal such revocation or suspension shall take effect as of the date that the conviction becomes effective for other purposes.

(7) The provisions of this section limiting the authority of a court to defer or suspend a sentence shall not take effect until January 1, 1980. The division of criminal justice, no later than December 31, 1980, shall submit a study to the house of representatives and to the senate which details the impact of the sentencing provisions established by this section. The impact study shall include, but shall not be limited to, the following information: The impact of the provisions upon county jail conditions and bed space, the cost impact of the provisions upon local and state governments, and the existence of alternative facilities to which individuals sentenced under this section may be committed."

Superior Court Civil Rules

CR 56
SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in such party's favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

[Originally effective July 1, 1967; amended effective September 1, 1978; September 1, 1985; September 1, 1988; September 1, 1990; September 1, 1993; April 28, 2015.]

Rules of Evidence

RULE ER 201
JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. A court may take judicial notice, whether requested or not.

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity To Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

[Adopted effective April 2, 1979.]

Comment 201

[Deleted effective September 1, 2006.]

Rules of Evidence

RULE ER 901
REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert Opinion on Handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by Court or Expert Witness. Comparison by the court or by expert witnesses with specimens which have been authenticated.

(4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public Records or Reports. (Reserved. See RCW 5.44 and CR 44.) (8) Ancient Documents or Data Compilation. Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence 20 years or more at the time it is offered.

(9) Process or System. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Electronic Mail (E-mail). Testimony by a person with knowledge that (i) the e-mail purports to be authored or created by the particular sender or the sender's agent; (ii) the e-mail purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

(11) Methods Provided by Statute or Rule. Any method of authentication or identification provided by statute or court rule.

[Adopted effective April 2, 1979; amended effective December 10, 2013.]

Comment 901

[Deleted effective September 1, 2006.]

Rules of Evidence

RULE ER 902
SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(a) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(b) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in section (a), having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(c) Foreign Public Documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (1) of the executing or attesting person, or (2) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(d) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with section (a), (b), or (c) of this rule or complying with any applicable law, treaty or convention of the United States, or the applicable law of a state or territory of the United States.

(e) Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(f) Newspapers and Periodicals. Printed materials purporting to be newspapers or periodicals.

(g) Trade Inscriptions and the Like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(h) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(i) Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(j) Presumptions Created by Law. Any signature, document, or other matter declared by any law of the United States or of this state to be presumptively or prima facie genuine or authentic.

[Amended effective August 27, 1980; September 1, 1988; September 1, 1992.]

Comment 902

[Deleted effective September 1, 2006.]

RCW 5.44.010

Court records and proceedings—When admissible.

*** CHANGE IN 2019 *** (SEE 5083.SL) ***

The records and proceedings of any court of the United States, or any state or territory, shall be admissible in evidence in all cases in this state when duly certified by the attestation of the clerk, prothonotary or other officer having charge of the records of such court, with the seal of such court annexed.

[1997 c 358 § 7; Code 1881 § 430; 1877 p 94 § 432; 1869 p 115 § 426; 1854 p 195 § 334; RRS § 1254.]

NOTES:

Rules of court: Cf. CR 44(a)(1).

RCW 5.44.040

Certified copies of public records as evidence.

*** CHANGE IN 2019 *** (SEE 5083.SL) ***

Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state.

[1991 c 59 § 1; 1891 c 19 § 16; Code 1881 § 432; 1854 p 195 § 336; RRS § 1257.]

NOTES:

Rules of court: Cf. ER 803; CR 44(a)(1).

CrR 3.2
RELEASE OF ACCUSED

If the court does not find, or a court has not previously found, probable cause, the accused shall be released without conditions.

(a) Presumption of Release in Noncapital Cases.

Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance pursuant to rule 3.2.1 or CrRLJ 3.2.1 be ordered released on the accused's personal recognizance pending trial unless:

- (1) the court determines that such recognizance will not reasonably assure the accused's appearance, when required, or
- (2) there is shown a likely danger that the accused:
 - (a) will commit a violent crime, or
 - (b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.

For the purpose of this rule, "violent crimes" are not limited to crimes defined as violent offenses in RCW 9.94A.030.

In making the determination herein, the court shall, on the available information, consider the relevant facts including, but not limited to, those in subsections (c) and (e) of this rule.

(b) Showing of Likely Failure to Appear—Least Restrictive Conditions of Release. If the court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the least restrictive of the following conditions that will reasonably assure that the accused will be present for later hearings, or, if no single condition gives that assurance, any combination of the following conditions:

- (1) Place the accused in the custody of a designated person or organization agreeing to supervise the accused;
- (2) Place restrictions on the travel, association, or place of abode of the accused during the period of release;
- (3) Require the execution of an unsecured bond in a specified amount;
- (4) Require the execution of a bond in a specified amount and the deposit in the registry of the court in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release or forfeited for violation of any condition

of release. If this requirement is imposed, the court must also authorize a surety bond under section (b)(5);

- (5) Require the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu thereof;
- (6) Require the accused to return to custody during specified hours or to be placed on electronic monitoring, if available; or
- (7) Impose any condition other than detention deemed reasonably necessary to assure appearance as required. If the court determines that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the accused's appearance.

(c) Relevant Factors—Future Appearance. In determining which conditions of release will reasonably assure the accused's appearance, the court shall, on the available information, consider the relevant facts including but not limited to:

- (1) The accused's history of response to legal process, particularly court orders to personally appear;
- (2) The accused's employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government;
- (3) The accused's family ties and relationships;
- (4) The accused's reputation, character and mental condition;
- (5) The length of the accused's residence in the community;
- (6) The accused's criminal record;
- (7) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;
- (8) The nature of the charge, if relevant to the risk of nonappearance;
- (9) Any other factors indicating the accused's ties to the community.

(d) Showing of Substantial Danger—Conditions of Release. Upon a showing that there exists a substantial danger that the accused will commit a violent crime or that the accused will

seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice, the court may impose one or more of the following nonexclusive conditions:

- (1) Prohibit the accused from approaching or communicating in any manner with particular persons or classes of persons;
- (2) Prohibit the accused from going to certain geographical areas or premises;
- (3) Prohibit the accused from possessing any dangerous weapons or firearms, or engaging in certain described activities or possessing or consuming any intoxicating liquors or drugs not prescribed to the accused;
- (4) Require the accused to report regularly to and remain under the supervision of an officer of the court or other person or agency;
- (5) Prohibit the accused from committing any violations of criminal law;
- (6) Require the accused to post a secured or unsecured bond or deposit cash in lieu thereof, conditioned on compliance with all conditions of release. This condition may be imposed only if no less restrictive condition or combination of conditions would reasonably assure the safety of the community. If the court determines under this section that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the safety of the community and prevent the defendant from intimidating witnesses or otherwise unlawfully interfering with the administration of justice;
- (7) Place the accused in the custody of a designated person or organization agreeing to supervise the accused;
- (8) Place restrictions on the travel, association, or place of abode of the accused during the period of release;
- (9) Require the accused to return to custody during specified hours or to be placed on electronic monitoring, if available; or
- (10) Impose any condition other than detention to assure noninterference with the administration of justice and reduce danger to others or the community.

(e) Relevant Factors—Showing of Substantial Danger. In determining which conditions of release will reasonably assure the accused's noninterference with the administration of justice, and reduce danger to others or the community, the court shall, on the available information, consider the relevant facts including but not limited to:

- (1) The accused's criminal record;

- (2) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;
- (3) The nature of the charge;
- (4) The accused's reputation, character and mental condition;
- (5) The accused's past record of threats to victims or witnesses or interference with witnesses or the administration of justice;
- (6) Whether or not there is evidence of present threats or intimidation directed to witnesses;
- (7) The accused's past record of committing offenses while on pretrial release, probation or parole; and
- (8) The accused's past record of use of or threatened use of deadly weapons or firearms, especially to victims or witnesses.

(f) Delay of Release. The court may delay release of a person in the following circumstances:

- (1) If the person is intoxicated and release will jeopardize the person's safety or that of others, the court may delay release of the person or have the person transferred to the custody and care of a treatment center.
- (2) If the person's mental condition is such that the court believes the person should be interviewed by a mental health professional for possible commitment to a mental treatment facility pursuant to RCW 71.05, the court may delay release of the person.
- (3) Unless other grounds exist for continued detention, a person detained pursuant to this section must be released from detention not later than 24 hours after the preliminary appearance.

(g) Release in Capital Cases. Any person charged with a capital offense shall not be released in accordance with this rule unless the court finds that release on conditions will reasonably assure that the accused will appear for later hearings, will not significantly interfere with the administration of justice and will not pose a substantial danger to another or the community. If a risk of flight, interference or danger is believed to exist, the person may be ordered detained without bail.

(h) Release After Finding or Plea of Guilty. After a person has been found or pleaded guilty, and subject to RCW 9.95.062, 9.95.064, 10.64.025, and 10.64.027, the court may revoke, modify, or suspend the terms of release and/or bail previously ordered.

(i) Order for Release. A court authorizing the release of the accused under this rule shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform the accused of the penalties applicable to violations of the conditions imposed, if any, shall inform the accused of the penalties applicable to violations of the conditions of the accused's release and shall advise the accused that a warrant for the accused's arrest may be issued upon any such violation.

(j) Review of Conditions.

- (1) At any time after the preliminary appearance, an accused who is being detained due to failure to post bail may move for reconsideration of bail. In connection with this motion, both parties may present information by proffer or otherwise. If deemed necessary for a fair determination of the issue, the court may direct the taking of additional testimony.
- (2) A hearing on the motion shall be held within a reasonable time. An electronic or stenographic record of the hearing shall be made. Following the hearing, the court shall promptly enter an order setting out the conditions of release in accordance with section (i). If a bail requirement is imposed or maintained, the court shall set out its reasons on the record or in writing.

(k) Amendment or Revocation of Order.

- (1) The court ordering the release of an accused on any condition specified in this rule may at any time on change of circumstances, new information or showing of good cause amend its order to impose additional or different conditions for release.
- (2) Upon a showing that the accused has willfully violated a condition of release, the court may revoke release and may order forfeiture of any bond. Before entering an order revoking release or forfeiting bail, the court shall hold a hearing in accordance with section (j). Release may be revoked only if the violation is proved by clear and convincing evidence.

(l) Arrest for Violation of Conditions.

- (1) **Arrest With Warrant.** Upon the court's own motion or a verified application by the prosecuting attorney alleging with specificity that an accused has willfully violated a condition of the accused's release, a court shall order the accused to appear for immediate hearing or issue a warrant directing the arrest of the accused for immediate hearing for reconsideration of conditions of release pursuant to section (k).
- (2) **Arrest Without Warrant.** A law enforcement officer having probable cause to believe that an accused released pending trial for a felony is about to leave the

state or has violated a condition of such release under circumstances rendering the securing of a warrant impracticable may arrest the accused and take him forthwith before the court for reconsideration of conditions of release pursuant to section (k).

(m) Evidence. Information stated in, or offered in connection with, any order entered pursuant to this rule need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(n) Forfeiture. Nothing contained in this rule shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.

(o) Accused Released on Recognizance or Bail--Absence--Forfeiture. If the accused has been released on the accused's own recognizance, on bail, or has deposited money instead thereof, and does not appear when the accused's personal appearance is necessary or violated conditions of release, the court, in addition to the forfeiture of the recognizance, or of the money deposited, may direct the clerk to issue a bench warrant for the accused's arrest.

Comment

Supersedes RCW 10.16.190; RCW 10.19.010, .020, .025, .050, .070, .080; RCW 10.40.130; RCW 10.46.170; RCW 10.64.035.

[Adopted effective July 1, 1973; amended effective July 1, 1976; September 1, 1983; September 1, 1986; September 1, 1991; September 1, 1995; April 3, 2001; September 1, 2002; September 1, 2015; February 28, 2017.]

Rules of Evidence

RULE ER 402
RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT
EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

[Adopted effective April 2, 1979.]

Comment 402

[Deleted effective September 1, 2006.]

CERTIFICATE OF SERVICE

I hereby certify that I caused service of the foregoing Brief of Respondents/Cross-Appellants State of Washington and Robert Brusseau, that has been electronically filed with the Court of Appeals Division II, and the Statutory Appendix, on all parties or their counsel of record on the date below as follows:

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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.

s/Jeanette Fagerness

Jeanette Fagerness, Legal Assistant

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

August 09, 2019 - 9:33 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49889-8
Appellate Court Case Title: M. Gwyn Myles, Appellant/Cross-Respondent v. State of Washington, et al,
Respondent/Cross-Appellants
Superior Court Case Number: 09-2-00347-9

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