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

BRENT RYAN, individually, and as guardian for ADDIE RYAN, a
minor, and BAILEY DECKER, a minor, and as Personal Representative
of the ESTATE OF TERESA RYAN, Respondent

v.

PIERCE COUNTY, Petitioner

Brief of Petitioner Pierce County

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I. INTRODUCTION

This is an action in which Pierce County has been sued by Teresa Ryan's estate, husband, and daughters on the claim that its Sheriff's deputies are responsible for her unforeseeable murder by her daughter's ex-boyfriend Austin Nelson. However, the record contains no evidence that Sheriff's deputies caused Ms. Ryan's murder and instead establishes as a matter of law that no duty exists under both the public duty doctrine and the foreseeability requirement. Thus, when the trial court erroneously denied summary judgment without analyzing those issues and the County moved for discretionary review, even plaintiffs stipulated that the requirements for such a review were present, did not oppose the motion for review, and waived oral argument before this Court's Commissioner.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

The trial court erred when it denied Pierce County's summary judgment motion and declined to dismiss plaintiffs' claim that alleges the County is liable for the murder of Teresa Ryan by her daughter's ex-boyfriend Austin Nelson.

B. Issues Pertaining to Assignment of Error

1. Did plaintiffs fail to meet their burden of producing evidence showing that Pierce County owed them a duty of care under the "special

relationship" exception to the public duty doctrine where the record instead shows plaintiffs made no direct inquiry to Sheriff's Deputies, deputies gave no express assurance they would act in a specific manner, and plaintiffs did not rely to their detriment on any statement by any deputy?

2. Did plaintiffs fail to meet their burden of producing evidence showing the Sheriff's Department owed them a duty of care where the record instead shows Teresa Ryan's murder by her daughter's ex-boyfriend was unforeseeable even by plaintiffs who knew the ex-boyfriend better than the Department?

3. Did plaintiffs fail to meet their burden of producing evidence that showed Pierce County was a cause in fact and legal cause of Ms. Ryan's murder by her daughter's ex-boyfriend?

III. STATEMENT OF THE CASE

A. UNCONTESTED FACTUAL RECORD

On December 8, 2015, plaintiffs Brent and Theresa Ryan had their first ever contact with the Pierce County Sheriff's Department (hereinafter "Sheriff") when they called to report that property had been stolen from their home. *See* CP 55-56, 108-09. At that time plaintiffs did not mention Austin Nelson or anyone else to the Sheriff as a possible suspect in that theft. *See* CP 58, 102-05, 142-46; *see also* CP 171-178, 181. No mention

of Nelson was made because at the time of this contact the Ryans did not know who had stolen from them nor that Nelson was romantically involved with Ms. Ryan's daughter Bailey Decker. *See* CP 58, 141-43.¹

The second contact plaintiffs had with the Sheriff arose over a month later on January 15, 2016, after Ms. Decker's high school reported her car had been vandalized in the school's parking lot. CP 146, 209-11. When Deputy Marty was dispatched and met Ms. Decker at the scene, she identified Nelson as someone she thought might have damaged her car but did not give any reason for her suspicion.² CP 61, 150, 207. This was the first time Nelson's name had been mentioned by plaintiffs to the Sheriff's office, and then only as a potential suspect for malicious mischief to Ms. Decker's car. CP 142-43. Her stepfather Mr. Ryan claims Deputy Marty with no prompting spontaneously then made the vague statement: "I think I want to go get this guy," but said nothing more specific, did not say he actually "would go get Nelson" or describe any intent to take future action

¹ Back in early September 2015, shortly before she turned 16, Ms. Decker met and had sex with the 19 year old Nelson. *See* CP 139-40. When her mother and stepfather later that month learned of this, Ms. Decker was banned from seeing Nelson and he was warned by her mother to stop seeing her daughter or else he would be reported to police for statutory rape. *See* CP 51, 219. Thereafter the Ryans "did not worry about it" – much less report the September 2015 underage sex to the Sheriff – because they concluded "we're just going to let this go." *See* CP 92, 219, 233.

² Because she did not want her mother and stepfather to know she had been violating their directions by having contact with Nelson, Ms. Decker did not reveal to police that her suspicion of Nelson was based on his earlier statement that he could vandalize her car. *See* CP 149-150, 167 (messages between Decker and Ryan: items # 611-615).

to get him. CP 59, 94-95, 107, 112.³

Later at their home that Friday evening, after a neighbor had identified Nelson as the driver of a white car seen in his neighborhood around the time of the December theft the month before, Mr. Ryan called 911 to accuse Nelson also of stealing from his house the previous December and to accuse him of statutory rape for Ms. Decker's having sex with him the previous September when she was under-aged. CP 67, 71. Deputies Malloy and Oney then were dispatched that evening to the Ryan home and filed a report of the new information provided by the Ryans – including that Nelson was believed to be living somewhere in his car. CP 79, 82. Mr. Ryan admits he provided the deputies little evidence to charge Nelson with theft or vandalism, and that the deputies expressly advised him it was unlikely prosecutors would do anything about the new statutory rape allegation since he had known but not reported it until months later. CP 83-85. In short, the deputies "didn't indicate there was going to be much going to happen" about prosecuting Nelson. *Id.*

³ Mr. Ryan concedes that neither Deputy Marty nor anyone else made any assurance that plaintiffs relied upon. *See* CP 112-13. In any case, according to Mr. Ryan, the alleged statement by Deputy Marty was not in response to any question or inquiry, but was believed by Mr. Ryan simply to be a spontaneous expression of what he took to be the deputy's "deeper" belief that at some point Nelson was someone that would have to be dealt with. *See* CP 94-95.

Two days later, on Sunday, January 17, 2016, plaintiffs had their final contact with the Sheriff when they summoned deputies to tell them that on Friday and Saturday an unknown "third party" – whom they called "creepy dude" – had been threatening to post on social media sexually compromising pictures of Ms. Decker if he was not paid, and then that Sunday evening the images and videos were posted. CP 86-87, 127-28, 232-33. The day before, on Saturday, Nelson had responded to Ms. Decker's call to him about the "creepy dude" by sending texts to her cell phone saying he was trying to help recover the embarrassing images from the unidentified third party. CP 88, 164-65. Thus, by Saturday morning plaintiffs had confirmed Nelson was "out and about" and "police weren't doing anything about" their allegations of property crimes and under-aged sex with Ms. Decker. CP 88.

When Deputy Rhyner was dispatched to plaintiffs' home to investigate their report of these postings, he spoke with the Ryans and Ms. Decker, obtained written statements from them about the "creepy dude," took photographs of text messages, gave Ms. Decker an informational pamphlet, obtained a commitment from the Ryans that "they would get a protection order" and then wrote and filed his report. CP 232-33. Plaintiffs told the deputy they "did not know Austin's middle name, [or] address" and in turn were advised "it would take a couple days to get it to the

detectives" about the "creepy dude." CP 226, 233. At that time, neither plaintiffs nor police believed Nelson was behind the postings. CP 123-24, 164-65.

Accordingly when Deputy Rhyner left the Ryan home that Sunday evening January 17, plaintiffs had no reason to change their conclusion that deputies "were not going to go out and arrest [Nelson] that night" because they "still had some things to do, and it was probably a detective who was going to do it, and that would take a couple more days" before it was looked into. CP 93, 96, 98-99, 111. Mr. Ryan still understood that the only grounds for believing Nelson had actually committed any crime concerned Ms. Decker's sexual activity with him in September of 2015, and that the allegation likely would not result in charges being filed. CP 76-77, 83-85. In short, as to the Sheriff, Mr. Ryan "did not rely on them to do something about this quickly" because he believed "they weren't doing something quickly." CP 112-113.

Thus, on Monday morning of the January 18th Martin Luther King Day holiday, plaintiffs "were just waiting to get to the point where we could file a protection order" the next day on Tuesday when the court was open since their only concern was that Nelson stop calling Ms. Decker and that no further embarrassing material be posted by the unknown "creepy dude." CP 99-100, 148. Because Nelson had not made even an unkind

comment about Ms. Ryan or expressed dislike of her – much less physically threatened her – her tragic and unexpected murder by him that holiday morning came as a total surprise to his ex-girlfriend and her father. CP 98, 100, 155, 160, 162.⁴

B. PROCEDURAL FACTS

On January 31, 2017, Mr. Ryan – on behalf of himself, as trustee of his wife's estate, and as guardian for Ms. Decker and Addie Ryan – filed a complaint naming Pierce County as the sole defendant liable for Nelson's murder of Ms. Ryan. CP 271. Because the allegations of the complaint supported neither a claim the County owed plaintiffs a legal duty nor was the proximate cause of the murder, the County immediately moved to dismiss under CR 12(b)(6) on the ground the complaint on its face failed to state a claim. *See* CP 1-12. Once the County had identified the complaint's fatal defects, plaintiffs filed a memorandum in opposition and a declaration of plaintiff Ryan which asserted for the first time a new allegation: *i.e.* that the Sheriff had supposedly given him specific assurances upon which he reasonably relied so that the "special relationship" exception to the public duty doctrine allegedly applied. *See* CP 13-22, 243-45. Plaintiffs also submitted a declaration of an "expert"

⁴ In contrast to its other disproved and repudiated allegations, CP 100-113, the complaint accurately states that the Sheriff thereafter ensured Nelson was "later apprehended, subsequently charged and convicted of murder in the First Degree." *See* CP 272.

who opined, based on the complaint's earlier assertions and Mr. Ryan's new allegations, that the Sheriff had probable cause to arrest Nelson before his murder of Ms. Ryan and was negligent in failing to do so. CP 246-48. In light of plaintiffs' new allegations and new legal theory that were not present in the complaint, the County struck its CR 12(b)(6) motion, filed an answer and deposed plaintiffs.⁵

When Mr. Ryan and Ms. Decker were deposed, however, their testimony *directly contradicted* their complaint's allegations and Mr. Ryan's declaration. *See supra.* at 2-6. Indeed, when in his deposition Mr. Ryan was directly confronted with plaintiffs' testimonies' contradictions with the complaint and his declaration, he under oath specifically *repudiated* point by point his prior allegations of County fault. CP 100-113. Likewise, contemporaneous records of both plaintiffs and the Sheriff – as well as the sworn testimony of every Sheriff's Deputy with whom plaintiffs had relevant contact – confirmed the record was uncontested that prior to Ms. Ryan's January 18, 2016 murder by Nelson, there was *no contact* with the Sheriff that contained anything approaching an

⁵ Though discovery, as detailed below, revealed that most of the complaint's essential assertions were untrue and would be recanted, "[o]n a motion to dismiss pursuant to CR 12(b)(6), the trial court" – unlike under CR 56(e) – not only would have to "accept all allegations in the complaint as true" but also "consider hypothetical facts supporting the plaintiff's claims." *See Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206, 209 (2007); *Dever v. Fowler*, 63 Wn.App. 35, 44, 816 P.2d 1237 (1991), *as amended on denial of reconsideration* (Dec. 20, 1991), *amended*, 824 P.2d 1237 (1992).

unequivocal express assurance by police of future action or that resulted in any reliance by plaintiffs and that no one involved foresaw the later murder. CP 170-233.

When the County therefore moved for summary judgment on the grounds neither duty nor proximate cause existed as a matter of law and fact, CP 23, plaintiffs without explanation refiled as their factual submissions only the aforementioned same two earlier declarations that Mr. Ryan had by then expressly contradicted and disavowed in his deposition. CP 100-113, 243-48.⁶ Further, plaintiffs' "argument" in their summary judgment response made no mention or use of their expert's declaration. *See* CP 237-42. Accordingly, the Honorable Judge G. Helen Whitener properly granted the County's motion to strike and disregard both of plaintiffs' factual submissions. CP 265.⁷ Nevertheless, despite the uncontested record, the trial court denied summary judgment on the stated ground that police had been "called a number of times within a relatively short period of time" before the murder. *See* 7/21/17 VRP at 3-4. The

⁶ Because plaintiffs' April 2017 depositions also repudiated the factually baseless foundation for their expert's earlier declaration, both the County's CR 56 motion and reply brief noted their expert's declaration also "cannot be considered because expert testimony on legal issues is not admissible" and "opinions of expert witnesses are of no weight unless founded upon facts in the case." CP 31 n. 7, 252 n. 2. *See also Davis v. Fred's Appliance, Inc.*, 171 Wn.App. 348, 357, 287 P.3d 51 (2012)("court cannot consider inadmissible evidence when ruling on a motion for summary judgment" (*citing Charbonneau v. Wilbur Ellis Co.*, 9 Wn.App. 474, 512 P.2d 1126 (1973))).

⁷ Plaintiffs did not appeal the trial court's order disregarding those declarations.

Court neither explained how the number of calls regarding suspicions of non-violent crimes overcame plaintiffs' failure to meet their burden to prove the elements of the special relationship exception to the public duty doctrine, nor made any mention of the lack of foreseeability and of causation. *Id.*

When the County on August 25, 2017, filed its notice of discretionary review, CP 267, plaintiffs: 1) stipulated under RAP 2.3(b)(4) that the order involves "controlling questions of law as to which there is substantial ground for a difference of opinion and that immediate review of those orders may materially advance the ultimate termination of the litigation," *id.*; 2) stated in their response to the County's motion for discretionary review that they do "not oppose Pierce County's motion," 10/23/17 P's Resp. Br. to Disc. Rev.; and 3) waived oral argument before this Court's commissioner. *See* 11/30/17 Ps' Ltr to Div. II. On December 12, 2017, Commissioner Eric B. Schmidt granted review. *See* 12/12/17 Commissioner's Ruling.

IV. ARGUMENT

A defendant moving for summary judgment under CR 56 meets its burden "by 'showing' – that is pointing out ... that there is an absence of evidence to support the nonmoving party's case." *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (citing

Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2458, 91 L.Ed.2d 265 (1986)). A trial court should grant judgment where a plaintiff thereafter "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 225 (citing *Celotex*, 477 U.S. at 322). In other words:

A defendant in a civil action is entitled to summary judgment when that party shows that there is an absence of evidence supporting an element essential to the plaintiff's claim. The defendant may support the motion by merely challenging the sufficiency of the plaintiff's evidence as to any such material issue. In response the nonmoving party may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists.

Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 198, 831 P.2d 744 (1992). *See also Tender v. Nordstrom*, 84 Wn.App. 787, 791, 84 P.2d 787 (1997) (ruling that the defendant's burden on summary judgment "may be met by pointing out that there is an absence of evidence in support of the nonmoving party's case.")

In analyzing whether plaintiffs have met their burden of demonstrating a genuine factual issue, a court will disregard written declarations that are later contradicted by the declarant's sworn deposition testimony. *See, e.g., Selvig v. Caryl*, 97 Wn. App. 220, 225, 983 P.2d 1141 (1999) ("genuine issues of material fact cannot be created by a declarant

who submits an affidavit that contradicts his or her own deposition testimony"); *Knit With v. Knitting Fever, Inc.*, 2012 WL 2466616, at *7 n. 4 (E.D. Pa. 2012), *aff'd sub nom. The Knit With v. Knitting Fever, Inc.*, 625 Fed. Appx. 27 (3d Cir. 2015) ("an affidavit may be nullified by subsequently-given, contradictory deposition testimony"); *U.S. Underwriters Ins. Co. v. 14-33/35 Astoria Blvd.*, 2014 WL 1653199, at *5 (E.D.N.Y. Apr. 23, 2014) (ruling that where plaintiff "was confronted with his prior affidavit and asked in almost identical language to his prior statement," his contrary answer in his later deposition controlled due to "the greater reliability' generally attributed to a deposition involving cross examination"). Here plaintiffs' records and deposition testimony not only flatly contradicted the complaint and the earlier conclusory Ryan declaration filed to oppose CR 12(b)(6) dismissal, but when directly confronted with his earlier contrary declaration Mr. Ryan expressly *recanted* its allegations line by line. *See* CP 100-113. For this reason, the two declarations submitted by plaintiffs were not considered by the Court and they did not appeal that order.

Thus, as "point[ed] out" below, "there is an absence of evidence to support the nonmoving party's case" because the depositions and records of plaintiffs, the Sheriff's records and declarations, as well as settled law, all show the absence both of the necessary elements of an actionable duty

of care owed to plaintiffs and of proximate cause. *Young*, 112 Wn.2d at 225 n.1 (citing *Celotex*, 477 U.S. at 325 (1986)).

A. TRIAL COURT ERRED IN RULING A DUTY EXISTED TO PREVENT NELSON'S MURDER OF HIS EX-GIRLFRIEND'S MOTHER

The first threshold determination in any negligence action "is a question of law; that is, whether a duty of care is owed by the defendant to the plaintiff." *See, e.g., Alexander v. Cty. of Walla Walla*, 84 Wn. App. 687, 692-93, 929 P.2d 1182 (1997) (citing *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 163, 168, 759 P.2d 447 (1988)). Here, no duty existed due to both the "public duty doctrine" and the separate requirement of "foreseeability."

1. No Duty Was Owed Under the "Special Relationship" Exception

Here plaintiffs' complaint sought to make the County liable for a murder by a third party based on the assumption the Sheriff had a duty to conduct "reasonable investigations and take appropriate action in response to reports" about Nelson. *See* CP 274. As a matter of law, however, a public official "has no duty to prevent a third person from causing physical injury to another." *See Couch v. Dep't of Corr.*, 113 Wn.App. 556, 564, 54 P.2d 197 (2002), *rev. denied*, 149 Wn.2d 1012 (2003) (reversing and ordering dismissal of wrongful death suit for murder by a suspect in other open murder, assault and rape investigations). *See also*

Sheikh v. Choe, 156 Wn.2d 441, 448, 128 P.3d 574 (2006) (reversing verdict on claim State should have prevented assault by attackers who were under its supervision due to their "criminal behavior and general incorrigibility"); *Estate of Davis v. Dep't of Corr.*, 127 Wn.App. 833, 841, 113 P.3d 487 (2005) (dismissing wrongful death claim since there "is no general duty to protect others from the criminal acts of a third party"); *Terrell C. v. State Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 29, 84 P.3d 899 (2004) (upholding dismissal under public duty doctrine of claim for assault despite State's supervision of attackers due to prior assault); *McKenna v. Edwards*, 65 Wn. App. 905, 830 P.2d 385 (1992) (reversing trial court for failure to dismiss County from suit for rape and murder by arrestee who had been released after arrest).

There is no government liability in such cases because the "duties of public officers are normally owed only to the general public," and thus even "a breach of such a duty will not support a cause of action by an individual injured thereby." *Hostetler v. Ward*, 41 Wn.App. 343, 361, 363-64, 704 P.2d 1193 (1985). Instead: "Officers have *discretion* as to whether they will ... make an arrest once they have probable cause." *State v. Fry*, 168 Wn.2d 1, 8-9, 288 P.3d 1 (2010)(emphasis added). Thus a failure to arrest, even where police have probable cause to do so, is not grounds for suit because:

The 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. [*Citation omitted.*] Courts frequently deny recovery for injuries caused by the failure of police personnel to ... investigate properly or to investigate at all. [*Citations omitted.*]

Torres v. City of Anacortes, 97 Wn.App. 64, 74, 981 P.2d 891 (1999), *rev. denied*, 140 Wn.2d 1007 (2000). *See also Fondren v. Klickitat Cty.*, 79 Wn.App. 850, 853, 862, 905 P.2d 928 (1995)(trial court erred in failing to dismiss because "claim for negligent investigation is not cognizable under Washington law"); *Donaldson v. Seattle*, 65 Wn.App. 661, 675, 831 P.2d 1098 (1992)(the "overall law enforcement function ... does not generate a right to sue for negligence" even where woman murdered by boyfriend after she informed police he had threatened "to kill you for ruining my life.")

Under this "public duty doctrine" any "recovery from a municipal corporation is possible only when the plaintiff can show that the duty breached was *owed to her individually*, rather than to the public in general." *See Bratton v. Welp*, 145 Wn.2d 572, 576, 39 P.3d 959 (2002) (emphasis added). The doctrine "reminds us that a public entity – like any other defendant – is liable for negligence only if it has a statutory or

common law duty of care" and "helps us distinguish proper legal duties from mere hortatory 'duties.'" *Osborn v. Mason Cty*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006). Still:

What differentiates a public entity defendant from other defendants is that the examination of whether it owed a specific duty to the plaintiff is *particularly stringent*. This is because public entities owe general duties to the public at large—they must, for instance, respond to 911 calls and police the streets. But public entities *are not negligent for a breach of these general duties*.

Estate of Linnik v. State ex rel. Dep't of Corr., 174 Wn.App. 1027, 2013 WL 1342316, at *3 (2013)(emphasis added).⁸

Thus, a "County has a 'duty' to protect its citizens in a colloquial sense, but it does not have a legal duty to prevent every foreseeable injury" because "'a broad general responsibility to the public at large rather than to individual members of the public' simply does not create a duty of care." *Osborn*, 157 Wn.2d at 28 (quoting *Campbell v. City of Bellevue*, 85 Wn.2d 1, 9, 530 P.2d 234 (1975))(emphasis added). Hence "no liability may be imposed for a public official's *negligent* conduct *unless* it is shown that 'the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in

⁸ Though unpublished opinions such as *Linnik* and *Rider v. King Cty.*, 176 Wn.App. 1029, 2013 WL 5336493 (2013) cited *infra* are not precedent, GR 14.1(a) provides they "may be cited as non-binding authorities ... and may be accorded such persuasive value as the court deems appropriate."

general (i.e., a duty to all is a duty to no one)." *Babcock v. Mason Cty. Fire Dist. No. 6*, 144 Wn.2d 774, 785, 30 P.3d 1261 (2001)(emphasis added). See also *Stansfield v. Douglas Cty*, 107 Wn.App. 1, 13, 27 P.3d 205 (2001)(suit properly dismissed because "liability may not be imposed ... for the *negligent conduct* of a public official *unless* the duty breached is owed to a particular individual rather than to the public as a whole")(emphasis added).

In opposing summary judgment, plaintiffs attempted to overcome the public duty doctrine by going beyond their complaint's allegations, the facts and the law to allege there was a "special relationship with the victims" because – when Nelson was mentioned in the parking lot as someone who might have vandalized Ms. Decker's car – Mr. Ryan claims Deputy Marty without prompting told him: "I think I want to get this guy." CP 59. As a matter of law this does not satisfy the "special relationship exception." Rather, that exception is a "narrow one" which arises only if "there are *express assurances* given by a public official, which ... gives rise to *justifiable reliance* on the part of the plaintiff." *Babcock*, 144 Wn.2d at 786 (*quoting Taylor v. Stevens Cty.*, 111 Wn.2d at 166)(emphasis added). Absent these elements, the number of calls made to authorities is irrelevant. See e.g. *Fishburn v. Pierce Cty Planning and Land Services Dept.*, 161 Wn.App. 452, 470-71, 250 P.3d 146

(2011)(claim of "numerous contacts" by County "fails" to create special relationship since there was no "express assurance").

Here, as demonstrated below, there was neither an "express assurance" nor "justifiable reliance."

a. Record Contains No Evidence of an "Express Assurance"

For an "express assurance" to exist, a "plaintiff must seek an express assurance and the government must unequivocally give that assurance." *Babcock*, 144 Wn.2d at 789. This "cannot arise from implied assurances" because it is "only where a *direct inquiry* is made by an individual[,] and ... information is *clearly set forth* by the government, the government intends that it be relied upon[,] and *it is relied upon* by the individual to his detriment, that the government may be bound." *Id.* (*emphasis added*). See also *Cummins v. Lewis Cty.*, 156 Wn.2d 844, 855, 133 P.3d 458 (2006). Thus, if plaintiffs do "not seek any assurance from" public officials, or officials do not state in reply that they "would act in a specific manner," there is no "special relationship." See *e.g. Babcock*, 144 Wn.2d at 789 (affirming summary judgment on claim firemen failed to put out fire despite telling plaintiff they "would take care of protecting his property").⁹

⁹ See also, *e.g., Rider v. King Cty.*, 176 Wn.App. 1029, 2013 WL 533649, at *2 (2013) (granting summary judgment because there was no express assurance but "only the general statement that the victim would be found if something bad had happened, with no

Here, Mr. Ryan testified only that Deputy Marty, *without prompting* by Mr. Ryan, *equivocally* stated, "I think I want to go get this guy" – without saying anything more, without asserting that he or anyone would actually take action to "go get Nelson," and without describing any future plan to do so. *See, e.g.* CP 59, 94-95, 105-07, 112-13. Thus, the record affirmatively *disproves* the presence of any "specific assurance" because plaintiffs' own testimony shows neither that Mr. Ryan had "specifically sought an express assurance" from any deputy nor that a deputy replied that any specific action would be taken in the future to "protect him from harm." *See Weaver*, 168 Wn.App. at 141. For this reason alone, this essential element of demonstrating a "special relationship" was absent and it was error for the trial court to deny Pierce County summary judgment on the missing element of "duty."

b. Record Disproves Any "Justifiable Reliance" by Plaintiffs

It also was error to not require plaintiffs to meet their *additional* burden of showing they *justifiably relied* on Deputy Marty's expression

mention of any specific future action"); *Weaver v. Spokane Cty.*, 168 Wn.App. 127, 141, 275 P.2d 1184 (2012)(rejecting "special relationship" because "plaintiff must specifically seek an express assurance and the government agent must *unequivocally* give that assurance" yet plaintiff presented "no evidence to show that [he] specifically sought an express assurance from Deputy Melville" that certain actions "would protect him from harm") (emphasis added); *Donohoe v. State*, 135 Wn. App. 824, 836, 142 P.3d 654 (2006)(rejecting "special relationship claim" because "there was no showing that DSHS expressly promised ... it would guarantee Pacific Care's compliance with nursing home regulations or ensure immediate correction of Pacific Care's identified deficiencies").

about what he *thought* he *wanted* to do. *See e.g., Babcock*, 144 Wn.2d at 792-93 (affirming summary judgment because "it is clear that Babcock neither factually nor legally relied upon the fire fighter's alleged assurance"); *Weaver*, 168 Wn.App. at 142 (summary judgment warranted because "the evidence [does not] support a conclusion that [plaintiffs were] justified in relying on the supposed promise."); *Alexander*, 84 Wn.App. at 695-96 (reliance on officer's assurances was not justified). Plaintiffs' depositions, their contemporaneous records, the Sheriff's records, and the declarations of the deputies with whom plaintiffs had contact, confirm any statement by Deputy Marty was not "relied upon by the [plaintiff] to his detriment." *Babcock*, 144 Wn.2d at 789.

Indeed, the reason plaintiffs called the Sheriff later in the day after meeting Deputy Marty in the high school parking lot was because he *had made no promise* to act and the Ryans believed the department needed more information to "make them move quicker." *See CP 71, 207, 223*. When later that same day Deputies Malloy and Oney came to the Ryan home and were provided additional information by plaintiffs, the deputies expressly made clear "the prosecutor wouldn't do anything," and plaintiffs knew the deputies "didn't indicate that there was going to be much going to happen." *See CP 83-85, 111*. The very next morning this understanding that Nelson would not be arrested was confirmed when Ms. Decker's cell

phone received text messages on Saturday from Nelson that showed plaintiffs "police weren't doing anything about" trying to arrest him for his alleged property crimes and under-aged sex with Ms. Decker. *See* CP 88-89. Finally on Sunday, plaintiffs were told by Deputy Rhyner that the Sheriff was not "going to go out and arrest [Nelson] that night" because deputies "still had some things to do, and it was probably a detective who was going to do it, and that would take a couple more days." CP 93. Thus, the next morning – the day of the murder, plaintiffs did not believe the Sheriff was going to act on their reports before the end of the Martin Luther King holiday, and Mr. Ryan testified he knew police "weren't doing something quickly" and thus he "did not rely on them to do something about this quickly." *See* CP 96, 98-100, 111-13.

The trial court's refusal to enforce the requirements for proving a "special relationship" and instead requiring police to go to trial without such a showing not only violates well settled precedent but is a harmful judicial overreach and contrary to public policy. Specifically:

[T]he amount of protection afforded by any individual police department is necessarily determined by the resources available to it. The determination of how these resources can most effectively be used is a legislative-executive decision. Were we to hold a police chief's failure to prosecute ... 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. [Citation omitted.] 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

Walters v. Hampton, 14 Wn.App. 548, 553, 543 P.2d 648 (1975).

Imposing a duty to somehow "better" investigate reports of property crimes and under-aged sex or else be held liable for a later unforeseeable murder will result in police allocating scarce resources to avoid this new and broad liability exposure rather than making allocations based on what best serves public safety. Therefor making police "insurer[s] against every harm imposed by a criminal act" as plaintiffs seek here would impermissibly "impair vigorous prosecution and have a chilling effect upon law enforcement." *See Dever*, 63 Wn.App. at 45.

2. No Duty Exists Because Ms. Ryan Was Not A Foreseeable Victim And Her Murder Was Not A Foreseeable Crime

The trial court also never addressed the additional ground for dismissal that, even when the "special relationship" exception is present, any duty is "limited by the requirements of foreseeability." *Bailey v. Town of Forks*, 108 Wn.2d 262, 271, 737 P.2d 1257 (1987). *See also Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 608, 257 P.3d 532 (2011)(once "a duty is found to exist from the defendant to the plaintiff *then* concepts of foreseeability serve to define the *scope of the duty* owed")(emphasis added)(citations omitted). Plaintiffs nowhere disputed that a "defendant's

obligation ... is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous." *Hunsley v. Giard*, 87 Wn.2d 424, 435-36, 553 P.2d 1096 (1976)(quoting *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509, 512 (1970))(abrogated on other grounds by *Schmidt v. Coogan*, 181 Wn.2d 661, 335 P.3d 424 (2014)).

Hence, in *Osborn v. Mason County*, a County was sued for the rape and murder of a child by a level III "high risk" sex offender whose presence had not been disclosed to the community by police eight months after his release from prison from his second conviction for a violent sexual offense. *See* 157 Wn.2d at 21. Our Supreme Court reversed the trial court's failure to dismiss and ordered judgment entered for the County because, among other things, the decedent minor girl "was not a foreseeable victim." *Id.* at 20 & 25. As in *Osborn*, 157 Wn.2d at 28. Here too, there was no duty owed Ms. Ryan because she was not "foreseeably endangered by the conduct" of her daughter's ex-boyfriend in previously having under-aged sex with her daughter or in his suspected theft and vandalism of property – especially when Nelson had never made an unkind comment about, stated a dislike of, or threatened physical violence toward Ms. Ryan. *See* CP 97-98, 100, 160, 162.

Because Ms. Ryan's murder was not among the likely "risks or hazards whose likelihood made the conduct unreasonably dangerous," Nelson's killing of his ex-girlfriend's mother came as a complete surprise even to plaintiffs who knew him best. *See id.*; CP 155. Thus summary judgment as a matter of law also should be granted for lack of duty on the additional ground that the murder of Ms. Ryan was unforeseeable under the uncontested facts of record.

B. TRIAL COURT ERRED BECAUSE THERE IS NO EVIDENCE SHERIFFS' DEPUTIES CAUSED MS. RYAN'S MURDER

The Supreme Court in *Hartley v. State*, 103 Wn.2d 768, 777–79, 698 P.2d 77 (1985), established that:

Washington law recognizes two elements to proximate cause: Cause in fact and legal causation. [Citations omitted.] Cause in fact refers to the "but for" consequences of an act – the physical connection between an act and an injury. Legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of *whether* liability should attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on "mixed considerations of logic, common sense, justice, policy, and precedent.

(Emphasis added). Here, the trial court also without explanation denied summary judgment even though "both cause in fact and legal cause" are absent under the record and law. *See* CP 19-24.

1. Cause in Fact is Absent as a Matter of Law

For an act to be a "cause in fact" there "must be a causal connection *between the negligence arising from the violation ... and the [event] itself before a cause of action arises,*" and the law is settled that "when, as here, the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion, [cause in fact] *is a question of law for the court*" and grounds for summary judgment. *See Hansen v. Washington Natural Gas Co.*, 95 Wn.2d 773, 779, 632 P.2d 504 (1981) (emphasis added). *See also Pratt v. Thomas*, 80 Wn.2d 117, 119, 491 P.2d 1285 (1972)(ruling that where "the facts do not admit of reasonable differences of opinion, proximate cause is a question of law to be decided by the court."); *Granite Beach Holdings, LLC v. State ex rel. DNR*, 103 Wn. App. 186, 195, 11 P.3d 847 (2000) (affirming summary judgment because "[w]here reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.") Actual *evidence* demonstrating cause in fact is required because "recovery cannot be based upon a claim of what 'might have happened.'" *Kristjanson v. City of Seattle*, 25 Wn. App. 324, 326 (1980) (affirming summary judgment for lack of proximate cause and quoting *Johanson v. King Cty.*, 7 Wn.2d 111, 122 (1941)). Thus "[w]henever cause in fact is too speculative ... there is no proximate cause." *See Marsh v. Commonwealth*

Land Title Ins. Co., 57 Wn. App. 610, 622, 789 P.2d 792

(1990)(abrogated on other grounds by *Bullard v. Bailey*, 91 Wn.App. 750, 959 P.2d 1122). Here, there is no evidence of a "causal connection between the *negligence arising from the [claimed] violation [i.e. Deputy Marty's supposed express assurance that he "think[s] I want to go get" Nelson] ... and the [murder] itself.*"

In such claims, courts grant summary judgment where there is no evidence plaintiffs would have done something different that would have prevented the injury to the victim. Here there is no evidence that "but for" some non-existent "specific assurance" from the Sheriff and newly minted claim of "justifiable reliance" by plaintiffs, plaintiffs would have done something different that would have prevented Nelson's murder of Ms. Ryan. *See, e.g., Rider*, 2013 WL 5336493, at *4 (granting summary judgment because plaintiffs "[did] not describe any additional action [plaintiff] Tommy would have taken but for [the County's] statement" since plaintiff "admitted in his deposition that the County never prevented him from doing anything to find" the victim and that "as far as what [he] could have done differently, [he did not] know"); *Cummins*, 156 Wn.2d at 857 ("Cummins does not show [that the victim] was induced to and did purposefully remain at his physical location awaiting help in reliance upon the dispatcher's assistance assurance"). Here, the record contains no

evidence the Sheriff did anything to prevent plaintiffs from protecting Ms. Ryan from Nelson. Indeed, the record shows plaintiffs understandably did nothing additional to protect her because they *had no reason to believe, and did not believe*, Nelson was a threat to her. CP 97-100, 155, 160, 162.

Further, had there been some reason for the Sheriff to believe Nelson was a threat to Ms. Ryan's life, to have prevented him from murdering her, Nelson would had to have been placed in custody. For Nelson to have been in custody at the time of Ms. Ryan's murder: 1) deputies would have had to have had evidence sufficient to constitute probable cause that he had committed the alleged property or under-aged sex crime claimed; 2) they would have had to decide to exercise their discretion to arrest and book him for it; 3) they would have had to then find the location of Nelson's car in which he was living, found him in or near it, and arrested him; 4) prosecutors would have had to conclude they had sufficient evidence to convict him and exercise their discretion to charge him; 5) a Court would have had to find probable cause existed for the charge; 6) bail would have had to have been imposed rather than he be released on his own recognizance; and 7) Nelson would have had to choose to stay incarcerated and not pay the percentage of bail necessary for a bondsman to gain his release. Speculation that Nelson was a threat to Ms. Ryan impermissibly requires the Court to guess "not only whether and

when the violation would have been pursued but also whether a judge would have done something ... and what that different result would have been." *Estate of Bordon ex rel. Anderson v. State, Dep't of Corr.*, 122 Wn. App. 227, 241-42 (2004) (dismissing wrongful death claim because killer's allegedly negligent release was not proximate cause of death).

Courts as a matter of law have dismissed wrongful death cases against organizations for similar lack of cause in fact where a death was caused by a third party. *See, e.g., Id.; Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 311 (2006) (dismissing because to "prove cause-in-fact, [plaintiff] had to be able to show that, but for [defendant's] breach of duty, Owens would not have killed Cordova" but he "cannot meet this burden"); *Hungerford v. State Dept. of Corrections*, 135 Wn. App. 240, 254, 139 P.3d 1131 (2006) (ruling that state's "negligence was not a but-for cause of Hungerford-Trapp's death because even had the trial court imposed Davis's misdemeanor sentence, Davis would have been released in time to kill Hungerford-Trapp").

Thus, in *Walters*, 14 Wn. App. at 550, the court dismissed a suit against the county regarding speculation that "had [the assailant] been prosecuted" earlier "plaintiff would not have been injured" by the assailant later because "there are too many gaps in the chain of factual causation to warrant submission of that issue to the fact finder." The court reasoned

"[i]t would require a high degree of speculation for the jury or the court to conclude that some sort of prosecutorial action by the police" somehow "would have prevented plaintiff's injuries at Hampton's hands" later. *Id.* at 555. Instead "[f]actual causation requires a sufficiently close, actual connection between the complained-of conduct and the resulting injuries," so that "[w]here inferences from the facts are remote or unreasonable, as here, factual causation is not established *as a matter of law.*" *Id.* at 553, 556 (emphasis added). So too in the instant case, factual causation cannot be established as a matter of law under the facts of record.

2. Legal Cause is Absent As a Matter of Law

The additional requirement of "legal causation" is always a question of law for the court. *See Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 51 (2008). "Legal causation" focuses "on 'whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.'" *Kim v. Budget Rent A Car Sys.*, 143 Wn.2d 190, 204, 15 P.3d 1283 (2001)(citations omitted). It is well settled that:

It is quite possible, and often helpful, to state every question which arises in connection with "proximate cause" [legal causation] in the form of a single question: was the defendant under a duty to protect *the plaintiff* against the *event which did in fact occur?*

Klein v. City of Seattle, 41 Wn. App. 636, 639, 705 P.2d 806 (1985) (holding the municipality was not liable because it was not the legal cause of injury)(quoting *Hartley*, 103 Wn.2d at 779 and W. Prosser, *Torts* § 42, at 244 (4th Ed.1971)). Such an analysis "serve[s] to direct attention to the policy issues which determine the extent of the original obligation and of its continuance, rather than to the mechanical sequence of events which goes to make up causation in fact." *Hartley*, 103 Wn.2d at 779–80.

Here, even if the law and facts were changed so that a duty of some kind could be owed by the Sheriff to plaintiffs in this case, any such duty would not include protecting Ms. Ryan against "the event which did in fact occur" – *i.e.* her *murder* by Nelson. The undisputed record shows that at the time of the murder, Nelson was – at worst – suspected only of property crimes and under-aged sex with Ms. Decker. Such allegations did not include claims of acts or threats of physical violence against any of the plaintiffs – much less *against Ms. Ryan*. "[L]ogic, common sense, justice, policy, and precedent" do not lead to a conclusion that the consequence of not having Nelson incarcerated on January 18, 2017 for alleged *property* crimes or under-aged sex *with Ms. Decker* is that the Sheriff is legally responsible for Nelson's later unforeseeable *first degree murder* of *Ms. Decker's mother* Ms. Ryan. Our Supreme Court in *Hartley* held that "failure to revoke Johnson's license (even assuming that Johnson would

have honored the revocation and not driven) is too attenuated a causal connection to impose liability" for his later drunken driving. *See* 103 Wn.2d at 785. So too not arresting Nelson for allegations of theft, vandalism and under-aged sex *with his girlfriend* also is too remote and insubstantial to impose liability on police for his later *murdering* that ex-girlfriend's *mother*.

V. CONCLUSION

As shown above, in the trial court the County met its burden of "pointing out ... that there is an absence of evidence to support the nonmoving party's case." *Young*, 112 Wn.2d at 225 n.1. Indeed, the County more than just met its burden to "challeng[e] the sufficiency of the plaintiff's evidence" as required for summary judgment, but went further and submitted evidence *disproving* the existence of duty and proximate cause. Summary judgment was appropriate thereafter because as a matter of law plaintiffs in response could "not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists." *See Las*, 66 Wn.App. at 198. Instead, as noted above, plaintiffs' own deposition testimony and records, as well as the records of the Sheriff's Department and testimony of its deputies, affirmatively *disproved* the existence of "element[s] essential to [plaintiffs'] case, and on which that party will bear the burden of proof at

trial." Thus, there was no admissible evidence showing a special relationship, the foreseeability of both the crime and the victim, and either cause in fact or legal cause of Nelson's murder of Ms. Ryan.

Accordingly, Pierce County respectfully requests the Court reverse the trial court's denial of its motion for summary judgment and order the instant suit be dismissed with prejudice.

DATED this 26th day of March, 2018.

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CERTIFICATE OF SERVICE

On March 26, 2018, I hereby certify that I electronically filed the foregoing Opening Brief of Petitioner with the Clerk of the Court and I delivered a true and accurate copy via electronic mail pursuant to the agreement of parties to the following:

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