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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

Reply Brief of Petitioner Pierce County

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I. INTRODUCTION

Pierce County's Opening Brief identifies the uncontested facts in this case as established "by plaintiffs' own deposition testimony and records, as well as ... the records of the Sheriff's Department and testimony of its deputies." AB 31. *See also id.* at 2-8, 12, 20; CP 49-233. Plaintiff's Responsive Brief "essentially agrees with the basic facts set forth in the defendant's brief," but claims the County "ignored *other facts*" supposedly contained in the "pleadings, declaration, and deposition of Brent Ryan." RB 1 (emphasis added). Plaintiff's alleged "other facts," however, do not exist in any of the admissible evidence of record.

First, as a matter of law, plaintiff cannot rely on "the pleadings" for *any*, much less nearly all, of the "other facts" that he alleges in his brief. *See* RB 1-5 (citing almost exclusively the complaint, CP 271-76, and his expert's inadmissible declaration based on that complaint's disproven allegations. CP 279-81).¹ *See* CP 264-65. Such mere allegations cannot be

¹ Plaintiff neither acknowledges nor refutes that – as noted in the County's opening brief – the expert declaration's hearsay statements were based *on the complaint* and its resulting conclusory statements and opinions were ruled inadmissible by the trial court in an order plaintiff did not appeal. *Compare* AB 9 n. 6 with RB 4-5. *See also* CP 264-65, 280. The trial court so ordered because a "court cannot consider inadmissible evidence when ruling on a motion for summary judgment," *see Davis v. Fred's Appliance, Inc.*, 171 Wn. App. 348, 357, 287 P.3d 51 (2012)(citing *Charbonneau v. Wilbur Ellis Co.*, 9 Wn.App. 474, 512 P.2d 1126 (1973)), and an expert's declaration is "of no weight unless founded upon facts in the case." *See Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990) (citing *Prentice Packing & Storage Co. V. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940)). *See also Smith v. Washington State Dep't of Corr.*, 189 Wn. App. 839, 851, 359 P.3d 867 (2015)("An expert's opinion must be based on facts"), *rev. denied*, 185 Wn.2d 1004 (2016); *Theonnes v. Hazen*, 37 Wn. App. 644, 648, 681 P.2d 1284 (1984)

relied upon because the subject of the instant appeal is not a CR 12(b)(6) motion on the pleadings but whether pursuant to CR 56 the trial court erred in denying summary judgment under the law and admissible evidence in the record. *See* AB 1-2. To oppose the motion at issue "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." *See Las v. Yellow Front Stores, Inc.*, 66 Wn.App. 196, 198, 198, 831 P.2d 744 (1992). *See also* CR 56(e)("an adverse party may not rest upon the mere allegations or denials of a pleading").

Second, plaintiff also cannot use the recanted allegations of his stricken "declaration" as factual support. The record is clear, and plaintiff nowhere disputes, that the supposed "other facts" he alleged against the County in his pre-deposition declaration were thereafter *extensively, expressly and repeatedly* repudiated *by plaintiff himself* when he was placed under oath and directly confronted with that declaration at his deposition. *See e.g.* CP 100-113. Plaintiff also does not contest cited precedent holding that "genuine issues of material fact *cannot be created* by a declarant who submits an affidavit that contradicts his or her own

(affirming summary judgment in favor of the defendant because: "The opinion of an expert must be based on facts" and an "opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury"). *See also* CP 31 n. 7, CP 252 n. 2.

deposition testimony." *Selvig v. Caryl*, 97 Wn.App. 220, 225, 983 P.2d 1141 (1999)(emphasis added); AB 11-12. *See also Tang v. City of Seattle*, 194 Wn.App. 1054 n. 7 (2016)("We credit Tang's sworn deposition testimony" but not his "declaration testimony to the contrary");² *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"). Finally, Plaintiff's Responsive Brief also chooses to overlook that the trial court expressly ruled (in an order plaintiff does not appeal) that his declaration be stricken. *See* CP 264-65; AB 9.³

² Though the unpublished *Tang* – as well as the later cited *Rider v. King Cty.* and *Estate of Linnik v. State ex rel. Dep't of Corr.* are not binding precedent, they "may be cited as non-binding authorities" and "accorded such persuasive value as the court deems appropriate." *See* GR 14.1(a).

³ Thus in deciding this appeal concerning denial of summary judgment, the court's rules and precedent bar any consideration of: 1) the mere disproven allegations of the complaint, CP 271-76; 2) the repetition of that complaint's assertions in the expert's stricken declaration or the expert's irrelevant opinions therein also based on that pleading, CP 279-81; and 3) the stricken declaration that plaintiff later contradicted and expressly repudiated when confronted with it in his later sworn deposition. CP 282-84. *See*

Third, as to the responsive brief's passing reference to the "deposition of Brent Ryan," the one and only citation in his brief to that document is the single innocuous statement therein that Mr. Ryan simply "believed the police would be investigating the matter" and "was frustrated that the police were not acting very fast." RB 5 (*citing* CP 110-112). However, this is not an "ignored other fact[]," but was expressly cited and addressed in the County's opening brief. *See e.g.* AB 4 n. 3, 6. Indeed, among the things plaintiff overlooks is that in those same cited deposition pages Mr. Ryan went on to testify that since he *knew* police "weren't doing something quickly" he and his family "did not rely on them to do something about this quickly." *See* CP 111-13.

In short: 1) there is no dispute concerning any material fact cited in the County's brief since they are based on the undisputed admissible record; and 2) any supposed "other facts" asserted in plaintiff's brief properly cannot be considered on appeal because they are not supported by admissible evidence.

Engstrom v. Goodman, 166 Wn. App. 905, 909, 271 P.3d 959, 961 (2012), as amended (Apr. 16, 2012)("a motion to strike is typically not necessary to point out evidence and issues a litigant believes this court should not consider" because "[n]o one at the Court of Appeals goes through the record or the briefs with a stamp or scissors to prevent the judges who are hearing the case from seeing material deemed irrelevant or prejudicial" and thus "the brief is the appropriate vehicle for pointing out allegedly extraneous materials—not a separate motion to strike.")(citing *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009), *rev. denied*, 168 Wn.2d 1018 (2010)).

II. LEGAL ANALYSIS

Plaintiff's brief concedes "the appellate Court reviews appeals regarding summary judgment De Novo." RB 5. It also does not dispute that once a defendant simply "*point[s] out ... that there is an absence of evidence to support the nonmoving party's case*" or "*merely challeng[es] the sufficiency* of the plaintiff's evidence as to any such material issue," plaintiff must "*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." *See Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 325, 106 S.Ct. 2458, 91 L.Ed. 2d 265 (1986)); *Yellow Front Stores, Inc.*, 66 Wn.App. at 198; *Tender v. Nordstrom*, 84 Wn.App. 787, 791, 84 P.2d 787 (1997).

Applying these rules to the record and law confirms it was error to deny summary judgment because Plaintiff failed to submit *any* admissible evidence that supports – much less makes "*a showing sufficient to establish* the existence of" – the essential elements of: 1) a duty owed by police specifically to any named individual; 2) a foreseeable crime and victim; and 3) cause in fact and legal causation.

A. PLAINTIFF IDENTIFIES NO ACTIONABLE DUTY THAT MAKES POLICE LIABLE FOR MS. RYAN'S MURDER

Plaintiff does not contest that the 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)). However, his responsive brief ignores his and his step daughter's own deposition testimony and contemporaneous communications – *as well as* the sworn declarations and contemporaneous records of the sheriff's deputies with whom they spoke – which all confirm there was no actionable duty upon which to sue the police because there was *neither* a "special relationship" *nor* a "foreseeable" crime and victim.

1. No "Special Relationship" Has Been Shown

Plaintiff concedes that under the public duty doctrine: 1) "a duty does *not* arise between a public entity and a plaintiff *unless* the duty is owed to the plaintiff individually rather than to the public in general;" 2) that "[i]n the case at hand, we are dealing with" his claim a "special relationship" exception to this public duty doctrine was present; and 3) to prove such a relationship and avoid summary judgment "Washington law *requires* direct contact setting the citizen apart from the general public, and '*express assurances*' of assistance that give rise to a *justifiable*

reliance on the part of the citizen." *See* RB 6-9 (emphasis added).

However, as shown above, plaintiff erroneously claims the inadmissible allegations of his "complaint" and the recanted and stricken assertions of his "Ryan Decl." somehow "establish a factual scenario in which this first prong of the duty is met." RB 8.

First, as previously noted, neither the mere allegations of the complaint nor Mr. Ryan's later disavowed and stricken declaration as a matter of law can "establish a factual scenario." *See* discussion *supra* at 1-2. Indeed, as has been meticulously documented, the stricken Ryan declaration was both *directly contradicted and expressly repudiated* by him when he was under oath and directly questioned in his deposition about both its allegations and the document itself. *See e.g.* AB 2-9; CP 100-103. So too, plaintiff nowhere confronts the fact that also his own contemporaneous records and that of the Sheriff – as well as the sworn testimony of every Sheriff's Deputy with whom plaintiff had relevant contact – all confirm that prior to Ms. Ryan's murder by Nelson, there was no contact with the Sheriff that contained anything approaching an unequivocal express assurance by police of future action or that resulted in any reliance by plaintiffs, and no person who foresaw the possibility of a later murder. CP 170-233.

Second, the *only* supposed statement by a law enforcement officer that plaintiff alleges was an "express assurance" is "that the claim [of nonviolent crimes] would be investigated" and that one of the officers supposedly said he "*wanted to get*" Nelson (emphasis added).⁴ RB 10. Though Plaintiff in his deposition did claim a deputy responding to his step daughter's car vandalism had said "*I think I want to go get this guy,*" *see* CP 59 (emphasis added), as a matter of law an "express assurance" requires that a "plaintiff must *seek* an express assurance and the government must *unequivocally give* that assurance." *Babcock v. Mason Cty Fire Dist. No. 6*, 144 Wn.2d 774, 789, 30 P.3d 1261 (2001) (emphasis added). It is well settled that an "express assurance ... 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). When plaintiffs do "not seek any assurance from" public officials, or officials do not state in reply they will "act in a specific

⁴ Plaintiff's only given citations for this are the inadmissible allegations of his complaint and the equally inadmissible stricken declaration of his expert who relied for his factual assumptions solely on that same complaint. *See* RB 10 (citing "CP 271-76" (i.e. Complaint) and "CP 279-81" (i.e. Lyman declaration)).

manner," there is no "special relationship." *Babcock*, 144 Wn.2d at 791 (dismissing claim for harm from fire despite firemen telling plaintiff they "would take care of protecting his property").

Here, there is no dispute that sheriff deputies *were* in fact investigating the Ryan's calls about non-violent crimes that he later thought Nelson might have committed. More importantly, it has been noted that the record shows – when under oath and exposed to examination at deposition – Mr. Ryan testified he only recalled a deputy making the vague and equivocal statement of: "*I think I want to go get this guy.*" *See* CP 59 (emphasis added). Plaintiff's brief also ignores that Mr. Ryan went on to testify that this alleged statement was made *without prompting* and *not* in response to any question or inquiry, and thus was considered by Mr. Ryan only to express what he surmised was the deputy's "deeper" belief that at some point Nelson was someone that would have to be dealt with. *See* CP 94-95. Further, Mr. Ryan's deposition makes clear no deputy told – much less assured – him that they in fact "would get" Nelson or described any intent to take some future action to do so. *See* CP 112-13. Finally, plaintiff does not dispute the overwhelming binding precedent that such a record *precludes* the presence of an "express assurance" – he instead just ignores it.

Thus, plaintiff does not confront the County's repeated citation to the Supreme Court's decision in *Babcock* which affirmed summary judgment on a claim for destruction of property by fire despite plaintiff's far more definite allegation that he was told by firemen that they "*would* take care of protecting his property." *See* 144 Wn.2d at 791 (emphasis added). *See also* AB 17, 18, 20. Likewise, his brief ignores the County's cite to *Rider v. King Cty.*, 176 Wn. App. 1029, 2013 WL 5336493 (2013), AB 18 n. 9, 26, where summary judgment was also granted because there was no express assurance by deputies but "only the general statement that the victim would be found if something bad had happened, with no mention of any specific future action." So too, plaintiff overlooks the cited case of *Weaver v. Spokane Cty.*, 168 Wn.App. 127, 141, 275 P.3d 1184 (2012), which also rejected a claim of "special relationship" because the law requires that a "plaintiff *must specifically seek an express assurance* and the government agent *must unequivocally give that assurance*" and there – like here – plaintiff presented "no evidence to show that [he] specifically sought an express assurance" that specific actions "would protect him from harm." *See* AB 19. Though plaintiff does in passing generically acknowledge the cited case of *Donohoe v. State*, 135 Wn.App. 824, 836, 42 P.3d 654 (2006), *compare* RB 6 with AB 19 n. 9, he fails to mention that there a "special relationship claim" again was *rejected* because "there

was no showing that DSHS expressly promised Mrs. Donohoe or her family that it would guarantee ... compliance with nursing home regulations or ensure immediate correction of Pacific Care's identified deficiencies."⁵ Plaintiff cannot avoid binding precedent by either ignoring it altogether or citing it for a general principle and ignoring its most relevant holding.

Third, plaintiff also cannot meet the separate burden of proving the additional element that he "justifiably relied" to his "detriment" upon a deputy's vague statement that did not unequivocally promise specific future protective action by police. Instead of citing any evidence of reliance and resulting detriment, plaintiff simply quotes *Beal v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998), for the principle that the "justifiable reliance" element is "*generally* not amenable to summary judgment." RB 9 (emphasis added). However: "Genuine issues of material fact also cannot be created by conclusory statements of fact." *Baldwin v.*

⁵ Plaintiff also surprisingly cites *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013), and asserts without explanation that it was a "similar case." RB 8. The court in *Robb* however did "*not* reach the question of whether the public duty doctrine would act to bar this action." 176 Wn.2d at 439 n. 4 (emphasis added). Nevertheless, *Robb* is "similar" to the instant case at least to the extent that – even under dissimilar facts where police had *direct contact* with the suspect to a reported *violent crime* – the Supreme Court still rejected police liability because police failure to arrest likewise did not "create a new risk" but only "failed to remove a risk" so that "the situation of peril in this case existed before law enforcement stopped [the suspect], and the danger was unchanged by the officers' actions" and thus "they did not make the risk any worse" and so were not liable. See 176 Wn.2d at 437–38.

Silver, 165 Wn. App. 463, 472, 269 P.3d 284 (2011)(citing *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002)("The 'facts' required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Likewise, conclusory statements of fact will not suffice.")). In *Beal* there was actual *evidence* that plaintiff "relied upon the assurance that police protection would be forthcoming" because in response to an assurance she had told police "she would wait in front of the apartment after being told the police would be sent" and "neither left the apartment nor attempted to proceed without police assistance." *See Beal*, 134 Wn.2d at 786. Here, not only was there no "assurance that police protection would be forthcoming," but plaintiff fails to cite *any evidence* that in some specified way he relied to his detriment on an alleged statement about what a deputy *thought* he *wanted* to do. *See e.g. Harvey v. Cty. of Snohomish*, 157 Wn.2d 33, 39, 134 P.3d 216, 219 (2006)(holding no "special relationship" existed because "[u]nlike ... *Beal*, ... in this case, [plaintiff] never received any assurance from the operator" and has not "shown that he relied on any assurance to his detriment."))

Instead, here the undisputed record affirmatively proves: 1) plaintiff *expressly testified* that there *was no reliance* on any police statement; and 2) contemporaneous documents affirmatively *confirm there was none*.

Specifically, immediately after the Friday, January 15, 2016 equivocal statement by the deputy in question, the Ryans' own contemporary records confirm they were critical of him for not agreeing to move "quicker." CP 70-72, 221 (text messages on Ms. Ryan's cell phone item #'s "178-183"). Thus, the Ryans thereafter called the sheriff that same evening because the deputy at issue had made no promise to act and the Ryans felt the department needed to know about Nelson's consensual sex with the under-aged Ms. Decker to "make them move quicker." *See* CP 71, 106, 134 (extraction report at 1/15/15 at 8:34:31 – item 183); CP 206-07. When still later that day other deputies came to the Ryan home in response to that call and were given the additional information, Ms. Ryan's texts and Mr. Ryan's testimony confirm those deputies made clear "the prosecutor *wouldn't do anything*" and thus the Ryans knew the deputies "didn't indicate that there was going to be much going to happen." CP 83-85, 213-214, 224 (extraction report at 1/16/15 at 7:32:11 – item 224)(emphasis added). When the next day Ms. Decker's cell phone received text messages from Nelson, it only further confirmed the Ryans' understanding that Nelson had not been arrested but was still out and about so that "police *weren't doing anything about it*." CP 88-90 (emphasis added). Finally, on Sunday, January 17th, the Ryans again were directly told by a deputy 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, 96, 98-99 (emphasis added). Indeed, Mr. Ryan unequivocally testified in his deposition that on the very day Ms. Ryan was murdered – on Monday January 18th – the Ryans knew police "*weren't* going out to find" Nelson and "*weren't* doing something quickly," and thus admitted that by the time of the murder the Ryans "*did not rely* on them to do something about this quickly." CP 111-113 (emphasis added).

The law is clear that when "the evidence [does not] support a conclusion that [the Ryans were] *justified* in relying on the supposed promise," summary judgment is appropriate on that ground alone. *See Weaver*, 168 Wn.App. at 141 (emphasis added). *See also Alexander*, 84 Wn.App. at 695-96 (court ruling that any reliance on the officer's assurances was not justified). Indeed, the Supreme Court in *Babcock*, 144 Wn.2d at 792-93, affirmed summary judgment despite a claim of a "special relationship" where the record – like here – showed plaintiff "neither factually nor legally relied upon the fire fighter's alleged assurance."

Our courts hold the "special relationship exception is a narrow one," *Babcock*, 144 Wn.2d at 687, because:

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). Here, because the only admissible evidence shows there was *neither* an "express assurance" *nor* "justifiable reliance on the part of the plaintiff" to his "detriment," the "*particularly stringent*" test for a public entity duty under the "narrow" special relationship exception requires summary judgment dismissal.

2. Plaintiff Has Not Denied That Duty Is Absent Also Because Ms. Ryan Was Not A Foreseeable Victim And Her Murder Was Not A Foreseeable Crime

Plaintiff's brief does not address the additional ground for dismissal that, even when the "special relationship" exception applies, 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). *Compare* AB 22-24 *with* RB generally. Thus, plaintiff does not dispute 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, 436, 553 P.2d 1096, 1103 (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)). See also *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 608 (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").

Accordingly, the briefing is uncontested that here, as in *Osborn v. Mason County*, 157 Wn.2d 18, 28, 134 P.3d 197 (2006), there is no duty because *Ms. Ryan* was not "foreseeably endangered by the conduct" of Nelson's consensual sex with her under aged daughter or his 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 a murder of anyone – especially of *Ms. Ryan* here – was not among the likely "risks or hazards whose likelihood made unreasonably dangerous" police not immediately finding and arresting a person alleged to have committed non-violent crimes, Nelson's murder of his ex-girlfriend's mother came as a total surprise to everyone. See *id.*; CP 155.

Because plaintiff has chosen not to respond to this dispositive ground, reversal and dismissal is appropriate on the additional ground that lack of foreseeability limits the scope of any alleged duty.

B. NO EVIDENCE THAT MURDER OF MS. RYAN BY NELSON WAS CAUSED BY POLICE

As to the required element of "cause in fact," plaintiff: 1) cites *Hertzog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999) for the proposition that cause in fact is "*generally* a question of fact;" and 2) cites *Beal, supra.*, as an example where a "court found that causation was a question of fact and held such." RB 11-12 (emphasis added).

First, it also is well 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.")

Second, as a factual matter here: 1) the trial court made *no holding* as to causation but appeared to deny summary judgment solely on the novel basis that police had been "called a number of times within a relatively short period of time" about allegations of non-violent crime, *see* 7/21/17 VRP at 3-4; and 2) plaintiff's own responsive brief admits "the appellate Court reviews appeals regarding summary judgment *De Novo*." RB 5 (emphasis added). Plaintiff makes no attempt to confront precedent in which summary judgment *was required* in similar matters on the ground that in those cases too "cause in fact" had not been shown. *See e.g., Cummins*, 156 Wn.2d at 857 (plaintiff "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"); *Estate of Bordon ex rel. Anderson*, 122 Wn.App. 227, 241-42, 95 P.3d 764 (2004), *rev. denied*, 154 Wn.2d 1003 (2004) (dismissing the suit because no proximate cause that death was result of convict's release); *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 311, 151 P.3d 201 (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"); *Rider*, 2013 WL 5336493, at *4 (granting summary judgment because plaintiffs "[did] not describe any additional action [plaintiff] would have taken but for [the County's] statement" since plaintiff "admitted in his deposition that the County never prevented him from doing anything" and that "as far as what [he] could have done differently, [he did not] know").

Third, "cause in fact" is one of the essential elements of a negligence action that a plaintiff bears the burden to prove, *see e.g. Hostetler v. Ward*, 41 Wn. App. 343, 349, 704 P.2d 343 (1985) (one of the required elements of negligence is proof of "a proximate cause relationship between the claimed breach and the resulting injury"), and here the County has done far more than met its burden of simply "point[ing] out" its absence. *See* AB 25-29. Thus, as a matter of law, the burden is on plaintiff 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." *See Young*, 112 Wn.2d at 225 (*citing Celotex Corp.*, 477 U.S. at 322); *Yellow Front Stores*, 66 Wn.App. at 198; *Tender*, 84 Wn.App. at 791. "Proof of negligence in the air, so to speak, will not do," because "there

also must be a causal connection between the negligence arising from the violation ... and the [event] itself before a cause of action arises" so 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. *Hansen*, 95 Wn.2d at 779 (granting summary judgment) (quoting F. Harper & F. James Torts § 18.2 at 1019 (1956)) (emphasis added).

However, plaintiff has made no attempt to identify any evidence showing a "causal connection *between the negligence arising from the violation ... and the [event] itself.*" *See id.* Thus, summary judgment should be granted in that plaintiff "has failed to meet its prima facie case because it did not identify a theory of causation and provide admissible evidence in support of that theory." *Smith v. Washington State Dep't of Corr.*, 189 Wn.App. 839, 853, 359 P.3d 867, 874 (2015). *See also Kristjanson v. City of Seattle*, 25 Wn. App. 324, 326, 606 P.2d 283 (1980)(affirming summary judgment for lack of proximate cause since "recovery cannot be based upon a claim of what 'might have happened'" (quoting *Johanson v. King Cty.*, 7 Wn.2d 111, 122, 109 P.2d 307 (1941)).

As to the separate required element of "legal causation," it is *always* a question of law for the court. *See e.g. Colbert v. Moomba Sports, Inc.*,

163 Wn.2d 43, 51, 176 P.3d 497 (2008). Nevertheless, plaintiff at the trial court and on appeal failed even to address this required element – much less offer an explanation as to why he need not respond to the County's "pointing out" its absence – nor disputed that “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). *Compare* AB 29-31.

III. CONCLUSION

Pierce County has "point[ed] out ... that there is an absence of evidence to support the nonmoving party's case" regarding the essential elements of the "special relationship" exception, "foreseeability" of the crime and victim, and both cause in fact and legal causation. In response plaintiff fails "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Young, supra*. Nevertheless, contrary to both the substantive requirements of negligence law and the procedural requirements for avoiding summary judgment, summary judgment was denied.

Such refusals to dismiss under such facts will require police to go to trial whenever they do not use every resource to find and arrest someone a frequent caller accuses of previously having under age sex and/or merely

alleges to have committed non-violent property crimes. Such not only violates well settled precedent but is harmful and contrary to public policy.

It is helpful again to note:

[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 in cases such as this 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. Thus a separate ground for reversal is that a denial of summary judgement under the unrefuted admissible evidence here makes police "insurer[s] against every harm imposed by a criminal act" and will impermissibly "impair vigorous prosecution and have a chilling effect upon law enforcement."

See Dever v. Fowler, 63 Wn.App. 35, 45, 816 P.2d 1237 (1991), *as amended on denial of reconsideration* (Dec. 20, 1991), *amended*, 824 P.2d 1237 (1992).

Accordingly, the County respectfully requests the Court reverse the denial of summary judgment and direct that the instant suit be dismissed.

DATED this 25th day of May, 2018.

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CERTIFICATE OF SERVICE

On May 25, 2018, I hereby certify that I electronically filed the foregoing Reply 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 the parties to the following:

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