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No. 66061-6-I

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

SYDNEY ALLRUD, Administrator of the
Estate of Tracey Kirsten Allrud,

Appellant,

v.

CITY OF EDMONDS, A municipal corporation; SOUTHWEST
SNOHOMISH COUNTY PUBLIC SAFETY COMMUNICATIONS
AGENCY, dba SNOCOM; JOHN DOES I and II,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

OPENING BRIEF OF APPELLANT

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

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gravely disabled. Did Officer Falk have a statutory duty to properly evaluate Ms. Allrud by performing a safety check as an exception to the public duty doctrine? (Assignments of Error 1 and 2)

3. Southwest Snohomish County Public Safety

Communications Agency (SNOCOM) 911 operator assured Ms. Allrud's psychotherapist that a police officer would go to Ms. Allrud's residence and perform a safety check. Did SNOCOM's 911 operator's assurance that a safety check would occur amount to a rescue exception to the public duty doctrine when the psychotherapist ceased her rescue efforts? (Assignments of Error 1 and 2)

4. Police Officer Falk was in contact with his Edmonds Police

Department supervisor who started to go to the residence of Ms. Allrud's until he learned Ms. Allrud's ex-husband left the scene. Did Edmonds Police Department possess sufficient knowledge that Officer Falk was not going to complete a welfare check, such that the failure to perform a safety check on a mentally disabled person was an exception to the public duty doctrine? (Assignments of Error 1 and 2)

C. **STATEMENT OF THE CASE**

1. **FACTUAL HISTORY**

On February 16, 2006, mental health nurse practitioner¹ and certified clinical specialist Diane Kaplan called 911 to report concern over her psychotherapy patient, Kirsten Allrud. CP 69, 72, 79, 80. Ms. Allrud had been diagnosed with chronic pain, anxiety, fibromyalgia, and depression, and had recently shown signs that her condition was deteriorating. CP 69, 71, 72. Ms. Allrud had been scheduled for an appointment with Ms. Kaplan on February 14th, but did not show up. The appointment was rescheduled for the 16th, but Ms. Allrud again did not show up. CP 73. Ms. Allrud had not been eating or drinking, except for consuming alcohol, and appeared very anxious to family members. CP 71. Family members reported that Ms. Allrud was too weak to get out of bed and that there was no heat in her house. CP 71, 72. Ms. Allrud's children reported that she was "delirious." Ms. Kaplan believed that Ms. Allrud was "passively suicidal" and disabled. CP 73.

Ms. Kaplan called 911 because she believed that someone needed to do a "safety check" on Ms. Allrud. CP 72, 77. She believed that she

¹ Pursuant to RCW 18.79.050 and 18.79.250, an advanced registered nurse practitioner is authorized to perform specialized and advanced levels of nursing. An advanced registered nurse practitioner is authorized to assume "primary responsibility for continuous and comprehensive management of a broad range of patient care, concerns, and problems," including patient examinations, establishing diagnoses, admitting patients to health care facilities, prescribing medications, and prescribing therapies. WAC 246-840-300. A mental health nurse practitioner is qualified to testify as to mental health diagnoses and courses of treatment. *See, e.g., In re Dependency of H.S.*, 135 Wn. App. 223, 229-30, 144 P.3d 353 (2006).

needed to make the call based on her understanding as a psychiatric practitioner that her role was “to make the call by law, and that it be followed through, to hopefully keep somebody from suicide.” CP 76, 77. The 911 call taker assured Ms. Kaplan that a police officer would go check on Ms. Allrud. CP 72, 76, 77.

After calling 911, Ms. Kaplan was put in contact with Officer Falk of the Edmonds Police Department. CP 72. Ms. Kaplan told Officer Falk that she was concerned that Ms. Allrud would not be able to get out of bed to answer the door, and thought someone needed to “eyeball” her. CP 72, 73, 74. Officer Falk stated his belief that only a medical doctor, not a nurse practitioner, could initiate a community caretaking welfare check.² CP 78. Ms. Kaplan believed that Officer Falk’s response was inappropriate:

He questioned what my role is again, and seemed unaware of the role of a nurse practitioner. At some point he said to me, well, what are you, a nurse? Which was very inappropriate. I told him I saw Kirsten two times with her ex-husband and I was a psychiatric nurse practitioner.

CP 74. Officer Falk claimed that he had spoken with his supervisor who agreed with him that he could not do a safety check unless a doctor did a house call. CP 75.

² The Edmonds Police Department chief later called Ms. Kaplan and apologized, reaffirming that the department knew “what the role of a nurse practitioner is,” and assuring Ms. Kaplan that she “can always count on us, please feel free to call 911 again.” CP 78.

Officer Falk did in fact go to the outside of Ms. Allrud's residence. However, in spite of Ms. Kaplan's concerns and repeated attempts to get Officer Falk to enter the residence, Officer Falk stated that he would not enter Ms. Allrud's home because of her "civil liberties." CP.74, 77, 78. Officer Falk was instead focused on Ms. Allrud's ex-husband, a licensed mental health counselor, because he had a key to the residence and wanted Officer Falk to enter Ms. Allrud's home without her permission. See also CP 96, 97, 111.

Ms. Allrud's ex-husband, Michael Faltisco, had seen Ms. Allrud earlier in the day and observed there was inadequate food in the house, the house was very cold, Ms. Allrud did not appear to be able to meet her basic needs, plus, she was trembling. CP 105, 115. He had received a call from Ms. Allrud's employer and learned that she may have lost her job. He had learned that she had stopped paying rent. He was concerned because she had missed her counseling session. She was not caring for her pets. Ms. Allrud's house was filthy, with garbage and broken items accumulated around the deck area, and encrusted dishes and leaking water visible through the windows. CP 119. Mr. Faltisco believed that Ms. Allrud was "gravely disabled" at that time, and that she was "rapidly approaching a situation of a danger of imminent harm." CP 105, 115. Mr. Faltisco believed that Ms. Allrud was completely

incapacitated inside the house. CP 110. Mr. Faltisco reported what he knew to Officer Falk. CP 108. He felt that Ms. Allrud needed to be involuntarily committed. CP 109.

Instead of focusing on Ms. Allrud's condition, Officer Falk began asking questions why Mr. Faltisco had a key to Ms. Allrud's house. CP 110, 111. Officer Falk became very irritable and hostile:

Q Did you have any belief that Officer Falk was just trying to shirk this call and not do anything at all?

A I was really quite stunned at his reaction. I was surprised at how resistant and irritable he'd become. He started as a civil conversation, and ended up with him becoming very irritable.

Q What do you mean when you say irritable? Was he raising his voice?

A He was using language which was, I thought, kind of hostile.

Q What language was that?

A **One of his quotes was, "I think you're playing me, man."**

Q Anything else that you can remember?

A **"I'm in charge of this evaluation, I'll decide if this is an emergency." "I don't think this is an emergency."**

Q Any other language that you can remember that you'd consider to be hostile?

A I was having a civil conversation with him trying to

provide data, and then he starts with I'm playing you, man. To me that was – I was just taken aback by that unprofessional response, and how uncalled for that was. My voice was in no way heated. I was trying to be very calm, **presenting with enough facts to – to support his entering the house, and I reminded him that it was her health care provider who had prescribed her medication who was the requestor.**

Q How did you react to what you perceived to be his irritability during the call?

A My internal response was that I was quite anxious. I wanted to just enter the house, because the situation presented itself to me needing that. But I had the sense that he had already warned me that he thought I had no authority to enter the house, and that if he witnessed me entering the house the situation could deteriorate further where he might choose to arrest me.

CP 110, 111. Officer Falk would not allow Mr. Faltisco enter the house.

CP 111.

Mr. Faltisco told Officer Falk that if he was not going to enter the residence and check on Ms. Allrud that Mr. Faltisco would call 911 again.

CP 112. Officer Falk told Mr. Faltisco not to call 911 because he was in charge of the investigation. Mr. Faltisco learned that Officer Falk had told Ms. Kaplan that he would cancel any further calls to 911. CP 112. See CP 72. Mr. Faltisco left Ms. Allrud's residence, thinking that he would return and enter the house after Officer Falk had left. CP 113. Mr. Faltisco felt very intimidated by Officer Falk and thought Officer Falk had

obstructed the option for “some intervention.” CP 114.

Mr. Faltisco returned to Ms. Allrud’s home approximately two hours later. CP 117. He and Ms. Allrud’s children entered the house and Ms. Allrud’s 13-year-old son found Ms. Allrud’s body.

Ms. Allrud appeared to be unconscious at that time. Her body was warm and her eyes were open. She was foaming at the mouth. Mr. Faltisco tried to perform CPR, but later learned that Ms. Allrud had expired. CP 117.

2. PROCEDURAL HISTORY

Ms. Sydney Allrud as Administrator of her sister’s estate filed the Estate’s damage complaint on February 4, 2009 naming City of Edmonds and John Does I & II as defendants. She amended this complaint to identify the 911 agency on February 6, 2009. That on May 20, 2009 a second amended complaint was filed properly identifying the 911 center as Southwest Snohomish County Public Safety Communication Agency dba SNOCOM by a stipulated agreement.

The City of Edmonds and Southwest Snohomish County Public Safety Communications Agency dba SNOCOM filed their motion for summary judgment on July 30, 2009. The Allrud Estate moved to continue this motion which was subsequently renoted for November 6, 2009. The trial court granted the City of Edmonds and SNOCOM motion

for summary judgment on November 6, 2009. A motion for reconsideration was filed on November 16, 2009 and noted without argument before Judge Kurtz on November 25, 2009. That the trial court did not rule on the reconsideration until the motion was renoted and heard on September 2, 2010 when Judge Kurtz denied the motion for reconsideration the Allrud Estate filed its Notice of Appeal on September 30, 2010.

D. ARGUMENT

1. STANDARD OF REVIEW

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party. *Bremerton Pub. Safety Ass'n v. City of Bremerton*, 104 Wn. App. 226, 230, 15 P.3d 688 (2001) (citing *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998)). The court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Lybbert*, 141 Wn.2d at 34, 1 P.3d 1124. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068. Summary judgment “must be denied if a right of recovery is indicated

under any provable set of facts.” *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 558 P.2d 811, 814 (1976). “A trial is not useless but absolutely necessary where there is a genuine issue as to any material fact.” *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605, 607 (1960).

2. THE TRIAL COURT ERRED IN DECIDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT REGARDING “GROSS NEGLIGENCE.”

RCW 71.05.130 applies to a law enforcement officer’s duties under the involuntary commitment law, RCW Chapter 71.05. **Specifically, RCW 71.05.130 provides immunity to a law enforcement officer under the involuntary commitment law, but only if “such duties were performed in good faith and without gross negligence.”** *See generally Estate of Davis v. State, Dept. of Corrections*, 127 Wn. App. 833, 840, 113 P.3d 487, 491 (2005). **Gross negligence is defined as “negligence substantially and appreciably greater than ordinary negligence.”** *Whitehall v. King County*, 140 Wn. App. 761, 767, 167, P.2d 1184 (2007).

In this case, the trial court erred in granting the Defendants summary judgment motion because it essentially weighed the evidence as if it were the trier of fact. In response to the Defendants’ motion for summary judgment, the Plaintiff submitted evidence of gross negligence and bad faith law enforcement conduct. This evidence was more than

sufficient to raise material issues of fact regarding the Defendants' obligations to refrain from grossly negligent or bad faith conduct under the involuntary commitment law.

In particular, Plaintiff submitted evidence to the Court that Officer Falk refused to perform a community caretaking function despite overwhelming information that Ms. Allrud was in serious danger for her health and survival. In fact, Officer Falk stated that he would not permit Mr. Faltisco to call 911 again in the hopes of getting a different officer to respond to the scene. **See CP 112. Officer Falk went even further by intimidating Ms. Allrud's family against entering Ms. Allrud's home for fear of being arrested. Officer Falk even went so far as to cancel all future 911 calls to Ms. Allrud's residence. This type of behavior by a law enforcement is egregious, malicious, and spiteful. More importantly, at the very least, it certainly creates a question of fact as to whether Officer Falk's conduct was grossly negligent or indicative of bad faith.**

The City of Edmonds/SNOCOM argued below that they were "immune" under RCW 71.05.120 because the Plaintiff failed to show "gross negligence". However, to determine the presence of "gross negligence" the trial court had to make fact and credibility determinations, especially with regard to what information Officer Falk was given prior to

his refusal to perform a community caretaking welfare check on Ms. Allrud. A trial court cannot make fact and credibility determinations on summary judgment. CR 56. The jury should have been permitted to consider witness testimony about what information was conveyed to 911 and/or Officer Falk, and determine if the Defendants' subsequent actions rose to the level of gross negligence. *See* WPI 10.07 (instruction for gross negligence); *Whitehall v. King County*, 140 Wn. App. 761, 767, 167, P.2d 1184 (2007) (gross negligence is "negligence substantially and appreciably greater than ordinary negligence").

In addition to the facts stated above, and viewing the facts in a light most favorable to Ms. Allrud, at the time Officer Falk went to Ms. Allrud's residence, Officer Falk certainly was on notice that Ms. Allrud was suffering from a mental disorder and in imminent danger of becoming gravely disabled. The statutory conditions of RCW 71.05.150(4)(b) were met and Officer Falk had a duty to check on Ms. Allrud. He was aware, after contacting her psychotherapist and former spouse, that Ms. Allrud suffered from chronic pain, anxiety, fibromyalgia, and depression, she had stopped eating and drinking other than alcohol, she was tremulous, she had stopped paying rent and had possibly lost her job, and she had missed her psychotherapy appointments. Her psychotherapist was concerned that she was "passively suicidal" and disabled, and in fact had called 911 to

ask that someone check on Ms. Allrud. Ms. Allrud's former spouse also provided anecdotal evidence of Ms. Allrud's deteriorating physical and mental state at the scene. CP 209-215, CP 319-325.

In response to the Defendants' motion for summary judgment against this factual background, Ms. Allrud also submitted evidence establishing that the Edmonds Police Department's own policy manual made a basic standard of conduct to protect life together with community caretaking checks mandatory.³ Viewing the facts in a light most favorable to Ms. Allrud, Officer Falk's failure to complete a community caretaking welfare check was gross negligence. CP 66. CP 45-53. At the very least, whether Officer Falk failed to exercise "slight care" should have been left to the jury.

Officer Falk's conduct was later reviewed during an internal investigation. The investigator found:

In looking at this it is obvious that the information collected from Kaplan by the call taker was not entered correctly or completely into the call and the information dispatched over the radio to Ofc. Falk was even more incomplete and inaccurate and pertinent information (i.e. Kaplan being a nurse practitioner not a doctor and the information about the ex-husband responding to assist with a key and the information from the ex-husband about her not answering the door when someone knocks), even though it may have been entered in the incident history,

³ Policy and procedure manuals are admissible as evidence of the standard of care. *Joyce v. State, Dept. of Corrections*, 155 Wn.2d 306, 324, 119 P.3d 825 (2005).

was not relayed to the officer over the radio. CP 219, 327.

When Officer Falk's supervisor was asked why Officer Falk did not feel he could enter Ms. Allrud's residence, the supervisor responded that "he can't remember his exact words but that 'maybe' he thought the man [Mr. Faltesco] was trying to get us to go in for a reason other than a welfare check." CP 219, 329. Officer Falk's supervisor did not recall telling Officer Falk that only a medical doctor could initiate a safety check. **Officer Falk's supervisor admitted that if he had received information that Ms. Allrud was incapacitated or unable to care for herself, he would have instructed Officer Falk to enter the residence. CP 220, 330.**

Three (3) other Supervisors and Senior Officers at Edmonds Police Department believed Ms. Kaplan provide Officer Falk with sufficient information concerning Ms. Allrud to enter her home for a safety check. CP 224, 334. Edmonds Police Chief told Ms. Kaplan after Ms. Allrud's death that she should feel free to call 911 to do safety checks and they would go in the house. The Chief also admitted that the Falk incident was not a common occurrence. CP 69, 78, 79, 91. Officer Falk's actions were substantially at odds with the standard of care articulated by his own police department personnel.

Ms. Allrud's police practices expert, Lee Libby, concluded that

Officer Falk acted contrary to the requirements of Section 33.2.1(B)(3), which was formerly known as Section 33.2.1(A)(4) of the Edmonds Police Department Policy Manual, which provides:

“Upon the request of a mental health professional or the receipt of a court order an Edmonds police officer will take the person into custody and transport them to Stevens Health Center Emergency room. The person will be turned over to a mental health professional. The officer will complete an incident report.” CP 49.

Officer Falk failed to follow the request of Ms. Kaplan, a mental health professional under RCW 71.05.020, that there be a safety check on Ms. Allrud, even though there was ample evidence that Ms. Allrud was suffering from a “mental disorder” and in “imminent danger.” Mr. Libby also concluded that Officer Falk acted contrary to Section 13.1.1(A) regarding performance of duties in a competent manner. CP 45-53. Mr. Libby reviewed the following information **provided to Officer Falk while on his way and then outside Allrud’s residence.**

1. Allrud was probably passively suicidal;
2. Allrud was ingesting no food or water, only alcohol, information given to him by Kaplan and confirmed by Faltisco and as an experienced police officer, he would, or should, have been aware of the serious health risk posed to someone who has been ingesting only alcohol over an

extended period;

3. Allrud had been taken to the hospital for dehydration just the previous week;
4. Allrud had been hospitalized but removed her IV line and walked away from the hospital;
5. Kaplan had prescribed medication for depression that Allrud refused to take;
6. Allrud's home was in a notable state of disrepair including untrimmed trees and shrubs, weeds in the garden, debris scattered about the yard, debris on the front porch, the doorknob missing from the front door, piles of household garbage on the ground next to the house;
7. The heat had been turned off in the house. Faltisco told him that when he was in the house earlier, the inside temperature was 47 degrees Fahrenheit and the anticipated low temperature that night was going to be 17 degrees Fahrenheit;
8. Burnett told him that Allrud would not answer her door and he was told by Faltisco that she would probably not answer the door (even though he offers this in justification that her not answering his knock at the door was not unusual).

However, he had been told by Kaplan that Allrud might not even be able to physically get out of bed to answer the door;

9. The next door neighbor characterized Allrud as “nutty”;
10. Allrud would leave her house for periods of time and leave the front door standing wide open;
11. Faltisco that had been notified only that morning that Allrud was in danger of losing her job because she had not reported to work for an extended period;
12. Faltisco, as a mental health counselor, had the training and education to assess Allrud’s mental state;
13. He was told by Faltisco that Allrud needed to be evaluated by a physician and was told by Faltisco that Allrud was incoherent earlier in the day;
14. Faltisco was in possession of a key to the residence and could therefore have entered without using force or causing any damage.

Officer Falk ended the call and left the scene after eventually refusing to enter Allrud’s home to check on Ms. Allrud’s welfare.

As stated above, Plaintiff’s law enforcement expert, Lee Libby, opined that Officer Falk’s conduct and omissions amounted to clear and

unequivocal violations of the Edmonds Police Department's own policies and procedures. It is important to note that: "[A]n expert opinion on an 'ultimate issue of *fact*' is sufficient to defeat a motion for summary judgment." *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 910, 223 P.3d 1230, 1240 (2009) (citing *Eriks v. Denver*, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992) (quoting *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979)) (emphasis in original).

In addition to all the overwhelming evidence that should have precluded the trial court from granting summary judgment, the Plaintiff also submitted evidence that the Edmonds Police Department's failure to properly supervise and train Officer Falk regarding his duties under the involuntary commitment law was another proximate cause of Ms. Allrud's death. *See generally Niece v. Elmview Group Home*, 79 Wn. App. 660, 904 P.2d 784 (1995).

In response to Defendants' motion for summary judgment, Plaintiffs also submitted testimony from Plaintiff's police supervision and training expert, G. Robert Crow, who concluded the Edmonds Police Department failed to properly supervise and train Officer Falk as to how to properly execute a safety check and provide emergency aid. Officer Falk had previously in 1994 been criticized by his Field Training Officer (FTO) for failing to gather sufficient facts concerning a mentally impaired

person. CP 277-281. Officer Falk again failed to provide his supervisors sufficient information on Ms. Allrud's condition which delayed her rescue because Officer Falk felt he was being played by her ex and he gave no credence to the nurse practitioner's description of the condition of her psychotherapy patient.

Officer Falk had substantial information to reasonably believe Allrud was suffering from a "mental disorder" as defined by RCW 71.05.020 (24). He also had substantial information to reasonably believe that she was in "imminent danger" (as defined by RCW 71.05.020 (20)) of being "gravely disabled" (as defined by RCW 71.05.020 (17)). Mr. Libby opined that Officer Falk could reasonably believe the information was reliable because it was coming from two different "mental health professionals" as defined by RCW 71.05.020 (25). Therefore, Officer Falk had both the authority and the legal duty to take Ms. Allrud into custody in order to deliver her to some kind of a stabilizing facility. However, Officer Falk refused to do so. Moreover, Officer Falk went beyond merely refusing to perform his legal obligations. Instead, Officer Falk essentially tried to sabotage Ms. Allrud's family's other alternatives for seeking help to save her. This was substantially at odds with his standard of care and as such, constitutes gross negligence. Officer Falk's conduct was outrageous and certainly sufficient to establish a case of either gross

negligence or bad faith.

3. THE TRIAL COURT ERRED IN FAILING TO FIND A LEGISLATIVE INTENT EXCEPTION TO THE PUBLIC DUTY DOCTRINE.

In the present case, the question before the trial court was whether RCW 71.05.150 created a statutory duty such that the Defendants could be held liable for Officer Falk's complete refusal to perform a community caretaking check on Ms. Allrud. *See Ravenscroft v. The Washington Water Power Co.*, 136 Wn.2d 911, 929, 969 P.2d 75 (1998) (the public duty doctrine does not bar Ms. Allrud's action if a regulatory statute, by its terms, evidences a clear legislative intent to identify and protect a particular and circumscribed class of persons). There are no reported decisions precisely on point.⁴

In 2006, RCW 71.05.150⁵ provided in pertinent part:

A peace officer may, without prior notice of the proceedings provided for in subsection (1) of this section, take or cause such person to be taken into custody and immediately delivered to an evaluation and treatment facility or the emergency department of a local hospital:...

(b) When he or she has reasonable cause to believe that

⁴ Although *Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 458 (2006), is factually comparable. *Id.* at 854.

⁵ This version of the statute was in effect at the time of Ms. Allrud's death. The statute was amended in 2007.

such person is suffering from a mental disorder⁶ and presents an imminent likelihood of serious harm or is in imminent danger of being gravely disabled.⁷

The legislative intent behind this statute was explicitly stated:

(1) To prevent inappropriate, indefinite commitment of mentally disordered persons and to eliminate legal disabilities that arise from such commitment;

(2) To provide prompt evaluation and timely and appropriate treatment of persons with serious mental disorders;

(3) To safeguard individual rights;

(4) To provide continuity of care for persons with serious mental disorders;

(5) To encourage the full use of all existing agencies, professional personnel, and public funds to prevent duplication of services and unnecessary expenditures;

(6) To encourage, whenever appropriate, that services be provided within the community;

(7) To protect the public safety.

RCW 71.05.010 (emphasis added) Furthermore,

It is the intent of the legislature to enhance continuity of care for persons with serious mental disorders that can be

⁶ “Mental disorder” means “any organic, mental, or emotional impairment which has substantial adverse effects on an individual’s cognitive or volitional function.” RCW 71.05.020(2).

⁷ “Gravely disabled” means “a condition in which a person, as a result of a mental disorder: (a) Is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.” RCW 71.05.020(17).

controlled or stabilized in a less restrictive environment. Within the guidelines stated in *In Re LaBelle*, 107 Wn.2d 196 (1986), the legislature intends to encourage appropriate interventions at a point when there is the best opportunity to restore the person or to maintain satisfactory functioning.

RCW 71.05.012.

Ms. Allrud was within the class protected by the above statutes because she suffered from chronic pain, anxiety, and was delirious, delirium, confused, and depressed. Ms. Allrud also had stopped eating and drinking other than alcohol, she was tremulous, she had stopped paying rent, and she had recently missed her psychotherapy appointments. Her psychotherapist was concerned that she was “passively suicidal” and disabled. Her psychotherapist, in fact, called 911 and asked that a safety check be done on Ms. Allrud because she needed to go to the hospital immediately due her life or death condition. Throughout her (therapist) career, Ms. Kaplan had done this before and someone would eyeball the person to check on their welfare. CP 67-68. Ms. Allrud’s ex-husband (Mr. Faltisco) provided anecdotal evidence of Ms. Allrud’s deteriorating physical and mental state at the scene. Ms. Allrud was suffering from a mental disorder and was in imminent danger of being gravely disabled. CP 105, 108, 109. He asked Officer Falk to detain her under the involuntary commitment law, take her in on an involuntary commitment,

and let her be medically evaluated, and have a CDMHP decide her treatment. CP 109.

As such, it was clearly the legislature's intended intent that Ms. Allrud at least receive "prompt evaluation" of her condition. RCW 71.05.010 and .012. Officer Falk, the peace officer who responded to Ms. Kaplan's 911 call, had a statutory duty to enter Ms. Allrud's residence to perform a safety check pursuant to RCW 71.05.150 (2006). Officer Falk's supervisor (and others) admitted that had he known that Ms. Allrud was incapacitated and unable to care for herself, he would have instructed Officer Falk to enter her home. CP 220, 224, 330, 334, 69.

The Defendants failed to protect Ms. Allrud as the legislature intended. The 911 operator did not convey critical information about her condition to Officer Falk. Officer Falk did not understand that Ms. Allrud's psychotherapist had the authority to initiate a safety check, and Officer Falk ignored the information that was being given to him at the scene by Mr. Faltisco. Officer Falk did not enter Ms. Allrud's residence to "eyeball" her as Ms. Kaplan had requested. The Defendants failed to perform their community caretaking function, and as a result, Ms. Allrud died.

A law enforcement officer's responsibility to perform emergency checks on individuals suffering from mental disability has long been

recognized by Washington courts. *See, e.g., State v. Lowrimore*, 67 Wn. App. 949, 955-56, 841 P.2d 779 (1993) (officer authorized to detain person who had threatened to commit suicide even though there had been no recent overt act); *State v. Mason*, 56 Wn. App. 93, 96, 782 P.2d 572 (1989) (officer had authority to enter a residence and take custody of a person who was attempting suicide). The Washington Supreme Court has noted:

When an officer believes in good faith that someone's health or safety may be endangered, particularly if that person is known to have physical or mental problems, public policy does not demand that the officer delay any attempt to determine if assistance is needed and offer that assistance while a warrant is obtained. To the contrary, the officer would be considered derelict by *not* acting promptly to ascertain if someone needed help. [citation omitted] So long as it is undertaken in good faith and is not motivated by an intent to arrest or search for evidence of a crime, a warrantless search conducted in order to check on an individual's health or safety is a valid exception to constitutional warrant requirements.

State v. Gocken, 71 Wn. App. 267, 276, 857 P.2d 1074 (1993), *rev. denied* 123 Wn.2d 1024, 875 P.2d 635 (1994) (italics in original).

An officer performing a community caretaking check has the right to enter a residence without consent or warrant when the officer believes that the resident is in danger of death or physical harm. *State v. Leupp*, 96 Wn. App. 324, 330-31, 980 P.2d 765 (1999), *rev. denied* 139 Wn.2d 1018, 994 P.2d 849 (2000). An officer performing a community caretaking

function is not required to use the least intrusive means available. *State v. Mackey*, 117 Wn. App. 135, 139, 69 P.3d 758 (2003), *rev. denied* 151 Wn.2d 1034, 95 P.3d 758 (2004). To require the officer to do so would undercut the purpose of the community caretaking function, which exists so officers can assist persons and protect property. *State v. Johnson*, 104 Wn. App. 409, 414, 16 P.3d 680 (2001), *rev. denied* 1143 Wn.2d 1024, 25 P.3d 1020 (2001). Under Washington law, an officer has a duty to perform a community caretaking check when dealing with mentally disabled persons. *Gocken*, 71 Wn. App. at 276. Compare *State v. Raines*, 55 Wn. App. 459, 465, 778 P.2d 538 (1989), *rev. denied* 113 Wn.2d 1036, 785 P.2d 825 (1990) (officer responding to report of domestic violence has a duty to perform a community caretaking check).

These Legislative declarations are consistent with prior court decisions discussing the purpose of the community caretaking function. Significantly, even after the community caretaking function was codified, courts continued to rely on prior community caretaking case law to determine the authority of police officers in detaining mentally disabled individuals. See, e.g., *State v. Dempsey*, 88 Wn. App. 918, 922-24, 947 P.2d 265 (1997), *abrogated on other grounds*, *State v. Neeley*, 113 Wn. App. 100, 52 P.3d 539 (2002).

The trial court's orders granting summary judgment and denying

reconsideration essentially eliminate a critical police function that has been recognized, endorsed, and supported by Washington law for decades. This trial court held that police officers do not have a duty to check on mentally disabled persons who cannot care for themselves. This ruling runs directly contrary to the stated legislative intent of RCW 71.05.150.

4. THE TRIAL COURT ERRED IN FAILING TO FIND THAT A RESCUE EXCEPTION TO THE PUBLIC DUTY DOCTRINE.

The Washington Supreme Court has recognized an exception to the public duty doctrine in situations where a governmental entity or its agent undertakes a duty to aid a person in danger and fails to exercise reasonable care, and the offer to render aid is relied upon by either the person to whom aid is to be rendered or by another who, as a result of the promise, refrains from acting on the person's behalf. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 286 n.3, 669 P.2d 451 (1983). Under this exception, the governmental entity may be liable even if the agent acts gratuitously or beyond his or her statutory authority. *Id.* See also *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975) ("One who undertakes, albeit gratuitously, to render aid or warn a person in danger is required by our law to exercise reasonable care in his efforts, no matter how commendable. . . . If a rescuer fails to exercise such care and consequently increases the risk of harm to those he is trying to assist, he is

liable for any physical damages he causes.”); *Roth v. Kay*, 35 Wn. App. 1, 4, 664 P.2d 1299 (1983) (one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all).

The elements of the exception have been described as follows:

The rescue exception to the public duty doctrine applies where a governmental entity or its agent (1) undertakes a duty to aid or warn a person in danger; (2) fails to exercise reasonable care; and (3) offers to render aid and, as a result of the offer of aid, either the person to whom the aid is to be rendered, or another acting on that person’s behalf, relies on this governmental offer and consequently refrains from acting on the victim’s behalf.”

Vergeson v. Kitsap County, 145 Wn. App. 526, 539, 186 P.3d 1140

(2008). The reliance element of the exception was further explained in

Osborn:

Under the rescue doctrine, a public entity has a ‘special’ duty ‘to exercise reasonable care after assuming a duty to warn or come to the aid of a particular plaintiff.’ ... That ‘special’ duty exists because a public entity’s assurances may induce reliance. *Id.* ‘A person who voluntarily promises to perform a service for another in need has a duty to exercise reasonable care when the promise induces reliance and cause the promise to refrain from seeking help elsewhere.’ ... A person may reasonable rely on explicit or implicit assurances. ‘Even where an offer to seek or render aid is implicit and unspoken, a duty to make good on the promise has been found by most courts if it is reasonable relied upon.’ ... See also *Brown [v. McPherson’s]*, 86 Wn.3d [293] at 301 [, 545 P.2d 13 (1975)] (holding ‘a duty to act’ is ‘created by reliance not by the person to whom the aid is to be rendered, but by another who, as a result of

the promise refrains from acting on that person's behalf).

Osborn, 157 Wn.2d at 25-26. (citations added).

“The rescue exception is ‘based on the tort theory that if one undertakes to render aid to another or to warn a person in danger, one must exercise reasonable care. If a rescuer fails to exercise care and increases the risk of harm to those he is trying to rescue, he is liable for any damages he causes.’”

Babcock v. Mason County Fire District No. 6, 101 Wn. App. 677, 685, 5 P.3d 750 (2000), quoting *Smith v. State*, 59 Wn. App. 808, 814, 802 P.2d 133 (1990) (emphasis added).

In the present case, the Edmonds Police Department's internal investigation and the deposition testimony conclusively established that the 911 operator assured Ms. Kaplan that a police officer would go to Ms. Allrud's residence and perform a safety check. CP 76, 77, 270, 271. Yet, the 911 operator did not take down Ms. Kaplan's information correctly or convey it to Officer Falk over the radio. CP 72. Officer Falk went to Ms. Allrud's residence and rang her doorbell, but there was no answer. In spite of his discussions with Ms. Kaplan and Mr. Faltisco, who both described Ms. Allrud's mental and physical condition, Officer Falk did not enter the residence to “eyeball” Ms. Allrud. The safety check was never completed. CP 87-89.

At that point, Ms. Kaplan believed that there was nothing else she

could do, as any further calls to 911 would be cancelled unless a medical doctor called. CP 210, 320. Similarly, when Mr. Faltisco told Officer Falk that he was going to call 911 again, Officer Falk responded that he was in charge of the investigation. Mr. Faltisco believed that if he had tried to enter the residence himself, Officer Falk would have arrested him. CP 112.

The Defendants City of Edmonds/SNOCOM undertook a safety check at Ms. Allrud's residence, and both Ms. Kaplan and Mr. Faltisco relied upon the Defendants' undertaking this safety check. CP 77, 108. This caused Ms. Kaplan and Mr. Faltisco to refrain from taking any further action on Ms. Allrud's behalf. CP 11, 111, 112. The Defendants City of Edmonds/SNOCOM breached their duty to use reasonable care when the City of Edmonds failed to properly take Ms. Kaplan's information, convey it to Officer Falk, and complete the safety check by entering the residence to make direct contact with Ms. Allrud. Under these circumstances, the Defendants are not shielded by the public duty doctrine.

As discussed in Subpart 3 above, a police officer has a statutory duty under RCW 71.05.150(4) to perform a community caretaking check on a person suffering from a mental disorder who is in imminent danger of being gravely disabled. Thus, even though an officer's undertaking does not have to be within his statutory authority to satisfy the rescue exception,

in this case the undertaking (performing a community caretaking welfare check on Ms. Allrud) was within Officer Falk's statutory authority.

As discussed above, the 911 operator assured Ms. Allrud's psychotherapist that a police officer would go to Ms. Allrud's residence and perform a safety check. CP 270, 271. Nevertheless, Officer Falk did not enter the residence to check Ms. Allrud. Officer Falk instead took steps to further isolate Ms. Allrud. He told Ms. Kaplan that any further calls to 911 would be cancelled. CP 210. Officer Falk became upset with Mr. Faltisco, to the point where Mr. Faltisco believed that if he had tried to enter the residence himself, Officer Falk would have arrested him. CP 111. Officer Falk refused to use the house key provided by Ms. Allrud's son. CP 111.

The undisputed facts show that Officer Falk arrived on the scene, exerted control of what he conceived was a "suspicious" ex-husband and up to no good. CP 110.

An emergency response starts with evaluating the victim's needs and then continues with providing appropriate medical care. Officer Falk began gratuitous aid as soon as he started to take control of the scene. Officer Falk gratuitously took over as a medical authority on the scene by preventing others from rendering aid to Ms. Allrud. Therefore, Officer Falk's negligent actions were not merely responding to a call, but rather,

he was negligent in the rendition of medical aid to Ms. Allrud. CP 110-112.

It is not a surprise that an EMT might defer to a police officer aggressively controlling an alleged crime scene. It is undisputed that Officer Falk ordered the 911 operator to advise him before she dispatch to his crime scene and she relied on Officer Falk's authoritative statements. CP 72, 112.

The undisputed facts show both that 911 was called by Kaplan and Faltisco and that the 911 callers and bystanders did not try to seek help elsewhere after Officer Falk's arrival since he was in charge of the investigation. CP 112, 210, 110.

Chambers-Castanes, 100 Wn.2d 275, 669, P.2d 451 (1983), indicates a third party may rely on the assurances and to hold that municipalities can be held liable for their negligence under the special relationship exception only if the injured party is conscious and communicating makes little sense. Ms. Allrud's relationship was with the 911 callers, Ms. Kaplan and Mr. Faltisco. These individuals were given express assurances by the City of Edmonds/SNOCOM of a safety check, yet Officer Falk interfered to a point they refrained from any attempted rescue due to Officer Falk's actions.

5. THE TRIAL COURT ERRED IN FAILING TO FIND A FAILURE TO ENFORCE EXCEPTION TO THE PUBLIC DUTY DOCTRINE.

Officer Falk was in contact with his supervisor while he was at Ms. Allrud's residence. Officer Falk apparently had enough information about Ms. Allrud to let his supervisor know that Ms. Allrud was "acting strange" and "not taking care of herself." Officer Falk also told his supervisor that both Ms. Allrud's health practitioner and her ex-husband were requesting a safety check. Officer Falk's supervisor admitted that if he had received information that Ms. Allrud was incapacitated or unable to care for herself, he would have instructed Officer Falk to enter the residence. The supervisor himself started to go to the scene after talking with Officer Falk, but then "saw no point in going" after Mr. Faltisco left. Ultimately, no police officer completed the safety check and Ms. Allrud died. CP 218-220.

Under RCW 71.05.150, discussed above, the Defendants had a duty to perform a safety check on Ms. Allrud. The Edmonds Police Department possessed actual knowledge that Officer Falk was not going to enter Ms. Allrud's residence because Officer Falk discussed the safety check with his supervisor while he was at the Allrud residence. Yet the supervisor never ordered Officer Falk to complete the safety check, and never completed it himself:

I asked him to describe his primary reason for not telling Ofc. Falk to enter the residence and check on the occupant's welfare. He told me that he thought that there was enough question about her status that she was probably OK based on the fact that her ex-husband was an MHP and had just been there previously. CP 219.

Thus, the City of Edmonds failed to take corrective action, even though Ms. Allrud was within the class (mentally disabled persons in imminent danger of becoming gravely disabled) that RCW 71.05.150(4) was intended to protect.

At the very least, the City of Edmonds (through its police department) failed to enforce its statutory obligation to perform a safety check on a mentally disabled person who was believed by her psychotherapist to be "passively suicidal." But because Officer Falk did not follow the Edmonds Police Department's own policy manual, and a department supervisor "saw no point" in checking on someone who was "passively suicidal," there is a genuine issue of material fact as to whether the Edmonds Police Department properly trained or supervised its officers with regard to safety checks. The public duty doctrine does not protect the City under these circumstances.

As discussed in Subpart 3 above, a police officer has a statutory duty to perform a community caretaking check on a mentally disabled person when that person is in imminent danger of being gravely disabled.

RCW 71.05.150(4). The City of Edmonds police department was responsible for enforcing its statutory duty by requiring Officer Falk to complete this safety check.

All of the elements of the failure to enforce exception are met. The City of Edmonds (through its police department) failed to enforce its statutory obligation to perform a community caretaking check on a mentally disabled person who was believed by her psychotherapist to be “passively suicidal.”

The City of Edmonds/SNOCOM may argue that *State v. Gocken* does not provide a basis for a finding that police officers have a duty to perform community caretaking checks on mentally disabled individuals.

In *Gocken*, a police officer received a call from a friend of the victim, stating that she had not been able to reach the victim for some time. *State v. Gocken*, 71 Wn. App. 267, 269, 857 P.2d 1074 (1993). The officer was aware that the victim “was elderly and had mental health problems because she had a reputation at the police station for making ‘crazy’ calls complaining that people from federal and local agencies were watching her.” The officer knocked on the victim’s door and there was no answer, so the officer decided to perform a routine health and safety check to see if the victim needed assistance. The officer entered the victim’s residence through an unlocked window, without a warrant. Finding

nothing amiss, the officer left. *Id.* at 270.

Later, the officer responded to a second call from the victim's friend. *Id.* Because nothing appeared to be wrong, the officer did not re-enter the victim's home. *Id.* A few days later, the victim's niece filed a missing person report. *Id.* At that time, a different officer went to the victim's home and entered through an unlocked window. *Id.* at 270-71. After entering the residence, the officer found signs that a crime had been committed. *Id.* at 271-272. When a dead body was found in the apartment, the investigation became criminal in nature and evidence was collected. *Id.* at 272-73.

The *Gocken* court began its analysis by discussing exceptions to the warrant requirement.

Both the federal constitution and our state constitution prohibit unreasonable searches. [citation omitted] However, there are several well-established exceptions to the warrant requirement, including the emergency exception. [citations omitted] Under that exception, the police may conduct a warrantless search "where there is no probable cause of a crime, as when an officer enters a house to give emergency medical assistance." [citation omitted] A warrantless search based upon the emergency exception must not be primarily motivated by the officer's intent to make an arrest and seize evidence. . . .

Similarly, the police may be required to perform a warrantless search, not as a response to an immediate emergency, but as part of their function of protecting and assisting the public. [citation omitted] As the Ninth Circuit

recently observed:

“[I]n addition to being an enforcer of the criminal law,” a police officer “is a jack-of-all-emergencies.” [citations omitted] He is “expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety.” [citation omitted]

When an officer believes in good faith that someone's health or safety may be endangered, particularly if that person is known to have physical or mental problems, public policy does not demand that the officer delay any attempt to determine if assistance is needed and offer that assistance while a warrant is obtained. To the contrary, the officer could be considered derelict by *not* acting promptly to ascertain if someone needed help. [citation omitted] So long as it is undertaken in good faith and is not motivated by an intent to arrest or search for evidence of a crime, a warrantless search conducted in order to check on an individual's health or safety is a valid exception to constitutional warrant requirements.

Id. at 274-77 (emphasis added).

The *Gocken* court ultimately concluded that because the officers entered the victim's residence to perform health and safety checks, as opposed to investigating a crime, the evidence they observed in plain view was admissible in the subsequent criminal trial of the defendant. *Id.* at 277-78. The court relied heavily on the testimony of one of the officers:

In this case, Officer Shively's initial entry into Compton's condominium on June 25, 1990, was clearly intended to be a routine check on Compton's welfare. He testified that he entered the condominium to determine if Compton was injured or ill. Although he was not certain "what [he] had", Berthon's concerns convinced him that Compton might have been inside in need of help. Hence, Officer Shively was motivated to enter Compton's home "by a perceived need to render aid or assistance" (*see Loewen*, 97 Wn.2d at 568, 647 P.2d 489), and the subjective prong of the test is satisfied as to that initial entry. Given that Compton was elderly, mentally ill, and on medication, and Berthon had been unable to contact her for several weeks, a reasonable person would also have concluded that Compton might have been injured and unable to care for herself or call for help. Further, Officer Shively had a reasonable basis to associate Compton's potential need for assistance with her residence because that was where Berthon expected to find her and where she normally would be.

Id. at 277 (emphasis added).

In the present case, there has never been any dispute that Officer Falk was **not** called to Ms. Allrud's residence to investigate a crime. There is no factual question that the reason Officer Falk went to Ms. Allrud's residence was because her psychotherapist believed that Ms. Allrud suffered from a mental disability and was "passively suicidal," and called 911 so that someone would check on her. Like the victim in *Gocken*, Ms. Allrud was mentally disabled. She had missed her psychotherapy appointments and was not eating or drinking, other than alcohol. Ms. Allrud's former spouse, also a mental health professional, confirmed Ms. Allrud's deteriorating condition at the scene and asked

Officer Falk to enter Ms. Allrud's residence to check on her. Under *Gocken*, Officer Falk certainly should have been subjectively convinced that Ms. Allrud "might have been inside in need of help." *Id.* at 277. A reasonable person would have concluded that Ms. Allrud might have been injured and unable to care for herself based on the information given to Officer Falk. *Id.* There was a reasonable basis for Officer Falk to associate Ms. Allrud's potential need for assistance with her residence because that was where her former spouse and psychotherapist expected to find her and where she would normally be. *Id.* Thus, under these circumstances, Officer Falk would not have been in violation of the Fourth Amendment if he had entered Ms. Allrud's residence.

Officer Falk based his refusal to enter Allrud's home (even though there was a key available to him) to a concern for respecting Allrud's constitutional 4th Amendment right to privacy in her own home. Police are obligated to respect the limitations that the 4th Amendment of the U.S. Constitution place on searches and seizures, a right which exists to protect two fundamental liberty interests of American citizens: the right to privacy and the freedom from arbitrary governmental invasions. However, Officer Falk should have been aware, as any experienced officer should be aware, that the restriction only applies to "unreasonable searches" in the absence of a warrant supported by probable cause. Even then, the US Supreme

Court has carved out numerous exceptions to this limitation, two of which could have been applied here. Either Ethan or Dylan Faltisco (Kirsten Allrud's and Michael Faltisco's sons, who were initially present), as third party residents of the house they could have lawfully given Officer Falk consent to enter the home. All he had to do was ask them for their consent.

Officer Falk had gathered enough information to also satisfy the exigent circumstances exception to the 4th Amendment protection against unreasonable searches. A recognized branch of this exigent circumstances exception is the emergency aid category wherein the 4th amendment has been found not to bar police officers from making warrantless entries when they have a reasonable belief that someone inside is in need of immediate aid. If an officer can show a reasonable basis that swift action was necessary to safeguard someone's life, then the exception applies. An objectively reasonable officer would see the totality of the circumstances in this case as sufficient to give him reason to enter the home to check on Allrud's well-being

Gocken makes clear that if an officer who believes, in good faith, that someone's health or safety may be endangered; the officer is not required to delay assistance while obtaining a warrant. **"To the contrary, the officer could be considered derelict by *not* acting promptly to ascertain if someone needed help."** *Id.* at 277 (emphasis added). Given

the egregious facts of this case, Officer Falk should not have delayed entering Ms. Allrud's residence. Viewing the facts in a light most favorable to the Plaintiff Ms. Allrud, Officer Falk's decision not to even look for Ms. Allrud was irrational and grossly negligent in the face of pleas for help from Ms. Allrud's psychotherapist and former spouse, a licensed mental health counselor. He should have performed an immediate community caretaking welfare check on her to verify if she needed medical attention.⁹

Officer Falk had a legal duty to perform a caretaking check, which is what Plaintiff Allrud is asking the Court to rule. That as a matter of law Officer Falk had a legal duty to perform a check which would be consistent with other cases which have found such a duty. *See State v. Raines*, 55 Wn. App. 459, 465, 778 P.2d 538 (1989), *rev. denied* 113 Wn.2d 1036, 785 P.2d 825 (1990) (officer responding to report of domestic violence has a duty to perform a community caretaking check).

E. CONCLUSION

Edmonds Police Officer Falk abused and exerted his authority by threat and intimidation over the pleas of two mental health professionals who were simply trying to protect Ms. Allrud from foreseeable danger.

⁹ Again, the Plaintiff does not ask the Court to rule on what duty an officer may have to take a person into custody after he performs a community caretaking check. That question is not raised by the facts of this case, wherein the officer flatly refused to perform any check.

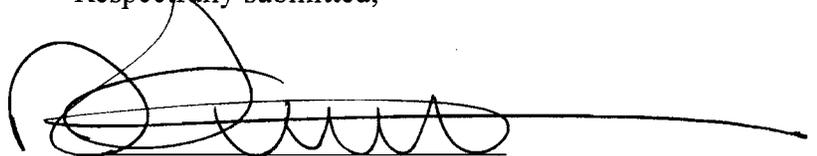
Through his abuse of power, Officer Falk discouraged Ms. Allrud's family long enough to cause her death. Officer Falk's actions and omission were unconscionable and certainly sufficient to establish a prima facie case of bad faith or gross negligence to go to the aid of a gravely disabled and mentally ill Ms. Allrud, by discouraging them from making any further 911 calls in search of aid for her as she lay dying in her home.

These actions go beyond human decency or discretion permitted without repercussions by common or statutory law.

Ms. Allrud asks the trial court decision be overruled and remanded.

Dated this 13th day of January 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Russ Juckett', with a long horizontal line extending to the right.

RUSS JUCKETT, WSBA 5220
Attorney for Appellant