

No. 24-595

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**ESTATE ADMINISTRATIVE SERVICES, LLC,**

*Plaintiff-Appellant,*

v.

**CITY AND COUNTY OF HONOLULU; AND  
DOE DEFENDANTS 1-25,**

*Defendants-Appellees.*

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Appeal From the Judgment of the United States District Court  
for the District of Hawaii  
The Honorable Leslie E. Kobayashi Presiding  
(Case No. 1:23-CV-00127 LEK-RT)

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**OPENING BRIEF OF PLAINTIFF-APPELLANT**

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**PLAINTIFF-APPELLANT'S OPENING BRIEF**

I. **JURISDICTIONAL STATEMENT**

The civil rights claims asserted herein present a question of federal law thereby conferring jurisdiction upon the United States District Courts under 42 U.S.C. §1983, inter alia. The District Court dismissed Plaintiff's First Amended Complaint with prejudice and entered judgment in favor of Defendant City and County of Honolulu on January 2, 2024. 1-ER-0002. Plaintiff timely noticed the instant appeal on January 29, 2024. 1-ER-0070.

The Ninth Circuit Court of Appeals has jurisdiction to review the instant appeal of the trial court's January 2, 2024, judgment dismissing with prejudice Plaintiff's First Amended Complaint pursuant to 28 U.S.C. §§1291 and 1294(1).

II. **ISSUES PRESENTED FOR REVIEW**

A. Whether the District Court erred in dismissing Plaintiff's Fourteenth Amendment Substantive Due Process claim under the "state created danger" doctrine by finding that deliberate indifference by any HPD officer to Linda May Johnson's constitutional rights was insufficiently pled.

B. Whether the District Court erred in dismissing Plaintiff's Fourteenth Amendment Substantive Due Process claim under the "state created danger" doctrine by finding that Defendant City and County of Honolulu's policies

mandating her arrest and transportation to Kapolei were not deliberately indifferent to Linda May Johnson's constitutional rights.

C. Whether the District Court erred in dismissing Plaintiff's Fourteenth Amendment Substantive Due Process claim under the "state created danger" doctrine by finding that Defendant City and County of Honolulu's policies were not the moving force behind the violations of Linda May Johnson's constitutional rights.

D. Whether the District Court erred in dismissing Plaintiff's state law negligence claims by finding that Defendant City and County of Honolulu owed no duty of care to Linda May Johnson.

E. Whether the District Court erred in dismissing Plaintiff's state law negligence claims by finding that malice by any employee or agent of Defendant City and County of Honolulu was insufficiently pled.

### III. STATEMENT OF THE CASE

#### A. Procedural History

On February 27, 2023, Plaintiff Estate Administrative Services, LLC, on behalf of the Estate of Linda May Johnson, ("Plaintiff") filed a Complaint against the following entities and individuals: (1) City and County of Honolulu; (2) and Doe Defendants 1-25 ("Doe Defendants") in the Circuit Court for the First Circuit, State of Hawaii. On March 8, 2023, Defendant City and County of Honolulu

removed the case to the United States District Court for the District of Hawaii where it was assigned Case No. 1:23-CV-00127 LEK-RT. (Dkt. No. 1)

The Complaint asserted two causes of action. Count 1 alleged that Defendants were negligent in ensuring their premises were safe and secure thereby resulting in the death of Linda May Johnson. Count 2, arising under 42 U.S.C. § 1983, alleged that Defendants violated Linda May Johnson's rights under the Fourth, Fifth, Eighth and Fourteenth Amendments.

On March 20, 2023, Defendant City and County of Honolulu filed a Motion to Dismiss Complaint pursuant to FRCP 12(b)(6). (Dkt. No. 7). On May 5, 2023, Plaintiff filed its Opposition to Defendant City and County of Honolulu's Motion to Dismiss, (Dkt. No. 20), to which Defendant City and County of Honolulu later replied, (Dkt. No. 21).

On May 30, 2023, the District Court entered an Order Granting in Part and Denying in Part Defendant City and County of Honolulu's Motion to Dismiss Complaint ("May 30, 2023 Order"). (Dkt. No. 23). In the May 30, 2023 Order, The District Court dismissed Plaintiff's Fifth Amendment and Hawai'i State constitutional claims with prejudice. The District Court dismissed Plaintiff's state law negligence claims and claims under the Fourth, Eighth, and Fourteenth Amendments without prejudice and granted Plaintiff leave to file an amended complaint by June 29, 2023.

On June 29, 2023, Plaintiff filed its First Amended Complaint (“FAC”). 2-ER-056 (Dkt. No. 24). The FAC alleged the same state law negligence claims against the same Defendants as the Complaint and alleged a violation of Linda May Johnson’s right to bodily integrity under the Substantive Due Process Clause of the Fourteenth Amendment.

On July 12, 2023, Defendant City and County of Honolulu filed a Motion to Dismiss the FAC. (Dkt. No. 28). On September 15, 2023, Plaintiff filed an Opposition to Defendant’s Motion. (Dkt. No. 31). On September 22, 2023, Defendant City and County of Honolulu filed a Reply to Plaintiff’s Opposition. (Dkt. No. 32). The District Court heard argument on the motion on October 6, 2023, and took the matter under advisement. 2-ER-0037 (Dkt. No. 46).

On November 8, 2023, the District Court issued an Order Granting Defendant City and County of Honolulu’s Motion to Dismiss the FAC (“November 8, 2023 Order”). 1-ER-0006 (Dkt. No. 35). The November 8, 2023 Order dismissed Plaintiff’s state law negligence claims against Defendant City and County of Honolulu with prejudice, and granted the Motion to Dismiss as to Plaintiff’s Substantive Due Process claim without prejudice giving Plaintiff until December 8, 2023, to file a second amended complaint. See id.

Plaintiff elected not to file a second amended complaint, and the District Court entered an order dismissing the case with prejudice on December 18, 2023.

1-ER-0003 (Dkt. No. 39). Judgment was entered against Plaintiff on January 2, 2024, 1-ER-0002 (Dkt. No. 40), and Plaintiff timely appealed, 2-ER-0070 (Dkt. No. 41).

B. Facts of the Case

Linda May Johnson was a chronically houseless person with mental health issues who lived in and around the Waikiki area. (FAC ¶¶ 6-11). She had a caregiver and case worker named David Fong who had helped and assisted her for many years. (FAC ¶ 12). Honolulu Police Department officers were well aware of her condition because they had had prior interactions with her dating back to at least July 6, 2021. Officers arrested Johnson for sit/lie violations on July 6 and July 12, 2021. (FAC ¶¶ 1-2). On February 11, 2022, officers found Johnson sleeping on a public sidewalk outside the HPD Waikiki Substation and issued her a warning. (FAC ¶ 4). On February 14, 2022, officers arrested Johnson and charged her with entering a closed park, failing to comply with posted signs, camping in a public park, and camping without a permit after they found her sleeping in Kuhio Beach Park. (FAC ¶¶ 5-6). She told HPD officers that she did not have a camping permit and could not obtain one because her identification had been stolen. Id.

Johnson's arrest on February 14, 2022 was mandated under HPD Policy Number 4.44 because she had been cited or arrested for the same offense within the last twelve months. (FAC ¶ 7). Under then existing policy, she was transported

to the Kapolei Police Station to be processed. (FAC ¶ 9). That directive was issued by then Acting Chief Rade Vanic because the cell block at HPD's main station was still under repair and renovation. Id. Some nineteen hours after her arrest and fourteen hours after her release from custody, HPD Lieutenant Dalton Wong contacted David Fong and advised Fong that LINDA MAY JOHNSON had been arrested and taken to the Kapolei Police Station, that she was unable to care for herself, and was suffering from paranoia and anxiety. (FAC ¶ 14). Because Johnson was houseless, mentally ill, and without means to get back to town or otherwise help herself or seek assistance, she remained on the premises of the Kapolei Police Station. (FAC ¶ 11). This was a known and obvious consequence of Acting Chief Vanic's directive that individuals arrested in town who could not make bail be taken to the Kapolei Police Station to be processed which placed Johnson in a tenuous and dangerous situation. (FAC ¶ 10). Cut off from support, mental health services, and transportation and placed some 25 miles from where she had been arrested without means to otherwise help herself or seek assistance, Johnson would likely fall victim to some untoward circumstance.

In this case, that untoward circumstance turned out to be Michael Armstrong. Armstrong was arrested by officers on February 14, 2022, at approximately 9:49 p.m., for assaulting an employee of the supervised group home in Mililani where he was living. (FAC ¶ 24). Armstrong was living at the

supervised group home because he was on conditional release after having been found not guilty by reason of insanity of Burglary in Second Degree, Unauthorized Control of a Propelled Vehicle, and Theft in the Second Degree on March 19, 2007. (FAC ¶ 25).

When HPD officers arrived at the supervised group home, Armstrong attacked Officer Wesley Au Hong from behind and struck Officer Au Hong in the head with his fist injuring Officer Au Hong. (FAC ¶ 27). When interviewed by officers, the employee of the supervised group home reported that Armstrong had struck her in the face with his fist without provocation earlier that evening. (FAC ¶ 28). Responding officers described Armstrong at the time of his arrest as “mentally deranged,” “mentally unstable,” and “schizophrenic/bi-polar.” (FAC ¶ 29). In their arrest and use of force reports, officers identified Armstrong as suffering from schizophrenia and bi-polar disorders and as a court ordered client of a State of Hawaii residential program. Armstrong also was described in the reports as having recently been released from Kahi Mohala, a mental health treatment facility. (FAC ¶ 31). At approximately 6:40 p.m., on February 15, 2022, HPD officers released Michael Armstrong from the Kapolei Police Station “pending investigation” without charging him for the assaults on the resident manager or Officer Au Hong which, in addition to being new felonies, also constituted violations of Armstrong’s conditional release status for which he should have been held in custody pending

commitment back to the Hawaii State Hospital. (FAC ¶ 34). Immediately upon his release from police custody, Michael Armstrong brutally attacked and beat Linda May Johnson to death on the premises of the Kapolei Police Station. (FAC ¶ 35).

Armstrong's attack on Johnson was observed and reported to officers by a bystander, Thomas Smith. On February 15, 2022, at approximately 6:30 p.m., Thomas Smith arrived at the Kapolei Police Station to meet his ex-wife and transfer custody of their child for visitation purposes when Johnson approached him near the entrance to the police station and asked for some water and emergency assistance. (FAC ¶ 14). Smith then went back to his car to obtain two bottles of water and went inside the police station to find an officer to help Johnson. (FAC ¶ 15).

Inside the Kapolei Police Station Smith spoke to Officer Sandy Cesar, who was the officer at the front desk. Smith told Officer Cesar that there was a woman outside who needed emergency assistance, but instead of going outside to look for Johnson, Officer Cesar walked away and went further back into the station. (FAC ¶ 16). A short time later, Smith, who was now waiting for his ex-wife inside the front lobby of the Kapolei Police Station, saw Michael Armstrong outside the entrance of the station causing a commotion. (FAC ¶ 17).

For approximately twenty to thirty minutes Smith heard Armstrong screaming and punching a tree until Armstrong succeeded in uprooting the tree. (FAC ¶ 18). Smith then saw Armstrong slamming the tree against the ground but could not see

whether Armstrong was hitting anything. However, when Smith went outside, he saw Armstrong standing over Linda May Johnson who was on the ground bleeding. (FAC ¶ 19). It appeared that Armstrong brutally beat Johnson to death with the tree he had uprooted on the grounds of the Kapolei Police Station. (FAC ¶ 20). Smith then went back inside the police station and pounded on the glass partition at the front desk to try and obtain help, and when no officers responded, he called 911. (FAC ¶ 21). At approximately 7:26 p.m., Thomas Smith told the 911 operator that a man had beaten a woman right outside the Kapolei Police Station, that the woman was on the ground bleeding and in need of assistance, that he could not find any police officers to help and provided the 911 operator with a description of Armstrong. (FAC ¶ 22). When officers responded to Smith's 911 call, Smith pointed Armstrong out, and the officers placed Armstrong under arrest for murdering Johnson. (FAC ¶ 23).

#### IV. SUMMARY OF ARGUMENT

A. The District Court erroneously found that Honolulu Police Department officers were not deliberately indifferent to Linda May Johnson's substantive due process rights. The District Court also erroneously imposed upon Plaintiff pleading requirements well in excess of what is required under well-settled law. Accepting Plaintiff's allegations as true and giving Plaintiff all favorable inferences, the District Court failed to recognize that the danger HPD

officers placed Linda May Johnson in and then ignored was no different than the danger created and ignored by the officers in Munger v. City of Glasgow Police Dept., 227 F.3d 1082 (9<sup>th</sup> Cir. 2000); Wood v. Ostrander, 879 F.2d 583 (9<sup>th</sup> Cir. 1989); White v. Rochford, 592 F.2d 381 (7<sup>th</sup> Cir. 1979); and Kneipp v. Tedder, 95 F.3d 1199 (3<sup>rd</sup> Cir. 1996), inter alia.

B. The District Court erroneously found that Defendant City and County of Honolulu's arrest policies, as alleged, were not deliberately indifferent to Linda May Johnson's substantive due process rights. That Defendant's policies were deliberately indifferent to Johnson's substantive due process rights is evident from the known and obvious consequences these policies had on houseless and mentally ill arrestees. These arrestees would not be able to make bail resulting in their geographic displacement to Kapolei where they would be isolated from any support systems, mental health resources, shelter, and means of transportation that they may have had. As a result of this displacement and isolation, these arrestees would be in significantly more danger than they would have been in the absence of these policies, to include disorientation, decompensation, dehydration, starvation, and physical attack by others. These additional dangers were not speculative and were the natural and obvious consequences of these policies being followed by HPD officers as evidenced by Lieutenant Dalton Wong's phone call to Johnson's

caseworker David Fong hours after her release informing Fong that Johnson was unable to care for herself and suffering from paranoia and anxiety.

C. The District Court erroneously found that Defendant City and County of Honolulu's arrest policies were not the moving force behind Linda May Johnson's death but was instead caused by Michael Armstrong alone. Defendants were the cause in fact and proximate cause of the substantive due process violation suffered by Johnson. Had she not been arrested and transported to the Kapolei Police Station, she would not have faced the additional dangers resulting from her displacement and isolation. That the implementation of these policies would bring about these additional dangers was reasonably foreseeable and is established by their obvious and self-evident nature and by the fact that an HPD officer, Lieutenant Wong, acknowledged them when he called David Fong.

D. The District Court erroneously dismissed Plaintiff's state-law negligence claim on the basis that Linda May Johnson was owed no duty of care by Defendant City and County of Honolulu. As alleged, Johnson was on HPD premises pursuant to her arrest for camping in public park, camping without a permit, entering a closed park, and disobeying a posted sign, all within the day-to-day operations and business of HPD. Assuming the truth of Plaintiff's allegations and giving Plaintiff all favorable inferences, the District Court also failed to

recognize that Plaintiff was owed a duty of care by Defendants because they had placed her in greater danger by arresting her and transporting her to Kapolei.

E. The District Court erroneously found that Plaintiff had not sufficiently alleged malice in its FAC. With respect to malice, Plaintiff has alleged sufficient facts to establish that HPD officers engaged in conduct “substantially certain to cause injury” and in “reckless disregard of the law or of a person’s legal rights.” Awakuni v. Awana, 115 Haw. 126, 140-41, 165 P.3d 1027, 1402 (2007). The District Court disregarded the fact that even without Michael Armstrong’s presence, there was danger to Linda May Johnson. Her arrest and transportation away from town increased the danger to her by removing her from an area with which she was familiar, where she had support and could fend for herself and isolated her some twenty-five miles away with no way to get back to town. That some adverse, harmful, or detrimental event would befall her was likely, if not inevitable, given her physical, mental, and economic limitations. Armstrong happened to be the actor that caused the harm to Johnson, and to make matters worse, HPD, with knowledge of his dangerousness, released him instead of sending him back to the Hawaii State Hospital like they should have.

As alleged, the officers created Johnson’s vulnerability and danger to her by displacing and isolating her in Kapolei and then putting Michael Armstrong in her immediate proximity, all with knowledge of her vulnerability and his

dangerousness. These acts, as alleged, were substantially certain to cause injury and in reckless disregard of her substantive due process rights under the Fourteenth Amendment.

## V. ARGUMENT

### A. Standard of Review

An appeal from a dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. Kahle v. Gonzales, 487 F.3d 697, 699 (9th Cir. 2007). A complaint should not be dismissed for failure to state a claim unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) . In reviewing the complaint, the court should accept all well pleaded factual allegations and construe them in the light most favorable to the plaintiff. Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9<sup>th</sup> Cir. 2001).

In addition, the Supreme Court has held:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a

defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal citations and quotation marks omitted).

In Star v. Baca, 652 F.3d 1202, 1216-17 (9<sup>th</sup> Cir. 2011), this Court explained the plausibility test as follows:

If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *im* plausible. The standard at this stage of the litigation is not that plaintiff's explanation must be true or even probable. The factual allegations of the complaint need only "plausibly suggest an entitlement to relief." (citations omitted).

This Court has established a two-prong test that applies in cases alleging constitutional violations under 42 U.S.C. § 1983:

First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

AE ex rel. Hernandez v. Cty. of Tulare, 666 F.3d 631, 637 (9<sup>th</sup> Cir. 2012).

B. The District Court Erred When It Found That Deliberate Indifference By Any HPD Officer To Linda May Johnson’s Constitutional Rights Had Been Insufficiently Pled.

To establish liability under the “state created danger” doctrine, a plaintiff must plausibly allege: 1) affirmative state action that exposes her to a danger she would not have otherwise faced; 2) an actual particularized danger created by the affirmative action; and 3) deliberate indifference by the state actor to that danger. Kennedy v. City of Ridgefield, 439 F.3d 1055, 1061 (9<sup>th</sup> Cir. 2006). As to the first element, the test is whether the officer “left the person in a situation that was more dangerous than the one in which they found him.” Munger v. City of Glasgow Police Dept., 227 F.3d 1082, 1086 (9<sup>th</sup> Cir. 2000). As to the second element, the test is whether the plaintiff was part of a “discrete and identifiable group” subjected to danger as opposed to a member of the public exposed to a generalized danger. Sinclair v. City of Seattle, 61 F.4<sup>th</sup> 674, 685 (9<sup>th</sup> Cir. 2023); Hernandez v. City of San Jose, 897 F.3d 1125, 1135 (9<sup>th</sup> Cir. 2018); Estate of Gonzales v. Hickman, 2006 WL 495780 (C.D.Cal. 2006).

As to the third element, the test is whether the defendant recognized an unreasonable risk to the plaintiff and intended to expose the plaintiff to that risk without regard to the consequences. L.W. v. Grubbs, 92 F.3d 894, 899 (9<sup>th</sup> Cir. 1996). A plaintiff must be able to establish that the defendant was subjectively aware of a substantial risk of serious harm or danger to the plaintiff and failed to

adequately respond or simply disregarded that danger. Conn v. City of Reno, 591 F.3d 1081, 1096 (9<sup>th</sup> Cir. 2010). Subjective awareness may be based on inferences drawn from circumstantial evidence, common sense, or the obviousness of the risk. Conn, 591 F.3d at 1097; Wood v. Ostrander, 879 F.2d 583, 590 (9<sup>th</sup> Cir. 1989) (“Moreover, the inherent danger facing a woman left alone at night in an unsafe area is a matter of common sense”); White v. Rochford, 592 F.2d 381, 385 (7<sup>th</sup> Cir. 1979) (“In the case before us the police could not help knowing that, absent their assistance, the three children would be subjected to exposure to cold weather and danger from traffic”); L.R. v. School District of Philadelphia, 836 F.3d 235, 246 (3d Cir. 2016) (“the risk of harm in releasing a five-year old child to an unidentified, unverified adult is ‘so obvious’ as to rise to the level of deliberate indifference”); Ayala v. Mohave County, Arizona, 2008 WL 4849963 (D.Arizona 2008) (“Alternatively, reasonable jurors could conclude that the danger presented by abandoning Shamblin on the shoulder of a remote highway in complete darkness was exceedingly obvious”). A defendant need only be aware that a serious harm is likely to result but need not be aware that a particular consequence is more or less likely. Gibson v. County of Washoe, 290 F.3d 1175, 1193 (9<sup>th</sup> Cir. 2002).

Having found no issue as to the first two elements of Plaintiff’s “state created danger” claim, the District Court erred in dismissing Plaintiff’s FAC when

it found that Plaintiff had not plausibly alleged deliberate indifference on the part of any HPD officer. The Court reached this conclusion based on its belief: 1) that no policymaker was alleged to have been aware that transporting arrestees to Kapolei could result in a violation of their constitutional rights; 2) that no HPD officer was alleged to have been aware that transporting Linda May Johnson to Kapolei could expose her to the danger of being attacked by a third party; and 3) that no officer was alleged to have been aware that Linda May Johnson was vulnerable and still on the station premises and that Michael Armstrong was dangerous to her at the time he was released.

Here the District Court's finding was erroneous because it ignored the obvious dangers created by the HPD officers in arresting and displacing Johnson and because it imposed on Plaintiff pleading requirements well in excess of what is required under well-settled law.

In Munger v. City of Glasgow Police Dept., 227 F.3d 1082 (9<sup>th</sup> Cir. 2000), police officers in Glasgow, Montana responded to a local bar and ejected a visibly drunk patron, Lance Munger. Munger was further advised by an officer not to drive his vehicle which was parked nearby. The outside temperature was 11 degrees with a windchill factor of minus 20 degrees, and Munger was dressed in jeans and a t-shirt when confronted by officers. Munger walked away from the police and away from the bar and was found dead the next day due to hypothermia

in an alley two blocks from the bar. Munger's parents sued under the Due Process Clause of the Fourteenth Amendment and had their claims dismissed on qualified immunity grounds.

In reversing the district court, the Ninth Circuit ruled that the officers violated the "danger creation" exception by affirmatively placing Munger in a more dangerous position than when they found him, and that the law was clearly established that this constituted a violation of Munger's substantive due process rights. Munger, 227 F.3d at 1087. In so finding, the Ninth Circuit relied upon its decision in Wood v. Ostrander, 879 F.2d 583 (9<sup>th</sup> Cir. 1989). Munger, 227 F.3d at 1086.

In Wood v. Ostrander, Wood was the female passenger of a driver arrested for drunk driving. A state trooper arrested the driver, impounded his vehicle, and left Wood alone at the side of the road at 2:30 a.m. in a neighborhood known to be dangerous. Wood accepted a ride home with a stranger who subsequently raped her. Wood sued under the Due Process Clause of the Fourteenth Amendment and had her claims dismissed on qualified immunity grounds and grounds that the officer owed her no affirmative constitutional duty of protection.

In reversing the district court, the Ninth Circuit ruled that the trooper acted with deliberate indifference to Wood's interest in personal security and well-being when he left her at the side of the road at 2:30 a.m. in a high-crime neighborhood,

and that the law was clearly established that this constituted a violation of her substantive due process rights. Wood, 879 F.2d at 587-88. In so finding, the Ninth Circuit relied upon the Seventh Circuit's decision in White v. Rochford, 592 F.2d 381 (7<sup>th</sup> Cir. 1979).

In White v. Rochford, Chicago police arrested a driver for drag racing on the Chicago Skyway. Despite the driver's protestations, the police left three minor children in the car unattended at the side of the road in cold weather at night. The children crossed eight lanes of traffic to get to a telephone and called their mother who, in turn, called the police. The police refused to help the children, and they were ultimately retrieved by a neighbor. The parents sued under the Due Process Clause of the Fourteenth Amendment and had their claims dismissed on a motion to dismiss.

In reversing the district court, the Seventh Circuit adopted the Supreme Court's recognition of a right to personal security as set forth in Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed 2d 711 (1976), found that the conduct of the Chicago police was offensive to a sense of justice and shocked the conscience, and held that the conduct of the police demonstrated reckless disregard and indifference in the face of known dangers to the children abandoned on the side of the highway. White, 592 F.2d at 383-85.

The Seventh Circuit's reasoning in *White* was adopted by the Third Circuit in *Kneipp v. Tedder*, 95 F.3d 1199 (3<sup>rd</sup> Cir. 1996). In *Kneipp*, officers stopped a husband and wife for causing a disturbance on a highway less than a block from their home. The wife was visibly intoxicated, smelled of urine, and could not walk without assistance. The husband told officers that their son was home with a babysitter and that he needed to relieve the babysitter. Officers allowed him to leave, and he assumed the officers would escort his wife home. Instead, officers sent the wife home unescorted. She was later found at the bottom of an embankment suffering from hypothermia, anoxia, and permanent brain damage. The wife's legal guardians sued under the Due Process Clause of the Fourteenth Amendment and their claims were dismissed on summary judgment.

In reversing the district court, the Third Circuit adopted the state-created danger theory of liability and found that there were genuine issues of material fact regarding foreseeability that the wife would fall and injure herself, that the officers acted in willful disregard of the wife's safety, and that the officers used their authority to create a dangerous situation or to make the wife more vulnerable to danger had they not intervened. *Kneipp*, 95 F.3d at 1206-08.

None of these cases required allegation of a specific harm or a specific form of harm, only that a serious harm would likely result and that defendants were deliberately indifferent to the risk of harm. In this case, Plaintiff has plausibly

alleged that officers used their authority to arrest Linda May Johnson and transport her to the Kapolei Police Station. Officers knew that she was houseless, without identification, and had been previously found in and around Waikiki. From their prior encounters with her, officers knew that she was mentally ill and vulnerable. This is evidenced by Lieutenant Dalton Wong's phone call to her caseworker David Fong hours after her release in which he told Fong that she had been arrested and taken to the Kapolei Police Station, that she was unable to care for herself, and that she was suffering from paranoia and anxiety. Her arrest and transportation away from town increased the danger to her by removing her from an area with which she was familiar, where she had support and could fend for herself, and isolated her some twenty-five miles away with no way to get back to town. That some adverse, harmful, or detrimental event would befall her was foreseeable given her physical, mental, and economic limitations and the fact that she had been displaced from town by virtue of her arrest independent of Michael Armstrong.

That she was vulnerable and in danger was evidenced by the fact that Linda May Johnson was still at the police station some thirty hours after she had been released from custody and sought the assistance of Thomas Smith. When Smith attempted to notify officers at the station of her plight he was ignored. Had Officer Cesar acted upon Smith's information, it is likely Johnson would never have

encountered Michael Armstrong and been beaten to death. By this point officers undoubtedly knew of Johnson's vulnerability which they had created and simply ignored.

To make matters worse, officers also had arrested Armstrong and brought him to the Kapolei Police Station. Armstrong was known to officers to be mentally ill and dangerous not only because of his acquittal by reason of insanity but also because he had just been arrested for assaulting an employee at the supervised group home where he had been living and assaulting one of the responding officers. Armstrong was described by responding officers as mentally deranged, mentally unstable, and schizophrenic/bipolar. Instead of charging Armstrong or, at a minimum, holding him in custody pending commitment back to the Hawaii State Hospital for violating the conditions of his conditional release, officers released him "pending investigation." Shortly thereafter, he encountered Linda May Johnson on the grounds of the Kapolei Police Station and beat her to death. Here, the officers not only placed Linda May Johnson in a more dangerous and vulnerable situation than when they found her and arrested her, they actually subjected her to the instrumentality which directly caused her death, and they did so with knowledge of all of the underlying circumstances that made this situation so rife for catastrophe. The danger these officers created for Linda May Johnson

was no different and no less actionable than the danger created for the victims in Munger, Wood, White, and Kneipp.

C. The District Court Erred When It Found That Defendant City and County of Honolulu’s Policies, As Alleged, Were Not Deliberately Indifferent To Linda May Johnson’s Constitutional Rights.

Municipalities are persons under 42 U.S.C. § 1983 and may be held liable when the execution or implementation of one of their policies or customs inflicts or causes the constitutional deprivation. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In Oviatt By and Through Waugh v. Pearce, 954 F.2d 1470, 1474 (9<sup>th</sup> Cir. 1992), this Court recognized that a municipality could be held liable for a policy or custom of inaction which resulted in a constitutional deprivation. This Court held:

A local governmental entity is liable under § 1983 when “action pursuant to official municipal policy of some nature cause[s] a constitutional tort.” Monell v. Department of Social Servs., 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978); *see also* City of Canton v. Harris, 489 U.S. 378, 389, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989). Moreover, a local governmental body may be liable if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights. City of Canton, 489 U.S. at 388, 109 S.Ct. at 1204.

To impose liability on a local governmental entity for failing to act to preserve constitutional rights, a section 1983 plaintiff must establish: (1) that he possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy “amounts to deliberate indifference” to the plaintiff’s constitutional right; and (4) that the policy is the “moving force behind the constitutional violation.” City of Canton, 489 U.S. at 389–91, 109 S.Ct. at 1205–06.

Deliberate indifference means a deliberate or conscious choice to accept the risk that a constitutional violation will result. Municipal liability will result where a policy of inaction constitutes a failure to protect plaintiff's constitutional rights. Oviatt By and Through Waugh v. Pearce, 954 F.2d 1470, 1474 (9<sup>th</sup> Cir. 1992). An inference of deliberate indifference arises when a municipality ignores a known or obvious consequence of its action or where the municipality disregards an obvious need for more or different actions so as to prevent a likely constitutional violation. Oviatt By and Through Waugh, 954 F.2d at 1478 (9<sup>th</sup> Cir. 1992); Gibson v. County of Washoe, 290 F.3d 1175, 1194-95 (9<sup>th</sup> Cir. 2002). With respect to municipal liability, the test for deliberate indifference is an objective one and can be based upon actual or constructive notice of facts giving rise to a substantial risk of a constitutional violation. Castro v. County of Los Angeles, 833 F.3d 1060, 1076 (9<sup>th</sup> Cir. 2016). Knowledge of government officials and employees can be imputed to a municipality for purposes of determining deliberate indifference. Id. Whether a municipality's policy is deliberately indifferent to a citizen's constitutional rights is generally a question for the jury. Gibson, 290 F.3d at 1195 (9<sup>th</sup> Cir. 2002).

Where it is alleged that a municipal policy is defective or deficient a cause of action will lie against the municipality if “the need for more or different [procedures] is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to

have been deliberately indifferent to the need.” City of Canton v. Harris, 489 U.S. 378, 390, 109 S.Ct. 1197, 1204-05, 103 L.Ed.2d 412 (1989).

In Boyd v. City of San Rafael, 2023 WL 6960368 (N.D. Cal. Oct. 19, 2023), plaintiffs, members of two organized homeless camps, sued the City of San Rafael to enjoin enforcement of a new ordinance that would require campsites to be separated by no less than 200 feet. The district court granted, in part, plaintiffs’ motion for a preliminary injunction reducing the buffer between campsites to 100 feet.

In so doing, the district court found that plaintiffs had established a likelihood of success on the merits of their “state created danger” claim under the substantive due process clause of the Fourteenth Amendment. The district court found that by isolating homeless individuals from each other, the ordinance created a particularized danger for those who were physically disabled, those who were female and subject to domestic violence and sexual assault, those who were susceptible to theft, and those with psychological disabilities. The district court found enforcement of the ordinance to be deliberately indifferent because the dangers it would cause “seem obvious.”

Relying on Janosko v. City of Oakland, 2023 WL 187499 (N.D. Cal. Jan. 13, 2023), Sanchez v. City of Fresno, 914 F.Supp.2d 1079 (E.D. Cal. 2012), and Jeremiah v. Sutter County, 2018 WL 1367541 (E.D. Cal. Mar. 6, 2018) which

recognized the danger posed by anti-camping ordinances and homeless sweeps in certain circumstances, as well as Wood v. Ostrander, 879 F.2d 583 (9<sup>th</sup> Cir. 1989) and its progeny, the district court found that:

[A]lthough the contours of this doctrine in this context have not been decided by the Ninth Circuit, the cases thus far decided by the Circuit establish the general due process proposition advanced by Plaintiffs. Given the logic of the doctrine and the body of district court cases applying it to similar situations involving the treatment of unhoused individuals and groups, the court concludes the Plaintiffs have raised at least serious questions on the merits of this due process claim at this preliminary stage.

Applying those standards to this case, Plaintiff submits that its allegations are sufficient to establish that Defendant City and County of Honolulu's policies were deliberately indifferent to Linda May Johnson's Fourteenth Amendment Substantive Due Process rights, and that the District Court erred in dismissing the FAC. As alleged in the complaint, Linda May Johnson's arrest and transportation to the Kapolei Police Station were the direct result of Policy Number 4.44 and Acting Chief Vanic's directive that persons arrested between Hawaii Kai and Chinatown who could not make bail be transported to Kapolei for processing. Both meet the test for official policy as the District Court found.

That these policies were deliberately indifferent to Linda May Johnson's constitutional rights is evident from the known and obvious consequences these policies would have on houseless and mentally ill arrestees. These arrestees would not be able to make bail resulting in their geographic displacement to Kapolei

where they would be isolated from any support systems, mental health resources, shelter, and means of transportation that they may have had at their disposal. As a result of this displacement and isolation, these arrestees would be in significantly more danger than they would have been in the absence of these policies since they would have been processed and released from the HPD main station in the heart of downtown Honolulu in an area with which they were familiar. The additional dangers they would face by being released some 25 miles away include disorientation, decompensation, dehydration, starvation, and physical attack by others.

These additional dangers were not speculative as evidenced by Lieutenant Dalton Wong's phone call to Johnson's caseworker David Fong hours after her release informing Fong that she was unable to care for herself and suffering from paranoia and anxiety. These additional dangers arose from the displacement and isolation visited upon homeless arrestees by the officers following these policies, and HPD certainly was aware that these were the natural and obvious consequences for mentally ill, houseless individuals like Johnson. The policies were deliberately indifferent to the constitutional rights of homeless, mentally ill arrestees by creating these additional dangers as the natural and obvious consequences of their implementation.

The danger Linda May Johnson was exposed to by being transported some twenty-five miles to Kapolei by HPD officers and being released there was no less severe and no less obvious than the dangers faced by the plaintiffs in Boyd who were going to have a 200-foot buffer placed between their campsites. What was Linda Johnson to do once she was released on bail? She had no way to call anyone and no way to get help or transportation back to town. The obviousness of the dangers she faced are sufficient to make out a plausible claim of deliberate indifference, and the District Court erred in not recognizing that.

That defendants were aware of and indifferent to Linda May Johnson's vulnerability is further established by Lieutenant Wong's phone call to Johnson's caregiver David Fong made some fourteen hours after her release on bail and some nine hours prior to her murder. In that phone call, Wong tells David Fong that Johnson had been arrested and taken to the Kapolei Station, that she was unable to care for herself, and was suffering from paranoia and anxiety. In the light most favorable to Plaintiff, Lieutenant Wong must have believed Johnson was still stranded in Kapolei and in dire need of assistance or he wouldn't have called David Fong. That the call was not made during the five hours Johnson was in custody and some fourteen hours after she was released also speaks to the deliberate indifference defendants had to the danger in which they had placed Johnson.

Finally, officers were given one last opportunity to address the dangers to which they had subjected Johnson and utterly failed in that regard by ignoring and disregarding Thomas Smith's request for emergency assistance on behalf of Johnson. Had Officer Cesar simply gone outside in response to Thomas Smith's request and brought Johnson inside the station to provide assistance, give her some water, or make a phone call, Johnson would likely still be alive today. Instead, she ignored Smith and went back inside the station.

D. The District Court Erred When It Found That Defendant City and County of Honolulu's Policies, As Alleged, Were Not The Moving Force Behind The Violation Of Linda May Johnson's Constitutional Rights.

A policy is the moving force behind a constitutional violation where it is the cause in fact and the proximate cause of the violation. Trevino v. Gates, 99 F.3d 911, 918 (9<sup>th</sup> Cir. 1996). In order to be a moving force behind the plaintiff's injury, a deficient or defective municipal policy must be "closely related" to the injury suffered such that if a proper policy or procedure had been implemented, plaintiff's injury would have been avoided. Long v. County of Los Angeles, 442 F.3d 1178, 1190 (9<sup>th</sup> Cir. 2006); Oviatt By and Through Waugh v Pearce, 954 F.2d 1470, 1478 (9<sup>th</sup> Cir. 1992); Gibson v. County of Washoe, 290 F.3d 1175, 1196 (9<sup>th</sup> Cir. 2002).

Where a government actor, by policy or otherwise, sets "in motion a series of acts by others which the actor knows or reasonably should know would cause

others to inflict the constitutional injury,” that government actor is the moving force behind the violation. Van Ort v. Estate of Stanewich, 92 F.3d 831, 836-37 (9<sup>th</sup> Cir. 1996); Conn v. City of Reno, 591 F.3d 1081, 1098 (9<sup>th</sup> Cir. 2010); Cabrales v. County of Los Angeles, 864 F.2d 1454, 1461 (9<sup>th</sup> Cir. 1988), vacated, 490 U.S. 1087, 109 S.Ct. 2425, 104L.Ed.2d 982 (1989), reinstated, 886 F.2d 235 (9<sup>th</sup> Cir. 1989). In Conn, the officers’ omission of information regarding the prisoner’s prior suicide attempt rendered subsequent medical reviews meaningless, thereby denying the prisoner access to adequate medical care and proximately causing her suicide. Conn, 591 F.3d at 1101. In Cabrales, chronic understaffing at the jail which left a prisoner’s psychological illness essentially undiagnosed and untreated was the moving force behind the prisoner’s suicide rendering the county liable. Cabrales, 864 F.2d at 1461.

Here, the District Court erroneously found that Michael Armstrong was the sole cause of Linda May Johnson’s death and not Defendant City and County of Honolulu’s policies. In so doing, the District Court failed to view Plaintiff’s allegations in the light most favorable as it is obligated to do and ignored the fact that Defendant’s policies stranded Linda May Johnson in Kapolei vulnerable, isolated, and with no means to obtain assistance. These policies were the cause in fact and proximate cause of the substantive due process violation suffered by Linda May Johnson.

Had she not been arrested and transported to the Kapolei Police Station pursuant to policy, Johnson would not have faced the additional dangers resulting from her displacement and isolation. That these additional dangers would result from the implementation of HPD policies was reasonably foreseeable, is established by their obvious and self-evident nature, and by the fact an HPD officer, Lieutenant Wong, acknowledged them when he called David Fong to tell Fong that Johnson had been arrested and taken to the Kapolei station, was unable to care for herself, and was suffering from paranoia and anxiety.

Further, the District Court failed to consider that HPD had custody of Armstrong immediately prior to his attack on Johnson and released him when it should have detained him and returned him to the Hawaii State Hospital for violating the conditions of his conditional release. Armstrong was not some third-party roaming free in the community as to whom HPD had no knowledge or control, but rather someone whom HPD knew to be violent and seriously mentally ill and whom they had within their custody.

The District Court further ignored the fact that Armstrong murdered Johnson on HPD's premises where they had just released him and Johnson after both had been transported there pursuant to policy, with knowledge that he was violent and dangerous and she was vulnerable and in need of assistance. Johnson was still outside the station some thirty hours after her release because she had no resources

available to her, had no way to leave, and was stranded. That a houseless, mentally ill arrestee transported twenty-five miles away and released would still be at the location where she was released some thirty hours later was reasonably foreseeable and should surprise no one. To make matters worse, had Officer Cesar merely stepped outside and provided Johnson some assistance in response to Thomas Smith's request, Johnson would likely still be alive.

E. The District Court Erred When It Found That Defendant City and County of Honolulu Owed No Duty Of Care To Linda May Johnson.

In its FAC, Plaintiff brought state-law negligence claims based upon premises liability and a duty not to worsen a situation or increase or enhance the risk of harm to a person. The District Court erroneously denied Plaintiff's negligence claim finding that Defendant City and County of Honolulu owed no duty of care to Linda May Johnson based on her status as an arrestee rather than an invitee and that the City had not increased the danger to her by displacing her to Kapolei.

Hawaii has extinguished all distinctions between the duty owed to different classes of individuals, and occupiers of land owe a duty of reasonable care to all persons reasonably anticipated to be on their premises be they invitees, licensees, or trespassers. Pickard v. City and County of Honolulu, 51 Haw. 134, 135, 452 P.2d 445, 446 (1969); Farrior v. Payton, 57 Haw. 620, 629, 562 P.2d 779, 786 (1977); Kaczmarczyk v. City and County of Honolulu, 65 Haw. 612, 615, 656 P.2d

89, 92 (1982). Landowners owe a duty to business visitors/invitees (i.e., persons with whom they have a special relationship) and persons reasonably anticipated to be on their premises to protect them from the criminal acts of third parties where those criminal acts are reasonably foreseeable. Moyle v. Y & Y Hup Shin, Corp., 118 Haw. 385, 392, 191 P.3d 1062, 1069 (2008); Knodle v. Waikiki Gateway Hotel, Inc., 69 Haw. 376, 386, 742 P.2d 377, 384 (1987); Kau v. City and County of Honolulu, 6 Haw. App. 370, 376, 722 P.2d 1043, 1048 (1986). Additionally, although the police have no affirmative duty to arrest, they do have a duty not to engage in conduct which worsens a situation or increases the risk of harm and then fails to provide protection from the enhanced danger. Freitas v. City and County of Honolulu, 58 Haw. 587, 590, 574 P.2d 529, 532 (1978); Pezzimenti v. United States, 114 F.3d 1195 (9<sup>th</sup> Cir. 1997); Fochtman v. Honolulu Police and Fire Departments, 65 Haw. 180, 183, 649 P.2d 1114, 1116 (1982); Vargas v. City and County of Honolulu, 2020WL3547941 (D. Hawaii, June 30, 2020).

In this case, Johnson's murder took place on the premises of the Kapolei Police Station. Johnson was on the premises because she had been brought there by officers pursuant to her arrest, a purpose connected with the business of the possessor of the land. By all accounts, Linda May Johnson was a business invitee, and the District Court erred in not so finding. The District Court then compounded its error by ruling that the City owed no duty to Johnson because Johnson was an

arrestee and not a business visitor. This ruling was defective in two respects.

First, it violated the rule established by the Hawaii Supreme Court in Pickard and its progeny which did away with distinctions based on the class of the injured party. Second, it failed to recognize that Johnson was clearly a person whose presence on the premises was reasonably anticipated. She had, after all, been arrested by HPD officers and transported to the Kapolei station where she was later released on bail.

That Michael Armstrong was violent and dangerous and constituted a foreseeable danger was known to HPD because of his criminal history and the nature of his arrest on February 14, 2022. Armstrong had just assaulted an employee of the supervised care home where he was residing and one of the police officers who went there to investigate. Responding officers described Armstrong as mentally deranged, mentally unstable, and schizophrenic/bi-polar. Significantly, HPD had actual physical control and custody of Armstrong immediately prior to the attack. Kau v. City and County of Honolulu, 6 Haw. App. 370, 376, 722 P.2d 1043, 1048 (1986). HPD was obligated to consider whether there was a sufficiently serious probability of harm that a reasonable and prudent person would take steps to avoid it. Knodle, 69 Haw. at 388, 742 P.2d at 385. Under this test, it was foreseeable that Armstrong posed a sufficient danger to others that HPD should have taken measures to avoid. If Armstrong was not arrested and

charged for assaulting the care home employee and the responding officer, he could at least have been detained for commitment back to the Hawaii State Hospital for violating the terms of his conditional release. Had the officers held Armstrong for commitment back to the Hawaii State Hospital for violating the conditions of his conditional release, Johnson's murder would likely have been avoided.

The District Court then erred in finding that HPD had not engaged in conduct which worsened the situation or increased the risk of harm to Linda May Johnson and then failed to provide protection from the enhanced danger. Freitas v. City and County of Honolulu, 58 Haw. 587, 590, 574 P.2d 529, 532 (1978); Pezzimenti v. United States, 114 F.3d 1195 (9<sup>th</sup> Cir. 1997); Fochtman v. Honolulu Police and Fire Departments, 65 Haw. 180, 183, 649 P.2d 1114, 1116 (1982); Vargas v. City and County of Honolulu, 2020WL3547941 (D. Hawaii, June 30, 2020). Here, HPD worsened and increased the risk of harm to Johnson by displacing and isolating her in Kapolei, a situation the District Court clearly misapprehended. It was not, as the District Court put it, a matter of Kapolei being more dangerous than downtown Honolulu. It was the fact that HPD displaced Johnson from familiar surroundings to an unfamiliar area some twenty-five miles away with no way to get back and no way to get help. Lieutenant Wong's

telephone call to David Fong is certainly compelling and persuasive evidence that HPD was aware of the danger in which they had placed Johnson.

Then, instead of rectifying or mitigating the danger, HPD placed Armstrong, a violent and dangerous individual, in close physical proximity to Johnson. HPD was given another chance to take preventative measures when Thomas Smith notified Officer Cesar of Johnson's presence on the premises and her need for emergency assistance in the hours and minutes before Armstrong was released and murdered her, but it was ignored. Had an officer simply brought Johnson inside, given her access to a phone to call someone, or called someone for her, her murder would have been avoided. A duty of care to Linda May Johnson and a breach of that duty was plausibly alleged, and the District Court erred when it failed to so find.

F. The District Court Erred When It Found That Plaintiff Had Insufficiently Pled Malice Regarding Its State Law Negligence Claim.

In this case, the District Court erred when it ignored that Plaintiff could establish malice by alleging sufficient facts to establish that HPD officers engaged in conduct "substantially certain to cause injury" and in "reckless disregard of the law or of a person's legal rights." Awakuni v. Awana, 115 Haw. 126, 140-41, 165 P.3d 1027, 1402 (2007). Further, the element of malice is generally one for the jury to determine. Runnels v. Okamoto, 56 Haw. 1, 5, 525 P.2d 1125, 1129 (1974). In Vargas v. City and County of Honolulu, 2020 WL 3547941 (D. Hawaii

June 30, 2020), Vargas, a female, had called HPD to eject an acquaintance from her residence whom she no longer wanted there. Two HPD officers, Oh and Costa, responded to the scene. Vargas was intoxicated and did not get along with Costa. Costa then left Oh alone with Vargas and went back to his vehicle. Oh subsequently took Vargas to her bedroom where they engaged in sex. There were factual disputes regarding whether Costa was still in the house when Oh and Vargas entered the bedroom and in what state of undress Vargas was when Costa left the residence. Interestingly, in denying Costa's motion for summary judgment, the District Court concluded that as a matter of law Costa owed Vargas a duty not to engage in conduct that would worsen her situation, and that there were issues of material fact regarding whether Costa had acted in reckless disregard of the law or of Vargas' constitutional rights.

Here, the officers created Johnson's vulnerability and the danger to her by displacing and isolating her in Kapolei and then putting Michael Armstrong in her immediate proximity, all with knowledge of her vulnerability and his dangerousness. In the light most favorable to Plaintiff, Lieutenant Wong's telephone call to David Fong some fourteen hours after Johnson's release is certainly compelling and persuasive evidence that HPD was aware of the danger in which they had placed Johnson, that the danger was clear and obvious, and that was all they were going to do about it. Instead of rectifying or mitigating the

danger, HPD placed Armstrong, a violent and dangerous individual, in close physical proximity to Johnson. Then, HPD was given another chance to take preventative measures when Thomas Smith notified Officer Cesar of Johnson's presence on the premises and her need for emergency assistance in the hours and minutes before Armstrong was released and murdered her, but simply ignored it. These acts, as alleged, were substantially certain to cause injury and in reckless disregard of her rights under the Fourteenth Amendment at least as much as Officer Costa's were, and the District Court should be reversed.

VI. CONCLUSION

Based on the foregoing arguments and authorities Plaintiff requests this Court vacate the judgment below and remand this case for further proceedings.

DATED: Honolulu, Hawaii, April 15, 2024.

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**CERTIFICATE OF COMPLIANCE**

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1, the attached Brief is proportionately spaced, has a typeface of 14 points or more and contains 9,219 words.

DATED: Honolulu, Hawaii, April 15, 2024.

/s/ Eric A. Seitz

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**STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28-2.6, Plaintiff-Appellant states that there are no known Ninth Circuit cases related to this case.

DATED: Honolulu, Hawaii, April 15, 2024.

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ESTATE ADMINISTRATIVE  
SERVICES, LLC,

Plaintiff-Appellant,

vs.

CITY AND COUNTY OF  
HONOLULU; and DOE  
DEFENDANTS 1-25,

Defendant-Appellees.

NO. 18-16692

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served this date electronically via CM/ECF or U.S. Mail to the following at the addresses listed below:

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