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NO. 67518-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SABRINA RASMUSSEN,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS,

Defendant/Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Plaintiff asks this court to hold the State responsible for the intentional criminal acts of Terapon Adhahn despite that Adhahn had not been under state supervision for close to three years when he committed the new crime at issue here. In doing so, plaintiff attempts to expand the concept of supervision liability far beyond what any court has previously recognized.

At the time of Sabrina Rasmussen's kidnapping and rape in 2000, Adhahn had been off DOC supervision for a substantial period of time. Plaintiff nevertheless alleges that the defendant Washington State Department of Corrections (DOC) is liable for her injuries due to alleged negligence in supervising Adhahn from 1990 through 1997, that Adhahn failed to register as a sex offender, and that DOC improperly "classified" Adhahn as a Level I sex offender.

Plaintiff's claims against defendant DOC were properly dismissed as a matter of law by the trial court because DOC had no involvement with Adhahn for almost three years preceding the event that is the basis for this lawsuit. DOC did not have a "take charge" relationship with Adhahn at the time he kidnapped and raped Sabrina Rasmussen. Accordingly, DOC did not owe a duty in tort to plaintiff.

Furthermore, DOC's prior supervision of Adhahn was not a proximate cause of Sabrina Rasmussen's kidnapping and rape, DOC owed no duty to rehabilitate Adhahn during the period of his supervision, DOC owed no duty to assign a "classification level" to Adhahn as a sex offender, and DOC owed no duty to ensure Adhahn registered as a sex offender. Without the existence of these duties and because there is no proximate cause, the trial court properly granted summary judgment to DOC and dismissed plaintiff's claims.

II. ISSUES

A. Did the Department of Corrections owe a duty to plaintiff for her injuries when those injuries were inflicted upon her by the intentional criminal acts of her assailant, when all supervision requirements relating to her assailant had terminated almost three years previously by order of the sentencing court?

B. Was DOC a proximate cause of plaintiff's injuries when DOC had no contact with plaintiff's assailant for almost three years and plaintiff cannot demonstrate that her assailant would have been in jail or out of the United States on the date of her assault had DOC done something differently?

III. COUNTER STATEMENT OF THE CASE

The following facts were undisputed below. At the time Terapon Adhahn committed his crimes against Ms. Rasmussen, he had not been under DOC supervision for close to three years. At one time DOC had supervised Adhahn as a requirement of a judgment and sentence for a March 25, 1990 crime of Incest in the First Degree. CP 152-56. Under

that judgment and sentence, the last contact DOC had with Adhahn was on July 8, 1997, when Superior Court Judge Karen Strombom entered an order that terminated Adhahn's treatment and supervision. CP 150.

Nearly three years later, on May 31, 2000, Adhahn kidnapped and raped Sabrina Rasmussen while she was walking to school. CP 2-3, 24-25. Terapon Adhahn was not suspected of or arrested for that crime until 2007 following his arrest for the rape and murder of another child. CP 3.

DOC's involvement with Adhahn began in 1990 when he was arrested and charged for rape of his 16 year-old half sister. CP 152-56. Adhahn pled guilty to Incest in the First Degree. CP 152 Adhahn received an exceptional sentence under the Special Sex Offender Sentencing Alternatives of 14 months total confinement, which was suspended with the following conditions imposed: 60 days in jail and 60 months of treatment concurrent with 60 months of supervision. CP 155. Adhahn was never confined in a DOC facility for that or any other crime until after he was sentenced for the 2007 murder unrelated to this lawsuit. CP 146.

At the outset of his supervision period Adhahn only began treatment for substance abuse though he was supposed to also obtain sex offender treatment. CP 158. The reason Adhahn provided for not enrolling in both treatment programs simultaneously was that he did not

have enough money. CP 158. Adhahn's DOC Community Corrections Officer (CCO) Brad Garrett repeatedly worked with Adhahn to ensure his compliance with the required treatment and learned that Adhahn had been in to inquire about sex offender treatment twice and that Adhahn continued to look for employment. CP 158. Nevertheless, the CCO kept the sentencing court informed of Adhahn's non-compliance by issuing a Notice of Violation. CP 158-59, *see also* CP 341-44.

After CCO Garrett informed the sentencing court of Adhahn's deficiencies, by order dated November 27, 1991 (CP 163), the court ordered that Adhahn begin treatment "no later than 11/01/91." CP 163. The court apparently back-dated that start date because Adhahn had begun the required treatment on October 29, 1991. CP 341. During that treatment period – which he completed – Adhahn was "an active and cooperative group therapy member." CP 165.

As a result of the work done by the CCOs, Adhahn's supervision period ran from 1990 to 1997 – longer than the originally sentenced 60 months. CP 161-63 (Petition on Non-Compliance); CP 158-59 (Notice of Violation); CP 152-56 (Judgment and Sentence). During that lengthy supervision period, Adhahn not only completed substance abuse (CP 352) and sex offender (CP165-66) treatment, he was closely monitored by his CCOs. CP 333-44.

Adhahn provided the sentencing court a letter from therapist Daniel DeWaelsche that informed the court that Adhahn had successfully "completed all aspects of the sex offender treatment program with this agency." CP 165-66. Specifically, the therapist noted that "Terapon has demonstrated that he is using the skills and techniques, gleaned in sex offender treatment, on a day-to-day basis to avoid recidivism." CP 165. Based on Adhahn's completion of the ordered sex offender treatment, on July 8, 1997, Superior Court Judge Karen Strombom entered an Order Terminating Treatment and Supervision. CP 150. Nearly three years later, on May 31, 2000, Adhahn abducted and raped Sabrina Rasmussen. CP 2-3, 24-25.

An outline of relevant dates is as follows:

03-25-90	Commission of crime for which supervision was ordered (CP 152);
09-04-90	Sentenced on Incest charge (CP 155);
11-24-90	Completed 60 day jail sentence (CP 158);
03-07-91	DOC issues Notice of Violation for failing to enter sexual deviancy treatment (CP 158-59);
07-31-91	Completed alcohol treatment (CP 352);
10-29-91	Began sex offender treatment (CP 341);
11-27-91	Incest sentence modified requiring 60 months of sexual deviancy treatment and 60 more months of community supervision (CP 163);

09-03-92	Washington Supreme Court issued its opinion in *State v. Onefrey*, 119 Wn.2d 572, 835 P.2d 213 (1992);[1]
09-09-92	Sentenced on intimidation charge (CP 354);
07-03-97	Completes "all aspects of the sex offender treatment program . . . ." (CP165-66);
07-08-97	Order Terminating Treatment and Supervision entered (CP 150);
05-31-00	Sabrina Rasmussen assaulted (CP 10).

IV. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate if the pleadings, depositions, admissions and affidavits on file show that there exists no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A material fact is one upon which the outcome of litigation depends. *Amant v. Pacific Power & Light Co.*, 10 Wn. App. 785, 786, 520 P.2d 181 (1974), *aff'd*, 84 Wn.2d 872, 529 P.2d 829 (1975). Once the moving party has met its burden, the non-movant must then produce concrete evidence, without merely relying on allegations in the pleadings, that there remain genuine factual issues. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Our supreme court has characterized the facts necessary to oppose a motion for summary judgment as follows:

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[1] *State v. Onefrey*, 119 Wn.2d 572, 835 P.2d 213 (1992), held that a sentencing court in 1990 could not impose a supervision period lasting more than two years in a SSOSA case in which the crime occurred in 1989, as is the case here. The impact of this case to Adhahn's sentence is addressed in detail below.

> A fact is an event, an occurrence, or something that exists in reality . . . . It is what took place, an act, an incident, a reality as distinguished from supposition or opinion . . . . The "facts" required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient . . . . Likewise, conclusory statements of fact will not suffice . . . .

Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (citations omitted). Plaintiff did not – and could not – supply evidence sufficient to avoid summary judgment under these standards in the matter below.

B. Plaintiff's Negligent Supervision Claim Is Unsupported Because She Failed To Prove The Existence Of A Duty Owed To Her By DOC And Because She Failed To Prove That Any Alleged Breach Of A Duty Proximately Caused Her Injuries

The elements of negligence are: (1) a duty owed by the defendant to the plaintiff; (2) breach of that duty; (3) an injury to the plaintiff; and (4) a proximate causal relationship between the defendant's breach and the plaintiff's injury. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). In order to preclude summary judgment, a plaintiff must produce evidence of the existence of each of the four elements. *See Lettengarver v. Port of Edmonds*, 40 Wn. App. 577, 580, 699 P.2d 793 (1985).

Negligent supervision cases such as this are premised on the idea that a duty is created by the "take charge" relationship a supervising agency may have with parolees. *Taggart v. State*, 118 Wn.2d 195, 218,

822 P.2d 243 (1992). By its very nature – the "take charge" relationship – the duty has limitations. That is, if the agency has no relationship with the offender, there can be no duty. "DOC owes a duty to those who are injured during an offender's active supervision, not after it ends." *Hungerford v. State Dep't of Corr.*, 135 Wn. App. 240, 258, 139 P.3d 1131 (2006). The termination of DOC's relationship with Adhahn almost three years prior to his crime against Sabrina Rasmussen is therefore dispositive of plaintiff's claims.

1. DOC's Duty To Plaintiff Ended With The Court Order Terminating Supervision

"In a negligence action the threshold question is whether the defendant owes a duty of care to the injured plaintiff." *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998). Whether a defendant owes a duty of care is a question of law, not a question of fact. *Osborn v. Mason County*, 157 Wn.2d 18, 23, 134 P.3d 197 (2006). When no duty of care exists, a defendant cannot be subject to liability for negligent conduct. *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 438, 874 P.2d 861 (1994). The burden of establishing the existence of a duty is on the plaintiff. *Jackson v. City of Seattle*, 158 Wn. App. 647, 651, 244 P.3d 425 (2010).

The general rule at common law is that a person has no duty to prevent a third person from causing physical injury to another. *Taggart*, 118 Wn.2d at 218. The Washington Supreme Court recognized a narrow exception to this general rule when it held that a parole officer had a duty to control the conduct of a parolee under active supervision based on the "take charge" relationship between the officer and the parolee. The supreme court stated that the duty to prevent crimes by parolees arises from the parolee's relationship to the parole officer who has the statutory authority to supervise the offender, "within the conditions of a parolee's release from custody." *Taggart*, 118 Wn.2d. at 219; *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999). Absent this limited duty, DOC owes no duty in common law or statute to persons injured by offenders under DOC supervision, or by offenders who have been released from DOC supervision.

Plaintiff seeks to extend this narrow exception far beyond the clear limitations set forth in Washington case law. In all cases in which a correctional agency has been held to have a duty to prevent injuries to plaintiffs, the offender was under supervision by the court or the agency at the time the injuries were inflicted. DOC is aware of no appellate court that has ever concluded that once an offender is under the supervision of a correctional agency, the agency is forever responsible for all crimes the

offender commits for the rest of his or her life. Yet, this would be the result if this court were to adopt the rule plaintiff advances. Instead, the duty is premised on the concurrent existence of a "take charge" relationship and a tortious act. When the legal authority to control the offender's behavior ends, so, too, ends the duty. *Hungerford*, 135 Wn. App. at 258.

Despite plaintiff's claims to the contrary, *Hungerford* is controlling. In *Hungerford*, the estate of Jane Hungerford-Trapp sued DOC alleging it failed to adequately supervise an offender named Cecil Davis. *Id.* at 247. DOC began to supervise Davis in 1990 for felony assault. *Id.* In July of 1992, Davis completed his sentence and probation, but still had outstanding legal financial obligations. *Id.* In December 1992, Davis pled guilty to a gross misdemeanor. *Id.* Davis was sentenced to two years of probation, along with legal financial obligations. *Id.*

Davis was at-large for approximately one year, before being arrested on suspicion of assault and rape in December 1993. *Id.* Davis remained incarcerated pending trial until February 1995 when he was released from custody. *Id.* at 247-48. Two days following his release from incarceration, DOC reported that Davis had failed to make payments on his misdemeanor legal financial obligations. *Id.* at 248. A warrant was issued for Davis'

arrest. *Id.* On June 4, 1995, Davis was arrested for domestic violence assault and on the outstanding warrant. *Id.*

On June 5, 1995, the court held a hearing and found that Davis' failure to pay was not willful and entered an order ending his "direct supervised probation" – but allowed his supervision for purposes of legal financial obligations to continue. *Id.* Like plaintiff here, *Hungerford* argued that alleged negligent acts that allowed supervision to end are a basis for imposing a duty of care for injuries that occur after supervision actually does end. The *Hungerford* court rejected that argument.

> Hungerford argues that DOC breached that duty before June 5, 1995, and that this breach caused Hungerford-Trapp's death even though Davis was no longer under direct supervision. Although phrased as a question of proximate cause, Hungerford's argument also asks us to expand DOC's duty to supervise. Hungerford would have us impose a general duty on DOC to report probation violations and extend probation in order to prevent crimes that may occur after active probation supervision ends. We decline to do so.

Hungerford, 135 Wn. App. at 257 (emphasis added). In an attempt to bypass this dispositive legal principle, plaintiff mistakenly argues that the court's holding in *Hungerford* is dicta. Plaintiff is incorrect because that holding was necessary to the court's decision.

That court stated as follows: "We *hold* that once that special relationship ends, the exception to the public duty doctrine expires.

Therefore, DOC did not owe a duty to [plaintiff] after DOC's take charge relationship with [the offender] ended." *Id.* at 258 (emphasis added). Likewise, that holding is derived from prior supreme court precedent, which linked the duty to control an offender's dangerous propensities with the actual legal authority to do so. *See Taggart*, 118 Wn.2d at 218; *Hertog*, 138 Wn.2d 265. The *Hungerford* court repeated that holding:

> *We hold that the duty to supervise does not require DOC to prevent future crimes an offender might commit after his supervision ends* even when the offender is placed on LFO status. DOC owes a duty to those who are injured during, not after, an offender's active supervision ends.

Id. at 258 (emphasis added). The court's decision in *Hungerford* is consistent with prior negligent supervision cases.

In *Couch v. Washington Dep't of Corr.*, 113 Wn. App. 556, 54 P.3d 197 (2002), *review denied,* 69 P.3d 874 (2003), DOC was supervising the same violent offender who was the assailant in *Hungerford.* The offender murdered Mrs. Couch. The Couch family claimed that DOC was liable because the offender could have been in jail at the time of the murder if DOC had informed the sentencing court of the offender's failure to report and pay his LFOs.

The *Couch* court held that DOC did not have a duty to prevent the new crime because the agency did not have a "take charge" relationship with the offender as required by *Taggart. Couch*, 113 Wn. App. at 569.

The court held that the conditions of supervision determined whether DOC had "taken charge" of the offender and had a duty to prevent the crime by the offender. *Couch*, 113 Wn. App. at 565. The court stated:

> To determine whether a supervising officer has "taken charge" of an offender within the meaning of *Taggart v. State* and *Restatement* §§ 315 and 319, a court must examine "the nature of the relationship" between the officer and that person, including all of that relationship's "[v]arious features." In most cases, two of the most important features, though not necessarily the only ones, will be the court order that put the offender on the supervising officer's caseload and the statutes that describe and circumscribe the officer's power to act. *A community corrections officer must have a court order before he or she can "take charge" of an offender; and even when he or she has such an order, he or she can only enforce it according to its terms and applicable statutes.*

Couch, 113 Wn. App. at 565 (emphasis added) (footnotes omitted). The *Couch* court further noted, if DOC is not authorized to intervene, it cannot have a duty to do so. *Couch*, 113 Wn. App. at 569; *see also Stenger v. State*, 104 Wn. App. 393, 404, 16 P.3d 655 (2001) (absent the ability, a defendant does not have the duty to control the conduct of a third person).

Again, the basis for imposing the duty in negligent supervision cases is the courts' perceived ability of the parole officer to control the conduct of the parolee while the parolee is under an agency's supervision. A necessary corollary to that is when the parole supervision terminates, so

does the supervising agency's duty inasmuch as the agency no longer has any legal ability to control the parolee.

This same proposition has previously been recognized by the court in *Plotkin v. State Dep't of Corr.*, 64 Wn. App. 373, 826 P.2d 221 (1992). In *Plotkin*, while discussing the plaintiff's claims, the court stated:

> [Plaintiff] did not allege negligent supervision of [the parolee], as opposed to negligent reporting to the Board, and indeed, it appears she could not have done so. [The parolee] was not on active supervision after 1981, and not on any supervision at the time of the assault.

Plotkin, 64 Wn. App. at 376. Without the existence of a court-imposed supervision requirement, there can be no duty to an offender's future victims.

The supreme court agrees: "The mere existence of some ability to control a third party is not the dispositive factor in determining whether a take charge duty exists; rather, the purpose and extent of such control defines the relationship for purposes of tort liability." *Sheikh v. Choe*, 156 Wn.2d 441, 453, 128 P.3d 574 (2006), citing *Taggart*, 118 Wn.2d at 220.

This case presents facts even more persuasive than those in the cases cited above. Here, a court order had relieved DOC of all responsibility in supervising Adhahn almost three years prior to the time he intentionally abducted and raped Sabrina Rasmussen (CP 150). Pursuant to that Order, defendant had no legal obligation or ability to

control Adhahn in any manner. That is, both legally and practically, DOC had neither the ability nor the duty to control the conduct of Adhahn at the time of his intentional criminal acts. Consequently, there was no duty owed by DOC to plaintiff. Absent such a duty, plaintiff's claim fails.

Plaintiff attempts to reframe this negligence issue by arguing her case is simply founded upon "basic negligence principles." Basic negligence principles, including that a party is not responsible for harm intentionally caused by a third party, establish that DOC owed no duty to plaintiff. It is only if she can show an *exception* to basic negligence principles that her claim can stand. As discussed above, she cannot show such an exception, and her claim thus fails.

Nor is the court's holding in *Hungerford* contrary to *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), as plaintiff suggests. *Peterson* involved a psychiatrist's release of a patient while knowing that the patient posed a danger and a resulting accident that occurred only five days after that release. *Petersen,* 100 Wn.2d at 424. However, *Taggart* exposes plaintiff's misplaced reliance on *Petersen* and the Restatement of Torts because both were considered in *Taggart.*

In *Taggart*, the court confronted the issue of whether DOC owed a duty of care to members of the public injured by parolees based upon the relationship between a parole officer and the offender under supervision.

Taggart, 118 Wn.2d at 217. The court began its analysis by noting that the public duty doctrine normally precludes liability for breach of a duty that is owed to the public at large. *Id.*

The court then recognized that exceptions to the public duty doctrine exist and focused its analysis on *Petersen* and the Restatement of Torts. *Id.* Ultimately, the court decided to extend the special relationship exception to the public duty doctrine it found in *Petersen* (based upon the *Restatement (Second) of Torts* § 315) to the situations where DOC is supervising offenders. *Id.* As noted above, in doing so, the State Supreme Court specifically limited the imposition of a duty to cases involving a "definite, established *and continuing relationship between the defendant and the third party [offender].*" *Id.* at 219 (citing *Honcoop v. State,* 111 Wn.2d 182, 193, 759 P.2d 1188 (1988)). Thus, neither *Petersen* nor § 315 of the *Restatement of Torts* support Plaintiffs' argument that a duty of care is owed after active supervision ends. Under *Taggart*, the duty to exercise reasonable care to control a dangerous offender arises under § 319 of the *Restatement of Torts*.

Furthermore, contrary to plaintiff's assertions, there is no nebulous duty owed by the government to prevent harm to citizens.

> Assuredly, Mason County has a "duty" to protect its citizens in a colloquial sense, but it does not have a *legal* duty to prevent every foreseeable injury . . . . An "action

> for negligence does not lie unless the defendant owes a duty of care to the plaintiff," . . ., and "a broad general responsibility to the public at large rather than to individual members of the public" simply does not create a duty of care.

Osborn v. Mason County, 157 Wn.2d 18, 28, 134 P.3d 197 (2006) (citations omitted). *Osborn* presented a more direct relationship in terms of proximity in time and control than the one presented here. Nevertheless, the supreme court affirmed summary judgment in favor of Mason County. Plaintiff's "basic negligence" argument is unsupported.

Despite these holdings, plaintiff requests that this court unilaterally expand the duty of DOC (and every other municipality in Washington that supervises offenders) to face legal liability in perpetuity for every bad act a former offender may commit. Plaintiff's invitation to expand "negligent supervision" duty should be rejected.

2. The Plaintiff Failed To Establish That The Breach Of A Duty By DOC Was The Factual Or Legal Cause Of Her Injuries When Supervision Of Her Assailant Ended Almost Three Years Prior To Her Injuries

Even if this court were to find that DOC owed a duty to plaintiff, her claim would still fail on summary judgment because she did not establish that a breach of the duty owed to her proximately caused her injuries. "A plaintiff in a negligent parole supervision action must prove the inadequate supervision proximately caused the complained-of

injuries." *Bell v. State*, 147 Wn.2d 166, 52 P.3d 503 (2002). A cause is "proximate only if it is both a cause in fact and a legal cause." *Gall v. McDonald Indus.*, 84 Wn. App. 194, 207, 926 P.2d 934 (1996), *review denied,* 131 Wn.2d 1013 (1997).

Cause in fact refers to the "but for" consequences of an act – the physical connection between an act and an injury. There must be evidence that some act or omission of the defendant produced injury to the plaintiff in a direct, unbroken sequence under circumstances where the injury would not have occurred "but for" the defendant's act or omission. *See* WPI 15.01 (5th ed.); *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Cause in fact "does not exist if the connection between an act and the later injury is indirect and speculative." *Estate of Bordon v. State, Dep't of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004), *review denied,* 154 Wn.2d 1003 (2005). It is reversible error to deny summary judgment when speculation is required to find factual causation. *See Rasmussen v. Bendotti,* 107 Wn. App. 947, 959, 29 P.3d 56 (2001).

The second prong of proximate cause analysis, legal causation, "involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact." *Hartley,* 103 Wn.2d at 779 (emphasis in original). Legal causation "[is] a question of law" for the court (*McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 359, 961 P.2d

952 (1998)) and involves "logic, common sense, justice, policy, and precedent." *Rasmussen*, 107 Wn. App. at 959. One of the policy considerations is how far the consequences of a defendant's acts should extend. *Hartley,* 103 Wn.2d at 779. Plaintiff's claims here fall short in both respects for many reasons including the simple fact that Adhahn left DOC supervision almost three years before he committed the intentional criminal acts against plaintiff.

a. Plaintiff Cannot Prove That Adhahn Would Have Been In Jail Or Deported If DOC Had Supervised Adhahn Differently And Thus Cannot Prove Factual Causation

Cause in fact exists if a plaintiff's injury would not have occurred "but for" the defendant's negligence. *Walker v. Transamerica Title Ins. Co., Inc.*, 65 Wn. App. 399, 403, 828 P.2d 621 (1992). There is no cause-in-fact if the connection between an act and the later injury is indirect and speculative. *See Walters v. Hampton*, 14 Wn. App. 548, 555, 543 P.2d 648 (1975). Plaintiff's causation theory here is apparently that closer or different supervision would have prevented Adhahn from committing further crimes almost three years after the supervisory relationship ended. That same theory was rejected in *Bell*, 147 Wn.2d 166, and *Estate of Bordon,* 122 Wn. App. at 240 (see discussions below). More particularly,

plaintiff has no evidence to support that theory, the theory is entirely speculative, and fails for the reasons outlined below.

A plaintiff must prove two elements to establish a negligent supervision case. First, the plaintiff must demonstrate that there was a violation of the conditions of supervision by the offender that was not reported to the court. *Kelley v. State*, 104 Wn. App. 328, 336-37, 17 P.3d 1189 (2000). Second, the plaintiff must prove that if the violation had been reported to the court, the offender would have been incarcerated up to and including the date that the plaintiff was injured. *Bell*, 147 Wn.2d at 179. Therefore, even in a case where there is evidence that the offender violated conditions of supervision, the plaintiff must still prove that reporting the violation would have prevented the offender from being able to harm the plaintiff.

In *Bell*, a woman claimed she had been sexually assaulted by an offender on parole supervision for a prior conviction of kidnapping and rape. *Bell*, 147 Wn.2d at 170. The plaintiff alleged in *Bell* that the offender would not have had the opportunity to attack her because adequate supervision would have discovered parole violations by the offender that would have justified restrictive measures to limit his freedom. *Bell*, 147 Wn.2d at 171-72. In other words, plaintiff contended the offender's parole would have been revoked and the offender would

have been in prison on the day he assaulted plaintiff. While the jury found DOC breached its duty to supervise the offender, the jury also concluded the plaintiff failed to prove negligent supervision was a proximate cause of her injuries. *Bell*, 147 Wn.2d. at 183.

On appeal, the plaintiff contended that the jury should have been instructed as to the burden of proof at a parole revocation hearing. *Bell*, 147 Wn.2d. at 175-79. The court disagreed and held that the standard of proof at a revocation hearing was irrelevant to the issue of causation because it does not answer the question of whether parole would have been revoked. *Bell*, 147 Wn.2d. at 178. *Bell* instructs, therefore, that it is not sufficient to present evidence that a violation has occurred for which parole *could* have been revoked, the plaintiff must present evidence from which the jury can conclude that parole *would* have been revoked in order to meet the burden of proving causation.

More recently, in *Bordon*, 122 Wn. App. at 240-47, the court of appeals held that a plaintiff in a negligent supervision case must present competent evidence that an offender would have been incarcerated at the time of his or her tortious conduct in order to survive a CR 50 motion for judgment as a matter of law on causation. In *Bordon*, the court noted that evidence that "some violations" may be punishable with up to 15 days in jail is insufficient. *Id.* at 241. Moreover, the plaintiff did not present

evidence about when a violation report would have been filed or when it would be heard. Nor did plaintiff present evidence that any jail sanction necessarily would have encompassed the date the tort occurred. *Id.* Under the circumstances, the court concluded that "this lack of evidence requires a jury to guess" about whether and when a violation would have been pursued and what a judge would have done if he or she had known about the violation. *Id.* at 241-42. The same is true in this case.

(1) Plaintiff Cannot Prove That If DOC Reported Violations To The Sentencing Court, Adhahn Would Have Been In Jail On The Day He Assaulted Her

Plaintiff offered no admissible evidence that Judge Strombom, the sentencing judge, would have revoked Adhahn's fourteen month suspended sentence based on the alleged supervision violations. In other words, regardless of the number and quality of the violations plaintiff could have established Adhahn committed during his period of supervision, plaintiff failed to establish that Adhahn would have been in jail as a result of those parole violations at the time he assaulted Sabrina Rasmussen in 2000, when Adhahn's supervision ended in 1997.[2]

[2] Note also the plaintiff's so-called expert offered no opinion that Adhahn would have been incarcerated on the day Ms. Rasmussen was assaulted, even though that declarant, William Stough, states repeatedly that had the sentencing court knew certain things "Adhahn's SSOSA would be revoked on the spot." CP 218, ll. 28-29; *see also* CP 220, ll. 13-14; 216, ll. 21-24. Instead, plaintiff's expert merely opines that Adhahn "would never have been on the street at the time of the brutal rape and murder of Zinaida

Regardless of whether the misdemeanor intimidation charge in 1992 was reported to the court as a violation, the most that could have happened was that Adhahn's SSOSA sentence could have been revoked by the court and the remainder of the fourteen month suspended incarceration time imposed. If those things were to happen, Adhahn still would not have been incarcerated at the time he assaulted Sabrina Rasmussen. That is, had Adhahn's SSOSA been revoked following the 1992 misdemeanor conviction, his supervision time would have been shorter than the nearly seven years it did last and would have ended well before Adhahn's assault on Ms. Rasmussen. Revocation of Adhahn's suspended sentence of 14 months incarceration was the most serious sanction available to the court. Consequently, Adhahn would have been in jail until, at most, 12 months[3] after September 9, 1992 (the date he was convicted of the intimidation with a weapon charge).

[Linnik]." CP 219, ¶12. Ms. Linnik's murder occurred in 2007 (CP 279) – seven years *after* Adhahn had assaulted plaintiff here. There are no set of circumstances under which Adhahn could have been incarcerated for the 1990 incest conviction during the period encompassing both Ms. Rasmussen's assault in 2000 and Ms. Linnik's murder in 2007. Of course, Mr. Stough's opinions about what a judge would have done have been previously ruled inadmissible by this court in any event. *Bordon*, 122 Wn. App. at 246-47 ("The trial court was thus well within its discretion when it refused to allow Stough to testify about what a judge would have done in the SRA violation hearing if the CCO had reported Jones' driving condition violation to the court. This testimony would clearly have been beyond his expertise and merely speculative.").

[3] Plaintiff had already served 60 days of his sentence in confinement in the Pierce County Jail, which would have been credited against the 14 month incarceration period. CP 155.

State v. Onefrey, 119 Wn.2d 572, 835 P.2d 213 (1992), demonstrates how entirely speculative plaintiff's claim is. In *Onefrey*, our supreme court allowed a defendant to appeal his standard range sentence to argue that the trial court erroneously interpreted SSOSA to preclude him from eligibility. *Onefrey*, 119 Wn.2d at 573-74. The trial court had determined that Onefrey would benefit from treatment and that a prison sentence would not benefit society. But, because the treatment provider recommended a treatment term of ten years, the court found that it could not order community supervision for enough time to treat Onefrey successfully because SSOSA did not provide for an exceptional sentence at that time. *Onefrey*, 119 Wn.2d at 573-74. The supreme court agreed. *Onefrey*, 119 Wn.2d at 577. The supreme court held that "Under SSOSA, the trial court is not permitted to fashion conditions such that the length of time spent in treatment exceeds that provided for in the statutory language." *Onefrey*, 119 Wn.2d at 576.

At the time Adhahn committed the crime for which he was under supervision, former RCW 9.94A.120(7)(a), provided that "the court may suspend the execution of the sentence and place the offender on community supervision for *up to two years*." *See* Appendix (emphasis added). Therefore, Adhahn's sentencing court did not have the authority to impose an exceptional sentence of five years supervision and treatment.

In other words, because Adhahn's treatment requirement was "60 months" (five years), as a matter of law he did not qualify for the SSOSA sentence combined with an "exceptional sentence" as ordered in 1990. *See* CP 153. As the supreme court in *Onefrey* noted: "If Onefrey could not be treated within the requisite 2 years, then he was outside the population that the Legislature intended to be eligible for SSOSA." *Onefrey*, 119 Wn.2d at 577.

The result of those legal restrictions here are dispositive of plaintiff's claims because they conclusively establish that Adhahn could not have been incarcerated on May 31, 2000, for any violations relating to his 1990 Incest conviction. This factual and legal reality is best illustrated as follows: Adhahn is sentenced on September 4, 1990. CP 155. The sentencing court imposed a term at the top end of the standard range of 14 months. *See* CP 153 and 155. By statute, the sentencing court could only impose a supervision and treatment term of two years. Former RCW 9.94A.120(7)(a); *Onefrey*, 119 Wn.2d at 577. Had a two year supervision term been imposed and all other sentence provisions remained the same, the supervision term would have expired on November 4, 1992 (two years plus two months tolling while Adhahn was confined in the Pierce County Jail). Assuming for purposes of this illustration that the sentencing judge learned of the intimidation charge

and then imposed the maximum sanction provided by law – revocation of the suspended sentence – Adhahn would have been confined for 12 months (14 months minus the two months [60 days] already spent in confinement),[4] Adhahn would have been relieved of all legal obligations relating to his 1990 incest charge by approximately the end of 1993.

The above illustration is applicable to plaintiff's case in at least three ways. First, it demonstrates that, as a matter of law, there was at a minimum, seven years of time that Adhahn could not have been supervised by DOC before he committed his assault on plaintiff. That is, just as the court stated in *Couch*:

> The judge sentenced Davis to the maximum allowed by law, so even if he had known more, he could not have done more; and if he could not have done more, the alleged failure to inform him bears no causal relation whatever to the harm later suffered by Couch.

Couch, 113 Wn. App. at 573. Second, any violations alleged (but unproven) by plaintiff beginning in 1994 are wholly irrelevant to the negligent investigation claim. Third, the illustration demonstrates how completely speculative plaintiff's liability claim is. There are simply no facts that can show that Adhahn would have been in jail on May 31, 2000.

[4] Note that this calculation does not include any "good time" credit, which is likely in almost all cases.

(2) Plaintiff Cannot Prove That If DOC Had Done Something Differently Adhahn Would Have Been Deported And Out Of The United States On The Day He Assaulted Her

In an apparent concession that the laws and facts relating to supervision do not support that Adhahn would have been in jail on the day he committed his assault on plaintiff, plaintiff attempts to argue that, had DOC done *its* job, Adhahn would have been deported. However, DOC clearly has no legal ability or authority to deport (remove) anyone from the United States. Rather, such proceedings necessarily are governed by federal laws, instituted by federal agencies, and decided upon by federal courts.

Plaintiff's legal theory here is very different from "negligent supervision" cases examined by Washington courts where DOC is alleged to have failed to arrest for or report violations of an existing judgment and sentence.[5] Instead, plaintiff attempts to expand that duty by asking this court to now require DOC to not only report all crimes to, presumably, the Immigration and Customs Enforcement (ICE), but also to ensure that the

[5] Plaintiff's deportation/removal argument is unsupportable also as a matter of policy. Plaintiff cites *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992), for the proposition that an agency must supervise an offender so as to protect others from the risk of harm from the offender. *See* Appellant's Opening Brief at 34. However, deportation – unlike incarceration – protects no one other than potential victims in the jurisdiction from which the offender may be removed. Such a proposition is contrary to the premise of negligent supervision liability as it is generally applied in this State.

offender is thereafter deported or removed from the United States by that or another federal agency. Plaintiff's proposition is preposterous and unworkable.

Contrary to plaintiff's assertions, DOC has no legal *duty* to report an offenders' immigration status as a matter of law. By statute, when an offender like Adhahn is not committed to DOC custody, DOC has no duty to inquire or report that offender's status to a United States immigration officer. RCW 10.70.140. Even if there were a duty, plaintiff could not establish causation because the uncontested facts demonstrate that a United States immigration officer knew of Adhahn's arrest in 1992 for the misdemeanor intimidating offense but the federal agency chose to not act. CP 532-33.

Similarly, plaintiff cannot establish that a failure by the state to report Mr. Adhahn's status to a United States immigration officer in 1990 or 1992 contributed in any manner to Ms. Rasmussen 's injuries in 2000. As our supreme court recently noted:

> Even if an *undocumented* immigrant is apprehended, removal from the United States is not a foregone conclusion. The immigrant still faces removal proceedings in front of an immigration judge. Even if an immigrant is deportable, removal can still be canceled in some cases.

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 670, 230 P.3d 583 (2010) (emphasis added, citations omitted). It is even more speculative here that

Adhahn would have been deported because, as a legal resident, there were more opportunities for Adhahn to avoid removal. *See* CP 534-39.

Perhaps more illustrative than the supreme court's comment in *Salas* that the certainty of deportation is tenuous at best, is that same court's recognition that "The Department of Homeland Security (DHS) estimates there were 11.6 million unauthorized immigrants residing in the United States as of January 2008." *Id.* Thus, plaintiff has no factual basis to opine whether Adhahn would have been in Tacoma, Washington on a particular day eight years after a theoretical 1992 deportation was possible. *See Bordon*, 122 Wn. App. at 246-47.

Furthermore, the record below demonstrates the speculative nature of plaintiff's "deportation" argument given Adhahn's citizenship and the unlikely impact his crimes may have had on his status. As a matter of law, "Adhahn's incest conviction would not have been a conviction that would subject Adhahn to *deportation proceedings*, much less *mandatory deportation*." CP 536-37. Also, "even if Mr. Adhahn had been convicted of failure to register [as a sex offender] during the 1990 to 2007 period, the conviction, or even multiple convictions for this offense would not have constituted the second CIMT [(crime of moral turpitude)] conviction, which would have made Adhahn subject to deportation/removal proceedings." CP 537.

Plaintiff's deportation argument rests on a series of speculative and unpredictable variables. In addition, that argument is based on a flawed understanding of immigration law. CP 534-39. For plaintiff's deportation argument to withstand any level of scrutiny, the record would have to demonstrate that: (1) Adhahn would have been subject to mandatory detention *if* he was apprehended for, and/or convicted of, any of the crimes which plaintiff assumes would have resulted in conviction, and (2) those crimes would have been reported to ICE, and (3) removal proceedings would been initiated against Adhahn, and (4) those removal proceedings would not have been overturned on appeal, and (5) Adhahn would have left the United States, and (6) Adhahn would not have returned to the United States prior to his assault on plaintiff. Given the pure conjecture inherent in each of these steps, plaintiff failed to meet the burden of proving that DOC's actions caused, in fact, her injury.

Again, regardless of the number of violations that may or may not have occurred during Adhahn's supervision period from 1990 to 1997, taken together or separately, there is no admissible evidence that can demonstrate Adhahn would have been taken into custody, whether a court would have imposed any jail sanction, what the duration of a theoretical jail sanction would have been, whether the timing of any jail sanction would have been coincident with the assault of Sabrina Rasmussen;

whether any of those crimes were "removable" offenses; if the crimes were removable offenses, that ICE would have decided to pursue removal; that the removal proceedings would have been successful; that the removal proceedings would not have been overturned on appeal; and that even if he were removed, that Adhahn would not have returned legally or illegally prior to the date of his assault on plaintiff.

Proof of the precise alignment of all the necessary variables that must have occurred to support plaintiff's deportation or negligent supervision claim requires "rank speculation" and is insufficient to withstand summary judgment. *See Hungerford*, 135 Wn. App. at 258. Proof of causation is a legal and practical impossibility under these facts. Plaintiff's claim against the Defendant DOC was properly dismissed.

b. Policy And Precedent Dictate That DOC Was Not The Legal Cause Of Plaintiff's Injuries Because The Connection Between DOC's Alleged Failures And Plaintiff's Injuries Is Too Remote

Even if DOC owed a duty to plaintiff, and even if plaintiff could somehow prove factual causation, plaintiff cannot show legal causation. Legal causation is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Schooley v. Pinch's Deli Market*, 124 Wn.2d 468, 478, 951 P.2d 749 (1998). The focus is on whether as a matter of policy, the connection between the ultimate result

and the act of the defendant is too remote or unsubstantial to impose liability. *Id.* A determination of legal liability will depend upon "mixed considerations of logic, common sense, justice, policy and precedent." *Hartley,* 103 Wn.2d at 779.

In *Hartley*, the court held that the State was not liable to the estate of a person killed by a drunk driver whose license was renewed when there was clearly cause for revocation due to numerous drunk-driving arrests. *Id.* at 770. The court concluded that "the failure of the government to revoke Johnson's license [was] too remote and insubstantial to impose liability for Johnson's drunk driving." *Hartley,* 103 Wn.2d at 784. The court went on to state:

> While a license is necessary for anyone wishing to drive an automobile legally in this state, a license does not grant authority to disobey the law. [citations omitted.] The failure to revoke Johnson's license (even assuming that Johnson would have honored the revocation and not driven) is simply too attenuated a causal connection to impose liability.
> . . . Public policy considerations also dictate against liability in this case. The government would be open to unlimited liability were we to hold potentially liable every decision by a prosecutor of the DOL to delay proceedings [to revoke a license].

Id. at 785.

Similarly, the connection between DOC's conduct in this case – the alleged failure to properly supervise Adhahn – and the plaintiff's

injuries are simply too remote to impose liability as a matter of common sense or policy. The speculative opinions of plaintiff's expert cannot carry a case to the jury. *Melville v. State*, 115 Wn. 2d 34, 41, 793 P.2d 952 (1990). Prior cases in which liability has been asserted against the State based on negligent supervision of an offender have involved offenders who were under supervision at the time of the alleged injurious acts.

These cases establish a limited exception to the general principle of negligence that a person is not responsible for the intentional acts of a third party, and the requirement that the offender must be under DOC supervision at the time of the offense establishes an outer boundary of where State liability ceases. Plaintiff's theory in this case, like the one rejected in *Hartley*, places no limit whatsoever on potential State liability for acts committed by offenders who have been released from DOC supervision. Here, not only was Adhahn not under DOC supervision, his supervision ended 35 months prior to his criminal assault of Ms. Rasmussen.

Moreover, the significant passage of time between DOC's alleged negligence and Adhahn's intentional, criminal acts shows a lack of legal causation. In a case regarding liability for the criminal acts of a third party, the Washington Supreme Court discussed approvingly a New York decision: "At a minimum, the remoteness in time between the criminal act

and the injury [was] dispositive to the question of legal cause in [that] case." *Kim v. Budget Rent-A-Car Sys. Inc.*, 143 Wn.2d 190, 205, 15 P.3d 1283 (2001), citing *Devellis v. Lucci*, 266 A.D.2d 180, 697 N.Y.S.2d 337, 339 (App. Div. 1999), for the proposition that the "passage of 24 days between the theft of the vehicle and the injury-producing event vitiated any proximate cause between the purported negligence and the accident as a matter of law." *Kim*, 143 Wn.2d at 205. The supreme court in *Kim* also noted – at least in cases where defendants have allowed keys to be left in their vehicles' ignitions – that one "should not be 'answerable in perpetuity for the criminal and tortious conduct of others . . . .'" *Id.* The same analysis applies here.

Here, not only was Adhahn off DOC supervision at the time he assaulted Sabrina Rasmussen, that supervision had ended nearly three years prior by order of Adhahn's sentencing court.[6] The temporal proximity between the alleged failures on the part of DOC and the much later intentional criminal acts of Adhahn, militate against finding legal cause in this case. Similarly, plaintiff's deportation argument requires too many variables and affirmative acts by federal agencies and courts over whom defendant has no control or influence. For all these reasons, as a

[6] Again, after the supreme court's decision in *Onefrey*, the law clearly limited the period of Adhahn's community supervision to two years, which would have required that sentence to be complete after a maximum of 38 months (two years supervision and 14 months confinement), or by November 4, 1993.

matter of policy, the connection between the ultimate result and the act of the defendant is too remote or unsubstantial to impose liability.

3. DOC Does Not Have A Duty To Rehabilitate Offenders While Under Its Supervision

It appears plaintiff is arguing that DOC owes her a duty to rehabilitate offenders who may later cause her injury. However, the court of appeals in *Hungerford* dispensed with this "rehabilitation" theory of liability in negligent supervision cases as follows:

> This rehabilitation argument reveals how tenuous [plaintiff's] cause of action is. By asking us to require DOC to rehabilitate offenders, [plaintiff] would have us turn DOC into a guarantor of future good behavior for all offenders. Even if [plaintiff] could show that DOC's lack of supervision contributed to [the offender's] recidivism, as a matter of policy, the connection between the ultimate result and DOC's action is too remote to establish liability. Accordingly, we hold that as a matter of law, DOC's alleged failure to closely supervise [the offender] and rehabilitate him is not the legal cause of [plaintiff's injury].

Hungerford, 135 Wn. App. at 256; *see also* Melville, 115 Wn.2d 34. The same policy arguments hold true here and are dispositive of all plaintiff's claims against DOC. As a matter of law, DOC's alleged failure to closely supervise Adhahn from 1990 to 1997 and rehabilitate him in the process is not the legal cause of the kidnapping and rape of Sabrina Rasmussen.

Summary judgment was appropriate because plaintiff could not establish a genuine issue of material fact as to whether DOC's alleged

negligence proximately caused plaintiff's injury. CR 56(e); *see also Hungerford*, 135 Wn. App. 240. Plaintiff's claim against defendant DOC is unsupported as a matter of law and was properly rejected.

C. Plaintiff's "Improper Classification" Claim Is Unsupported As A Matter Of Law Because There Is No Duty For DOC To Properly Classify Sex Offenders And, Even If Such A Duty Exists, The Classification Assigned To Adhahn Did Not Proximately Cause Plaintiff's Injuries

There has never been a legal duty on the part of DOC to assign a classification level – properly or otherwise – to sex offenders who are not committed to DOC custody. Plaintiff has not established otherwise. Moreover, even if DOC owed a duty to properly classify a seriousness level to sex offenders – Adhahn in particular – plaintiff cannot show that a failure to do so was a proximate cause of Sabrina Rasmussen's injuries.

The same year Adhahn was first convicted of a sexual offense, the Washington Legislature adopted the sex offender registration requirements found in RCW 9A.44.130. Those requirements then, as they do now, provide that when an offender like Adhahn is "not in custody but under . . . the active supervision of the state department of corrections . . . [the offender] must register within ten days of July 28, 1991." RCW 9A.44.130(3)(a)(ii). A copy of both the 1990 and 2009 versions of RCW 9A.44.130 can be found at CP 171-72 and CP 174-79. That section

does not impose on DOC a duty, nor does it give DOC the authority, to assign a classification level to sex offenders.

Similarly, for "sex offenders in custody," the Legislature required that offenders released from custody "must register within twenty-four hours from the time of release with the county sheriff for the county of the person's residence. The agency that has jurisdiction over the offender shall provide notice to the sex offender of the duty to register." RCW 9A.44.130(3)(a)(i). Nowhere do those statutes require DOC to "classify" a sex offender's level of seriousness. The absence of that requirement is especially true here, because Adhahn was never in DOC custody. Absent a duty at common law or imposed by statute, plaintiff's improper classification claim is unsupported as a matter of law.

In 1997 – the same year the sentencing court released Adhahn from DOC supervision – the Washington Legislature enacted RCW 72.09.345. That statute required the end of sentence review committee to:

> [R]eview each sex offender under its authority before the offender's release from confinement or start of the offender's term of community custody in order to: (a) Classify the offender into a risk level for the purposes of public notification under RCW 4.24.550; (b) where available, review the offender's proposed release plan in accordance with the requirements of RCW 72.09.340; and (c) make appropriate referrals.

RCW 72.09.345(4). However, the statute did not become effective until July 27, 1997 – *after* Adhahn was released from supervision on July 10, 1997. CP 181-83.

This claim also fails because, like plaintiff's negligent supervision claim, there is no set of facts that demonstrate that had Adhahn been classified at a different level by DOC between 1990 and 1997, that would have changed the circumstances of Sabrina Rasmussen's injuries in 2000. First, there is no evidence in the record below that DOC ever assigned a sex-offender classification level to Adhahn and DOC had no obligation to do so. Also, if DOC had classified Adhahn as plaintiff alleges, DOC's classification is merely a recommendation to law enforcement, subject to review and change by the local law enforcement agency. *See* RCW 4.24.550(7) ("Local law enforcement agencies that disseminate information pursuant to this section shall: (a) Review available risk level classifications made by the department of corrections, the department of social and health services, and the indeterminate sentence review board; (b) assign risk level classifications to all offenders about whom information will be disseminated . . . ."). These many variables demonstrate "how tenuous plaintiff's cause of action is" and that they cannot establish proximate cause. *See Hungerford*, 135 Wn. App. at 256.

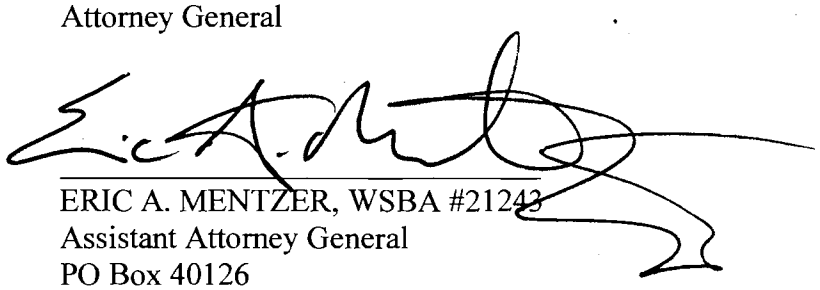
Without proof of proximate cause, plaintiff's improper classification claim fails as a matter of law.

V. CONCLUSION

DOC respectfully requests that this court affirm the trial court's dismissal of plaintiff's claims on each of the grounds discussed above.

RESPECTFULLY SUBMITTED this 2nd day of March, 2012.

ROBERT M. MCKENNA
Attorney General



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PROOF OF SERVICE

I certify that I served a copy of *Respondent's Brief* on all parties or their counsel of record on the date below via United States Mail, with proper postage affixed as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of March, 2012, in Tumwater, Washington.

Michelle Anderson

Michelle Anderson, Legal Assistant to
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Assistant Attorney General

Appendix

criminal history shall be decided at the sentencing hearing. [1981 c 137 § 10.]

Effective date——1981 c 137: See RCW 9.94A.905.

9.94A.110 Sentencing hearing——Time period for holding——Presentence reports——Victim impact statement and criminal history——Arguments——Record. Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The sentencing hearing shall be held within forty court days following conviction. Upon the motion of either party for good cause shown, or on its own motion, the court may extend the time period for conducting the sentencing hearing. The court shall order the department to complete a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense. The department of corrections shall give priority to presentence investigations for sexual offenders. The court shall consider the presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed. If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record. Copies of all presentence reports presented to the sentencing court and all written findings of facts and conclusions of law as to sentencing entered by the court shall be sent to the department by the clerk of the court at the conclusion of the sentencing and shall accompany the offender if the offender is committed to the custody of the department. Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys. [1988 c 60 § 1; 1986 c 257 § 34; 1985 c 443 § 6; 1984 c 209 § 5; 1981 c 137 § 11.]

Severability——1986 c 257: See note following RCW 9A.56.010.

Effective date——1986 c 257 §§ 17-35: See note following RCW 9.94A.030.

Severability——Effective date——1985 c 443: See notes following RCW 7.69.010.

Effective dates——1984 c 209: See note following RCW 9.94A.030.

Effective date——1981 c 137: See RCW 9.94A.905.

9.94A.120 Sentences. (Effective until July 1, 1990.) When a person is convicted of a felony, the court shall impose punishment as provided in this section.

(1) Except as authorized in subsections (2), (5), and (7) of this section, the court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.

(4) An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years. An offender convicted of the crime of assault in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years. An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than three years, and shall not be eligible for furlough, work release or other authorized leave of absence from the correctional facility during such minimum three year term except for the purpose of commitment to an inpatient treatment facility. The foregoing minimum terms of total confinement are mandatory and shall not be varied or modified as provided in subsection (2) of this section.

(5) In sentencing a first-time offender the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include up to two years of community supervision, which, in addition to crime-related prohibitions, may include requirements that the offender perform any one or more of the following:

(a) Devote time to a specific employment or occupation;

(b) Undergo available outpatient treatment for up to two years, or inpatient treatment not to exceed the standard range of confinement for that offense;

(c) Pursue a prescribed, secular course of study or vocational training;

(d) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(e) Report as directed to the court and a community corrections officer; or

(f) Pay a fine and/or accomplish some community service work.

(6) If a sentence range has not been established for the defendant's crime, the court shall impose a determinate sentence which may include not more than one year of confinement, community service work, a term of community supervision not to exceed one year, and/or a fine. The court may impose a sentence which provides more than one year of confinement if the court finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(7) (a) When an offender is convicted of a sex offense other than a violation of RCW 9A.44.040 or RCW 9A.44.050 and has no prior convictions for a sex offense or any other felony sexual offenses in this or any other state, the sentencing court, on its own motion or the

motion of the state or the defendant, may order an examination to determine whether the defendant is amenable to treatment.

After receipt of the reports, the court shall then determine whether the offender and the community will benefit from use of this special sexual offender sentencing alternative. If the court determines that both the offender and the community will benefit from use of this provision, the court shall then impose a sentence within the sentence range and, if this sentence is less than six years of confinement, the court may suspend the execution of the sentence and place the offender on community supervision for up to two years. As a condition of the suspended sentence, the court may impose other sentence conditions including up to six months of confinement, not to exceed the sentence range of confinement for that offense, crime-related prohibitions, and requirements that the offender perform any one or more of the following:

(i) Devote time to a specific employment or occupation;

(ii) Undergo available outpatient sex offender treatment for up to two years, or inpatient sex offender treatment not to exceed the standard range of confinement for that offense. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment;

(iii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(iv) Report as directed to the court and a community corrections officer;

(v) Pay a fine, accomplish some community service work, or any combination thereof; or

(vi) Make recoupment to the victim for the cost of any counseling required as a result of the offender's crime.

If the offender violates these sentence conditions the court may revoke the suspension and order execution of the sentence. All confinement time served during the period of community supervision shall be credited to the offender if the suspended sentence is revoked.

(b) When an offender is convicted of any felony sexual offense committed before July 1, 1987, and is sentenced to a term of confinement of more than one year but less than six years, the sentencing court may, on its own motion or on the motion of the offender or the state, order the offender committed for up to thirty days to the custody of the secretary of social and health services for evaluation and report to the court on the offender's amenability to treatment at these facilities. If the secretary of social and health services cannot begin the evaluation within thirty days of the court's order of commitment, the offender shall be transferred to the state for confinement pending an opportunity to be evaluated at the appropriate facility. The court shall review the reports and may order that the term of confinement imposed be served in the sexual offender treatment program at the location determined by the secretary of social and health services or the secretary's designee, only if the report indicates that the offender is amenable to the treatment program provided at these facilities. The offender shall be transferred to the state pending placement in the treatment program. Any offender who has escaped from the treatment program shall be referred back to the sentencing court.

If the offender does not comply with the conditions of the treatment program, the secretary of social and health services may refer the matter to the sentencing court. The sentencing court shall commit the offender to the department of corrections to serve the balance of the term of confinement.

If the offender successfully completes the treatment program before the expiration of the term of confinement, the court may convert the balance of confinement to community supervision and may place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

(i) Devote time to a specific employment or occupation;

(ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(iii) Report as directed to the court and a community corrections officer;

(iv) Undergo available outpatient treatment.

If the offender violates any of the terms of community supervision, the court may order the offender to serve out the balance of the community supervision term in confinement in the custody of the department of corrections.

After June 30, 1993, this subsection (b) shall cease to have effect.

(c) When an offender commits any felony sexual offense on or after July 1, 1987, and is sentenced to a term of confinement of more than one year but less than six years, the sentencing court may, on its own motion or on the motion of the offender or the state, request the department of corrections to evaluate whether the offender is amenable to treatment and the department may place the offender in a treatment program within a correctional facility operated by the department.

Except for an offender who has been convicted of a violation of RCW 9A.44.040 or 9A.44.050, if the offender completes the treatment program before the expiration of his term of confinement, the department of corrections may request the court to convert the balance of confinement to community supervision and to place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

(i) Devote time to a specific employment or occupation;

(ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(iii) Report as directed to the court and a community corrections officer;

(iv) Undergo available outpatient treatment.

If the offender violates any of the terms of his community supervision, the court may order the offender to serve out the balance of his community supervision term in confinement in the custody of the department of corrections.

Nothing in (c) of this subsection shall confer eligibility for such programs for offenders convicted and sentenced for a sexual offense committed prior to July 1, 1987.

(8) (a) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense, a serious violent offense, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, the court shall in addition to the other terms of the sentence, sentence the offender to a one–year term of community placement beginning either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.150(1). When the court sentences an offender under this section to the statutory maximum period of confinement then the community placement portion of the sentence shall consist entirely of such community custody to which the offender may become eligible, in accordance with RCW 9.94A.150(1). Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(b) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense, a serious violent offense, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, unless a condition is waived by the court, the sentence shall include, in addition to the other terms of the sentence, a one–year term of community placement on the following conditions:

(i) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(ii) The offender shall work at department of corrections–approved education, employment, and/or community service;

(iii) The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

(iv) An offender in community custody shall not unlawfully possess controlled substances; and

(v) The offender shall pay community placement fees as determined by the department of corrections.

(c) The court may also order any of the following special conditions:

(i) The offender shall remain within, or outside of, a specified geographical boundary;

(ii) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(iii) The offender shall participate in crime–related treatment or counseling services;

(iv) The offender shall not consume alcohol;

(v) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

(vi) The offender shall comply with any crime–related prohibitions.

(d) Prior to transfer to, or during, community placement, any conditions of community placement may be removed or modified so as not to be more restrictive by the sentencing court, upon recommendation of the department of corrections.

(9) If the court imposes a sentence requiring confinement of thirty days or less, the court may, in its discretion, specify that the sentence be served on consecutive or intermittent days. A sentence requiring more than thirty days of confinement shall be served on consecutive days. Local jail administrators may schedule court–ordered intermittent sentences as space permits.

(10) If a sentence imposed includes a fine or restitution, the sentence shall specify a reasonable manner and time in which the fine or restitution shall be paid. Restitution to victims shall be paid prior to any other payments of monetary obligations. In any sentence under this chapter the court may also require the offender to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary (a) to pay court costs, including reimbursement of the state for costs of extradition if return to this state by extradition was required, (b) to make recoupment of the cost of defense attorney's fees if counsel is provided at public expense, (c) to contribute to a county or interlocal drug fund, and (d) to make such other payments as provided by law. The offender's compliance with payment of monetary obligations shall be supervised by the department. The rate of payment shall be determined by the court or, in the absence of a rate determined by the court, the rate shall be set by the department. All monetary payments ordered shall be paid no later than ten years after the most recent of either the last date of release from confinement pursuant to a felony conviction or the date the sentence was entered. Nothing in this section makes the department, the state, or any of its employees, agents, or other persons acting on their behalf liable under any circumstances for the payment of these financial obligations. If an order includes restitution as one of the monetary assessments, the county clerk shall make disbursements to victims named in the order. The restitution to victims named in the order shall

be paid prior to any payment for other penalties or monetary assessments.

(11) Except as provided under RCW 9.94A.140(1), a court may not impose a sentence providing for a term of confinement or community supervision or community placement which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

(12) All offenders sentenced to terms involving community supervision, community service, restitution, or fines shall be under the supervision of the secretary of the department of corrections or such person as the secretary may designate and shall follow explicitly the instructions of the secretary including reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, and notifying the community corrections officer of any change in the offender's address or employment.

(13) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

(14) A departure from the standards in RCW 9.94A.400(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in subsections (2) and (3) of this section, and may be appealed by the defendant or the state as set forth in RCW 9.94A.210(2) through (6).

(15) The court shall order restitution whenever the offender is convicted of a felony that results in injury to any person or damage to or loss of property, whether the offender is sentenced to confinement or placed under community supervision, unless extraordinary circumstances exist that make restitution inappropriate in the court's judgment. The court shall set forth the extraordinary circumstances in the record if it does not order restitution.

(16) As a part of any sentence, the court may impose and enforce an order that relates directly to the circumstances of the crime for which the offender has been convicted, prohibiting the offender from having any contact with other specified individuals or a specific class of individuals for a period not to exceed the maximum allowable sentence for the crime, regardless of the expiration of the offender's term of community supervision.

(17) In any sentence of partial confinement, the court may require the defendant to serve the partial confinement in work release or in a program of home detention. [1988 c 154 § 3; 1988 c 153 § 2; 1988 c 143 § 21. Prior: 1987 c 456 § 2; 1987 c 402 § 1; prior: 1986 c 301 § 4; 1986 c 301 § 3; 1986 c 257 § 20; 1984 c 209 § 6; 1983 c 163 § 2; 1982 c 192 § 4; 1981 c 137 § 12.]

Reviser's note: This section was amended by 1988 c 143 § 21, 1988 c 153 § 2, and by 1988 c 154 § 3, each without reference to the other. All amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date——Implementation——Application of increased sanctions——1988 c 153: See notes following RCW 9.94A.030.

Applicability——1988 c 143 §§ 21-24: "Increased sanctions authorized by sections 21 through 24 of this act are applicable only to those persons committing offenses after March 21, 1988." [1988 c 143 § 25.] Sections 21, 23, and 24 were amendments to RCW 9.94A.120, 9.94A.383, and 9.94A.400, respectively. Section 22, an amendment to RCW 9.94A.170, was vetoed by the governor.

Effective date——1987 c 402: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1987." [1987 c 402 § 3.]

Effective date——1986 c 301 § 4: "Section 4 of this act shall take effect July 1, 1987." [1986 c 301 § 8.]

Severability——1986 c 257: See note following RCW 9A.56.010.

Effective date——1986 c 257 §§ 17-35: See note following RCW 9.94A.030.

Effective dates——1984 c 209: See note following RCW 9.92.150.

Effective date——1983 c 163: "Sections 1 through 5 of this act shall take effect on July 1, 1984." [1983 c 163 § 7.]

Effective date——1981 c 137: See RCW 9.94A.905.

9.94A.120 Sentences. (Effective July 1, 1990.) When a person is convicted of a felony, the court shall impose punishment as provided in this section.

(1) Except as authorized in subsections (2), (5), and (7) of this section, the court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.

(4) An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years. An offender convicted of the crime of assault in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years. An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than three years, and shall not be eligible for furlough, work release or other authorized leave of absence from the correctional facility during such minimum three year term except for the purpose of commitment to an inpatient treatment facility. The foregoing minimum terms of total confinement are mandatory and shall not be varied or modified as provided in subsection (2) of this section.

(5) In sentencing a first-time offender the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include up to two years of community supervision, which, in addition to crime-related prohibitions, may include requirements that the offender perform any one or more of the following:

(a) Devote time to a specific employment or occupation;