FILED
JUL 15 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jul 02, 2015, 3:52 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

**No. 91644-6**

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

[No. 7172-9-I – Court of Appeals, Division I]

---

FRED BINSCHUS, individually and as Personal Representative of the Estate of JULIE ANN BINSCHUS; TONYA FENTON; TRISHA WOODS; TAMMY MORRIS; JOANN GILLUM, as Personal Representative of the Estate of GREGORY N. GILLUM; CARLA J. LANGE, Individually and as Personal Representative of the Estate of LEROY B. LANGE; NICHOLAS LEE LANGE, Individually; ANDREA ROSE, Individually and as Personal Representative of the Estate of CHESTER M. ROSE; STACY ROSE, Individually; RICHARD TRESTON and CAROL TRESTON; and the marital community thereof; BEN MERCADO; and PAMELA RADCLIFFE, Individually and as Personal Representative of the ESTATE OF DAVID RADCLIFFE; TROY GIDDINGS, Individually,

Respondents,

v.

SKAGIT COUNTY, a political subdivision of the State of Washington,

Petitioner,

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS; SKAGIT EMERGENCY COMMUNICATIONS CENTER d/b/a "Skagit 911," an interlocal government agency; OKANOGAN COUNTY, a political subdivision of the State of Washington,

Defendants.

---

# MEMORANDUM OF AMICUS WASHINGTON CITIES INSURANCE AUTHORITY IN SUPPORT OF PETITION FOR REVIEW

---

Attorneys for Amicus, Washington Cities Insurance Authority,

ORIGINAL

Shannon M. Ragonesi, WSBA #31951
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Treatises**

## I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Washington Cities Insurance Authority ("WCIA"), is a municipal organization of Washington public entities that join together for the purpose of providing protection, education, training and risk management to its members, which include cities, towns and public safety answering points for emergency services. It has an interest in this case because if the Court of Appeals decision is allowed to stand, its members will be significantly affected by the expansion of tort liability in the area of providing jail services.

## II. COURT OF APPEALS DECISION

WCIA asks this Court to grant Skagit County's Petition for discretionary review of Division One's published decision and reverse the decision of the Court of Appeals.[1]

## III. STATEMENTOF THE CASE

WCIA adopts the facts set forth by Petitioner Skagit County in its Petition for Review. WCIA further notes that the facts recognized by the Court of Appeals include the fact that Mr. Zamora did not have any behavioral issues while he was in jail, and he did not present a risk to himself or others while in jail.[2] The facts also indicate Mr. Zamora would

[1] *Binschus v. State, Dept. of Corrections*, 186 Wn. App. 77, 345 P.3d 818 (2015).
[2] *Id*, 186 Wn. App. at 86-87.

not take the mood stabilizing medication he was prescribed in jail.[3] Mr. Zamora was released from Okanogan County Jail on August 2, 2008, and did not commit the crimes at issue in this case until September 2, 2008.[4]

## IV. ARGUMENT WHY THIS COURT SHOULD ACCEPT REVIEW

### A. This Case Raises An Issue of Substantial Public Interest Which Should Be Reviewed By The Court.

In this case, the Court of Appeals failed to consider whether legal liability for crimes committed long after an offender is released from jail should attach to his former jailors as a matter of legal policy. Discretionary review is appropriate under RAP 13.4(b)(4) because legal causation is a significant question of law which must be decided.

### B. Legal Causation Is Grounded In Policy Determinations As To How Far The Consequences Of a Defendant's Acts Should Extend – And In This Case – The Court Of Appeals Has Extended Those Consequences Too Far.

Washington law recognizes two elements to proximate cause: Cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777-81, 698 P.2d 77 (1985), citing *Harbeson v. Parke-Davis, Inc.*, 98 Wash.2d 460, 475, 656 P.2d 483 (1983); *Petersen v. State,* 100 Wash.2d 421, 435, 671 P.2d 230 (1983); *King v. Seattle,* 84 Wash.2d 239, 249, 525 P.2d 228 (1974). Cause in fact refers to the "but for" consequences of an act—the

[3] *Id*, at 87.
[4] *Id*, at 87-89.

physical connection between an act and an injury. *King v. Seattle, supra* at 249.

Legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant's acts *should* extend. *Hartley v. State*, *supra* at 779. It involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact. *Id.* If the factual elements of the tort are proved, determination of legal liability will be dependent on "mixed considerations of logic, common sense, justice, policy, and precedent." *Id*, citing *King v. Seattle,* 84 Wash.2d at 250 (quoting 1 T. Street, *Foundations of Legal Liability* 100, 110 (1906)). *See also* W. Prosser, *Torts* 237, 244 (4th ed. 1971).

As the court explained in *Hartley v. State*, duty and legal causation are intertwined and linked to policy considerations. *Id*, at 779-80. The Supreme Court quoted Prosser in noting that it is often helpful to state every question which arises in connection with legal causation in the form of a single question: Was the defendant under a duty to protect the plaintiff against the event which did in fact occur? In this case, the question is: Was the jail under a duty to protect the Respondents from being attacked by an inmate a month after he was released from the jail?

Such a question serves to direct attention to the policy issues which determine the extent of the original obligation and of its continuance,

rather than to the mechanical sequence of events which goes to make up causation in fact. "The entire doctrine [of proximate cause] assumes that a defendant is not necessarily to be held responsible for all the consequences of his acts." *King*, at 250, citing McLaughlin, Proximate Cause, 39 Harv.L.Rev. 149, 155 (1925). As Prosser put it – does the defendant stand in any relation to the plaintiff as to create any legally recognized obligation of conduct for the plaintiff's benefit? *Hartley, at 780*, citing *Prosser* at 244-45. The answer to that question in this case is "no."

1. Jailors Are Responsible For The Safety Of Inmates And Staff Inside The Jail – Not People Outside The Jail.

Washington courts have long recognized a jailor's special relationship with inmates, particularly the duty to ensure health, welfare, and safety. *Gregoire v. City of Oak Harbor*, 170 Wash. 2d 628, 635-36, 244 P.3d 924 (2010). In *Kusah v. McCorkle,* 100 Wash. 318, 325, 170 P. 1023 (1918), the Supreme Court acknowledged that a sheriff running a county jail owes the direct duty to a prisoner in his custody to keep him in health and free from harm. The duty owed "is a positive duty arising out of the special relationship that results when a custodian has complete control over a prisoner deprived of liberty." *Gregoire v. City of Oak Harbor*, at 635, citing *Shea v. City of Spokane,* 17 Wash.App. 236, 242, 562 P.2d 264 (1977), *aff'd,* 90 Wash.2d 43, 578 P.2d 42 (1978).

"[A] city, in operating and maintaining a jail, has a twofold duty: one to the public to 'keep and produce the prisoner when required,' and the other to the prisoner 'to keep him in health and safety.'" *Shea v. City of Spokane*, 17 Wn. App. at 241-42, citing *Kusah v. McCorkle*, 100 Wash. at 323. No Washington case has ever broadened this to a duty to protect the public from new criminal acts committed by the prisoner after he is released from the jail.

Restatement (Second) of Torts § 319 states:

> One who "takes charge" of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

(Quotes added). In its opinion in this case, the Court of Appeals noted the Washington courts have broadened the scope of the "take charge" relationship to exist between correction officers and offenders.[5] The court cites to three cases to illustrate this point.[6] *However these three cases all involved government employees who were specifically tasked with the job of monitoring the conduct of offenders after they were released into the community.* The court was unable to cite to a single case that has

[5] *Binschus v. State*, 186 Wn. App. at 93

[6] *Taggart v. State*, 118 Wn.2d 195, 223-24, 822 P.2d 243 (1992) (parolee assaulted victims after release from jail); *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 281, 979 P.2d 400 (1999) (probationer on pretrial release assaulted young girl); *Bishop v. Miche*, 137 Wn.2d 518, 531, 973 P.2d 465 (1999) (probationer killed child in drunk driving accident).

broadened the scope of the "take charge" relationship to exist between jailors and offenders once the offender leaves the jail, because there is no such precedent. Indeed, it would not be logical to do so as corrections officers take over the supervision of these offenders once they leave the jail.

2. It Is Illogical To Make Jailors Responsible For The Conduct Of Offenders After They Are Released From Jail As Jailors Have No Legal Authority To Dictate Or Control That Conduct.

In the recent decision of *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 344 P.3d 661 (2015), the Supreme Court rejected a broad notice rule requiring landowners to protect business invitees from third party criminal misconduct merely because it is foreseeable that crimes may be committed on their property.

> We recognize the wisdom of the Supreme Court of Michigan when it stated: Subjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten. Because criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere. However, even police, who are specially trained and equipped to anticipate and deal with crime, are unfortunately unable universally to prevent it. This is a testament to the arbitrary nature of crime. Given these realities, it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so, effectively vicariously liable for the criminal acts of third parties.

*McKown*, at 669, citing *MacDonald v. PKT, Inc.*, 464 Mich. 322, 335, 628 N.W.2d 33 (2001).

Just as landowners are not deputized to engage in law enforcement and crime prevention in the community, neither are jailors. They have no authority to act once an inmate is released from confinement. They certainly have no authority to ensure compliance with mental health treatment or medications once inmates are no longer under their control. Their only authority to require treatment for mental illness is for the benefit of the inmates and jail staff while in custody because the inmate does not have the freedom to obtain the treatment for himself and could present a danger to the jail population. Yet in its opinion, the Court of Appeals has essentially created a broad notice rule with regard to jail liability for future criminal acts by mentally ill former inmates – simply because it is foreseeable that some inmates with mental illnesses may commit crimes after being released from jail. This is contrary to the Court's ruling in *McKown*.

3. The Large Gap In Time Between Zamora's Release From Jail And His Later Crimes Defeats The Possibility Of Legal Causation In This Case.

In *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn. 2d 190, 204-06, 15 P.3d 1283 (2001), *as amended* (Jan. 31, 2001), a car rental agency left keys in one of its rental vehicles and an offender stole the vehicle. The

next day, the offender consumed alcohol and marijuana, caused an accident, attempted to flee from police, and caused a second accident that severely injured the plaintiff. The court held the remoteness in time between the criminal act and injury (one day) was dispositive to the question of legal cause. In so doing, the court stated, "Even if it were negligent for Budget to leave the keys inside of its minivan, 'the responsibility for such negligence must terminate at some time in the future...'" *Id*, at 205, citing *Gmerek v. Rachlin*, 390 So.2d 1230, 1231 (Fla. App. 1980). The court found it significant that the offender went home, went to sleep, and became intoxicated before causing the accident that injured the plaintiff.

The same policy concern applies in this case – times 30. Mr. Zamora was released from the Okanogan County Jail on August 2, 2008. He did not commit the crimes at issue until 30 days later on September 2, 2008. Common sense and justice dictate that a jail cannot be answerable in perpetuity for the criminal conduct of its former inmates. Particularly since the jail has no control over its former inmates once they leave the cell block.

4. Inmates Cannot Be Forced To Take Antipsychotic Medication Unless It Is Necessary To Ensure The Safety Of The Inmate, Other Prisoners, Or Prison Staff.

Inmates possess a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment. *Washington v. Harper*, 494 U.S. 210, 221-22 (1990). In *Washington v. Harper*, the U.S. Supreme Court stated that where an inmate's mental disability is the root cause of the threat he poses **to the inmate population**, the state's interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness. *Id*, at 225-26. "We hold that, **given the requirements of the prison environment**, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Id*, at 227 (emphasis added). The Court made no mention of a jail having any authority to force medical treatment or antipsychotic drugs on inmates to protect the general public once they are released from jail. This is likely because this would be an infringement on the inmates' constitutional rights. It could also send treatment of mentally ill offenders in jail back to the dark ages with forced medications and treatments against their will

merely because they have a mental illness, regardless of whether they have actually demonstrated any behavioral problems or violent tendencies.

Here, the facts cited by the Court of Appeals indicate Mr. Zamora did not have any behavioral issues while in jail, and he did not present a risk to himself or others while in jail. He also refused to take the mood stabilizing medication he was prescribed. Yet, despite acknowledging these facts, the Court of Appeals ruled a jury could still decide the jail was negligent for failing to evaluate, treat and administer antipsychotic drugs to Mr. Zamora while he was at the jail. This conflicts with well-established precedent and constitutional law. Without the required threat to the jail environment, a jailor cannot force medical treatment or antipsychotic drugs on inmates against their will, and certainly not as a means to try and protect future possible crime victims in the general public after the inmate is released.

## V. CONCLUSION

For the policy reasons set forth above which establish a lack of legal causation in this case, and for the reasons provided by Skagit County it its petition for review, WCIA respectfully requests that the Court grant the Petition for Discretionary Review and reverse the Court of Appeals decision in this case.

Respectfully submitted this 2nd day of July, 2015.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

By: /s/ *Shannon M. Ragonesi*
Shannon M. Ragonesi, WSBA #31951

## CERTIFICATE OF SERVICE

I declare that on June 30, 2015, a true and correct copy of the foregoing document was sent to the following parties of record via electronic mail and U.S. mail:

| | |
|---|---|
| John E. Justice<br>Law Lyman Daniel Kamerrer, et al.<br>P.O. Box 11880<br>Olympia, WA 98508<br>jjustice@lldkb.co, | Jaime D. Allen<br>Davis Wright Tremaine LLP<br>1201 Third Ave, Ste 2200<br>Seattle, WA 98104<br>jaimeallen@dwt.com |
| Arne O. Denny<br>Skagit County Prosecutor's Office<br>605 S Third St<br>Mount Vernon, WA 98273<br>arned@co.skagit.wa.us | Dean Brett<br>Brett Murphy Coats Knapp<br>McCandlis & Brown<br>P.O. Box 4196<br>Bellingham, WA 98227<br>dbrett@brettlaw.com |
| Howard M. Goodfriend<br>Catherine W. Smith<br>Smith Goodfriend PS<br>1619 8th Ave N<br>Seattle, WA 98109-3007<br>howard@washingtonappeals.com<br>cate@washingtonappeals.com | Joshua Choate<br>Paul J. Triesch<br>Attorney General's Office<br>800 Fifth Ave, Ste 2000<br>Seattle, WA 98104<br>pault@atg.wa.gov<br>joshuac1@atg.wa.gov |
| Jeffrey D. Dunbar<br>Ogden Murphy Wallace PLLC<br>901 Fifth Ave, Ste 3500<br>Seattle, WA 98164<br>jdunbar@omwlaw.com | Christopher J. Kerley<br>Evans, Craven & Lackie, P.S.<br>818 W Riverside Ave, Ste 250<br>Spokane, WA 99201<br>ckerley@ecl-law.com |
| W. Mitchell Cogdill<br>Cogdill Nichols Rein Wartelle<br>3232 Rockefeller Ave<br>Everett, WA 98201-4317<br>wmc@cnrlaw.com | Eugene R. Moses<br>Law Offices of Gene R. Moses, P.S.<br>2201 Rimland Dr, Ste 115<br>Bellingham, WA 98226-6639<br>gene@genemoses.net |
| John R. Connelly, Jr.<br>Nathan P. Roberts<br>Connelly Law Offices<br>2301 N 30th St | Phillip A. Talmadge<br>Talmadge Fitzpatrick<br>2775 Harbor Ave SW<br>Suite C |

| | |
|---|---|
| Tacoma, WA 98403<br>jconnelly@connelly-law.com<br>nroberts@connelly-law.com | Seattle, WA 98126<br>phil@tal-fitzlaw.com |

DATED this 2nd day of July, 2015.

*/s/ Elena Ortiz*
Elena Ortiz, Legal Assistant to Ms. Ragonesi

## OFFICE RECEPTIONIST, CLERK

**From:** Elena Ortiz <eortiz@kbmlawyers.com>
**Sent:** Thursday, July 02, 2015 3:49 PM
**To:** OFFICE RECEPTIONIST, CLERK
**Cc:** Arne Denny; Catherine Smith; Christopher Kerley; Dean Brett; Eugene Moses; Howard Goodfriend; Jaime Allen; Jeffrey Dunbar; John Connelly ; John Justice; Joshua Choate; Mitchell Cogdill; Nathan Roberts; Paul Triesch; Phillip Talmadge
**Subject:** Binchus, et al. v. Skagit County, et al. ** No. 91644-6 ** Amicus Motion & Memorandum, WCIA
**Attachments:** Mtn for Permission to File Amicus Curiae Brief.pdf; Memorandum of Amicus WCIA ISO Petition for Review.pdf

Mr. Carpenter,

Attached is an electronic copy of Motion for Leave to file Brief of Amicus Curiae and a proposed Memorandum of Amicus of the Washington Cities Insurance Authority. In accordance with the certificate of service (appended to the Memorandum) counsel of record will receive hard copies of these documents via U.S. mail as well as being copied hereto. Should you have any questions or concerns please feel free to contact Shannon M. Ragonesi directly. If you are unable to view the attachments please feel free to contact the undersigned immediately. Thank you in advance for your professional courtesies.

On behalf of Ms. Ragonesi,

*Elena Ortiz*
**KEATING BUCKLIN MCCORMACK, INC., P.S.**
Legal Assistant to Shannon M. Ragonesi
800 Fifth Avenue, Suite 4141, Seattle, Washington 98104
T: 206.623.8861 / F: 206.223.9423
E: *eortiz@kbmlawyers.com*

This message is confidential, intended only for the named recipient(s) and may contain information that is privileged, attorney work product or exempt from disclosure under applicable law. If you are not the intended recipient(s), you are notified that the dissemination, distribution or copying of this message is strictly prohibited. If you receive this message in error, or are not the named recipient(s), please notify the sender at either the e-mail address or telephone number above and delete this e-mail from your computer. Receipt by anyone other than the named recipient(s) is not a waiver of any attorney-client, work product, or other applicable privilege. Thank you.