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NO. ~~89256-3~~

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

FRED BINSCHUS, individually and as Personal Representative of the Estate of JULIE ANN BINSCHUS, et al.,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS; SKAGIT EMERGENCY COMMUNICATIONS CENTER, dba "Skagit 911," an interlocal government agency,

Defendants,

and

SKAGIT COUNTY, a political subdivision of the State of Washington; and OKANOGAN COUNTY, a political subdivision of the State of Washington,

Respondents.

BRIEF OF RESPONDENT SKAGIT COUNTY

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II. COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

A. Does a jail owe a duty to prevent its former inmates from committing new crimes after their period of incarceration when there is no legal or factual basis to continue their incarceration and they are not being supervised by the jail in the community?

B. Does a jail owe a duty to third parties to correctly diagnose and effectively treat an inmate's alleged mental illness in order to prevent the inmate from committing new crimes after the inmate's period of incarceration?

C. Was proximate cause absent as a matter of law when there was only speculation that criminal acts could have been prevented by the diagnoses and treatment of mental illness by a jail months prior to the criminal acts and when there was no basis to have had the criminal actor in custody on the day of his crimes?

III. COUNTER-STATEMENT OF THE CASE

A. Factual Background.

On September 2, 2008 Isaac Zamora shot and killed six people and injured five others. CP 2768-78.[1] His actions were not preceded by any threats of violence towards himself or others. In fact, according to his

1. The estate of one of those killed, Skagit County Deputy Anne Jackson, and one of those injured, Mr. Duncan, are not parties to this lawsuit. CP 3847.

father, in the year prior to his criminal acts, "Isaac never threatened to hurt anyone and never acted in a way that would lead me to believe he would hurt anyone. He did not like confrontation. He got along well with all our neighbors." CP 1766-77. His mother echoed these sentiments, stating that Isaac "was never aggressive towards others." CP 1718-19.

Zamora was found guilty by plea of 18 charges stemming from his criminal conduct on September 2, 2008, including four counts of aggravated murder, six counts of attempted murder, three counts of First Degree Burglary, Residential Burglary, Robbery in the First Degree, two counts of Theft of a Firearm and Second Degree Unlawful Possession of a Firearm. CP 3453-3482. He was sentenced to life without parole for the murder charges and several hundred months for the other charges. *Id.*

The only claim asserted by appellants against Skagit County is for negligence. CP 3863-64. The appellants claim that the Skagit County Jail owed them a duty to prevent the criminal acts of Zamora because of his incarceration at the Jail some months prior to his violent rampage. *See Brief of Appellants*, pp. 21-22.

On April 4, 2008, five months prior to his rampage, Isaac Zamora was arrested on warrants for FTA obstruction and FTA possession of marijuana. CP 3553. At the time of arrest, he complained of a shoulder

injury and was taken to the local hospital to be cleared for entry into the Jail. CP 3554. He was cleared for custody by the hospital and taken to the Skagit County Jail. *Id.* He remained incarcerated pretrial at the Jail until May 15, 2008, when he was sentenced by the Skagit County Superior Court to six months incarceration for a drug crime and misdemeanor property damage crime. CP 3483-3503. His six months of jail time were to be followed by 12 months of community supervision by the State Department of Corrections. CP 3498-99.

The Judgment and Sentence contains, under the Community Supervision section, a condition imposed on Zamora to obtain a "mental health eval/treatment" and "drug evaluation comply with all treatment recommendations." CP 3499. The Judgment does not indicate that Skagit County Jail is responsible for this condition, nor was Skagit County a party to the Judgment. Finally, as will be further explained below, the trial court's inclusion of this condition was not supported by any specific findings or pre-sentence report indicating that Zamora was mentally ill.

On April 9, 2008, in response to a call by Zamora's mother, a mental health counselor who contracts with the Jail to provide services, asked Zamora if he wanted to be seen. CP 3681. He was seen by a counselor on April 10, 2008. CP 3685. Following that visit, the mental

health counselor recommended to the Jail's medical doctor that Zamora be started on Lamictal, a mood stabilizer, which was prescribed by the doctor a few days later. *Id.* Lamictal is not an antipsychotic medication. CP 2539.

On April 16, 2008, the mental health counselor again saw Zamora and he told her that he did not want to take any mental health medications, that he did not have any mental health problems and was angry at his mother for calling "everyone." CP 3687. Zamora's mother confirmed that he consistently "declined to voluntarily obtain mental health treatment". CP 1719.

On May 29, 2008, Zamora was transferred from Skagit County Jail to the Okanogan County Jail and remained there until the completion of his sentence on August 2, 2008. CP 3563. Zamora did not exhibit any mental health symptoms at any time in the Okanogan County Jail, up to and including the date of his lawful release. CP 3647-3654. The appellants claim that Skagit County "culled" the records sent to Okanogan County when Zamora was transferred, but provide no authority specifying what records must accompany a transferred inmate and they concede that his current list of medications was included.[2] Significantly, the

2. The provision of records from Skagit County to Okanogan County was solely a

Okanogan County Jail medical provider stated that the records not included in the transfer made no difference to the treatment Zamora received at the Okanogan County Jail. CP 3701.

The appellants indicate throughout their brief that Zamora claimed to have had hallucinatory thoughts while in custody. *Brief of Appellants*, pg. 7, 11, 12 and 19. However, they fail to make clear that there is no evidence that he ever reported these alleged thoughts to the Jail officers at either Skagit County or Okanogan County. The allegations that appellants rely upon were reportedly made by Zamora *after* he committed his shooting rampage and was being interviewed by psychiatrists to determine his competency to stand trial for his crimes. CP 2540.

The appellants also state that Zamora had "violent outbursts and aggressiveness" that were known to the Jail. *Brief of Appellants*, pg. 27. Not surprisingly, there is no citation to the record for this statement. In fact, there is no evidence that Zamora was violent or aggressive during his stay at the Skagit County Jail in 2008. The only reference by appellants

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function of the contractual relationship between Skagit County and Okanogan County and appellants have not, and could not, establish that they were third party beneficiaries of that contract. *Key Development Inv., LLC v. Port of Tacoma*, 173 Wn. App. 1, 29, 292 P.3d 833 (2013) ("contracting parties must intend to create such a relationship, with the promisor intending to assume a direct obligation to the third party at the time the contract is created.")

to any violence in the Jail involved a situation in which *another inmate* was charged with assaulting Zamora. CP 2483. There is no evidence that Zamora assaulted this inmate first. *Id.* On August 5, 2008, having been released by Okanogan County Jail, Zamora was again arrested at his parents' home in Skagit County and jailed overnight on an outstanding misdemeanor warrant for failing to appear in court. CP 1590. While he reportedly pounded on the walls of the holding room after being booked he "was changed down without incident" and there is no evidence of any additional behavior problems. CP 3563. Zamora was released on his own recognizance by the Court the next day, August 6, 2008. CP 3563-64.

After August 6, 2008, Zamora had no further contact with the Skagit County Jail before committing his crimes nearly one month later on September 2, 2008. He was not being supervised in the community by Skagit County. CP 3499. Significantly, appellants did not argue to the trial court that Zamora could have or should have been detained beyond his release date of August 2, 2008, under the Involuntary Treatment Act (ITA), ch. 71.05 RCW. VRP 47.

On August 6, 2008, following his release from Jail, Zamora visited a local hospital emergency room complaining of nausea and vomiting. CP 3511-12. He was given some anti-nausea medication and released.

CP 3513-15. The ER doctor who examined Zamora did not find any symptoms of a mental health crisis. CP 3516-17.

On August 13, 2008, a 911 hang up call originated from Zamora's parents' home. CP 3558. A Skagit County Deputy responded to the residence and spoke with Isaac Zamora and his mother, Denise. *Id.* Both denied making the call and no further action was taken. *Id.*

On August 18, 2008, a 911 caller reported that someone was riding a motorcycle on State owned property in Alger. CP 3507-08. A Skagit County Deputy responded and contacted Zamora near his residence. *Id.* The Deputy told Zamora not to ride his motorcycle on State property. *Id.* A short while later, Zamora was involved in a motorcycle accident on his parent's property and reportedly injured his shoulder. CP 3508-09. He had to be taken by ambulance to the hospital for care. CP 3519-20. The ER Doctor who examined Zamora on August 18 noted that he had no homicidal or suicidal ideations and "had adequate decisional capacity to decline care." CP 3521-3522. The Doctor further concluded that Zamora "did not meet the criteria for detaining for psychiatric evaluation." CP 3522.

On September 1, 2008, one of Zamora's neighbors reported to 911 that Zamora allegedly came on his property, scared his wife and destroyed

a sign on the property. CP 3524-25. The neighbor later spoke to Skagit County Deputy Anne Jackson. CP 3526-27. No one witnessed Zamora damage the sign. CP 3528. Deputy Jackson responded to the scene, and tried to take prints from the damaged sign. CP 3528-29. However, there is no record of Deputy Jackson locating Isaac Zamora on that day. *Id.*

Later, in the evening of September 1, 2008, *the night before his crime spree*, Zamora was seen by a psychologist, Dr. Sylverio Arenas, who was contracted by the State Department of Social and Health Services to assess Zamora for eligibility for State general public assistance. CP 3538-40. While Dr. Arenas was unable to conduct a full assessment, he did testify that Zamora was not, in his opinion, an imminent danger to himself or others - "he wasn't acutely, at that point, symptomatic."[3] CP 3541.

Following his guilty plea and conviction, Zamora was sent to Western State Hospital for a period of time. CP 2100. Two of the psychiatrists who treated Zamora at that facility opined as follows:

> The purpose of this letter is to notify all interested parties that Mr. Zamora has no current major mental illness that requires inpatient psychiatric treatment. Further,

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3. Appellants indicate that Sylverio Arenas diagnosed Zamora with a "rule out diagnosis". A "rule out" diagnosis, however, is not a definitive diagnosis. *See, e.g., Ruggiero v. Warner-Lambert, Co.*, 424 F.3d 249, 254 (2nd Cir. 2005).

> additional observations and clinical history have allowed us to refine Mr. Zamora's **historical diagnoses such that we now find it highly unlikely that Mr. Zamora ever suffered from major mental illness**, other than a time-limited psychotic episode induced by illicit drug use. He has never suffered mental illness symptoms except in the context of illicit drug use and tapering off of his antipsychotic medication over the past month has shown no reemergence of any psychotic symptoms.
>
> Mr. Zamora currently presents with only diagnoses of substance abuse, severe character pathology, and threatening behavior **stemming purely from his antisocial personality traits.**

CP 2100-02. (Emphasis added).

B. Procedural Background.

Skagit County moved for summary judgment on all claims against it. CP 3567-3594. The County asserted that it did not owe appellants a duty as a matter of law and that proximate cause was not established as a matter of law. *Id.* Skagit County also argued that it was entitled to immunity under the ITA's immunity provision, RCW 71.05.120(1), for any claim that the County failed to involuntarily detain Zamora.[4]

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4. Appellants suggest that Skagit County did not bring a separate motion for immunity under the ITA. *Brief of Appellants,* pg. 43, n. 34. In fact, it was asserted as a separate basis for summary judgment by Skagit County in its motion. CP 3592-93. That prompted the trial court, at the hearing on the County's motion, to specifically inquire of appellants' counsel if they were making any claim under the ITA, to which counsel answered "No, your Honor." VRP 47. Thus, any claim that the ITA provided a basis for detaining Zamora beyond his release date was never asserted by appellants in the trial court and is clearly waived.

Appellants did not respond to the ITA argument in the trial court and informed the court that they were not making any claims for breach of the ITA. VRP 47.

The trial court granted Skagit County's motion for summary judgment on the basis of duty and proximate cause.[5] CP 211-15. Appellants seek review of the summary judgment on their claim against Skagit County solely related to the incarceration of Zamora by the Skagit County Jail.[6] CP 214-15.

IV. SUMMARY OF ARGUMENT

The common law generally imposes no duty on the government to prevent one citizen from intentionally injuring another. In their brief to this Court, appellants argue that two potential exceptions to this general rule apply in this case: The "special relationship" exception described in Restatement (Second) of Torts § 315 and specifically § 319, and an exception described in Restatement (Second) of Torts § 302B.

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5. The appellants also asserted a claim below related to the alleged actions of a Skagit County Deputy on the day of the shootings as well. The trial court granted summary on that claim. CP 215. Appellants have not appealed from that ruling. *Brief of Appellants*, pg. 2.

6. Appellants also sued the State of Washington, Skagit 911 and Okanogan County. CP 3847. The trial court granted summary judgments to Skagit 911 and Okanogan County as well. CP 203-218. Only the summary judgments in favor of Skagit County and Okanogan County were appealed. *Brief of Appellant*, pg. 2. The appellants settled their claims with the State of Washington. CP 24-62.

First, §§ 315 and 319 of the Restatement have never been held to create a duty upon Jails to correctly diagnose and treat an inmate's previously undiagnosed mental illness. The duty under these sections is to control inmates to prevent their escape during the incarceration period.

Second, with regard to Restatement (Second) § 302B, appellants did not assert that section as a theory of liability against the Skagit County Jail and they should not be permitted to make it for the first time on appeal. RAP 2.5(A). However, even if considered by this court, § 302B has not been interpreted to create a duty for the alleged failure to take action, i.e. to diagnose and treat mental illness in a Jail inmate. Instead, in its limited application to the government, § 302B requires proof of an affirmative act that creates a new, recognizable and extremely high risk of injury to a third person (i.e. leaving dynamite caps near a playground where children are known to play).

Third, proximate cause between the Jail's incarceration of Zamora between April 4 and May 29, 2008 and August 5 to 6, 2008, and his criminal acts on September 2, 2008, was not established as a matter of law. There was no claim made in the trial court that Skagit County could have caused Zamora to be in custody on the date of his crimes. Thus, Appellants argue that Zamora would have voluntarily medicated himself –

despite a history of non-compliance with mental health medication – if the jail had foreseen that he would go on a rampage. Their "but-for" proximate cause argument does not rise above a series of speculative assertions that run counter to known facts: that Zamora would have cooperated with a mental health evaluation in the Jail; that an evaluation would have diagnosed mental illness; that the right medication would have been prescribed, that he would have voluntarily agreed to take the "right" mental health medication; that he would have continued to take this medication *after* leaving the Jail; and that the medication would have actually prevented him from committing his crimes long after he was released into the community. Legal causation was also absent, considering neither policy nor precedent supports liability in this case.

The trial court's summary judgment should be affirmed.

V. ARGUMENT

A. Standard of Review.

"The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

The purpose of summary judgment is to avoid a useless trial. *Hudesman v. Foley*, 73 Wn.2d 880, 886, 441 P.2d 532 (1968). Summary

judgment should be granted if it appears from the record that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

B. Jails do not owe a duty to prevent former inmates from committing new crimes after their period of incarceration.

The appellants allege a claim for negligence against Skagit County based on Zamora's period of incarceration in the Skagit County Jail prior to his crimes. CP 3868. Negligence requires proof of four elements: duty, breach, causation and damages. *American Commerce Ins. Co. V. Ensley*, 153 Wn. App. 31, 42, 220 P.3d 215 (2009). The "existence of a duty is a question of law," not one 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).

As a "general rule, our common law imposes no duty to prevent a third person from causing physical injury to another." *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006). Two potential exceptions to this general rule are asserted by appellants.

First, appellants argue that because Zamora was incarcerated in the Skagit County Jail prior to his crimes, the special relationship exception under Restatement (Second) of Torts § 315 and more specifically the "take charge" provision described in § 319 applies. *See, Taggart v. State*, 118 Wn.2d 195, n. 4, 822 P.2d 243 (1992). Second, appellants raise, for the first time on appeal, Restatement (Second) of Torts § 302B as well.[7]

1. The duty described in Restatement (Second) of Torts §§ 315 and 319 (1965) does not extend beyond the "take charge" period.

Washington has adopted Restatement (Second) of Torts § 315, which provides two exceptions to the general rule that there is no duty to protect individuals from the criminal acts of a third party. *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983). A duty can arise where there is a "special relationship" between the actor and the third person who injures another or a "special relationship" between the actor and the person injured. Appellants allege only a special relationship between the Skagit County Jail and Zamora.

Under Restatement (Second) of Torts § 315(a), "a duty arises where 'a special relationship exists between the actor and the third person

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7. In the trial court, appellants asserted only the "take charge" theory as a basis for the Jail's duty. CP 2676-2680.

which imposes a duty upon the actor to control the third person's conduct." *Sheikh, supra*, 156 Wn.2d at 448. The special relationship exception set forth in § 315, as it pertains to appellants' claim, is set forth in Restatement (Second) of Torts § 319 (1965) which provides:

> 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.

Since the *Petersen* decision, this Court has clarified that a "take charge" duty under § 319 "will be imposed . . . only upon a showing of a 'definite, established, and **continuing** relationship between the defendant and the third party.'" *Taggart, supra,* 118 Wn.2d at 219. (emphasis added). Other courts have drawn a line in cases where the relationship between a government agent and a third party does not include a *continuing* legal obligation to supervise and monitor the progress of the third party. For example, in *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 23-24, 84 P.3d 899, *review denied*, 152 Wn.2d 1018, 101 P.3d 109 (2004), the Court held that DSHS's active supervision of two children, for whom dependency petitions had been filed but not adjudicated, did not create a "take charge" relationship so that DSHS had a duty to prevent the children from sexually assaulting a neighbor child.

Id. at 28, 84 P.3d 899.

Similarly, in *Couch v. Department of Corrections*, 113 Wn. App. 556, 54 P.3d 197 (2002), *review denied*, 149 Wn.2d 1012, 69 P.3d 874 (2003), the Court ruled that there was no "take charge relationship" where Department of Corrections' (DOC) supervision of an offender is limited to the collection of legal financial obligations (LFO). The court held that DOC's authority, limited to requiring offenders to report and answer questions about financial matters, is insufficient to "impose on DOC a duty to prevent future crimes, as opposed to a duty to collect LFO's." *Id.* at 569, 54 P.3d 197.

In *Sheikh, supra,* the Court was required to determine whether DSHS had a "take charge" relationship with two minors who assaulted a third party. The two minors were dependents of the State and both were in foster care. 156 Wn.2d at 445-46. The Court noted that the minors were dependents of the State and thus it had the ability to control their placement and services offered to them. However, it explained that "[t]he 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." *Id.*, at 453. After analyzing the statutory

scheme and the public policy considerations, the Court held that DSHS's relationship to dependent children in foster care did not rise to the level of a "take charge" relationship and thus DSHS had no duty to the third party injured by the minors' criminal assault. *Id.*, at 454.

In this case, it is undisputed that Skagit County did not have a take charge relationship with Zamora at the time he committed his criminal acts on September 2, 2008, i.e. "a definite, established, and continuing relationship." Any duty that might flow from the fact of incarceration ended when he was no longer incarcerated in the Jail. Appellants do not appear to contest that point. Instead, they argue that the alleged failure to both diagnose and effectively treat Zamora's alleged mental illness *while* he was incarcerated can result in a duty to prevent him from committing new crimes long after his lawful release from custody. No case cited by appellants supports such a duty for jails under § 319.

First, the duty described by § 319, i.e., the "take charge" duty, has not previously resulted in liability for injuries that occurred *after* the take charge period ended. The case of *Hungerford, DOC*, 135 Wn. App. 240, 247, 139 P.3d 1131 (2006) is particularly relevant in this regard.

In *Hungerford*, DOC supervised an offender after his release from prison for a felony assault conviction. The court later terminated

supervision except for monitoring payment of his legal financial obligations. *Id.*, at 248. Approximately ten months after termination of supervision, the offender murdered Ms. Hungerford-Trapp. *Id.*, at 249. The estate of Hungerford-Trapp appealed summary judgment dismissal of the lawsuit against DOC for negligent supervision. *Id.* The estate made a similar argument to the one made here, namely that DOC breached its duty of care *while the offender was being supervised* and that this led to the murder that occurred *after* supervision ended. On appeal, the court held that DOC did not have a duty *after active supervision ended.* *Id.*, at 257-58, explaining:

> The duty to supervise offenders on probation is an exception to the public duty doctrine based on the "special relationship" between the government and the offender. (citing *Joyce* and *Taggart).* DOC owes a duty of care to those who an offender might injure **while DOC is supervising the offender**. *Taggart*, 118 Wn.2d at 220, 822 P.2d 243. We hold that **once that special relationship ends, the exception to the public duty doctrine expires**.
>
> 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 [legal financial obligation] status. DOC owes a duty to those who are injured **during an offender's active supervision, not after it ends**.

Id., at 258 (emphasis added).

See also McKenna v. Edwards, 65 Wn. App. 905, 830 P.2d 385

(1992) (No take charge relationship between County and individual released pending arraignment, noting that there was "no order to supervise, no statute which would mandate supervision and no agreement to supervise."); *Caldwell v. Idaho Youth Ranch, Inc.*, 132 Idaho 120, 124, 968 P.2d 215 (1998) (§ 319 did not provide a basis for a duty "[b]ecause the Youth Ranch no longer had custody or control of Espinoza at the time of the murder" and thus "owed no duty to the [victim] at that time . . .") CP 2715-2725.

In this case, Skagit County had no special relationship with Zamora following his release from custody because it had no authority and hence no duty to control his behavior from that point forward. Under *Hungerford*, a duty under § 319 does not require a jail to prevent future crimes. Nor does it owe a duty to those injured after the "take charge" period ends.

2. *Petersen v. State* did not recognize a duty for correctional facilities to diagnose and treat mental illness in order to prevent future crimes.

The appellants rely on *Petersen v. State*, 100 Wn. 2d 421, 671 P.2d 230 (1983) for the establishment of a duty in this case. However, *Petersen* did not hold that there is a duty to diagnose and treat inmates in correctional facilities to prevent them from committing future crimes.

Rather *Petersen* recognized that *psychiatrists* have a duty to take action when they possess specific knowledge of dangerousness in their patients. *Petersen* does not support the new and virtually unlimited duty appellants are seeking to impose on jails in this case.

Petersen, relying on the case of *Tarasoff v. Regents of Univ. Of California*, 17 Cal.3d 425, 551 P.2d 334 (1976), considered "whether a psychiatrist has a duty to protect against injuries caused by a patient." *Petersen*, 100 Wn.2d at 426. The Court "ruled that when a psychotherapist determines, or, pursuant to the standards of the profession, should determine, that a patient presents a serious danger of violence to another the therapist incurs an obligation to use reasonable care to protect the intended victim against such danger." The harm caused by the patient in *Petersen* occurred five days after his discharge from a State mental hospital. The case does not address the issue of the lapse of time between discharge and the crime, nor does it appear the argument was raised.

Petersen involved a specific relationship: psychiatrist-patient. It involved testimony from the treating psychiatrist, Dr. Miller, that his patient, Knox, "was a potentially dangerous person and that his behavior would be unpredictable. He also testified that if Knox used angel dust

again he was likely to continue having delusions and hallucinations, especially if he quit taking the drug Navane. Dr. Miller testified he knew of Knox's reluctance to take Navane, and he thought it quite likely Knox would revert to using angel dust again. Nevertheless, Dr. Miller failed to petition the court for a 90-day commitment, as he could have done under RCW 71.05.280. *Petersen,* 100 Wn.2d at 428-29.

Petersen does not control here. First, its holding applied to a *psychiatrist* treating a patient with known dangerousness due in part to diagnosed mental illness and drug addiction. The claim was not that the psychiatrist did not correctly diagnose and treat the patient, but that he failed to "seek additional confinement or to disclose information about Knox's parole violation." *Id.*, at 424. Here, the Jail did not have a psychiatrist-patient relationship with Zamora and was not treating him for mental illness. It was confining him for committing non-violent crimes. Nor did the Jail fail to report a probation violation or have a basis to petition the court to detain Zamora. Finally, the appellants did not argue in the trial court that the Jail could have detained Zamora past his release date under any theory.

Significantly, *Petersen* did not hold that the failure to correctly diagnose and effectively treat mental illness during a take charge period

creates a duty to third parties injured by future criminal acts of a third party after the take charge period ends. Rather, it recognized a duty by a psychotherapist to seek continued detention of a patient when they know or should know at the time of discharge, "pursuant to the standards of the profession" that their patient presents a "serious danger of violence to another." 100 Wn.2d at 427. Because the psychiatrist in *Petersen* testified that he was aware of the danger to others posed by Knox *at the time of discharge* and hence while he still had control, he had a duty to try and *prevent that discharge* under an available statutory regime. Appellants cite no Washington case establishing a duty owed by jails to the public to prevent *former* inmates from committing new crimes, particularly when there is no legal basis to continue their detention.

Appellants did not argue to the trial court that Zamora could have been detained under any statutory basis. They attempt to do so for the first time before this Court, which should not be permitted. RAP 2.5(a). Further, they expressly waived any such claim in the trial court. VRP 47. Finally, there is no evidence in the record that Zamora was ever exhibiting symptoms at discharge that met the standard for involuntary detention at or before his lawful release. In fact, appellants' own expert does not opine that Zamora could have been detained under the ITA prior to his

release from custody. CP 3626. Nor do appellants point to any evidence that Zamora presented an imminent threat to self or others prior to his release. As appellants' own expert testified, even when diagnosed, "mental illness does not make somebody necessarily violent." CP 3612.

In this case, there is no basis for a duty under a special relationship exception found in § 319 when there was no special relationship in existence at the time of the criminal acts and no argument or basis to detain Zamora beyond his lawful release date.

3. A Jail's duty under the "take charge" relationship is to prevent an inmate's escape.

Restatement (Second) of Torts § 319 itself does not impose a duty for jails to treat mental illness in order to prevent future crimes, but rather it recognizes a duty to "control" the inmate to prevent escape. The comment section provides two illustrations of this sections applicability in the context of detention of a person:

> 1. A operates a private hospital for contagious diseases. Through the negligence of the medical staff, B, who is suffering from scarlet fever, is permitted to leave the hospital with the assurance that he is entirely recovered, although his disease is still in an infectious stage. Through the negligence of a guard employed by A, C, a delirious smallpox patient, is permitted to escape. B and C communicate the scarlet fever and smallpox to D and E respectively. A is subject to liability to D and E.

> 2. A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac, is permitted to escape. B attacks and causes harm to C. A is subject to liability to C.

Appellants have not cited a single case applying this section to establish a duty on Jails to do anything other than prevent inmates from escaping. *See Natrona County v. Blake*, 81 P.3d 948, 956-57 (Wyo. 2003) (collecting cases). The Skagit County Jail did not allow Zamora to escape.

Appellants, however, argue that § 319 imposes a duty on the Jail to: 1) correctly diagnose and treat potentially mentally ill inmates while they are in custody; and 2) to facilitate mental health treatment by another correctional facility by providing all of its inmate's health records to that facility in order to prevent future criminal behavior after the inmate is released. This "failure to treat" theory, however, has never been adopted in Washington.

In *Hungerford, supra,* 135 Wn. App. at 256, the Court held that "DOC does not have a duty enforceable in tort to rehabilitate offenders." *citing Melville v. State*, 115 Wn.2d 34, 38–39, 793 P.2d 952 (1990). It noted that "the Sentencing Reform Act's purpose is primarily punishment, not rehabilitation." *citing* RCW 9.94A.010; *State v. Rice*, 98 Wn.2d 384,

393, 655 P.2d 1145 (1982) (noting that punishment is the paramount purpose of the adult sentencing system while the juvenile system "has not utterly abandoned the rehabilitative ideal.") The Court explained:

> This rehabilitation argument reveals how tenuous Hungerford's cause of action is. By asking us to require DOC to rehabilitate offenders, Hungerford would have us turn DOC into a guarantor of future good behavior for all offenders.

Hungerford, 135 Wn. App. at 256. *See, also, Sheikh v. Choe*, 156 Wn. 2d at 582-83 (rejecting claim of negligent failure to provide treatment for the benefit of third parties.)

This is precisely what appellants argue here. There is no recognized duty for Jails to evaluate for, diagnose and treat all possible mental illness in the inmate population to prevent future crimes.[8] Otherwise, it would turn jails into a "guarantor of future good behavior for all" its former inmates. Such a duty would subject all treatment decisions made by a Jail into potential liability claims by third parties later injured

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8. Appellants cite *Gregoire v. City of Oak Harbor*, 170 Wn. 2d 628, 635, 244 P.3d 924 (2010). That case holds that a jail owes a duty to its inmates to "ensure health, welfare, and safety." *Id.*, at 635. It does not hold that this duty is owed to anyone other than the inmate. Moreover, neither *Gregoire* nor any other case holds that a jail owes a duty to evaluate inmates to discover whether they are suffering from mental illness and then insure they medicate themselves in the jail and in the community. In fact, a person cannot be forced to accept mental health treatment. *See, Guardianship of Ingram*, 102 Wn.2d 827, 689 P.2d 1363 (1984) ("a person has the right to choose one medical treatment over another, or even to refuse medical treatment altogether.")

by a former inmate.

Melville, supra, is instructive in this regard. In that case, "three months after his release from prison, a former inmate murdered his ex-wife, their young daughter and the ex-wife's viable unborn child. He then committed suicide." *Melville*, 115 Wn.2d at 35. The plaintiff's theory was that DOC policies required mental health treatment for the inmate and "[f]rom there plaintiff construct[ed] a theory of liability that had treatment been offered, the inmate would have accepted it voluntarily, that treatment would have been successful, and that the inmate would not have killed the victims." *Id.* The plaintiff pointed to statutes and internal DOC policies in support of their argument that the State had a duty to provide mental health treatment to an inmate for the benefit of third parties. The Court declined to impose a duty enforceable in tort by third parties under these facts.[9] *Id.* at 39.

The appellants, similar to the plaintiffs in *Melville*, refer to a Judgment and Sentence (J&S) in Zamora's criminal case that ordered *him*

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9. The appellants attempt to distinguish *Melville* by claiming that a statute, RCW 70.48.130(1), now requires that Jail's provide medical care and that the operative language of that statute was not present at the time *Melville* was issued. However, the 1986 version of that statute, which deals with cost recovery for providing medical care in correctional facilities, provided that "under no circumstances shall necessary medical services be denied or delayed pending a determination of financial responsibility." *Appendix A.* There is no basis to claim this statute impacts the holding in *Melville.*

to obtain a mental health evaluation while on community supervision. CP 3499. They claim this provided notice to the Jail that Zamora needed a mental health evaluation. First, the J&S does not indicate Zamora had a "psychotic condition" that needs treatment, as appellants imply. *Brief of Appellants*, pg. 30. Second, it imposes *upon Zamora* an obligation to obtain an evaluation *after* his release from incarceration and to comply with treatment recommendations. The J&S did not direct Skagit County to take any action other than to incarcerate Zamora, which it did.

Finally, it was outside the court's authority to include a mental health evaluation and treatment or a drug evaluation provision. RCW 9.94A.500. A sentencing court may only require an offender to "comply with any crime-related prohibitions" as a condition of community custody. RCW 9.94B.050 (5) (e). A "crime-related prohibition," is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030 (11); *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000); *see also* Former RCW 9.94A.030 (13) (2006).

An order requiring a mental health evaluation and treatment requires specific mental health findings and a presentence report. RCW 9.94A.500; *State v. Lopez*, 142 Wn. App. 341, 174 P.3d 1216 (2007),

review denied, 164 Wn.2d 1012 (2008) (court may not order mental health treatment as a condition of community custody where the court has not obtained or considered a presentence report or mental status evaluation and has not made findings that the defendant was a person whose mental illness contributed to his crimes); *State v. Brooks*, 142 Wn. App. 842, 176 P.3d 549 (2008); *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003). Here, the sentencing court made no requisite mental health findings. Similarly, an order requiring a drug evaluation requires a chemical dependency screening report. RCW 9.94A.500. Here, there was no screening report and the court specifically omitted from the Judgment and Sentence a finding that chemical dependency contributed to Zamora's crimes. CP 3495. (note the unchecked box).[10] The fact that this condition was not properly included in the Judgment and Sentence hardly supports using it to impose a legal duty on Skagit County enforceable in tort to see that it was carried out.

In sum, to the extent the appellants argue that they can proceed

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10. Appellants suggest that Skagit County cannot assert this argument for the first time on Appeal. *Brief of Appellants*, pg. 30, n. 24. However, this argument was raised by Skagit County, without objection, to the trial court on summary judgment. CP 2130. In addition, Skagit County was not party to the Judgment and Sentence and because it imposed no obligation on the County and the County would have had no basis to appeal that Judgment and Sentence. RAP 3.1 ("Only an aggrieved party may seek review by the appellate court.")

against the Jail because they are alleging that negligence occurred during the existence of the take charge relationship, that argument fails. The cases which have established the contours of the "take charge" duty have emphasized that it requires an "ongoing" relationship and that the injury must occur during the period of supervision. Finally, and perhaps most significantly, no case establishes that § 319 creates a duty for jails to diagnose and treat mental illness to prevent future crimes by inmates. The duty under that section is to prevent an inmate's escape, which Skagit County satisfied.

Appellants did not argue in the trial court that any other basis existed for a "special relationship" between Skagit County and Zamora beyond his previous incarceration at the Skagit County Jail *prior* to the events in question. Zamora's criminal acts occurred long after his incarceration, and after any corresponding duty to control Zamora, ended. Summary judgment on behalf of Skagit County should be affirmed because no duty has been established under § 315 and § 319.

4. Appellants did not raise Restatement (Second) § 302B as a basis for liability regarding the Jail in the trial court.

The only theory of liability the appellants asserted against the Skagit County Jail in the trial court was the "take charge" theory discussed

above. CP 3323-24; 2676-2680; 2042-47. They did **not** assert § 302B as a basis for a duty regarding the Jail.[11] RAP 2.5(a) provides that this Court may refuse to review a claim of error "which was not raised in the trial court." *See, Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *review denied*, 165 Wn.2d 1017, 199 P.3d 411 (2009) ("An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal.") Because this argument was not raised in the trial court, it should not be considered for the first time on appeal.

5. Restatement § 302B does not create a duty when Skagit County did not act affirmatively to create a new danger.

Even if this Court considers the appellants § 302B argument for the first time on appeal, that section does not create a duty in this case.

Restatement (Second) of Torts § 302B (1965) provides:

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

Appellants point specifically to comment e as applying here.

The Restatement provides the following illustration of comment

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11. Appellants did raise § 302B in connection with the actions of a Skagit County Deputy on the day of the shootings, but the summary judgment granted on that claim has not been appealed.

e's applicability:

> The A Company makes a business of conducting tourists through the slums of the city. It employs guards to accompany all parties to protect them during such tours. B goes upon such a tour. While in a particularly dangerous part of the slums the guards abandon the party. B is attacked and robbed. The A Company may be found to be negligent toward B.

Id., illustration A.3 under comment e.

Appellants argue that Skagit County's failure to conduct what they contend was a proper mental health evaluation can result in a duty under this section and comment e. *Brief of Appellants,* pg. 34. However, there is no evidence Skagit County expressly or impliedly agreed to protect the appellants in this case, as described in the illustration.

Furthermore, this Court has limited application of § 302B to affirmative acts that create a new danger, not an alleged failure to remove or ameliorate a potential danger. The first case in which this Court analyzed the application of § 302B to a claim of government liability was in *Robb v. Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013). In that case the plaintiff's decedent was killed by a man named Samson Berhe, and it was alleged that Seattle police "acted negligently by failing to pick up and remove shotgun shells lying near Samson Berhe after stopping him on suspicion of burglary. After the stop, Berhe returned to retrieve the

cartridges, and shortly thereafter used one of them to kill Michael Robb." *Id.* at 429. The issue before the Court was whether *Restatement (Second) of Torts* § 302B created a duty to protect Robb against the "criminal acts of a third party." *Id.*

The Court explained that "as a general rule, 'in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another.'" *Id.* at 433. (Internal citation omitted). The Court noted, "[u]ntil now, our cases involving a duty to protect a party from the criminal conduct of a third party have fallen into one of two categories: where there is a special relationship with the victim or where there is a special relationship with the criminal." *Id.* (internal citation omitted) "However, we have also recognized under Restatement § 302B that a duty to third parties may arise in the limited circumstances that the actor's own affirmative act creates a recognizable high degree of risk of harm." *Id.*

The Supreme Court has never found a duty "to protect a third party from the criminal acts of another absent a special relationship" but the Court of Appeals has applied § 302B in *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007), which involved the following allegations:

On August 28, 2002, an altercation erupted between

> two passengers on a King County Metro bus as it was traveling on MLK in Seattle. In an attempt to quell the altercation, the driver of the bus pulled over to the curb and ordered all of the passengers to disembark. . . . The two individuals involved in the altercation eventually left the bus. The driver then re-entered the bus, approached Carpenter, and again ordered him to disembark. Carpenter began exhibiting bizarre behavior, including acting as if he were talking to somebody outside of the vehicle although nobody was there, yelling unintelligibly, and striking the windows of the bus with his fists. After observing Carpenter's behavior for several minutes, the driver exited the bus a second time, again leaving the engine running with Carpenter on board. Carpenter then moved into the driver's seat of the idling 14-ton bus and drove it down MLK before crashing into several vehicles, including that of the Parrillas.

Id. at 430-31.

On review of a CR 12(c) motion to dismiss, the Court of Appeals held that "a duty to guard against a third party's foreseeable criminal conduct exists where an actor's own affirmative act has created or exposed another to a recognizable high degree of risk of harm through such misconduct, which a reasonable person would have taken into account." *Id.* at 439. As the Court noted, "it is an affirmative act, rather than a failure to act, that is at issue. The bus driver affirmatively acted by leaving Carpenter alone on board the bus with its engine running." *Id.* at 438. The plaintiffs alleged, that "an instrumentality uniquely capable of causing severe injuries was left idling and unguarded within easy reach of

a severely impaired individual. The bus driver was aware of these circumstances." The Court held, "[a]ssuming the truth of these averments, the bus driver's affirmative act created a high degree risk of harm through Carpenter's misconduct, which a reasonable person would have taken into account." *Id.* at 441 (emphasis added).

Absent the affirmative creation of a new and recognized risk, cases in Washington have **rejected** the application of § 302B. *See, Hutchins v. v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 230, 802 P.2d 1360 (1991) (a landowner is not liable for a trespasser's perpetration of a criminal act against a noninvitee on the owner's land under § 302B); *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 193, 15 P.3d 1283 (2001) (Court declined to impose a duty under § 302B where a person stole an unlocked minivan belonging to Budget that had the keys left in the ignition.)

Thus, the "relevant provision of Restatement § 302B comment e requires an affirmative act which creates or exposes another to a situation of peril. Foreseeability alone is an insufficient basis for imposing a duty." *Id.* In other words, "the bus driver in *Parrilla* left his keys in the ignition of a bus, leaving the engine running and leaving a crazed individual alone on the bus. The court there found the driver's affirmative

act of getting off the bus and leaving the engine running with an erratic passenger alone on board exposed motorists to a recognizable high degree of risk that a reasonable person would have foreseen, imposing on the county a duty of care to the injured motorists to guard against the man's criminal conduct." *Id.*

Turning to the case before it, the *Robb* court distinguished *Parilla* and explained:

> The difference between this case and *Parrilla* is the distinction between an act and an omission. . . . Thus, under § 314, an actor might still have a duty to take action for the aid or protection of the plaintiff in cases involving misfeasance (or affirmative acts), where the actor's prior conduct, whether tortious or innocent, may have created a situation of peril to the other. Liability for nonfeasance (or omissions), on the other hand, is largely confined to situations where a special relationship exists.

Id. at 435-36.

Thus, in *Robb*, the Court contrasted "misfeasance" which is "active misconduct resulting in positive injury to others" with "nonfeasance," which consists of "'passive inaction or failure to take steps to protect others from harm.'" *Id.* at 436-37, *quoting, Lewis v. Krussel*, 101 Wn. App. 178, 184, 2 P.3d 486 (2000). The Court went on to hold that:

> The police officers in this case did not affirmatively create a new risk when they stopped Berhe and failed to pick up the nearby shells. . . The officers ***failed to remove a risk***

> when they did not remove the shells. . . they did not make the risk any worse, their failure to pick up the shells was an omission, not an affirmative act, i.e., this is a case of nonfeasance.

Robb, 176 Wn.2d at 437-38. (emphasis added)

The recent case of *Washburn v. Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013) does not alter this analysis. In that case, this Court held that a police officer affirmatively created a new and recognized risk of harm to the decedent by serving an anti- harassment order to the subject of the order, despite knowing that the subject would react violently and leaving the subject home alone with the victim after service of the order. This affirmative act "created a new and very real risk to [the decedent's] safety based on Kim's likely violent response to the antiharassment order and his access to [the decedent]." *Id.* at 759-60.

In this case, the appellants claim that the alleged *failure* to correctly diagnose Zamora's alleged mental illness while he was in custody falls under § 302B. The appellants seek to avoid the non-affirmative nature of this act by claiming that the Jail's contract mental health counselors did not "properly" evaluate Zamora's mental health. This despite the fact that their psychiatric expert had no opinion at his deposition about whether the mental health counselor's assessment

met the standard of care. CP 3621. Zamora was seen by contract mental health counselors in the Skagit County Jail on two occasions and he was prescribed a mood stabilizer. The appellants claim Zamora was "deteriorating" but cite no contemporaneous record evidencing that statement. There is no evidence that Zamora was made worse or more dangerous *because of* these visits or the prescription of Lamictal. The illustration under comment f to § 302B explains the intended application of this section in the context of incarceration:

> A, who operates a private sanitarium for the insane, receives for treatment and custody B, a homicidal maniac. Through the carelessness of one of the guards employed by A, B escapes, and attacks and seriously injures C. A may be found to be negligent toward C.

Zamora was not known to be a homicidal maniac, nor was he allowed to escape. Appellants have not cited a single case that supports their novel theory under § 302B. The alleged failure to discovery and correctly diagnose alleged mental illness and then effectively treat it, cannot be equated with affirmative acts that *creates* a *new* and recognized high risk of harm. It is alleged nonfeasance, not misfeasance.

C. Proximate Cause.

A claim for negligence also requires that the breach of a duty be a proximate cause of the claimed injury or damages. *Hartley v. State*, 103

Wn.2d 768, 777 (1985). The issue of proximate cause can be decided on summary judgment, "where reasonable minds could not differ." *Bowers v. Marzano*, 170 Wn. App. 498, 506 290 P.3d 134 (2012). There are two elements of proximate cause: cause in fact and legal causation. *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 474-75, 656 P.2d 483 (1983).

1. Cause in Fact Was Not Established.

Cause in fact is lacking if the plaintiff's injury would have occurred without defendant's breach of duty. *Walker v. Transamerica Title Insurance*, 65 Wn. App. 399 (1992). There is "cause-in-fact if a plaintiff's injury would not have occurred "but for" the defendant's negligence." *Estate of Bordon ex rel. Anderson v. State*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004). When the connection between a defendant's conduct and the plaintiff's injury is too speculative and indirect, the cause in fact requirement is not met. *Taggart v. State*, 117 Wn.2d 195, 227 (1992). "[P]roximate cause may be a question of law for the court if the facts are undisputed, the inferences are plain and inescapable, and reasonable minds could not differ." *Estate of Borden ex rel. Anderson v. State*, 122 Wn. App. 227, 239, 95 P.3d 764 (2004).

In *Walters v. Hampton*, 14 Wn. App. 548, 556, 543 P.2d 648

(1975), the Court explained that factual causation "requires a sufficiently close, actual connection between the complained of conduct and the resulting injuries. Where inferences from the facts are remote or unreasonable, as here, factual causation is not established as a matter of law."

In cases involving harm caused by the criminal conduct of a third party brought under the "take charge" theory, the cause in fact element of proximate cause is analyzed by asking if the third party "would have been incarcerated on the day of the" act and thus unable to commit the crime. *Bordon, supra* 122 Wn. App. at 241. A jury cannot be left to speculate on this issue. *Id.* at 244. In this case, there is no evidence that would establish that any act of Skagit County was the cause in fact of appellants' damages. Prior to September 2, 2008, Skagit County had no probable cause to arrest Zamora for any reason. Appellants do not suggest otherwise. Instead, their cause in fact argument is based on a theory that the Jail should have attempted to conduct a full psychiatric evaluation of Zamora despite no legal requirement to do so. Second, that if an evaluation were attempted, Zamora would have cooperated fully, despite evidence in the record that he had no interest in being treated for mental health issues and had no record of previous cooperation. CP 2956.

Third, that a diagnosis of treatable mental illness would have been made. Again, evidence from Zamora's actual treating psychiatrists are that he never actually suffered from a "major mental illness."[12] CP 2101. Fourth, that Zamora would have agreed to take the "right" medication, injectable or otherwise, in the Jail and continued to take it in the community. This is also contrary to the known evidence. CP 3629. Finally, that medication would have actually prevented his criminal acts. Again, his treating psychiatrists opined that his actions were the result of an *antisocial personality*, not major mental illness. CP 2101.

Appellants own expert was asked whether he could say on a more probable than not basis that if Zamora had been asked to see a mental health professional that: a) he would have agreed; and b) he would have cooperated. CP 3632. The expert testified that he could not say on a more probable than not basis that he would have. *Id.*

Appellants cite to *Hertog, ex rel. S.A.H. v. Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999) to argue that Zamora would have been incarcerated – and unable to harm anyone – if the Jail had evaluated him. However, the issue in Hertog was whether a probation officer should have looked at

12. Appellants' psychiatric expert never interviewed Zamora or reviewed his Western State Hospital *treatment* records. CP 2536-37.

additional treatment records that were available to him as a probation officer because those records *might* have given him evidence on which to revoke the person's probation prior to the criminal attack on the plaintiff. *Id.* at 283. The court did not find that cause in fact existed because the probation officer failed to look at the records, which had not been produced in discovery prior to the summary judgment motion, but that the existence of the records raised an issue of fact at that stage. *Id.*

Here, no similar theory is supported by the evidence. Zamora was free in the community on September 2, 2008, he was not under the county's supervision, and there was no argument made to the trial court that Skagit County could have or should have caused him to be in custody on the day in question. Cause in fact was therefore lacking and summary judgment was appropriate.

Perhaps recognizing the speculative nature of their "failure to medicate" theory, the appellants argue for the first time on appeal that the ITA could have been utilized. *Brief of Appellants*, pg. 42. First, this argument was expressly waived in the trial court. VRP 47. Appellants should not be allowed to assert it for the first time on appeal. RAP 2.5(a). Second, there is no evidence in the record, and certainly none cited by appellants, that Zamora ever met the stringent requirements of the

ITA while in Skagit County's custody.[13]

To detain someone under the ITA, Washington's laws require "reasonable cause to believe" that a "[p]erson is suffering from a mental disorder **and** presents an imminent likelihood of serious harm, or is in imminent danger because of being gravely disabled." RCW 71.05.153 (emphasis added). Gravely disabled means:

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

RCW 71.05.020(17).

"Likelihood of serious harm" means:

> "(a) A substantial risk that: (i) Physical harm will be inflicted by a person upon his or her own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on oneself; (ii) physical harm will be inflicted by a person upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm; or (iii) physical harm will be inflicted by a person upon the property of others, as evidenced by behavior which has caused substantial loss or damage to

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13. Appellants' expert claims he may have been detainable under the ITA as of mid-August, 2008. CP 3626. This was after the Jail's last contact with Zamora on August 6, 2008.

> the property of others; or (b) The person has threatened the physical safety of another and has a history of one or more violent acts."

RCW 71.05.020(25)(a) and (b).

Finally, "[i]mminent" means "[T]he state or condition of being likely to occur at any moment or near at hand, rather than distant or remote." RCW 71.05.020(20).

There is no contemporaneous evidence from any of the individuals, including law enforcement, DOC officials, jail employees, medical professionals and the psychologist who interacted with Zamora between August 5, 2008 and September 1, 2008, that he met the criteria for detention under the ITA. In fact, there is uncontroverted evidence from the two medical providers who saw Zamora on August 6, 2008 and August 18, 2008 and the psychologist who saw him on September 1, 2008 that he was *not* detainable under the ITA. CP 3517; 3522; 3541. *See., e.g., In re LaBelle*, 107 Wn. 2d 196, 201, 728 P.2d 138 (1986) (". . . mental illness alone is not a constitutionally adequate basis for involuntary commitment.")

In sum, because there is no legally or factually supported argument that Skagit County could have or should have had Zamora incarcerated for any reason on September 2, 2008, the cause in fact requirement of

proximate cause is not established. *Couch v. Washington Department of Corrections,* 113 Wn. App. 556, 573, 54 P.3d 197 (2002) (explaining cause in fact lacking when criminal actor could not have been in custody on date of murder.)

2. Legal Causation Was Not Established.

Legal cause is the second prong of proximate causation and "[is] a question of law" for the court. *McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 359, 961 P.2d 952 (1998). Determining whether the alleged breach of a duty of care was the legal cause of damages involves "mixed considerations of logic, common sense, justice, policy and precedent." *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). One such policy consideration is how far should the consequences of a defendant's acts extend. *Id.*

In this case, the Skagit County Jail incarcerated Zamora from April 4 to May 29, 2008, on drug and property damage crimes. He was not known to be a violent person and made no threats to harm himself or others while incarcerated. He was not known to be suffering from untreated mental illness in the Jail. Zamora spent the remainder of his sentence in Okanogan County and, following an unremarkable stay there, was lawfully released on August 2, 2008. He was re-incarcerated for one

night on August 5, 2008 on a warrant for failure to appear related to an "unlawful stop payment on a bank check." CP 1590. Nearly a month later Zamora committed his crimes. This "remoteness in time" alone is dispositive of the legal causation issue. *See, Kim, supra*, 143 Wn.2d at 205, *citing*, *Devellis v. Lucci*, 697 N.Y.S.2d 337, 339, 266 A.D.2d 180 (App.Div.1999) ("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").

Moreover, there is a complete lack of precedent for appellants' theory. Appellants cite to no case from Washington or any other state that has held that jails are responsible for the acts of their former inmates based on a theory that the jail failed to identify and treat mental illness while the person was incarcerated.

Finally, the Skagit County Jail is not a mental hospital. Zamora was not a mental patient at the Jail. He was a criminal being incarcerated as punishment for drug and property crimes. Under appellants' theory, any time a former jail inmate commits a new crime, and is later diagnosed with mental illness, any jail that incarcerated that person previously could be liable for failing to diagnose and treat the mental illness. This effectively makes jails and prisons insurers of future good conduct of all

former inmates. This is an unwarranted and massive expansion of liability that no court has recognized.

Logic, common sense, justice, policy and precedent do not support "legal cause" in this case regarding the claims against Skagit County.

D. Skagit County is Entitled to Immunity under the Involuntary Treatment Act.

The appellants' complaint did not assert that Skagit County had a duty to act under the Involuntary Treatment Act (ITA) in regards to Isaac Zamora. The appellants confirmed to the trial court that they were not pursuing a claim under the ITA. VRP 46-47.

Nevertheless, Skagit County included within its motion for summary judgment, an argument that it was entitled to immunity under the only statutory basis to have detained Zamora, the ITA. CP 3592. RCW 71.05.120(1) provides:

> (1) No . . . unit of local government, . . . shall be civilly or criminally liable for performing duties pursuant to this chapter with regard to the decision of whether to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment: PROVIDED, That such duties were performed in good faith and without gross negligence.

Gross negligence "is that which is substantially and appreciably greater than ordinary negligence." *Estate of Davis v. Dept. of*

Corrections, 127 Wn. App. 833, 840, 113 P.3d 487 (2005). This statute applies to the duties "under the involuntary commitment law." *Id.* In *Estate of Davis*, an individual (Mr. Erickson) who had drug problems, mental health issues and a history of nonviolent crimes was ordered by a court to undergo a "psychological anger control evaluation and comply with the resulting treatment requirements." *Id.* at 837. A licensed mental health counselor (Mr. Jones) with Stevens County met with Erickson, and "determined [Erickson] should be referred to a clinical services program for individual therapy." *Id.* at 838. Approximately two weeks after his visit with Mr. Jones, Erickson murdered someone after drinking and smoking marijuana. *Id.* The decedent's estate sued Stevens County, along with the State DOC, which was supervising Erickson in the community. *Id.*

The court held that "[t]o the extent the estate alleged Mr. Jones was liable because he failed to detain Mr. Erickson, the immunity provision of RCW 71.05.120 applies because the only authority for him to detain Mr. Erickson was under chapter 71.05 RCW." The court held that Stevens County, Jones' employer, was thus immune pursuant to RCW 71.05.120. *Id.* at 841.

In this case, the only statutory basis to detain Zamora was the ITA.

There was no allegation of bad faith or gross negligence by Skagit County. Thus, Skagit County is entitled to summary judgment on this basis as well.[14]

VI. CONCLUSION

For the foregoing reasons, the trial court's grant of summary judgment in favor of Skagit County should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of February, 2014.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.

John E. Justice, WSBA № 23042
Attorneys for Respondent Skagit County

14. This Court can affirm an order granting summary judgment on any basis supported by the record. *LaMon v. Butler*, 112 Wn.2d.193, 200-01, 770 P.2d 1027(1989).

adopted by the ((~~commission~~)) board and any rules, regulations, or ordinances adopted by the governing unit.

Sec. 7. Section 11, chapter 316, Laws of 1977 ex. sess. and RCW 70-.48.110 are each amended to read as follows:

Upon obtaining approval for the substantial remodeling or construction of a jail pursuant to RCW 70.48.060 and biennial appropriation of the legislature, a governing unit shall receive full funding from the state for the costs of the necessary new construction or improvements to or remodeling of existing detention or correctional facilities necessary to comply with the standards established pursuant to this chapter. The ((~~commission~~)) board shall biennially establish for each application the level of costs necessary to comply with the physical plant standards and shall authorize payment by the state treasurer of the designated amount from the local jail improvement and construction account created in RCW 70.48.120 to the eligible governing unit in accordance with procedures established by the ((~~commission~~)) board.

Sec. 8. Section 12, chapter 316, Laws of 1977 ex. sess. as amended by section 2, chapter 276, Laws of 1981 and RCW 70.48.120 are each amended to read as follows:

There is hereby established in the state treasury a fund to be known as the local jail improvement and construction account in which shall be deposited such sums as are appropriated by law for the purpose of providing funds to units of local government for new construction and the substantial remodeling of detention and correctional facilities so as to obtain compliance with the physical plant standards for such facilities. Funds in the local jail improvement and construction account shall be invested in the same manner as other funds in other accounts within the state treasury, and such earnings shall accrue to the local jail improvement and construction account. Funds shall be remitted to the governing units in a reasonably timely fashion to meet their contractual obligations. Funds in this account shall be disbursed by the state treasurer to units of local government, subject to biennial legislative appropriation, at the direction of the ((~~commission~~)) board.

Sec. 9. Section 13, chapter 316, Laws of 1977 ex. sess. and RCW 70-.48.130 are each amended to read as follows:

Payment for emergency or necessary health care shall be by the governing unit, except that the department of social and health services shall reimburse the governing unit for the cost thereof if the confined person requires treatment for which such person is eligible under the ((~~department's~~)) department of social and health services' public assistance medical program.

The governing unit may obtain reimbursement from the confined person for the cost of emergency and other health care to the extent that such

person is reasonably able to pay for such care, including reimbursement from any insurance program or from other medical benefit programs available to such person. To the extent that a confined person is unable to be financially responsible for medical care and is ineligible for financial assistance from the department or from a private source, the governing unit may obtain reimbursement for the cost of such services from the unit of government whose law enforcement officers initiated the charges on which the person is being held in the jail: PROVIDED, That reimbursement for the cost of such services shall be by the state for state prisoners being held in a jail who are accused of either escaping from a state facility or of committing an offense in a state facility.

There shall be no right of reimbursement to the governing unit from units of government whose law enforcement officers initiated the charges for which a person is being held in the jail for care provided after the charges are disposed of by sentencing or otherwise, unless by intergovernmental agreement pursuant to chapter 39.34 RCW.

This section is not intended to limit or change any existing right of any party, governing unit, or unit of government against the person receiving the care for the cost of the care provided or paid for.

Under no circumstance shall necessary medical services be denied or delayed pending a determination of financial responsibility.

Sec. 10. Section 16, chapter 316, Laws of 1977 ex. sess. as amended by section 3, chapter 276, Laws of 1981 and RCW 70.48.160 are each amended to read as follows:

Having received approval pursuant to RCW 70.48.060, a governing unit shall not be eligible for further funding for physical plant standards for a period of ten years from the date of the completion of the approved project. A jail shall not be closed for noncompliance to physical plant standards within this same ten year period. This section does not apply if:

(1) The ((~~commission~~)) board or its successor elects to fund phased components of a jail project for which a governing unit has applied. In that instance, initially funded components do not constitute full funding within the meaning of RCW 70.48.060(1) and 70.48.070(2) and the ((~~commission~~)) board may fund subsequent phases of the jail project;

(2) There is destruction of the facility because of an act of God or the result of a negligent and/or criminal act.

Sec. 11. Section 10, chapter 232, Laws of 1979 ex. sess. and RCW 70-.48.200 are each amended to read as follows:

(1) In determining the capacity of a planned jail facility for purposes of funding under this chapter, the ((~~commission~~)) board shall consider all relevant information, including data supplied to the ((~~commission~~)) board by the office of financial management with regard to the governing unit's population projections, current incarceration rates as applied to population

CERTIFICATE OF SERVICE

I certify that I caused to be e-mailed, pursuant to an agreement of the parties to accept service by e-mail, a copy of the **BRIEF OF RESPONDENT SKAGIT COUNTY**, on this 5th day of February, 2014, to the following counsel of record:

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Original e-mailed for filing to:

Washington Supreme Court Clerks Office
'supreme@courts.wa.gov'

DATED this 5th day of February, 2014 at Tumwater,

Washington.

Marry Marze

Marry Marze

OFFICE RECEPTIONIST, CLERK

To: Marry Marze
Subject: RE: Binchus, et al v. Skagit County, et al Supreme Court Cause No.: 89256-3: Brief of Respondent Skagit County

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Sent: Wednesday, February 05, 2014 10:39 AM
To: OFFICE RECEPTIONIST, CLERK
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Subject: Binchus, et al v. Skagit County, et al Supreme Court Cause No.: 89256-3: Brief of Respondent Skagit County

Good Morning:

Attached please find the Brief of Respondent Skagit County in Supreme Court Cause No.: 89256-3 for today's filing.

Sincerely,

Marry Marze
Legal Assistant
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