No. 911044-6

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 71752-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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. LANG; NICHOLAS LEE LANGE, 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, and TROY GIDDINGS, individually,

Respondents,

v.

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

Petitioner,

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

Defendants.

PETITION FOR REVIEW OF SKAGIT COUNTY

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Catherine W. Smith
WSBA No. 9542

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

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

By: John E. Justice
WSBA No. 23042

P.O. Box 11880
Olympia, WA 98508
(360) 754-3480

OFFICE OF THE SKAGIT
COUNTY PROSECUTING
ATTORNEY

By: A. O. Denny,
Senior Civil Deputy
WSBA No. 14021

605 S. 3rd Street
Mount Vernon, WA 98273
(360) 336-9460

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

I. IDENTITY OF PETITIONER

The petitioner is Skagit County, defendant in the trial court and respondent in the Court of Appeals.

II. COURT OF APPEALS DECISION

The Court of Appeals issued its published decision on Feb. 23, 2015, *Binschus v. Dep't of Corrections,* ___ Wn. App. ___, 345 P.3d 818 (2015) (App. A), and denied Skagit County's timely motion for reconsideration on April 6, 2015. (App. B)

III. ISSUES PRESENTED FOR REVIEW

1. Whether a county owes a tort duty to the public at large to medicate jail inmates while in custody to prevent an inmate from committing crimes after the inmate's release and completion of his sentence?

2. Does a county's "take charge" duty of care owed to jail inmates extend to random victims of violent crimes an inmate commits after release from custody and completion of his sentence?

3. Is an expert psychiatrist's opinion, that had the County medicated an inmate while in custody the inmate would not have committed criminal acts a month after his release, sufficient to allow a reasonable juror to find the County's failure to medicate the inmate was a proximate cause of the crime victims' injury?

IV. STATEMENT OF THE CASE

A. Statement of Facts.

Isaac Zamora "had a long-standing psychiatric disorder that began to emerge when Zamora was in his late-teens, more than a decade before the incident on September 2, 2008." (CP 2538) Zamora had begun experiencing symptoms of insomnia, paranoia, and anger in May 2000. In 2003, Zamora was involuntarily committed at North Sound Evaluation and Treatment Center, where he was prescribed an antipsychotic medication that is commonly used for treatment of schizophrenia. (Opinion ¶ 5)

Zamora also had an extensive criminal history. Although none were for violent crimes, Zamora had been arrested 21 times and incarcerated 11 times in Skagit County. (Op. ¶ 47) Zamora and his parents had many contacts with Skagit County officers by September 2008. (Op. ¶¶ 6, 48) In May 2007, for instance, Zamora called Skagit County deputies concerned that "someone in his house 'was out to get him.'" (Op. ¶ 48)

The tort claims in this case, however, arise solely from Zamora's arrest and incarceration from April 4 until August 2, 2008. After being arrested on outstanding warrants on April 4, 2008, Zamora was incarcerated pretrial in Skagit County. He was

seen by a mental health counselor at the Skagit County Jail on April 10, 2008. (CP 3685) On the counselor's recommendation, the Jail's medical doctor prescribed Zamora Lamictal, a mood stabilizer. (CP 2539) A week later, and contrary to a Jail mental health counselor's recommendations, Zamora told a Jail counselor "he doesn't want any type of 'mental' medications." (CP 3687)

On May 15, 2008, Zamora was sentenced by the Skagit County Superior Court to six months incarceration for drug and misdemeanor property damage crimes. (CP 3483-3503) Zamora's six months of jail time were to be followed by 12 months of community supervision by the State Department of Corrections. (CP 3498-99) Although the sentencing court did not make any specific findings regarding Zamora's mental health (Op. ¶ 7), the Community Supervision section of the Judgment and Sentence required Zamora to obtain a "mental health eval/treatment" and "drug evaluation comply with all treatment recommendations." (CP 3499)

On May 29, 2008, Zamora was transferred to Okanogan County, which by contract provided detention services for Skagit County. (Op. ¶ 14) Zamora completed his sentence without incident, and was released from the Okanogan County Jail on August 2, 2008. (Op. ¶¶ 15-23)

On August 5, 2008, three days after his release, Zamora was again arrested in Skagit County and jailed overnight on an outstanding misdemeanor warrant for failing to appear in court. (Op. ¶ 24; CP 1590) Zamora was released on his own recognizance by court order the next day, August 6, 2008. (Op. ¶ 26; CP 3563-64) Skagit County deputies answered additional calls about Zamora on August 13, August 18, and September 1, 2008. (Op. ¶¶ 29-30; CP 3558, 3507-08, 3561) Later in the evening on September 1, 2008, Zamora was seen by a psychologist contracted by DSHS to assess his eligibility for State general public assistance. (CP 3538-40) The DSHS psychologist testified that Zamora was not, in his opinion, an imminent danger to himself or others – "he wasn't acutely, at that point, symptomatic." (CP 3541)

The next day, September 2, 2008, Isaac Zamora shot and killed six people and injured five others. (CP 2768-78) Zamora pled guilty to 18 charges stemming from his rampage, including four counts of aggravated murder. Zamora is now serving a life sentence without possibility of parole. (Op. ¶ 32; CP 3453-3482)

B. Procedural Background.

Plaintiffs received settlements of almost $10 million from the State of Washington Department of Corrections, which was solely

responsible for supervising Zamora after his release from incarceration. (CP 24-62) Plaintiffs additionally asserted that the negligent failure of Skagit County and Okanogan County to evaluate and treat Zamora's mental illness while he was incarcerated from April 4-August 2, 2008, was the cause of Zamora's violent rampage on September 2, 2008. (CP 2667-73, 3867)

In opposing the Counties' motions for summary judgment, plaintiffs relied heavily on the declaration of a consulting psychiatric expert, Dr. Csaba Hegyvary. Dr. Hegyvary never examined Zamora or reviewed his Western State Hospital records. (CP 2536-37) However, he asserted that a mental health evaluation in the Skagit County Jail "would have discovered Mr. Zamora's psychosis and . . . required administration of one or more of the antipsychotic medications." (CP 2540-41)

Dr. Hegyvary also opined that Skagit County "could have provided long-acting treatment to Zamora that would have been effective long after his release:"

> Mr. Zamora may have had difficulty complying with an oral regimen of antipsychotic medications requiring daily administration, but there are long-acting, injectable medications for use is [sic] these situations. Haloperidol Decanoate is one such antipsychotic commonly used in the treatment of schizophrenia and acute psychotic states. The

> medication is a long-acting injection given only once every four weeks. The medication is administered directly by the psychiatrist, only once per month, compliance can be documented and is virtually assured. The positive, therapeutic effects of the Haloperidol Decanoate last for longer than four weeks, thus, even if an injection was not given at the four-week mark the medication would continue to work to subdue or eliminate psychosis for up to six weeks. Another such medication is Risperdal Consta (risperidone), which is a depot injection administered once every two weeks.

(Op. ¶ 67, *quoting* CP 2544-45) (bracket in opinion) According to Dr. Hegyvary, had Skagit County identified his psychosis and placed him on a treatment plan that included injecting Zamora with a long-acting antipsychotic medication, Zamora "would not have been in a psychotic state on September 2, leading to the victims' tragic deaths and injuries." (Op. ¶ 68)

The trial court held on summary judgment that neither County owed plaintiffs a duty and that proximate cause was not established as a matter of law. (CP 5-20) In a published decision, Division One reversed, remanding a single claim to the trial court: plaintiffs' "take charge" claim under *Restatement (Second) of Torts* §§ 315 and 319, against Skagit County alone, for its alleged failure to perform a mental health evaluation and provide long term mental health treatment to Zamora during his incarceration. (Op. ¶ 70)

V. WHY THIS COURT SHOULD GRANT REVIEW

A. A county jail has no "take charge" duty to the public to prevent an inmate from committing random acts of violence after the inmate's release upon completion of his sentence.

The Court of Appeals erroneously held that Skagit County had a duty to control a jail inmate's behavior after his release from confinement. This Court has repeatedly held that the government's "take charge" duty to prevent an inmate from committing criminal acts terminates when the government's duty of supervision terminates. The Court of Appeals' published decision conflicts with established precedent, RAP 13.4(b)(1), (2), and unwisely creates an enormous new burden on financially strapped counties to provide mental health services for jail inmates in contravention of express statutory limits on a County's duty. RAP 13.4(b)(4).

1. A county has no duty to prevent jail inmates from committing crimes after supervision has ended. The Court of Appeals' decision is inconsistent with this Court's decision in *Taggart* and conflicts with Division Two's decisions in *Hungerford* and *Couch*. RAP 13.4(b)(1), (2).

With very limited exceptions, "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, ¶ 12, 128 P.3d 574 (2006). The Court of Appeals expands far beyond the recognized

limits one such exception – that which imposes a duty to control a third person's conduct where the defendant "takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled". (Op. ¶ 43, *quoting Restatement (Second) of Torts* § 319)

This Court has relied on the "take charge" duty under § 319 to hold that the State, which has control over convicted offenders under community supervision, has "a duty to protect others from reasonably foreseeable dangers engendered by parolees' dangerous propensities." *Taggart v. State*, 118 Wn.2d 195, 224, 822 P.2d 243 (1992). *See also Hertog v. City of Seattle*, 138 Wn.2d 265, 279, 979 P.2d 400 (1999) (city may be liable to probationer's crime victims because "[a] probation counselor is clearly in charge of monitoring the probationer to ensure that conditions of probation are being followed, and has a duty to report violations to the court."); *Bishop v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999) (county probation officer had duty to control probationer under officer's supervision).

Each of these cases imposes as a threshold requirement for this limited duty to prevent harm by a third party the existence of a "'definite, established, *and continuing* relationship between the defendant and the third party.'" *Taggart*, 118 Wn.2d at 219,

quoting Honcoop v. State, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988) (emphasis added); *see also Walker v. State,* 60 Wn. App. 624, 629, 806 P.2d 249 (1991), *rev. granted,* 118 Wn.2d 1001, *cause dismissed,* 118 Wn.2d 1014 (1992). Once the "take charge" exercise of control over the third party has ended, however, so too does the defendant's duty to protect others from the third party's intentional acts of violence.

In *Hungerford v. Dep't of Corrections,* 135 Wn. App. 240, 250-56, 139 P.3d 1131 (2006), *rev. denied,* 160 Wn.2d 1013 (2007), Division Two held that the Department of Corrections had no continuing "take charge" duty after its period of supervision terminated. "[T]he duty to supervise does not require DOC to prevent future crimes an offender might commit after his supervision ends . . . . DOC owes a duty to those who are injured during an offender's active supervision, not after it ends." *Hungerford,* 135 Wn. App. at 258, ¶47. Accord, *Couch v. Dep't of Corrections,* 113 Wn. App. 556, 572, 54 P.3d 197 (2002) ("Axiomatically, a legal duty must be breached while it is in effect;" DOC's supervision of offender's compliance with financial obligations following completion of active supervision insufficient to establish duty of control), *rev. denied,* 149 Wn.2d 1012 (2003).

The Court of Appeals relied on Skagit County's admitted "take charge" relationship with Zamora while he was in the Skagit County Jail (Op. ¶ 45), but failed to recognize that the relationship – and Skagit County's "take charge" duty – terminated upon Zamora's unconditional release from custody. No court has imposed tort liability on a jail or prison for an inmate's post-release crimes in the absence of a continuing duty of supervision. The Court of Appeals' published decision in this case conflicts with *Taggart's* requirement that the "take charge" relationship be a continuing one, and with Division Two's decisions in *Couch* and *Hungerford* that the government's "take charge" duty does not extend to prevent criminal acts occurring after its supervisory responsibility ends. RAP 13.4(b)(1), (2).

2. A county's obligation to provide health care to inmates does not create a duty to the public to prevent post-release criminal acts. The Court of Appeals' decision conflicts with this Court's decisions in *Sheikh* and *Melville* and contravenes statutory policy. RAP 13.4(b)(1), (4).

The Court of Appeals also erred in holding that the narrow constitutional and common law duty to provide for the health, safety and welfare of jail inmates imposes upon the County a broad duty to protect the public at large from an inmate's violent crimes

after his release. The Court of Appeals' published decision conflicts with *Sheikh v. Choe*, 156 Wn.2d 441, 128 P.3d 574 (2006), with *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990), and with the statutes governing the treatment of inmates and the mentally ill.

In *Sheikh*, this Court held that the State's control over children placed in foster care did not create a duty to protect a member of the public from criminal assault by a dependent child. Characterizing the State's "take charge" obligations as a "continuum," 156 Wn.2d at 451, ¶ 16, the Court distinguished the statutory obligations of DSHS, "which exists to protect abused children from harm," from those of the "criminal justice agencies at issue in *Taggart, Hertog* and *Bishop*, which supervise and impose conditions on criminals *because they are criminals* in order to protect the public." *Sheikh*, 156 Wn.2d at 451-52, ¶ 17 (emphasis in original).[1]

As *Sheikh* demonstrates, the existence of a duty is a legal question that this Court determines based on considerations of

---

[1] The *Sheikh* Court approved the reasoning of *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 23-24, 84 P.3d 899, *rev. denied*, 152 Wn.2d 1018 (2004), which 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" duty to prevent the children from sexually assaulting a neighbor child. 156 Wn.2d at 453, ¶ 19.

"logic, common sense, justice, policy and precedent." *Snyder v. Medical Service Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001). In deciding whether as a matter of common sense and public policy to impose a "take charge" duty under *Restatement* § 319, this Court, as it did in *Sheikh,* has consistently looked to the statutes that both describe the parameters of the duty of control and articulate the purpose of state supervision. *See, e.g., Taggart*, 118 Wn.2d at 219-20 (relying on RCW 72.04A.080, which gave the Department of Corrections "the statutory authority . . . to supervise parolees," including the authority to "regulate a parolee's movements, require the parolee to report . . . . [and to] impose special conditions such as refraining from using alcohol or undergoing drug rehabilitation or psychiatric treatment," in order to protect the public).

The Court of Appeals thus erred in relying on *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), where this Court held that a state psychiatrist who evaluates a patient involuntarily detained for 14 days pursuant to statute, and who knows that the patient "presents a likelihood of serious harm," had a duty to "petition the court for a 90-day commitment . . . under RCW 71.05.280, or to take other reasonable precautions to protect those who might foreseeably be endangered by [the patient's] drug-

related mental problems." 100 Wn.2d at 424, 428-29. The duty in *Petersen* was based on the involuntary treatment act, which is intended to protect public safety. *See* RCW 71.05.010(7). "Because the patient in *Petersen* was under the care, custody and control of the hospital, the doctor had *statutory* authority to further confine him." *McKenna v. Edwards,* 65 Wn. App. 905, 914-15, 830 P.2d 385, *rev. denied,* 120 Wn.2d 1003 (1992) (emphasis added).

In this case, however, the relevant statutes provide no support, and in fact counsel against, the imposition of the broad duty imposed by the Court of Appeals. Counties have a statutory obligation to adopt standards "necessary to meet federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff . . . ." RCW 70.48.071. *See also* RCW 70.48.130 (legislative intent that jail inmates "receive appropriate and cost-effective emergency and necessary medical care"). Recognizing that county jails are obliged to do no more than to meet constitutional standards for the health, safety and welfare of inmates, the Legislature has directed that persons presenting a "likelihood of serious harm" (like the patient in *Petersen*) be detained, evaluated and treated by qualified professionals in "designated evaluation and treatment facilities." RCW 71.05.150(2). Indeed, the Legislature

has prohibited the use of jails for this purpose: "No correctional institution or facility, or jail, shall be an evaluation and treatment facility" under RCW ch. 71.05. RCW 71.05.020(16).[2]

In addition, the Legislature has granted immunity to any public official or entity "with regard to the decision of whether to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment" under RCW ch. 71.05, "if performed in good faith and without gross negligence." RCW 71.05.120(1). Lacking any evidence that Zamora met the strict standards for involuntary commitment, and in light of this statutory immunity, plaintiffs "did not argue to the trial court that Zamora could have or should be been detained beyond his release date of August 2, 2008, under [RCW ch. 71.05]." (Op. n.37)

The absence of any statutory obligation to provide long term mental health treatment to jail inmates should have ended the inquiry. As Zamora himself could have no statutory claim to mental health treatment in the Skagit County Jail to prevent the

---

[2] This Court and the federal district court have both required DSHS to provide mental health services to jail inmates in an appropriate medical setting precisely because jails are "inherently punitive institutions," ill suited for specialized mental health services. *Trueblood v. Dep't of Soc. & Health Servs.*, ___ F. Supp. 3d ___, 2015 WL 1526548, at *5 (W.D. Wash. 2015); *Det. of D.W. v. Dep't of Soc. & Health Servs.*, 181 Wn. 2d 201, 332 P.3d 423 (2014).

commission of criminal acts following his release, "it logically follows that members of the public cannot claim a duty to them." *See Melville,* 115 Wn.2d at 39. The Court of Appeals failed to acknowledge *Melville's* holding the State had no duty to prevent an inmate from murdering his ex-wife and their daughter three months after his release from custody because no statute nor regulation required the Department to provide (nor the inmate to accept) mental health treatment. 115 Wn.2d at 39-41.

The Court of Appeals instead extrapolated from the narrow common law duty to prevent harm to the inmate himself or to other inmates a much broader duty to protect the public from post-release crimes. This was error. The common law protects the health of the inmate and the safety of fellow inmates while in custody, not the public at large. *See Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 634, ¶ 12, 244 P.3d 924 (2010); *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) ("An inmate must rely on prison authorities to treat his medical needs"). While the 8th Amendment requires states to provide inmates "the minimal civilized measure of life's necessities," *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), inmates also have "a significant constitutionally protected liberty interest in

avoiding the unwanted administration of antipsychotic drugs," *State v. Hernandez-Ramirez,* 129 Wn. App. 504, 510, ¶ 12, 119 P.3d 880 (2005), that is wholly inconsistent with the plaintiffs' theory of liability in this case. *See* Argument § B, *infra.*

Unlike the duty to supervise a parolee, the County's duty is to provide medical care to an inmate not "because he is a criminal" requiring supervision, *Sheikh,* 156 Wn.2d at 451-52, ¶ 17, but because the inmate cannot provide for his own basic human needs while in custody. *Kusah v. McCorkle,* 100 Wash. 318, 326, 170 P. 1023 (1918) (recognizing sheriff's duty to protect another inmate from mentally ill inmate's assault because of a jailer's "sole power" over prisoners). The County's limited obligation to provide health care to a jail inmate while in custody is an insufficient basis to extend a tort duty to any member of the public who may be injured by the inmate's criminal acts after his release.

Nor can the common law "take charge" duty of a psychiatrist treating a civilly committed patient subject to laws authorizing involuntary treatment extend to a county operating a jail. A jailer lacks the skill and training underlying the professional standard of care that imposes upon a psychotherapist the "obligation to use reasonable care to protect the intended victim" of his or her patient.

Petersen, 100 Wn.2d at 427, *citing Tarasoff v. Regents of Univ. of Cal.*, 17 Cal.3d 425, 435, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

Finally, the Court of Appeals erred in imposing for the benefit of the public at large a common law duty to medicate inmates in order to prevent post-release crimes without considering the onerous financial obligations such a mandate entails, in contravention of the legislative and constitutional requirement to treat the mentally ill in medical settings and not in jails. The Court of Appeals' decision ignores the limited statutory duties of county jails and imposes a common law "take charge" duty to protect the general public following an inmate's release that is unsupported by logic, reason or common sense. Its published decision conflicts with *Sheikh* and *Melville,* RAP 13.4(b)(1), and raises an issue of substantial public concern to all Washington counties and cities operating jails. RAP 13.4(b)(4).

B. Skagit County's failure to medicate Zamora was neither a legal nor factual cause of his criminal rampage a month after his unconditional release from custody. RAP 13.4(b)(1),(4).

The Court of Appeals also erred in reversing the trial court's determination that the County's failure to provide long term mental health treatment to Zamora was neither a legal nor factual cause of

Zamora's post-release criminal rampage. Only speculation supports the plaintiffs' theory that but for the County's failure to medicate him while in custody, Zamora would not have committed crimes a month later. *See Estate of Bordon ex rel. Anderson v. State, Dep't of Corrections*, 122 Wn. App. 227, 243, 95 P.3d 764 (2004) ("some evidence of a direct link between DOC's negligence and the harm to a third party is necessary"), *rev. denied*, 154 Wn.2d 1003 (2005). As a matter of law, the plaintiffs' injuries are too remote from the County's alleged breach of a duty to provide mental health care to Zamora while he was in custody.

Despite recognizing that Zamora's voluntary compliance with any long term treatment plan was highly unlikely, the Court of Appeals nonetheless held there was sufficient evidence of causation, reasoning that had the County "provided Zamora with a proper mental health evaluation, a mental health provider would have been able to identify his psychosis and place him on a treatment plan that would include a long-acting antipsychotic medication." (Op. ¶ 68) As there was no evidence that Zamora would have consented to a "long-acting injection" (CP 2544-45) of antipsychotic drugs, the expert testimony supporting this theory was entirely speculative and insufficient to raise a triable issue of cause in fact. *See Melville*

v. State, 115 Wn.2d 34, 40-41, 793 P.2d 952 (1990) (expert opinion that inmate "probably would have accepted" anger management treatment and as a consequence refrained from killing his wife and child were "speculations insufficient to raise an issue of fact.").

In holding that the County can be liable for any "foreseeable" harm, the Court of Appeals also failed to address legal causation, an issue of law based on policy considerations regarding how far a defendant's duty of care extends. *See Hartley v. State,* 103 Wn.2d 768, 779, 698 P.2d 77 (1985). This Court has very recently refused to adopt foreseeability as "an all-expansive standard" for defining the limits of a duty of care in tort to prevent criminal assaults by third parties. *See McKown v. Simon Property Group, Inc.,* ___ Wn.2d ___, ¶ 28, 344 P.3d 662 (2015).

The Court of Appeals' published decision conflicts with *Melville* and *McKown,* RAP 13.4(b)(1), and raises the specter of involuntary treatment of jail inmates with "long-acting antipsychotic medication" to guard against tort liability for crimes committed long after an inmate's release from custody and supervision. RAP 13.4(b)(4).

VI. CONCLUSION

This Court should accept review and reinstate the trial court's summary judgment of dismissal. Skagit County's "take charge" duty does not extend beyond an inmate's release from jail, particularly when supervision was then assumed by the State Department of Corrections. Because the County was no longer in "control" of Zamora, any breach of its pre-release duties was not the proximate cause of Zamora's violent crimes, which affected an unforeseeable universe of potential victims.

Dated this 6th day of May, 2015.

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

By: _____ for
John E. Justice
WSBA No. 23042

OFFICE OF THE SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____ for
A. O. Denny
WSBA No. 14021

SMITH GOODFRIEND, P.S.

By: _____
Howard M. Goodfriend
WSBA No. 14355
Catherine W. Smith
WSBA No. 9542

Attorneys for Petitioner Skagit County

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 6, 2015, I arranged for service of the foregoing Petition for Review of Skagit County, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger ___ U.S. Mail X E-File
John E. Justice Law Lyman Daniel Kamerrer et al P.O. Box 11880 Olympia, WA 98508	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Arne O. Denny Skagit County Prosecutor's Office 605 S. 3rd Street Mount Vernon, WA 98273	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Jaime D. Allen Davis Wright Tremaine LLP 1201 3rd Ave Ste 2200 Seattle, WA 98101-3045	___ Facsimile ___ Messenger X U.S. Mail X E-Mail
Dean Brett Brett Murphy Coats Knapp McCandlis Brown P.O. Box 4196 Bellingham, WA 98227	___ Facsimile ___ Messenger X U.S. Mail X E-Mail
Mark R. Bucklin Keating Bucklin & McCormack Inc. P.S. 800 5th Avenue, Suite 4141 Seattle, WA 98104	___ Facsimile ___ Messenger X U.S. Mail X E-Mail

Joshua Choate Paul J. Triesch Attorney General's Office 800 5th Avenue, Suite 2000 Seattle, WA 98104	___ Facsimile ___ Messenger X U.S. Mail X E-Mail
W. Mitchell Cogdill Cogdill Nichols Rein Wartelle 3 Thirty Two Sq 3232 Rockefeller Ave Everett, WA 98201-4317	___ Facsimile ___ Messenger X U.S. Mail X E-Mail
John R. Connelly, Jr. Nathan P. Roberts Connelly Law Offices 2301 N. 30th Street Tacoma, WA 98403	___ Facsimile ___ Messenger X U.S. Mail X E-Mail
Jeffrey D. Dunbar Ogden Murphy Wallace PLLC 901 5th Avenue, Suite 3500 Seattle, WA 98164	___ Facsimile ___ Messenger X U.S. Mail X E-Mail
Christopher J. Kerley Evans, Craven & Lackie, P.S. 818 W. Riverside Avenue, Suite 250 Spokane, WA 99201	___ Facsimile ___ Messenger X U.S. Mail X E-Mail
Eugene R. Moses Law Offices of Gene R. Moses P.S. 2200 Rimland Drive, Sutie 115 Bellingham, WA 98226-6639	___ Facsimile ___ Messenger X U.S. Mail X E-Mail
Philip A. Talmadge Talmadge/Fitzpatrick 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126	___ Facsimile ___ Messenger X U.S. Mail X E-Mail

DATED at Seattle, Washington this 6th day of May, 2015.

V. Vigoren

Victoria K. Vigoren

345 P.3d 818
Court of Appeals of Washington,
Division 1.

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. Lang; Nicholas Lee Lange, 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, Appellants,

v.

STATE of Washington, DEPARTMENT OF CORRECTIONS; Skagit Emergency Communications Center d/b/a "Skagit 911," an interlocal government agency; Skagit County, a political subdivision of the State of Washington; Okanogan County, a political subdivision of the State of Washington, Respondents.

No. 71752–9–I. | Feb. 23, 2015.

Synopsis

Background: After former inmate, who had been released from county jail following incarceration for committing nonviolent crimes, killed six people and injured several others while experiencing a psychotic episode, estates of five people inmate killed and four people he injured brought lawsuit against counties in which defendant had been incarcerated for negligence. The Superior Court, Snohomish County, Ellen J. Fair, J., 2013 WL 9582409, granted counties summary judgment. Estates and injured persons appealed.

Holdings: The Court of Appeals, Trickey, J., held that:

[1] fact issue existed as to whether county in which inmate was initially incarcerated knew or should have known of inmate's violent propensities;

[2] there was no evidence as to whether county to which inmate was transferred was aware of inmate's violent disposition;

[3] fact issue existed as to whether injuries to victims were reasonably foreseeable;

[4] alleged improper mental health evaluation and treatment of inmate did not create duty to protect victims; and

[5] fact issue precluded summary judgment on claim that counties proximately caused victims' injuries.

Reversed and remanded.

West Headnotes (19)

[1] **Negligence**
Elements in general

272 Negligence
272I In General
272k202 Elements in general
To prevail on claim of negligence, party must prove the following elements: (1) existence of legal duty; (2) breach of that duty; (3) resulting injury; and (4) proximate cause.

Cases that cite this headnote

[2] **Judgment**
Tort cases in general

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) Tort cases in general
Where legal duty in negligence action depends on proof of certain facts, which may be disputed, summary judgment is inappropriate. CR 56(c).

Cases that cite this headnote

[3] **Judgment**
Tort cases in general

228 Judgment
228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) Tort cases in general
Genuine issue of material fact existed as to whether county in which former inmate had been initially incarcerated knew or should have known of former inmate's violent propensities, precluding summary judgment on claim that special relation existed between county and inmate that imposed duty upon county to prevent inmate from doing bodily harm, asserted in negligence suit filed by estates of people inmate killed and people injured by inmate while he was experiencing a psychotic episode following his release from county jail. CR 56(c); Restatement (Second) of Torts §§ 315, 319.

Cases that cite this headnote

[4] **Negligence**
Protection against acts of third persons
272 Negligence
272II Necessity and Existence of Duty
272k220 Protection against acts of third persons
Generally, common law imposes no duty to prevent a third person from causing physical injury to another.

Cases that cite this headnote

[5] **Municipal Corporations**
Nature and grounds of liability
268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 Nature and grounds of liability
Special relation exception to common law rule that there is no duty to prevent third person from causing physical injury to another is exception to public duty doctrine. Restatement (Second) of Torts §§ 315, 319.

Cases that cite this headnote

[6] **Negligence**
Protection against acts of third persons
272 Negligence
272II Necessity and Existence of Duty
272k220 Protection against acts of third persons
Once the take charge relationship is established between third party and actor who takes charge of third party, actor has a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by dangerous propensities of third party. Restatement (Second) of Torts §§ 315, 319.

Cases that cite this headnote

[7] **Negligence**
Protection against acts of third persons
272 Negligence
272II Necessity and Existence of Duty
272k220 Protection against acts of third persons
Relevant threshold questions when determining whether special relation exists between actor and third party that imposes duty upon actor to control third party to prevent him from doing bodily harm to others are whether actor has taken charge of the third party and whether actor knows or should know of the danger posed by third party. Restatement (Second) of Torts §§ 315, 319.

Cases that cite this headnote

[8] **Negligence**
Protection against acts of third persons
272 Negligence
272II Necessity and Existence of Duty
272k220 Protection against acts of third persons
To determine whether actor has taken charge of the third party, such that actor has duty to control third party and prevent him from doing bodily harm to others, there must be definite, established, and continuing relationship between the defendant and the third party. Restatement (Second) of Torts §§ 315, 319.

Cases that cite this headnote

[9] **Counties**
Injuries by mobs or other wrongdoers
104 Counties
104VII Torts
104k148 Injuries by mobs or other wrongdoers

There was no evidence as to whether county to which former inmate had been transferred was aware of inmate's violent disposition, as required to support claim that special relation existed between county and inmate that imposed duty upon county to prevent inmate from doing bodily harm, asserted in negligence suit filed by estates of people inmate killed and people injured by inmate while he was experiencing a psychotic episode following his release from county jail. Restatement (Second) of Torts §§ 315, 319.

Cases that cite this headnote

[10] **Negligence**
Foreseeability
272 Negligence
272II Necessity and Existence of Duty
272k213 Foreseeability
Once theoretical duty exists, question remains whether injury was reasonably foreseeable.

Cases that cite this headnote

[11] **Negligence**
Foreseeability
272 Negligence
272II Necessity and Existence of Duty
272k213 Foreseeability
Plaintiff's harm must be reasonably perceived as within general field of danger that should have been anticipated in order to recover in negligence action.

Cases that cite this headnote

[12] **Negligence**
Duty as question of fact or law generally
Negligence
Standard of proof; evidentiary showing required
272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1692 Duty as question of fact or law generally
272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1694 Standard of proof; evidentiary showing required
Foreseeability is normally an issue for the jury in negligence action, but it will be decided as a matter of law where reasonable minds cannot differ.

Cases that cite this headnote

[13] **Judgment**
Tort cases in general
228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) Tort cases in general
Genuine issue of material fact existed as to whether injuries to victims inflicted by former inmate during psychotic episode were reasonably foreseeable, precluding summary judgment in favor of county in which inmate had been incarcerated in negligence action filed by estates of victims killed by inmate and victims injured by inmate, asserting that special relation existed between county and inmate that imposed duty upon county to prevent inmate from doing bodily harm. CR 56(c); Restatement (Second) of Torts §§ 315, 319.

Cases that cite this headnote

[14] **Counties**
Injuries by mobs or other wrongdoers
104 Counties
104VII Torts
104k148 Injuries by mobs or other wrongdoers
Alleged improper mental health evaluation and treatment of former inmate by counties in which inmate had been incarcerated did not create duty in county to protect shooting victims, who were injured or killed by inmate during psychotic episode following his release from county jail, against inmate's criminal acts, despite contention that purported improper evaluation and treatment dramatically increased risk of harm to victims; counties' conduct in failing to evaluate and provide inmate with mental health treatment was

an omission and did not constitute affirmative acts or misfeasance, and counties' conduct did not create new risk of harm to victims. Restatement (Second) of Torts § 302B.

Cases that cite this headnote

[15] **Negligence**
Necessity of and relation between factual and legal causation
272 Negligence
272XIII Proximate Cause
272k373 Necessity of and relation between factual and legal causation
Proximate cause contains two separate elements: (1) cause in fact, and (2) legal causation.

Cases that cite this headnote

[16] **Negligence**
Requisites, Definitions and Distinctions
272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k375 In general
Cause in fact, as element of proximate cause, refers to physical connection between an act and an injury.

Cases that cite this headnote

[17] **Negligence**
Proximate Cause
272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1712 Proximate Cause
272k1713 In general
Cause in fact, as element of proximate cause, is usually a question for the jury, but it may be decided as a matter of law if causal connection between the act and the injury is so speculative and indirect that reasonable minds could not differ.

Cases that cite this headnote

[18] **Negligence**
Proximate Cause
272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1712 Proximate Cause
272k1713 In general
Causal connection between an act and an injury is "speculative," such that cause in fact, as element of proximate cause, may be decided as a matter of law, when, from a consideration of all the facts, it is as likely that it happened from one cause as another.

Cases that cite this headnote

[19] **Judgment**
Tort cases in general
228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) Tort cases in general
Genuine issue of material fact existed as to whether, but for alleged negligence of counties in which former inmate had been incarcerated, inmate would not have engaged in shooting during psychotic episode following his release from county jail, precluding summary judgment on claim that counties proximately caused victims' injuries by failing to properly and evaluate and provide inmate with mental health treatment during his incarceration. CR 56(c).

Cases that cite this headnote

Attorneys and Law Firms

***820** Eugene Ronald Moses, Law Offices of Gene R. Moses P. S., Dean Ralph Brett, Brett Murphy Coats Knapp McCandlis Brown, Bellingham, WA, W. Mitchell Cogdill, Attorney at Law, Everett, WA, Nathan Paul Roberts, John Robert Connelly Jr., Connelly Law Offices, Tacoma, WA, Jaime Drozd Allen, Davis Wright Tremaine LLP, Jeffrey Duane Dunbar, Ogden Murphy Wallace PLLC, Philip Albert Talmadge, Talmadge/Fitzpatrick, Seattle, WA, for Appellants.

Mark Richard Bucklin, Keating Bucklin & McCormack Inc. PS, Seattle, WA, for Defendant.

Mark Richard Bucklin, Keating Bucklin & McCormack Inc. PS, Paul J. Triesch, Attorney General's Ofc., Joshua Choate, Office of the Washington State Attorney, Seattle, WA, A.O. Denny, Skagit County Prosecutor's Office, *821 Mount Vernon, WA, Christopher Joseph Kerley, Evans, Craven & Lackie, P.S., Spokane, WA, John Edward Justice, Law Lyman Daniel Kamerrer et al, Olympia, WA, for Respondents.

Opinion

TRICKEY, J.

¶ 1 On September 2, 2008, Isaac Zamora killed six people and injured several others. Shortly before the tragic incident, Zamora had been incarcerated in Skagit County and Okanogan County Jails for committing non-violent crimes. At the time of the shooting, Zamora was experiencing a psychotic episode.

¶ 2 The estates of five people Zamora killed, together with four people he injured (collectively Binschus), brought the present lawsuit against Okanagan and Skagit Counties, Skagit Emergency Communications Center (Skagit 911), and Washington State Department of Corrections (DOC), alleging negligence. Binschus claimed, among other things, that, although the counties knew or should have known of Zamora's deteriorating mental illness during his incarceration, they failed to provide a thorough mental evaluation and appropriate treatment for his schizophrenia. The trial court granted Okanogan and Skagit Counties' motions for summary judgment, concluding that the counties owed no duty to the victims and, even if they did, Binschus failed to prove proximate causation.

¶ 3 On appeal, Binschus contends that the trial court erred in granting the counties' motions for summary judgment, arguing that the counties owed a legal duty to protect the victims from Zamora's violent propensities because the counties (1) had a "take charge" relationship with Zamora under §§ 315 and 319 of the *Restatement (Second) of Torts* (1965) or (2) committed misfeasance under § 302B of the *Restatement (Second) of Torts*.[1] Binschus additionally argues that the counties' purported breach was the cause in fact of the victims' injuries.

¶ 4 We hold that, with regard to Skagit County, material issues of fact precludes summary judgment on the question of whether §§ 315 and 319 imposed a legal duty upon the counties. We further hold that material issues of fact remain as to whether the alleged breach was the cause in fact of the victims' injuries. We hold, however, that a duty is not established under § 302B. Accordingly, we reverse and remand for additional proceedings.

FACTS

¶ 5 Zamora "had a long-standing psychiatric disorder that began to emerge when Zamora was in his late-teens, more than a decade before the incident on September 2, 2008."[2] In May 2000, Zamora began experiencing symptoms of insomnia, paranoia, and anger. In 2003, Zamora was involuntarily committed at North Sound Evaluation and Treatment Center, where he endorsed hallucinations and was prescribed an antipsychotic medication that is commonly used for treatment of schizophrenia. According to Binschus's expert psychiatrist, Dr. Csaba Hegyvary, Zamora was not given a proper diagnosis at that time.

Skagit County Jail

¶ 6 On April 4, 2008, Skagit County police officers responded to Zamora's parents' residence to investigate a 911 hang-up call from the residence. The officers soon discovered that Skagit County District Court had issued warrants for Zamora's arrest. Zamora complained of a sore shoulder when arrested. As a result, the officers transported Zamora to a local hospital to determine whether he was fit for jail. The hospital subsequently released Zamora, who then was transported to Skagit County Jail.

¶ 7 Zamora remained in the Skagit County Jail pending trial and his eventual guilty pleas. On May 15, 2008, the Skagit County Superior Court sentenced him to six months of confinement for malicious mischief in the second degree and possession of a controlled substance. The six-month term was to be followed by 12 months of community supervision by DOC. Under the community supervision provision of the judgment and sentence, *822 the trial court ordered "mental health eval/treatment" and "drug evaluation to comply with all treatment recommendation."[3] The trial court did not make any specific findings regarding Zamora's mental health.

¶ 8 Zamora remained in custody and began serving his sentence at the Skagit County Jail. The jail housed Zamora in a jail unit known as "C–Pod." [4] The C–Pod unit is more secure and isolated than other units in the jail. The Skagit County Jail would place a particular class of inmates in the C–Pod unit: inmates who fought with others; who threatened the general population of the jail; who were considered "anti-social;" who had severe behavioral issues; who were in protective custody; and who had mental health issues. [5]

¶ 9 During his time at the jail, Zamora's mother, Dennise Zamora, [6] made several requests to the Skagit County Jail and the county prosecutor, asking that Zamora receive mental health assistance. Dennise made such a request to the jail on April 7, 2008. She informed the Skagit County Jail that Zamora was bipolar, aggressive, and had anger problems. Dennise added that Zamora refused to obtain treatment and medication. She also reported that she and her husband were in fear of Zamora. In response, on April 11, 2008, Stephanie Inslee, a licensed mental health care professional, visited Zamora at the jail. In a document referred to as "Skagit County Jail Multi–Purpose Request Form," Inslee noted:

> Persecutorial thoughts, easily moved into rageful thinking, ... feels victimized by just about everyone in his world. Some grandiosity about his education / intelligence and his role in the world: to fix the crazy systems, make people treat him better. Very focused on the issue of chronic pain and poor.... Reports anxiety ... sounds like panic attack. He needs something! Recommend beginning Lamictal: He is paranoid about poison and not messing w/ his brain. Can a person in medical *please* meet with him if meds are approved and address his fears? [7]

¶ 10 Three days later, a physician approved the Lamictal prescription. According to Dr. Hegyvary, Lamictal is prescribed for seizure disorders and commonly used as a mood stabilizer. Lamictal is not an antipsychotic medication.

¶ 11 On April 23, 2008, another mental health counselor, Cindy Maxwell, saw Zamora after he submitted a mental health request. According to the "Skagit County Multi–Purpose Request Form" memorializing that visit, Zamora was refusing to take the Lamictal medication. [8] Zamora told Maxwell, however, that he was only taking the prescription because it helped him sleep. He said that he preferred to refrain from taking any type of mental health medications. In addition, Zamora expressed extreme anger toward his mother for calling the jail. Maxwell noted that Zamora appeared upset, easily angered, and that his speech was rambling. Maxwell recommended that the jail continue to offer Zamora "psych. meds." [9]

¶ 12 On May 10, 2008, Zamora submitted a request to see a mental health counselor. He reported that he was seeing black dots and white flashes. The request form does not indicate whether jail staff responded to his request.

¶ 13 The only evidence of any violent occurrence involving Zamora was a jail record reporting that another inmate attacked Zamora and was charged with assaulting Zamora. Otherwise, there were reports describing Zamora's insolent demeanor toward jail staff. Most commonly, however, Zamora complained that he was not receiving adequate medical care for his fractured clavicle and protested his placement in the C–Pod unit.

*823 ***Okanogan County Jail***

¶ 14 On May 29, 2008, Skagit County Jail transferred Zamora to the Okanogan County Jail. At the time of Zamora's transfer, Okanogan County Jail was a party to a contract with Skagit County Jail for the housing of Skagit County Jail inmates. During the term of the contract, when a Skagit County Jail inmate was transferred to Okanogan County Jail, Skagit County Jail would prepare a "Skagit County Jail Transport Form," which was usually sent to Okanogan County Jail in advance of the inmate's arrival. [10] The form identified the inmate, provided basic information about the Skagit County charges for which the inmate was serving time, indicated whether the inmate presented a risk of escape or violence, and listed the inmate's release date.

¶ 15 The contract required that Skagit County Jail send all of an inmate's medical records when it transferred an inmate to Okanogan County Jail. However, during the term of the contract, Skagit County Jail developed a practice in which it only transmitted records dealing with current problems that the jail deemed pertinent to the inmate's management. When Skagit County Jail transferred Zamora to Okanogan County Jail, it did not send the "Skagit County Multi–Purpose Request Form[s]" that memorialized Zamora's three mental health requests and visits with mental health professionals, as detailed above. [11] One of those forms documented the April 7, 2008 call made by Zamora's mother, requesting that Zamora receive mental health assistance. Skagit County Jail did send a copy of Zamora's medication log, however, which

listed the Lamictal prescription. Otherwise, the records that were transferred generally only reported Zamora's clavicle, shoulder and back problems, and his request for pain medication.

¶ 16 When Zamora arrived at Okanogan County Jail, the booking corrections officer asked him a series of questions. Those officers were trained to watch for signs of mental illness or problems. They noted no behavioral issues exhibited by Zamora during the booking process.

¶ 17 Based on Zamora's behavior and information transmitted by Skagit County Jail, Okanogan County Jail classified Zamora as a minimum custody inmate and housed him in "F module," a dormitory style unit for inmates without any special needs or risk factors. [12] The Okanogan County Jail inspection records indicate that Zamora did not display any unusual or inappropriate behavior while incarcerated there.

¶ 18 Inmates at Okanogan County Jail can request assistance or voice concern through a "kite" system. [13] Zamora never submitted a kite request asking to see a mental health counselor or expressing any mental health issue or concern. No other inmate submitted a kite request, or any other type of complaint regarding Zamora.

¶ 19 According to the terms of its contract with Skagit County Jail, Okanogan County Jail had the right to refuse an inmate. However, according to Noah Stewart, the chief corrections deputy at the time of Zamora's incarceration, the jail had only refused an inmate on one occasion due to a behavioral issue. Stewart stated that Okanogan County Jail would not have accepted an inmate with a serious psychiatric issue. But knowledge that an inmate saw a mental health professional for a mental health concern would not keep the jail from accepting that inmate. Stewart testified that had Skagit County Jail transferred the missing mental records to Okanogan County Jail, Okanogan County Jail would still have accepted Zamora. The jail would have monitored him and based its decision on whether to continue housing him on his behavior at the jail. Zamora did not exhibit any conduct, or make any statements suggesting that he presented a risk to himself or others or that he had a significant mental health problem.

¶ 20 Zamora submitted two "kites" requesting *824 treatment for his shoulder. [14] Consequently, Kevin Mallory, a physician's assistant at the Okanogan County Jail, performed a "med call" on Zamora on May 30, 2008. [15] During that visit, Mallory reviewed the medication log that Skagit County Jail had sent, along with other Skagit County Jail records relating to Zamora's orthopedic issues. When Mallory noticed on the medication log the prescription for Lamictal, he asked Zamora about it. Zamora replied that he had not been taking it and did not wish to do so.

¶ 21 Zamora's response was consistent with the Skagit County Jail log, which conveyed Zamora's refusal to take the medication. In fact, the only medication Zamora was interested in taking was narcotic pain medication. During Mallory's interaction with Zamora, Zamora did not display any behaviors indicative of a mood disorder or any other mental health problems. Because Mallory believed Zamora was engaged in drug seeking behavior, he only prescribed ibuprofen, and discontinued Zamora's prescription for Lamictal.

¶ 22 Zamora subsequently submitted additional "kites" relating to shoulder pain, nasal congestion, and digestive problems. [16] He did not submit any request regarding mental health care.

¶ 23 Zamora was released from Okanogan County Jail on August 2, 2008.

Skagit County Jail

¶ 24 On August 5, 2008, three days after his release from Okanogan County Jail, Dennise called 911, requesting that police remove Zamora from her residence because he was disrupting the family. The responding officer arrested Zamora at his parents' residence on an outstanding misdemeanor warrant for failing to appear in court. Before leaving the residence, Dennise advised the officer that Zamora was suffering from an undiagnosed and untreated mental illness and had been for some time. The officer transported Zamora for booking at Skagit County Jail.

¶ 25 While waiting to be booked, Zamora was reportedly pounding on the walls of the holding room. He was nevertheless "changed down with out [sic] incident" and there is no evidence of additional behavioral problems. [17]

¶ 26 Zamora was released on his own recognizance on August 6, 2008.

¶ 27 Zamora never received a full evaluation by a psychologist or psychiatrist at either jail.

Events Post-incarceration

¶ 28 That same day, on August 6, 2008, Zamora arrived by ambulance to a local hospital emergency room, complaining of sudden onset of nausea, vomiting, and diarrhea. Hospital staff noted that he appeared awake and cognizant of his surroundings. Zamora was prescribed an anti-nausea medication and he was released. Zamora did not manifest any symptoms of a mental health crisis.

¶ 29 On August 13, 2008, Skagit County police received a 911 hang-up telephone call from Zamora's parents' home where Zamora was residing. A Skagit County police officer responded to the residence and spoke with Zamora and his mother, both of whom denied making the call. No further action was taken.

¶ 30 On August 18, 2008, a 911 caller reported that someone was riding a motorcycle on state owned property in Alger, Washington. A Skagit County police officer responded and contacted Zamora. The officer told Zamora that he was not permitted to enter that area and that he was trespassing. Shortly after the encounter, Zamora was involved in a motor vehicle accident on his parents' property and was injured. As a result, Zamora was taken to a nearby hospital. One of the doctors who examined him concluded that Zamora had adequate decisional capacity to decline care and had no suicidal or homicidal ideations. The doctor further noted that Zamora presented no imminent threat of harm ***825** to himself or others. He concluded that there was no basis upon which to contact a designated mental health professional for further evaluation of Zamora and that Zamora did not meet the criteria for detaining for a psychiatric evaluation.

¶ 31 On September 2, 2008, Zamora committed the crimes that are issue.

Procedural History

¶ 32 Following this tragic incident, Zamora pleaded guilty to 18 charges. [18] On November 30, 2009, the trial court imposed a sentence of life without parole for the murder charges and several hundred months for the other charges.

¶ 33 Binschus filed the present action in Snohomish County Superior Court on September 6, 2011, [19] He filed suit against DOC, [20] Skagit 911, Skagit County, and Okanogan County. Binschus alleged negligence on the part of the counties and that the negligence was a proximate cause of the shooting and resulting deaths and injuries to the victims.

¶ 34 Binschus argued the counties owed the victims a duty under two theories. First, Binschus asserted that the counties had a special relationship with Zamora that gave rise to a duty to protect the victims under the *Restatement (Second) of Torts* §§ 315 and 319. Second, Binschus contended that the counties' actions created a recognizable high degree of risk of harm that constituted misfeasance under the *Restatement (Second) of Torts* § 302B. [21]

¶ 35 Skagit and Okanogan Counties moved for summary judgment on all claims against them. [22] Okanogan County moved for summary judgment on the theory that it had no duty to third parties injured after Zamora's release based on its alleged failure to identify, diagnose, and treat Zamora's mental illness. Skagit County claimed that it had no duty to control Zamora after his release. Binschus moved for partial summary judgment only on the issue of duty, contending that the public duty doctrine did not apply to bar his claims. The trial court granted the counties' summary judgment motions on the issues of duty and proximate cause.

¶ 36 Binschus appeals.

ANALYSIS

Standard of Review

¶ 37 We review a trial court's summary judgment order de novo. *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wash.2d 265, 275, 979 P.2d 400 (1999) (citing *Taggart v. State*, 118 Wash.2d 195, 199, 822 P.2d 243 (1992); CR 56(c)).

¶ 38 The court must construe all facts and inferences in the light most favorable to the nonmoving party. *Hertog*, 138 Wash.2d at 275, 979 P.2d 400 (citing *Taggart*, 118 Wash.2d at 199, 822 P.2d 243). "Questions of fact may be determined as a matter of law 'when reasonable minds could reach but one conclusion.' " *Owen v. Burlington N. & Santa Fe R.R.*

Co., 153 Wash.2d 780, 788, 108 P.3d 1220 (2005) (quoting *Hartley v. State*, 103 Wash.2d 768, 775, 698 P.2d 77 (1985)).

¶ 39 If the nonmoving party " 'fails to make a showing sufficient to establish the existence of an element essential to that party's *826 case, and on which that party will bear the burden of proof at trial,' " summary judgment is proper. *Young v. Key Pharms.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

[1] ¶ 40 To prevail on a claim of negligence, a party must prove the following elements: (1) existence of a legal duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *Christensen v. Royal Sch. Dist. No. 160*, 156 Wash.2d 62, 66, 124 P.3d 283 (2005). In the present case, only duty and causation are at issue.

Duty

[2] ¶ 41 It is well settled that the existence of a legal duty owed to the plaintiff is an essential element in any negligence action. *Petersen v. State*, 100 Wash.2d 421, 425–26, 671 P.2d 230 (1983). Whether a given defendant owes a duty is generally a question of law. *Yong Tao v. Heng Bin Li*, 140 Wash.App. 825, 833, 166 P.3d 1263, 1268 (2007). "But where duty depends on proof of certain facts, which may be disputed, summary judgment is inappropriate." *Sjogren v. Props. of the Pac. N.W., LLC*, 118 Wash.App. 144, 148, 75 P.3d 592 (2003).

[3] ¶ 42 Binschus contends that pursuant to the *Restatement (Second) of Torts* §§ 315 and 319, Skagit and Okanogan Counties had a "take charge" relationship with Zamora that gave rise to a duty to guard against the foreseeable dangers posed by Zamora's violent propensities. Specifically, Binschus asserts that the counties had a duty to provide Zamora with a mental health evaluation and treatment because they were aware of his dangerous propensities. For this claim, we hold that Skagit County potentially owed a duty to the victims, and genuine issues of material fact preclude summary judgment.

[4] [5] ¶ 43 Generally, "our common law imposes no duty to prevent a third person from causing physical injury to another." *Sheikh v. Choe*, 156 Wash.2d 441, 448, 128 P.3d 574 (2006). Section 315 of the *Restatement (Second) of Torts* carves out one exception to this rule: [23]

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

The "take charge" relationship, as set forth in the *Restatement (Second) of Torts* § 319, is one subset of special relationships contemplated in § 315. Accordingly,

> 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.

RESTATEMENT (SECOND) OF TORTS § 319.

[6] [7] [8] ¶ 44 Once the "take charge" relationship is established, the actor " 'has a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of [the third party].' " *Joyce v. State, Dep't of Corr.*, 155 Wash.2d 306, 310, 119 P.3d 825 (2005) (emphasis omitted) (quoting *Taggart*, 118 Wash.2d at 217, 822 P.2d 243). Thus, the relevant threshold questions for purposes of §§ 315 and 319 are whether the actor has taken charge of the third party [24] and whether the actor knows or should know of the danger posed by the third party. *Bishop v. Miche*, 137 Wash.2d 518, 527, 973 P.2d 465 (1999).

*827 ¶ 45 At oral argument before this court, Skagit County conceded that while Zamora was in custody at Skagit County Jail, the jail had a "take charge" relationship with him. We accept this concession. Since *Petersen* first announced that a special relationship exists between a state psychiatrist and his or her patient, 100 Wash.2d at 428, 671 P.2d 230, Washington courts have broadened the scope of the "take charge" relationship to exist between correction officers and offenders. *See, e.g., Taggart*, 118 Wash.2d at 223–24, 822 P.2d 243; *Hertog*, 138 Wash.2d at 281, 979 P.2d 400; *Bishop*, 137 Wash.2d at 531, 973 P.2d 465. We consider the first relevant question satisfied as for Skagit and Okanogan Counties.

¶ 46 The next question we examine, therefore, is whether the counties knew or should have known of Zamora's violent propensities. We hold that material questions of fact remain as to whether Skagit County knew or should have known of Zamora's dangerous tendencies. The same, however, is not true for Okanogan County. Evidence in the record indicates that Skagit County was likely aware that Zamora had potentially dangerous and criminal inclinations.

¶ 47 Zamora had an extensive criminal history. By September 2008, he had been arrested 21 times in Skagit County and incarcerated 11 times. Skagit County Jail had a list of Zamora's criminal history at the time of his 2008 incarceration.

¶ 48 In addition, the record evinces that during the years preceding the September 2008 tragedy, Zamora had several encounters with Skagit County police whereby police officers became aware of Zamora's mental illness. On April 27, 2004, Skagit County police responded to Zamora's parents' residence, where Zamora resided, after Zamora called DSHS indicating he was cutting himself. Police officers responded and contacted Dennise, who informed them that Zamora had previously cut himself. After the Skagit County officers were unable to locate Zamora, Dennise contacted them, reporting that Zamora was at her residence, was off his medications, but not harmed and not threatening suicide. The Skagit County police incident report noted: "At this time we are aware that ISAAC ZAMORA does have some mental problems and his mom will be monitoring him."[25] Furthermore, in May 2007, Zamora called Skagit County police, concerned that someone in his house "was out to get him."[26] The police officer who spoke with Zamora believed Zamora was intoxicated and that there was no threat to his well-being.

¶ 49 Additionally, while at the Skagit County Jail, Zamora was incarcerated in the C–Pod unit, known for inmates who had severe behavioral issues and mental health issues, among other things. Dennise also informed the jail and the Skagit County prosecutor that Zamora had severe and untreated mental health issues and requested that he receive mental health treatment. She also made clear that she and her husband were fearful of Zamora. Significantly, when mental health professional Inslee visited Zamora at jail, she submitted a strongly worded statement expressing concern regarding Zamora's mental health, noting his "rageful thinking."[27] Another mental health counselor, Maxwell, later made note of Zamora's erratic and angry temperament and appearance, recommending that Zamora continue taking "psych. meds."[28]

¶ 50 Finally, we note that on September 2, 2008, Zamora's name on the computer screen at the 911 call center was tagged with a 220 alert code, which indicated that Zamora had mental health issues and was unstable.

¶ 51 Given these numerous contacts between Zamora and Skagit County, reasonable minds could conclude that Skagit County was aware of the risk posed by Zamora's violent propensities. Summary judgment in Skagit County's favor was inappropriate.

[9] ¶ 52 The record does not indicate that a material question of fact remained as to whether Okanogan County was aware of Zamora's ***828** violent disposition. Nothing in the record establishes Okanogan County knew or should have known of Zamora's unstable mental health condition. Therefore, we affirm the trial court's decision to summarily adjudicate the question of duty in favor of Okanogan County.

¶ 53 The counties contend that no duty can be imposed because any "take charge" relationship terminated once the counties released Zamora from custody. But this argument confuses the existence of a duty with the scope of the duty, which is limited by the foreseeability of the danger to the victims. *Christen v. Lee,* 113 Wash.2d 479, 492, 780 P.2d 1307 (1989) ("The concept of foreseeability limits the scope of the duty owed.").

[10] [11] [12] [13] ¶ 54 "Once the theoretical duty exists, the question remains whether the injury was reasonably foreseeable." *Joyce,* 155 Wash.2d at 315, 119 P.3d 825 (citing *Taggart,* 118 Wash.2d at 217, 822 P.2d 243). The plaintiff's harm must be reasonably perceived as within the general field of danger that should have been anticipated. *Christen,* 113 Wash.2d at 492, 780 P.2d 1307. " 'Foreseeability is normally an issue for the jury, but it will be decided as a matter of law where reasonable minds cannot differ.' " *Taggart,* 118 Wash.2d at 224, 822 P.2d 243 (quoting *Christen,* 113 Wash.2d at 492, 780 P.2d 1307). Here, it was within the jury's province to determine whether the injuries to the victims were reasonably foreseeable.

¶ 55 Accordingly, viewing the facts in the light most favorable to Binschus, we conclude that genuine issues of material fact preclude summary judgment on the question of whether Skagit County owed a "take charge" duty to the victims.

[14] ¶ 56 Binschus next contends that the counties owed a duty to Zamora's victims because their purportedly improper mental health evaluation and treatment of Zamora "dramatically increased" the risk of harm to the victims.[29] Binschus bases this argument on the *Restatement (Second) of Torts* § 302B. We find that no such duty is compelled by § 302B.

¶ 57 The *Restatement (Second) of Torts* § 302B 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." The duty to protect victims against a third party's criminal act may be imposed " 'where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct.' " *Robb v. City of Seattle*, 176 Wash.2d 427, 434, 295 P.3d 212 (2013) (emphasis omitted) (quoting RESTATEMENT § 302B cmt. e).[30]

¶ 58 In *Parrilla v. King County*, we held that § 302B can impose a duty of care against a third party's criminal acts even where no special relationship existed. 138 Wash.App. 427, 439, 157 P.3d 879 (2007); *see also* § 302B cmt. e. In *Parrilla*, a county bus driver exited a bus on a public street while the engine was running and when a passenger was still on board. *Parrilla*, 138 Wash.App. at 431, 157 P.3d 879. When the driver re-entered the bus, he observed the passenger "exhibiting bizarre behavior." *Parrilla*, 138 Wash.App. at 431, 157 P.3d 879. The driver again exited the bus with the engine still running. *Parrilla*, 138 Wash.App. at 431, 157 P.3d 879. The passenger moved into the driver's seat and drove the bus until it collided with several vehicles. *Parrilla*, 138 Wash.App. at 431, 157 P.3d 879. We held that under those circumstances, the driver's affirmative actions created a high degree of risk that a reasonable person would have foreseen and, thus, pursuant to § 302B comment e, the county owed a duty ***829** of care to protect the victims of the collision. *Parrilla*, 138 Wash.App. at 438–41, 157 P.3d 879.

¶ 59 In *Robb*, the Supreme Court reaffirmed that "*Restatement* § 302B may create an independent duty to protect against the criminal acts of a third party where the actor's own affirmative act creates or exposes another to the recognizable high degree of risk of harm." 176 Wash.2d at 429–30, 295 P.3d 212. In that case, two police officers initiated a *Terry*[31] stop of Behre and his companion on suspicion of burglary. *Robb*, 176 Wash.2d at 430, 295 P.3d 212. During the stop, the officers noticed several shotgun shells on the ground but did not question the suspects or pick up the shells. *Robb*, 176 Wash.2d at 430, 295 P.3d 212. The officers released Behre and the other suspect. *Robb*, 176 Wash.2d at 430, 295 P.3d 212. After Behre walked away, he returned to the scene to grab the shells and then shot and killed Robb. *Robb*, 176 Wash.2d at 430, 295 P.3d 212. The officers had encountered Behre prior to the shooting and were aware of his strange behavior during the days leading up to the shooting. *Robb*, 176 Wash.2d at 431, 295 P.3d 212. Four days before the shooting, Behre had been transported to Harborview Medical Center for an involuntary mental health assessment and then had been released. *Robb*, 176 Wash.2d at 431, 295 P.3d 212.

¶ 60 Robb's widow sued the city, claiming that the officers owed a duty to Robb under § 302B. *Robb*, 176 Wash.2d at 429, 295 P.3d 212. Our Supreme Court distinguished its case from *Parrilla*, finding that the officer's failure to pick up the shells was an omission, not an affirmative act like that in *Parrilla*. *Robb*, 176 Wash.2d at 436–38, 295 P.3d 212. The court held that a duty may arise under § 302B only where the actor's conduct constitutes misfeasance (an affirmative act), rather than nonfeasance (an omission). *Robb*, 176 Wash.2d at 439–40, 295 P.3d 212. The court explained that an affirmative act—or misfeasance—involves the creation of a new risk of harm to plaintiffs. *Robb*, 176 Wash.2d at 437, 295 P.3d 212. On the other hand, an omission—or nonfeasance—merely makes the risk of harm no worse. *Robb*, 176 Wash.2d at 437, 295 P.3d 212. The court held that the officer's failure to pick up the shotgun shells was an omission, not an affirmative act, which was insufficient to impose a duty under § 302B. *Robb*, 176 Wash.2d at 430, 437–39, 295 P.3d 212.

¶ 61 More recently, in *Washburn v. City of Federal Way*, the Supreme Court held that a police officer created a new, affirmative risk to a murder victim's safety when the officer improperly served an anti-harassment order to the subject of the order while the subject was home alone with the victim. 178 Wash.2d 732, 759–60, 310 P.3d 1275 (2013). The court found that the officer knew or should have known that the subject would react violently when he received the order, and knew or should have known that after he served the order, he left the subject home alone with victim. *Washburn*, 178 Wash.2d at 759–60, 310 P.3d 1275. Binschus contends that, unlike the nonfeasance committed by the officers in *Robb*, and similar to the misfeasance in *Washburn*, here, the counties engaged in misfeasance by increasing the risk of harm when they failed to "properly evaluate and treat"

Zamora.[32] Binschus supports this contention by pointing to evidence that two of Skagit County Jail's mental health counselors saw Zamora in connection with his mental health condition but did not offer an appropriate mental health evaluation. As for Okanagan County, Binschus argues that although Mallory saw Zamora, he did not properly evaluate his mental health condition even though he knew that Skagit County Jail had prescribed Binschus with Lamictal. Binschus also points to evidence demonstrating the counties' awareness of Zamora's deteriorating mental health.[33] *830 Binschus references the opinion of Dr. Hegyvary, who testified that had the counties evaluated Zamora, they would have identified his psychosis.

¶ 62 In an effort to bring his claims within the scope of § 302B, Binschus characterizes the counties' conduct as an improper evaluation and treatment, which, he contends, constitutes affirmative acts or misfeasance. But Binschus's attempt to frame the issue in this way is unconvincing because here, there simply were no affirmative acts. Rather, the counties' failure to evaluate Zamora and provide mental health treatment was an omission.

¶ 63 Furthermore, as established in *Robb*, § 302B only applies if the entity's affirmative act creates a new recognizable high degree of risk of harm to the plaintiffs. Like the officers in *Robb*, the counties did not create a new risk. Although it is possible that the jail medical staff could have mitigated the risk posed by Zamora's deteriorating mental health, this is not sufficient to justify an imposition of duty under § 302B. And Binschus cites to no evidence demonstrating that the visits or the prescription of Lamictal created a new recognizable risk or exacerbated the risk that already existed. At best, it purports to show that the counties were aware of Zamora's mental health condition or would have been able to identify his condition had they examined him properly. Nevertheless, the evidence does not establish that the counties' failure to evaluate Zamora more thoroughly or provide treatment constitutes an affirmative act or misfeasance. Instead, the counties committed nonfeasance, which does not give rise to liability under § 302B.

Proximate Cause

¶ 64 Binschus contends that summary adjudication of his claims against the counties was improper because a jury could reasonably find that the counties proximately caused the victims' injuries because of their failure to properly evaluate and treat Zamora during his incarceration. We agree.

[15] [16] [17] [18] ¶ 65 Proximate cause contains two separate elements: cause in fact and legal causation. *Hartley*, 103 Wash.2d at 777, 698 P.2d 77. Cause in fact, is, in addition to legal causation, an element of proximate cause. It "refers to 'the physical connection between an act and an injury.' " *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wash.App. 183, 194, 252 P.3d 914 (2011) (internal quotation marks omitted) (quoting *Ang v. Martin*, 154 Wash.2d 477, 482, 114 P.3d 637 (2005)). Cause in fact is usually a question for the jury, but it may be decided as a matter of law if the causal connection between the act and the injury is " 'so speculative and indirect that reasonable minds could not differ.' " *Moore v. Hagge*, 158 Wash.App. 137, 148, 241 P.3d 787 (2010) (quoting *Doherty v. Mun. of Metro. Seattle*, 83 Wash.App. 464, 469, 921 P.2d 1098 (1996)). Causation is speculative " 'when, from a consideration of all the facts, it is as likely that it happened from one cause as another.' " *Moore*, 158 Wash.App. at 148, 241 P.3d 787 (internal quotation marks omitted) (quoting *Jankelson v. Sisters of Charity of House of Providence in Territory of Wash.*, 17 Wash.2d 631, 643, 136 P.2d 720 (1943)).

[19] ¶ 66 Binschus asserts that the counties' negligent failure to evaluate and treat Zamora's mental illness was the cause in fact of Zamora's psychotic outburst on September 2, 2008. To support this contention, Binschus relies heavily on expert witness Dr. Hegyvary's declaration:

> [H]ad Zamora been subjected to a mental health evaluation been [sic] during his time at either Skagit County Jail or Okanogan County Jail, the examiner would have discovered Mr. Zamora's psychosis and begun the process of formulating a diagnosis. At this point the standard of care required administration of one or more of the antipsychotic medications.[34]

¶ 67 Dr. Hegyvary also opined that for patients suffering with schizophrenia, "[m]ore often than not, skilled persuasion is all that is required."[35] He also stated that the jails could have provided long-acting *831 treatment to Zamora that would have been effective long after his release:

> Mr. Zamora may have had difficulty complying with an oral regimen of antipsychotic medications requiring

> daily administration, but there are long-acting, injectable medications for use is [sic] these situations. Haloperidol Decanoate is one such antipsychotic commonly used in the treatment of schizophrenia and acute psychotic states. The medication is a long-acting injection given only once every four weeks. Because the medication is administered directly by the psychiatrist, only once per month, compliance can be documented and is virtually assured. The positive, therapeutic effects of the Haloperidol Decanoate last for longer than four weeks, thus, even if an injection was not given at the four-week mark the medication would continue to work to subdue or eliminate psychosis for up to six weeks. Another such medication is Risperdal Consta (risperidone), which is a depot injection administered once every two weeks. It is likely that either of these medications would have been effective in reducing or completely eliminating Mr. Zamora's psychosis, including his hallucinations and delusions. [36]

¶ 68 Dr. Hegyvary also concluded that had either counties provided Zamora with a proper mental health evaluation, a mental health provider would have been able to identify his psychosis and place him on a treatment plan that would include a long-acting antipsychotic medication. Had the counties done so, Dr. Hegyvary opined, Zamora would not have been in a psychotic state on September 2, leading to the victims' tragic deaths and injuries.

¶ 69 Based on this evidence, we conclude that Binschus has demonstrated that material questions of fact exist that, but for the counties' alleged negligence, Zamora would not have engaged in the violent rampage. [37]

¶ 70 We hold that summary judgment should not have been granted in this case. We reverse the trial court's summary judgment order and remand for further proceedings consistent with this opinion.

WE CONCUR: VERELLEN and DWYER, JJ.

Footnotes

1 Br. of Appellant at 1, 19, 21.
2 Clerk's Papers (CP) at 2538 (Dr. Csaba Hegyvary's Deposition).
3 CP at 3499.
4 CP at 2581.
5 CP at 2581, 2599.
6 We refer to Dennise Zamora by her first name for ease of reference. We intend no disrespect.
7 CP at 3685.
8 CP at 3687.
9 CP at 3687.
10 CP at 3649.
11 CP at 3146–51.
12 CP at 3650.
13 CP at 3650.
14 CP at 3700.
15 CP at 3699, 3700.
16 CP at 3701.
17 CP at 3563.
18 Zamora was found not guilty by reason of insanity on two counts of aggravated murder.
19 The estate of one of the murdered victims and one of the injured victims are not parties to this lawsuit.
20 In July and August 2013, each of the plaintiffs entered into a settlement agreement with DOC. The trial court entered stipulated judgments with respect to each plaintiff.
21 Binschus also raised a claim of negligence against Skagit County for the actions of Deputy Terry Esskew, arguing that her actions constituted an affirmative act under the *Restatement (Second) of Torts* § 302B. The trial court found that no duty was imposed under this theory. It additionally ruled that even if such duty had been imposed, it denied Skagit County's summary judgment motion on the issue of proximate cause. Binschus does not make a specific argument as to Deputy Esskew's alleged negligence on appeal and, thus, the court's decision as to Deputy Esskew is not pertinent to this appeal.

22 Skagit 911 also moved for summary judgment.

23 This special relation exception also is an exception to the public duty doctrine. *Hertog,* 138 Wash.2d at 276, 979 P.2d 400 (quoting *Taggart,* 118 Wash.2d at 219 n. 4, 822 P.2d 243).

24 To determine whether an actor has taken charge of the third party, there must be a " 'definite, established, and continuing relationship between the defendant and the third party.' " *Taggart,* 118 Wash.2d at 219, 822 P.2d 243 (quoting *Honcoop v. State,* 111 Wash.2d 182, 193, 759 P.2d 1188 (1988)); *see also Sheikh,* 156 Wash.2d at 448–49, 128 P.3d 574; *Hertog,* 138 Wash.2d at 276, 979 P.2d 400.

25 CP at 3551.

26 CP at 3552.

27 CP at 3685.

28 CP at 3687.

29 Appellant's Br. at 33.

30 Comment e provides, in pertinent part:

> There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where ... **the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.**

RESTATEMENT (SECOND) OF TORTS § 302B (emphasis added).

31 *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

32 Appellant's Br. at 39.

33 Binschus references the following in support of his argument: Zamora's lengthy criminal record, his past involuntary treatment, his mother's calls for treatment, his status on Skagit County's 911 call center's computer, his housing in the C–Pod at Skagit County Jail, his judgment and sentence, and his behavior in both jails. Appellant's Br. at 37; Appellant's Reply Br. at 25.

34 CP at 2540–41.

35 CP at 2544.

36 CP at 2544–45.

37 Binschus additionally argues that a county official could have sought involuntary treatment for Zamora under the involuntary treatment act (ITA), ch. 71.05 RCW. Binschus 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 ITA. Binschus waives this argument by raising it for the first time on appeal. *State v. McFarland,* 127 Wash.2d 322, 332–33, 899 P.2d 1251 (1995); *see also* RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."). Thus, we decline to reach its merits.

End of Document

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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. LANG; NICHOLAS LEE LANGE, 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, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS; SKAGIT EMERGENCY COMMUNICATIONS CENTER d/b/a "Skagit 911," an interlocal government agency; SKAGIT COUNTY, a political subdivision of the State of Washington; OKANOGAN COUNTY, a political subdivision of the State of Washington, Respondents.	No. 71752-9-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Skagit County has filed a motion for reconsideration herein. The appellants have filed a response to the motion. The court has taken the matter under consideration and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 16th day of April, 2015.

FOR THE COURT:

Trickey, J

SMITH GOODFRIEND PS

May 06, 2015 - 2:29 PM

Transmittal Letter

Document Uploaded: 717529-Petition for Review.pdf

Case Name: Binschus v. Skagit County

Court of Appeals Case Number: 71752-9

Party Respresented: Petitioner

Is this a Personal Restraint Petition? ○ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Victoria Vigoren - Email: victoria@washingtonappeals.c

A copy of this document has been emailed to the following addı

howard@washingtonappeals.com
cate@washingtonappeals.com
jjustice@lldkb.com
arned@co.skagit.wa.us