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No. 33992-1-III

COURT OF APPEALS,

DIVISION III,

OF THE STATE OF WASHINGTON

AHMET HOPOVAC,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, and KIMBERLY ALLEN

Respondents.

PETITION FOR REVIEW BY THE SUPREME COURT OF WASHINGTON

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I. IDENTITY OF PETITIONER

Ahmet Hopovac, Petitioner, asks this Court to accept review of the Court of Appeals decision identified in Part II of this Petition.

II. COURT OF APPEALS DECISION

On February 14, 2017, Division III of the Court of Appeals filed a decision finding that the Department of Corrections (hereinafter, "Department") owes no duty of care to protect felons under its supervision from the intentional torts of third parties even though the Department was arguably liable under the Restatement (Second) of Torts § 314A(4) to protect its supervisee to the extent it had limited his ability to protect himself, and affirming the trial court's summary dismissal of Mr. Hopovac's claim. *Hopovac v. State*, No. 33992-1-III (Wash. Ct. App. Feb. 14, 2017). A copy of the decision is provided in the Appendix.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals decision finding that the Department of Corrections owes no duty of protection to its community supervisee when it limits his normal opportunity to protect himself from known dangerous third parties is in conflict with other decisions of the Supreme Court and Court of Appeals.
2. Whether the public has a substantial policy interest in protecting informants and purported informants in the criminal justice system by allowing them to absent themselves

from the county where the target of their law enforcement informing resides.

IV. STATEMENT OF THE CASE

A. Factual History

Ahmet Hopovac began Department of Corrections (hereinafter, "Department") community supervision in Grant County in January of 2011 upon his release from the Grant County jail. CP 217-20. The terms of his supervision required, *inter alia*, that he remain in Grant County. CP 217. Because he was homeless and without family support in Grant County, Mr. Hopovac requested that Community Corrections Officer Patrick Markovics arrange for his supervision to be transferred to Idaho, where he had family support and a place to stay. CP 132-35. CCO Markovics began the transfer application procedure. CP 197-213. The application was delayed for a variety of reasons, including CCO Markovics' failure to provide the proper paperwork. *Id.*

In mid-April, 2011, Mr. Hopovac had a run-in with a member of the Poco Locos gang, causing him to fear for his life. CP 157. Mr. Hopovac and a friend, Christopher Jones, encountered a gang member who told the men he had just shot someone and wanted to give the gun to someone for safekeeping. *Id.* Mr. Jones agreed to keep the gun. *Id.* The gang member retrieved it a few hours later, giving Mr. Jones a quarter-ounce of marijuana for his trouble. CP 158. Mr. Jones later reported this event to police, CP 148, and the gang became aware of Mr. Jones' report due to extensive media coverage of the matter. CP 144. Mr. Jones was subjected to threats by the gang, and eventually left the county to escape

them. CP 139; 148. Mr. Hopovac became concerned that the gang would think that he had also informed law enforcement about the gun and the shooting, since he had been present when the gang member displayed the gun and said he had shot someone. CP 140; 147. Although he did not receive explicit death threats as Mr. Jones had, gang members began following him. CP 150-51.

Mr. Hopovac could not leave Grant County without the Department's permission due to Department supervision terms. CP 217. He had a scheduled supervision check-in with CCO Markovics, and decided to keep that appointment and ask the Department to help him escape the gang during the visit. CP 136. He was afraid to visit the police, as he was being surveilled by gang members who might believe that he was visiting police as an informant. CP 137.

Mr. Markovics was not available when Mr. Hopovac reported for his appointment, so Mr. Hopovac met instead with Community Corrections Supervisor Kimberly Allen. CP 135-39. He explained his predicament to Ms. Allen, and requested that his supervision be transferred immediately to the relative safety of Idaho. CP 137-39. Ms. Allen responded that she could not effectuate the transfer without a copy of a police report, and instructed Mr. Hopovac to visit the police to obtain the report. CP 138-39. Mr. Hopovac again explained his danger of being observed visiting the police by the gang, but Ms. Allen maintained that there was nothing she could do for him and sent him on his way. *Id.* Ms. Allen was aware that Mr. Hopovac was without home or family in

Grant County. CP 139. In fear for his life, Mr. Hopovac went into hiding in Grant County. CP 148.

On May 24, 2011, Mr. Hopovac's worst fears were realized, when he was discovered by gang members while walking to a store, forced into a car, and taken to a house. CP 151-53. Once there, a group of men physically assaulted Mr. Hopovac while demanding to know if he had informed the police about the gun and the shooting. CP 153-54. As the hour-and-a-half-long ordeal continued, the men ripped out two of Mr. Hopovac's toenails with pliers, then partially severed several fingers with a hatchet. *Id.* Mr. Hopovac has not regained full function of his arm or hand. CP 128-30; 155-56.

B. Procedural History

Mr. Hopovac filed a civil complaint for damages against the Department of Corrections and Community Corrections Supervisor Allen. The Department moved for Summary Judgment, asserting that it did not owe a duty to Mr. Hopovac to protect him from assault by third parties while he was under community supervision. The trial court agreed and granted Summary Judgment. Mr. Hopovac appealed to Division III of the Court of Appeals, which affirmed Summary Judgment for the Department. Mr. Hopovac here requests review of this issue of first impression by the Supreme Court in light of the duties already imposed on the Department of Corrections under the Restatement (Second) of Torts § 314A(4) for offenders held in closed custody.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court may accept review of a Court of Appeals decision when that decision is in conflict with other decisions of the Supreme Court or Court of Appeals, or when the decision implicates an issue of substantial public interest. RAP 13.4(b)(1-2, 4). Here, the Court of Appeals finding that the Department of Corrections owes no duty of protection to its community supervisees is in conflict with the plain language of Restatement (Second) of Torts § 314A(4) as adopted by this Court and interpreted in *Shea v. City of Spokane*, 17 Wn.App. 236, 562 P.2d 264 (1977) and its progeny. This is an issue of first impression in Washington in regards to community supervision. Further, the Court of Appeals decision presents an issue of substantial public interest regarding protection of police informants, actual and suspected.

A. This Court should accept review because the issue presented is a matter of first impression in Washington and the decision of the Court of Appeals is in conflict with previous interpretations of the Restatement's duties published by this Court and the Court of Appeals.

The issue raised by Mr. Hopovac is a matter of first impression for the Court: whether the Department of Corrections owes a duty to protect its community supervisees from the tortious actions of third parties when it restricts the supervisee's normal opportunities to protect herself.

It is well-established in Washington that there is ordinarily no affirmative duty to protect others from the tortious acts of third parties. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 199, 943 P.2d 286

(1997). The Court of Appeals created, and this Court affirmed, an exception to this absence of duty for situations involving a "special relation" by adopting the Restatement (Second) of Torts § 314A(4) in 1977. *Shea*, 17 Wn.App. 236, 562 P.2d 264; *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978). Section 314A provides:

> § 314 A. Special Relations Giving Rise to Duty to Aid or Protect
>
> (1) A common carrier is under a duty to its passengers to take reasonable action
>
> (a) to protect them against unreasonable risk of physical harm, and
>
> (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
>
> (2) An innkeeper is under a similar duty to his guests.
>
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
>
> (4) **One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.**

Restatement (Second) of Torts § 314A (Am. Law Inst. 1965) (emphasis added). Courts have defined various relationships as "special relations" giving rise to a duty, such as school to student, carrier to passenger, employer to employee, business to customer and hospital to patient. *See Caulfield v. Kitsap County*, 108 Wn.App. 242, 255-56, 29 P.3d 738 (2002) (collecting cases) (internal citations omitted). Likewise, Washington law has established that jailors owe a duty of care and

protection to individuals in physical custody under § 314A(4). *See, e.g. Shea,* 17 Wn.App. at 242, 562 P.2d 264; *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010).

"Tak[ing] the custody of another" does not require complete physical custody of jail or prison to create a special relationship. *Taggert v. State*, 118 Wn.2d 195, 223, 822 P.2d 243 (1992). Rather, Washington courts have focused on the deprivation of normal opportunities for protection as the source of the duty. For example, a jail has an absolute duty of care and protection for an inmate in physical custody, precisely because the inmate lacks any ability to care for himself. *Shea*, 17 Wn.App. at 242. Similarly, a convalescent center owes a duty of reasonable care to a patient whose physical condition has robbed her of all ability to care for herself. *Shepard v. Mielke*, 75 Wn.App. 201, 205, 877 P.2d 220 (1994). A nursing home likewise has a duty to a patient who is completely disabled and unable to protect herself. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 46, P.2d 420 (1997). In each of these cases, the Court noted that the individual's inability to protect or care for himself gave rise to a corresponding, proportionate duty for the custodian to provide that care and protection otherwise unavailable to them.

Washington courts also recognize a duty for those with a special relationship to persons who, like Mr. Hopovac, retain some ability to protect themselves. *See, e.g., id.* (noting that the special relationship between a group home and a profoundly disabled person is more

significant than that between an innkeeper and a guest, because the guest is merely in unfamiliar surroundings, not absolutely deprived of the ability to protect himself). *See also Kaltreider v. Lake Chelan Comm. Hosp.*, 153 Wn.App. 762, 769, 224 P.3d 808 (Shultheis, J., dissenting) (noting that *Niece* and *Shepard* identify a range of relative vulnerability in special relationships, and that the scope of the duty owed is in direct relation to the degree of impairment); *Nivens*, 133 Wn.2d at 203-04, 943 P.2d 286 (1997) (noting that the duty arising from a special relationship does not make defendant completely responsible for plaintiff's safety in the case of a business-customer relationship); *Gregoire*, 170 Wn.2d at 645-46 (Madsen, J., dissenting) (explaining that different levels of duty correspond to different levels of incapacity).

In finding "special relations," courts examine the two prongs of § 314A(4): (1) the one owing the duty is required by law to take or has voluntarily taken custody of another and (2) that custodial relationship deprives the other of her "normal opportunities for protection." *Id.* In Mr. Hopovac's case, the Court of Appeals properly analyzed the first prong and found that the Department had custody of Mr. Hopovac by applying the definition of custody found in The Law of Torts: "[c]ustodians include those who actually exercise control over their charges or who have legal authority to control them." *Hopovac*, No. 33992-1-III at *9 (citing Dan B. Dobbs, The Law of Torts § 326, at 884 (2000)). However, the court's analysis of the second prong, regarding the deprivation of

normal opportunities of protection, relied on a novel test: "[t]he test is whether a trier of fact could find that Mr. Hopovac was deprived of his *normal opportunities* for protection" *Id.* at *10-11(emphasis original). This test distinguishes between the deprivation of a single opportunity for protection and multiple opportunities, and appears to find that normal opportunities for protection are impaired only when few or no opportunities remain to a person in custody. *Id.* In effect, the Court of Appeals alters the language of § 314A(4) as adopted by this Court, replacing "normal opportunities" with "all opportunities" or "virtually all opportunities."

The Court of Appeals explained that Mr. Hopovac was deprived of only one meaningful normal opportunity for protection, namely, the ability to flee Grant County, territory of the Poco Locos gang. *Id.* at *10. The court found that the "panoply of opportunities" for protection which remained for Mr. Hopovac, such as the opportunity to arm himself with a weapon other than a gun, the opportunity to move about within Grant County and the opportunity to appeal to law enforcement for help were sufficient such that Mr. Hopovac was not deprived of his normal opportunities to protect himself. *Id.* at *11. Although this analysis determining the sufficiency of an opportunity to protect oneself from danger looks and sounds like a matter for the jury, the court ruled that no duty arose as a matter of law. By the reckoning of the Court of Appeals, no special relation existed between Mr. Hopovac and the Department,

and the Department had no duty of care toward him because he still had one or more opportunities to protect himself despite the limitation from escaping the danger by leaving the county where the gang was located. *Id.*

In his dissent to the Court of Appeals decision, Judge Fearing took issue with this analysis. *Id.* at dissent *1-5 (Fearing, J., dissenting). Pointing out that an "opportunity" need not be an essential act, but simply one possibility among many, Judge Fearing went on to suggest that the ability to flee the geographical place of danger is in some cases the best option. *Id.* at dissent *2-3 (stating that physical flight is often the best option for mafia snitches [sic] and domestic violence victims). Judge Fearing suggests that a better test for the second prong is whether a particular opportunity for protection constitutes an "ordinary possibility" under the circumstances, and would leave that determination to the trier of fact. *Id.* at dissent *3.

The test created by the Court of Appeals to analyze the second prong of § 314A(4) is in conflict with Washington precedent, in that it imposes new meaning on the plain language of the Restatement adopted by the Court in the *Shea* line of cases. More faithful to *Shea* and its progeny would be a test which imposes a duty in proportion to the extent to which the opportunities for protection are impaired by custody as determined by a jury.

B. This Court should accept review because the public has a policy interest in protecting actual and suspected police informants.

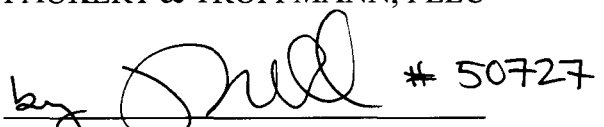
An auxiliary issue for Mr. Hopovac is the danger created by his status as a suspected police informant. The real possibility of having one's toenails ripped out and fingers hacked off by gang members could very well have a chilling effect on the willingness of actual informants to cooperate with law enforcement. Public safety is compromised when the state is known to turn its back on informants (real or suspected) facing foreseeable danger at the hands of the criminals upon whom they inform. In this case, Mr. Hopovac provided valuable information to an employee of a criminal justice agency regarding the weapon used in a high-profile murder. A reasonable jury could find that he should have been offered the modicum of protection within the Department's power to allow him to leave the county where he faced mortal danger.

VI. CONCLUSION

Petitioner, Ahmet Hopovac, respectfully requests that this Court grant review under RAP 13.4(b) to determine if the Court of Appeals erroneously applied Restatement (Second) of Torts § 314A(4) as adopted by this Court. Petitioner further requests that this Court to accept review to clarify the duty owed to community supervisees by the Department of Corrections and by criminal justice agencies to police informants when they have credible information about risk to the informant yet persist in limiting the normal opportunities of the informant to protect himself.

Respectfully submitted this 14th day of March, 2017.

PAUKERT & TROPPMANN, PLLC



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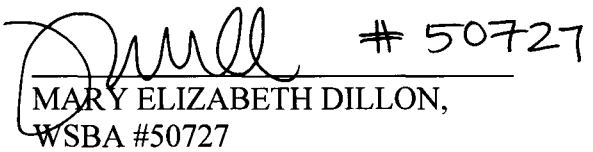

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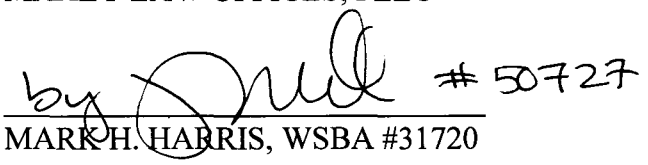

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

AHMET HOPOVAC, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS, and KIMBERLEY ALLEN, Respondents.	)	No. 33992-1-III PUBLISHED OPINION

LAWRENCE-BERREY, J. — We answer the question of whether the Department of Corrections (Department) owes a duty of care to protect felons under its supervision from the intentional torts of third parties. For such a duty to exist, *Restatement (Second) of Torts* § 314A(4) (Am. Law Inst. 1965) would require felons to be in the custody of the Department under circumstances such as to deprive them of their normal opportunities for protection. We determine that standard community custody conditions, such as those here, do not deprive felons of their normal opportunities for protection. We, therefore, answer the question in the negative and affirm the summary dismissal of Mr. Hopovac's claim.

FACTS

Because the trial court dismissed this case on summary judgment, the facts and all reasonable inferences are presented in the light most favorable to Mr. Hopovac, the nonmoving party. *Winston v. Dep't of Corr.*, 130 Wn. App. 61, 63, 121 P.3d 1201 (2005).

In January 2011, Mr. Hopovac was released from the Grant County jail after completing a sentence for residential burglary, theft, and forgery. He reported to Community Corrections Officer Patrick Markovics to begin his community supervision. Mr. Hopovac's conditions of community supervision prohibited him from, among other things, leaving Grant County and possessing a firearm.[1]

When Mr. Hopovac first reported for community supervision, he asked Mr. Markovics to transfer his supervision to Idaho so he could live with his family. Mr. Hopovac requested the transfer because he did not have any money or a place to stay in Grant County. At that time, he did not fear for his safety. Mr. Markovics told Mr. Hopovac they would discuss it more the following day.

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[1] Mr. Hopovac was also required to notify the Department before moving or changing jobs, report to and abide by written and oral instructions from Mr. Markovics, work at a Department-approved service, not possess or consume controlled substances or alcohol, not enter any establishments that sell alcohol, pay supervision fees, and perform other affirmative acts necessary to monitor compliance.

The following day, Mr. Hopovac did not report for his supervision appointment. The Department issued a warrant for his arrest. Mr. Hopovac was arrested almost two months later. The next time he reported for supervision, he told Mr. Markovics he had used methadone, methamphetamine, and marijuana. He entered into a stipulated agreement regarding his drug use.

Mr. Markovics submitted a request to transfer Mr. Hopovac's supervision to Idaho. In the transfer request, Mr. Markovics explained that Mr. Hopovac was homeless in Washington, Mr. Hopovac's father in Idaho was willing to help him, and Mr. Hopovac believed he had a job lined up in Idaho. Idaho denied the transfer request partly because it did not include a presentence investigation or police report. Idaho stated it could not investigate the request without one of these documents. Idaho also denied the request partly because Mr. Hopovac had violated the terms of his supervision within the last 30 days by using drugs and failing to report. After receiving Idaho's response, Mr. Markovics resubmitted the transfer request with a police report.

In mid-April, an incident occurred that made Mr. Hopovac begin to fear for his safety. Mr. Hopovac and his friend Christopher Jones were at Mr. Jones's house. While they were there, a Pocos Locos gang member arrived at the house. The gang member told them he had just shot someone and then showed them the handgun he used. The gang

member said he did not want the police to catch him with the handgun, so he asked Mr. Jones to hide it for him. Mr. Jones hid the handgun, and the gang member left. The gang member returned several hours later, retrieved the handgun, and gave Mr. Jones methamphetamine in exchange for hiding it.

Mr. Jones later went to the police and reported what he knew about the shooting. The case attracted media attention, including coverage on the radio and a story in the local newspaper. As a result, gang members began threatening Mr. Jones and his family. Because Mr. Hopovac was present at the house when the gang member came over, the gang suspected that Mr. Hopovac also played a role in reporting information to the police. The gang members never directly threatened Mr. Hopovac, but began following him. Mr. Hopovac believed he was in danger. Mr. Hopovac had an upcoming check-in at the Department supervision office and decided he would ask the Department for help during this visit.

When Mr. Hopovac arrived for his scheduled check-in, Mr. Markovics was out of the office, so Community Corrections Supervisor Kimberly Allen met with him. Mr. Hopovac told Ms. Allen he was in danger because of what he witnessed at Mr. Jones's house and told her he needed to get out of Washington. Ms. Allen told Mr. Hopovac that she needed a police report in order to request an expedited transfer request to Idaho and

instructed Mr. Hopovac to go to the police. Mr. Hopovac told Ms. Allen he could not go to the police because gang members were following him. Ms. Allen told Mr. Hopovac there was nothing she could do for him. She asked Mr. Hopovac if he had any family or resources in the area, and Mr. Hopovac said he did not.

Several days later, Mr. Hopovac failed to report for supervision, and the Department issued a warrant for his arrest. The Department then withdrew its resubmitted request to transfer Mr. Hopovac's supervision to Idaho.

On May 24, Mr. Hopovac began walking to a gas station to get a pack of cigarettes. As he was walking, a car pulled up near him. Two men jumped out of the backseat and told him to get in the car. Mr. Hopovac complied and the men drove him to a house. The men took him inside. Once inside, a larger group of men began beating Mr. Hopovac. They asked Mr. Hopovac who reported the shooting to the police and asked if Mr. Hopovac was involved in reporting the shooting to the police. They then pulled off two of Mr. Hopovac's toenails with a pair of pliers. A man then told Mr. Hopovac to hold out his hand. Mr. Hopovac did so, and the man brought an axe down on Mr. Hopovac's hand, partially severing several fingers.

I would deny the State's summary judgment motion to the extent the State argues it had no obligation to protect Ahmet Hopovac because of the community custody condition prohibiting travel outside Grant County. I would address, with the majority, the State's alternative argument that Ahmet Hopovac, as a matter of law, forewent Department of Corrections' liability under *Restatement (Second) of Torts* § 314A because of his behavior in violating community custody conditions, particularly his socializing with others engaged in criminal activity and his failing to contact the police. Otherwise, I would leave to a jury the questions of whether the Department of Corrections breached a duty and whether the breach caused Hopovac injury.

I concur in part and dissent in part.

Fearing, J.

Fearing, C.J.

Mr. Hopovac later went to the hospital where doctors reattached his fingers. Several days later, Mr. Hopovac was arrested on the outstanding Department warrant. He never recovered full function of his hand or arm.

Mr. Hopovac sued the Department and Ms. Allen for "tortious conduct." Clerk's Papers at 10. The Department moved for summary judgment, arguing it did not owe Mr. Hopovac a legal duty to protect him from assault while he was under community supervision. The trial court agreed and granted summary judgment for the Department. Mr. Hopovac appeals.

ANALYSIS

Mr. Hopovac argues the Department owed a duty of care to protect him from assault by the gang members. He contends the Department owed him a duty because the terms of his supervision—specifically, the conditions prohibiting him from leaving Grant County and possessing a firearm—limited his ability to protect himself.

An essential element in any negligence claim is the existence of a legal duty that the defendant owes the plaintiff. *Kaltreider v. Lake Chelan Cmty. Hosp.*, 153 Wn. App. 762, 765, 224 P.3d 808 (2009). Whether a duty exists is a legal question this court

decides de novo.[2] *N.K. v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 525, 307 P.3d 730 (2013).

In general, there is no affirmative duty to protect others from the criminal acts of third parties. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 199, 943 P.2d 286 (1997). The fact that a person knows that another person needs aid or protection does not in itself impose a duty to act. *Restatement* § 314. However, an exception exists where the defendant is in a special relationship with either the third party or the foreseeable victim of the third party's conduct. *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 430, 378 P.3d 162 (2016).

Several examples of special relationships establishing an affirmative duty to protect another person from the torts of third parties are set forth in *Restatement* § 314A. This court has adopted subsection (4), which provides:

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a . . . duty [to take reasonable action to protect the other person from unreasonable risk of physical harm].

Restatement § 314A(4); *accord Shea v. City of Spokane*, 17 Wn. App. 236, 242, 562 P.2d 264 (1977) (adopting *Restatement* § 314A(4)), *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978).

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[2] Mr. Hopovac argues that select portions of the trial court's oral ruling were incorrect. Because this court's review is de novo, this court need not individually analyze

This duty to protect extends to risks arising from the intentional or criminal acts of third parties. *Restatement* § 314A(4) cmt. d.

It is undisputed the Department owes a duty to ensure the health, welfare, and safety of incarcerated individuals. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010); *Kusah v. McCorkle*, 100 Wash. 318, 325, 170 P. 1023 (1918). For example, in *Shea*, Michael Shea was in jail and became nauseous. *Shea*, 17 Wn. App. at 238. He asked a guard for a tranquilizer or a doctor. *Id.* The guard denied both requests. *Id.* Mr. Shea collapsed and suffered a spinal injury. *Id.* at 240. He then sued the jail for negligence. *Id.*

The *Shea* court adopted *Restatement* § 314A(4) and held that the jail had a nondelegable duty to provide competent medical care to Mr. Shea. *Shea*, 17 Wn. App. at 242. The court reasoned that the duty to prisoners arises because when individuals are arrested and imprisoned for the protection of the public, they are deprived of their liberty as well as their ability to care for themselves. *Id.* at 241-42. Thus, the corresponding duty "is a positive duty arising out of the special relationship that results when a custodian has complete control over a prisoner deprived of liberty." *Id.* at 242. In reasoning that the jail's duty arose from having complete control over Mr. Shea, the court noted that

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the portions of the trial court's oral ruling that Mr. Hopovac contests.

"[t]he extent of this control is well illustrated in this case by the jailer's denial of plaintiff's request to telephone a doctor." *Id.*

The central question in this case is whether *Restatement* § 314A(4) imposes a duty on the Department to protect felons under its supervision. There does not appear to be any authority addressing this question.

Mr. Hopovac and the Department each argue that the plain language of *Restatement* § 314A(4) supports their respective positions. The first portion of *Restatement* § 314A(4) provides that only one who "voluntarily takes *the custody* of another" owes a duty to protect that person from third parties. (Emphasis added.) The Department argues this language limits *Restatement* § 314A(4)'s application to physical custody only. But this is a very narrow interpretation of the word "custody." "Custodians include those who actually exercise control over their charges or who have legal authority to control them." DAN B. DOBBS, THE LAW OF TORTS § 326, at 884 (2000); *see also Jacobs v. Ramirez*, 400 F.3d 105, 105-06 (2d Cir. 2005) (parolees are still in "custody" for purposes of 42 U.S.C. § 1983 analysis). While the Department did not physically control Mr. Hopovac, his conditions of community supervision demonstrate the Department had legal authority to control him.

But this conclusion is not dispositive of the central question presented. The latter portion of *Restatement* § 314A(4) imposes liability only where the conditions of custody "deprive [the plaintiff] of his normal opportunities for protection." Mr. Hopovac argues he was restricted from possessing a firearm as a condition of his community supervision. But Mr. Hopovac, similar to nearly all persons supervised by the Department, was a convicted felon. All felons are prohibited from possessing firearms by virtue of their felony convictions. *See* RCW 9.41.040(1)-(2). Because his right to possess a firearm was lost by virtue of his felony conviction, this condition of community custody did not deprive Mr. Hopovac of any right.

The only community custody condition that affected Mr. Hopovac's ability to protect himself was the condition that he remain in Grant County. Although this condition affected Mr. Hopovac's ability to protect himself, that is not the standard for imposing liability. Rather, Mr. Hopovac must establish the condition "deprive[d] [him] of his *normal opportunities* for protection." *Restatement* § 314A(4) (emphasis added). It is in this respect where we diverge from our dissenting colleague.

The test is not whether a trier of fact could find that Mr. Hopovac was deprived of *one* normal opportunity for protection. If that was the test, every condition that somehow impacted self-protection would create an issue of fact. The test is whether a trier of fact

could find that Mr. Hopovac was deprived of his *normal opportunities* for protection. We thus must view what panoply of opportunities Mr. Hopovac still had for protection. Among other opportunities to protect himself, Mr. Hopovac still could carry a weapon (other than a gun), he still could move anywhere within Grant County, and he still could report the threats to law enforcement and law enforcement could take appropriate actions. We conclude that no reasonable trier of fact could find that the opportunities Mr. Hopovac had for protection constituted a *deprivation* of that right. Moreover, to hold otherwise would put the Department in an untenable position every time a felon under community custody claimed his or her safety was at risk and asked to move outside of the supervising county.

For these reasons, we conclude that Mr. Hopovac did not have a special relationship with the Department under *Restatement* § 314A(4), and the Department did not owe him, or any felon subject to standard community custody conditions, a duty of care.[3] The trial court did not err when it summarily dismissed Mr. Hopovac's tort claim.

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[3] The Department also argues it owed no duty to Mr. Hopovac because he absconded from supervision. *See Husted v. State*, 187 Wn. App. 579, 586, 590, 348 P.3d 776, *review denied*, 184 Wn.2d 1011, 360 P.3d 817 (2015) (holding the Department has no duty to control an offender who absconds from supervision because it no longer "take[s] charge" of the offender under *Restatement* § 319). Because our above analysis is dispositive, we decline to address this argument. *State v. McCord*, 125 Wn. App. 888, 895, 106 P.3d 832 (2005).

Affirmed.

Lawrence-Berrey, J.

I CONCUR:

Korsmo, J.

No. 33992-1-III

FEARING, C.J. (concurring in part and dissenting in part) — The majority justifies its ruling on four propositions. First, Washington earlier adopted *Restatement (Second) of Torts* § 314A (Am. Law Inst. 1965). Second, the Department of Corrections' duty to protect others from criminal acts of third parties extends to felons in community custody, not only those in prison. Third, the Department of Corrections, as a matter of law, is not liable for denying Ahmet Hopovac the opportunity to use a gun to protect himself since Hopovac's status as a felon already precluded his possession of a gun. Fourth, the Department of Corrections, as a matter of law, is not liable for precluding Hopovac's flight from Grant County because the opportunity to flee town, the county, or the state does not qualify as "normal opportunities for protection."

I agree with the majority's first three rulings. I disagree with the fourth ruling. Admittedly an exhaustive search finds no decision wherein a court held that a question of fact existed as to the liability of a government entity because parole conditions precluded travel outside a county or that the ability to travel beyond one's county constitutes a "normal opportunity for protection." Nevertheless, the majority cites no authority to support its position to the contrary. The majority also fails to analyze what constitutes a

normal opportunity for protection and omits any explanation for stating that disappearing from one's community does not constitute a normal opportunity for protection.

Subsection 4 of *Restatement (Second) of Torts* § 314A provides:

> (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his *normal opportunities for protection* is under a similar duty to the other.

(Emphasis added.) The words "normal" and "opportunity" are key to our analysis. The terms may need no defining, but the Cambridge English Dictionary defines "normal" as

> ordinary or usual; as would be expected.

CAMBRIDGE ENGLISH DICTIONARY ONLINE, http://dictionary.cambridge.org/us/dictionary/english/normal (last visited Feb. 1, 2017). The same dictionary defines "opportunity" as

> an occasion or situation which makes it possible to do something that you want to do or have to do, or the possibility of doing something.

CAMBRIDGE ENGLISH DICTIONARY ONLINE, http://dictionary.cambridge.org/us/dictionary/english/opportunity (last visited Feb. 1, 2017). Under the *Restatement*, fleeing one's town to avoid violence need not be an ordinary step actually taken by those in danger. Running need not be a typical measure exercised. Instead, skedaddling need only be an ordinary possibility.

Because of a sheltered, privileged life and because of a large, formerly athletic frame, I have never needed or sought protection from a mob, a gang, an angry spouse, or anyone wishing to physically harm me. Nevertheless, from my decades of reading newspapers, I know that Mafia snitches must often escape their respective communities

and assume another identity. From my experience as a lawyer, I comprehend that wives of abusive husbands must flee or would benefit by fleeing to another county or state. Thus, a parole condition eliminating one's liberty to escape to another county or beyond may interfere with a normal opportunity for protection. At least, a trier of fact should determine whether flight constitutes an ordinary possibility for protection.

The criminal justice system depends extensively on the cooperation of informants. Although Ahmet Hopovac may not have been an informant, a criminal gang considered him an informant. Public policy should encourage state protection of informants or purported informants facing the wrath of a mob, about whom the informant tattled.

The majority additionally concludes that Ahmet Hopovac fails to present a question of fact as to the application of *Restatement (Second) of Torts* § 314A because the *Restatement* section refers to "normal opportunities for protection." The majority emphasizes the plural nature of the word "opportunities." From this emphasis, the majority concludes that any plaintiff relying on the *Restatement* language must present evidence that his custodian thwarted more than one opportunity for protection. Ahmet Hopovac only posited one legitimate opportunity.

The majority fails to recognize the universal view that use of the singular includes the plural, and the plural the singular. RCW 70.74.010; *Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 434, 98 P.3d 463 (2004); *State v. Nugent*, 20 Wash. 522, 523, 56 P. 25 (1899); *State v. Veazie*, 123 Wn. App. 392, 396, 98 P.3d 100 (2004); *State v. Wiggins*, 114 Wn. App. 478, 483, 57 P.3d 1199 (2002); *Hinton v. Johnson*, 87 Wn.

App. 670, 675, 942 P.2d 1061 (1997); *State v. Welty*, 44 Wn. App. 281, 283, 726 P.2d 472 (1986). Since courts apply the *Restatement* verbatim, *Restatement* sections function as statutes. RCW 1.12.050, concerning construction of statutes, declares:

> Words importing the singular number may also be applied to the plural of persons and things; words importing the plural may be applied to the singular . . . .

The majority's reading the plural to exclude the singular would lead to silly consequences. A motel might post a placard that declares: "Please no pets." John Steinbeck could sleep with Charley as long as he traveled with only Charley. Steinbeck would have brought only one pet, not pets. A tavern may post a sign that reads: "No minors allowed." According to the majority, Holden Caulfield could enter the tavern if he is the only underage patron.

To illustrate further the error of the majority, assume that the *Restatement* reads as follows:

> (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of *a normal opportunity for protection* is under a similar duty to the other.

Under the majority's reading of the rule, if the custodian deprived the one in custody of two opportunities to protect himself, the custodian would avoid liability because the rule only mentions the singular. If the majority holds that plural cannot mean singular, the logical extension of the holding is that singular cannot mean plural. So the custodian would avoid liability the more the custodian deprives the ward of means of protection.

I would deny the State's summary judgment motion to the extent the State argues it had no obligation to protect Ahmet Hopovac because of the community custody condition prohibiting travel outside Grant County. I would address, with the majority, the State's alternative argument that Ahmet Hopovac, as a matter of law, forewent Department of Corrections' liability under *Restatement (Second) of Torts* § 314A because of his behavior in violating community custody conditions, particularly his socializing with others engaged in criminal activity and his failing to contact the police. Otherwise, I would leave to a jury the questions of whether the Department of Corrections breached a duty and whether the breach caused Hopovac injury.

I concur in part and dissent in part.

Fearing, J.

Fearing, C.J.

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

AHMET HOPOVAC, Petitioner, v. STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, and KIMBERLY ALLEN Respondents.	NO. 33992-1-III DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury pursuant to the laws of the State of Washington, I am now and at all times herein mentioned have been, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party

to or interested in the above-entitled action, and competent to be a witness herein.

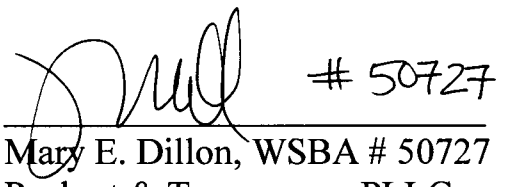
On this date, I personally delivered the original and one copy of Petitioner's Petition for Review by the Supreme Court of Washington to the Clerk, Court of Appeals, Division III, State of Washington, for filing in the above-captioned matter; and served a true and correct copy on co-counsel for Petitioner by personal delivery to:

Mark J. Harris
Maxey Law Office, PLLC
1835 West Broadway Avenue
Spokane, WA 99201

and on this date, I served a true and correct copy of Petitioner's Petition for Review by the Supreme Court of Washington on counsel for Respondent, by placing same in the United States Mail, postage prepaid, and properly addressed to:

Carl P. Warring
Assistant Attorney General
1116 W Riverside Ave
Spokane, WA 99201-1194

DATED March 14, 2017.



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