No. 100137-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 81246-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANTHONY SMITH and JULIE SMITH, a marital community, and ANTHONY SMITH as personal representative of the ESTATE OF MEAGAN SMITH,

Appellants,

WASHINGTON STATE DEPARTMENT OF CORRECTIONS and AMERICAN BEHAVIORAL HEALTH SYSTEMS, INC., a Washington corporation,

Respondents.

PETITION FOR REVIEW

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A. Identity of Petitioners and Decision Below.

Petitioners Anthony and Julie Smith, and Anthony Smith as personal representative of the Estate of Meagan Smith (collectively, "Petitioners" or "the Smiths"), seek review of Division One's July 26, 2021 decision (App. A) affirming the summary judgment dismissal of the Smiths' wrongful death claim against the Department of Corrections ("DOC").

B. Issues Presented for Review.

1. Does the Court of Appeals' decision that the DOC's "take charge" duty over offenders sentenced to community custody cannot, as a matter of law, arise unless and until the DOC decides to assign a Community Corrections Officer ("CCO") conflict with this Court's prior decisions expressly holding that a "take charge" duty can arise from statute or court order?

2. Does the Court of Appeals' decision that the DOC did not have a special relationship with an offender that the DOC had previously characterized as "highly violent" conflict with this Court's decision in *Volk v. DeMeerler*, 187 Wn.2d 241, 386 P.3d 254 (2016)?

3. Does the Court of Appeals' holding that no special relationship exists between the DOC and an offender ordered into its immediate supervision prior to the assignment of a CCO create an issue of substantial public interest by (a) encouraging the DOC to delay assigning a CCO in order to avoid assuming any take charge duty and (b) allowing the DOC to escape liability for any crimes the offender commits while under DOC supervision but prior to the assignment of a CCO?

4. Did the Court of Appeals incorrectly weigh conflicting evidence, thereby invading the province of the jury, by concluding as a matter of law that the DOC's failure to supervise an offender under its control could not have been a proximate cause of Meagan Smith's murder?

C. Statement of the Case.

1. Craven Was Known to the DOC as a Highly Violent Offender.

Zachary Craven had a long history of criminal conduct before he murdered 21-year-old Meagan Smith on July 7, 2015. In 2011, Craven pled guilty to Animal Cruelty for stabbing his grandmother's cat to death. (CP 864) The next year, he was arrested for assaulting his mother and was twice reported to the authorities for mental health issues. (CP 864) In 2013, Craven held his grandmother, Angelika Hayden, at knife-point; after telling her, "[Y]ou know I'm crazy, *I'll kill you*," he using electrical cords to tie her up and steal her debit card. (CP 860-61) He was eventually convicted of, and sentenced to, 12 months in community custody under DOC supervision for First Degree Theft, Driving Under the Influence, and Felony Harassment for attacking and threatening to kill his grandmother. (CP 860-61)

The DOC assigned community corrections officer ("CCO") Wayne Derouin to Craven's case. (CP 399) While under DOC supervision, Craven repeatedly violated the terms of his community custody. (CP 385) He was terminated from his substance abuse treatment program, repeatedly drank alcohol and used controlled substances, and never provided proof that he

received a required mental health evaluation. (CP 351, 386, 388-90) Craven also refused to report to the DOC when ordered to do so, and the DOC issued a warrant at least once when he went missing. (CP 392) CCO Derouin learned on at least one occasion that Craven was hostile toward his then-girlfriend Theresa Cunningham, as well as her family. (CP 386) The DOC's supervision of Craven arising from the 2013 convictions ended in December 2014. (CP 382-83)

However, on September 8, 2014, while Craven was still under DOC supervision, he again attacked his grandmother. (CP 352) Craven demanded that she drive him to the hospital because he needed pain medication. (CP 352) During the drive, he told her that he was going to "kill her dog" and "slit her throat," and "twice jerked the steering wheel of the moving car." (CP 352) Craven "emphasized that he could end both of their lives at any time." (CP 352) The police arrested Craven who, according to his grandmother, "had not been taking prescribed medication and . . . was more prone to violence under these circumstances." (CP 352) Craven plead guilty to felony harassment for the 2014 attack on his grandmother on April 1, 2015. (CP 337-41)

On June 26, 2015, King County Superior Court Judge Benton sentenced Crave to a condition-laden residential drug offender sentencing alternative ("DOSA"). (CP 361-75) The DOSA statutes, enacted as part of the Sentencing Reform Act of 1981 ("SRA"), ch. 9.94 RCW, authorize a court to sentence an eligible offender to community custody in lieu of serving a prison sentence. RCW 9.94A.660(3). The DOC supervises

offenders sentenced to community custody. RCW 9.94A.030(21); .501(1), (4)(f). Judge Benton specifically ordered:

> The defendant shall serve 24 months in community custody **under the supervision of the DOC, on the condition that the defendant enters and remains in residential chemical dependency treatment** certified under RCW Ch. 96.96 for 3-6 (between 3 and 6) months. The DOC shall make chemical dependency assessment and treatment services available during the terms of community custody, within available resources.
>
> Pending DOC placement in residential chemical dependency treatment, **the defendant is ordered to attend a DOC day reporting center and follow all applicable rules. The defendant shall report to the DOC to being the day reporting program within 24 hours of his release.**

(CP 365)

The Judgement and Sentence ("J&S") mandated that Craven "comply with the treatment and other conditions proposed in the examination report"; "not use illegal controlled substances and [*sic*] submit to urinalysis or other testing to monitor compliance"; "not use any alcohol or controlled substances without prescription"; "undergo testing to monitor compliance"; "report as directed to a community corrections officer"; and submit to a mental health evaluation. (CP 365, 375) Judge Benton also imposed a Domestic Violence No Contact Order, prohibiting Craven from contacting his grandmother for a maximum of five years. (CP 365)

Judge Benton expected Mr. Craven to be "immediately under the supervision of the DOC when [she] signed the judgment and sentence on June 26, 2015" and that "the DOC [would] enforce the terms of Mr.

Craven's sentence and alert the Superior Court for the issuance of an immediate arrest warrant should he fail to comply." (CP 813) She signed the J&S with the understanding that the "DOC immediately had the authority to regulate Mr. Craven's movements and monitor his behavior to ensure he complied with all terms of his sentence, including reporting to the DOC, entering treatment, and abstaining from drugs, alcohol, and violence." (CP 813) Judge Benton was "aware that Mr. Craven was classified by the DOC as highly violent, and that absent his compliance with the terms of his sentence, including residential treatment, he was a risk to the community and may reoffend." (CP 813) She entrusted the "DOC to enforce the terms of Mr. Craven's sentence," "alert the Superior Court for issuance of an immediate arrest warrant should he fail to comply," and "detain Mr. Craven even absent a bench warrant" "if he violated a condition of his sentence." (CP 813)

On July 1, 2015, Craven failed to report for residential treatment at ABHS, the treatment facility. (CP 482-83) Instead, Craven went to the home of Robert Luxton, whom Craven referred to as his grandfather. (CP 256, 390) Craven, who appeared to be under the influence of heroin and methamphetamine, threatened Mr. Luxton's life while holding a gun to his head before pistol whipping him across his forehead. (CP 256, 282) Mr. Luxton filed a police report the following day. (CP 282)

ABHS notified the DOC of Craven's failure to show up for treatment on July 2, 2015, after Craven had already assaulted Luxton. (CP 440, 456-57) The DOC did not investigate Craven's disappearance. On July

5, 2015, Craven violated his the Domestic Violence No Contact Order by going to his grandmother's home. (CP 282) Two days later, on July 7, Craven first shot and killed his grandmother. Later that same day, Craven went to the home where his ex-girlfriend Cunningham lived with her parents. (CP 283) Craven had previously threatened to hurt Cunningham, her family, and her friends. (CP 270) Cunningham's best friend, Meagan Smith, was housesitting for the Cunningham family when Craven arrived at the home. (CP 268, 284-86) Craven shot and killed Meagan. (CP 286)

On July 8, 2015, Craven was arrested for the murders he had committed while under DOC supervision. (CP 787) That same day, the DOC claims that it first became aware that Craven had been sentenced to community custody under DOC supervision *twelve days* earlier. (CP 332, 359) The DOC assigned Deruoin as Craven's CCO on the day of Craven's arrest for two murders. (CP 332, 359)

2. Procedural History

On July 3, 2018, Meagan's father, Anthony Smith, as personal representative of his daughter's estate, sued the DOC and ABHS for survivorship and wrongful death arising from their negligent supervision of Craven. (CP 1-7) Meagan's parents, Anthony and Julie, later amended their complaint to add claims on their own behalf. (CP 26-34)

On January 24, 2020, the DOC and ABHS each filed motions for summary judgment dismissal of the Smiths' claims. (CP 44-71, 401-20) The trial court granted both motions and dismissed the Smiths' claims on February 21, 2020. The Court of Appeals affirmed the trial court in its July

26, 2021 opinion. The Smiths now seek review of the Court of Appeals' decision dismissing the Smiths' claims against the DOC.

D. Argument Why Review Should be Granted.

1. The Court of Appeals' decision conflicts with this Court's holdings in *Joyce* and *Taggart*. (RAP 13.4(b)(1), (4))

Washington has adopted Section 319 of the *Restatement (Second) of Torts* (hereinafter, "Section 319"), under which an actor "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" has a duty to exercise "reasonable care to control the third person to prevent him from doing such harm." Section 319; *Taggart v. State*, 118 Wn.2d 195, 219, 822 P.2d 243 (1992) (adopting Section 319). Premised on a flawed interpretation of this Court's decisions in *Taggart* and *Joyce v. State*, 155 Wn.2d 306, 119 P.3d 825 (2005), Division One erroneously held that a "take charge" duty of an offender sentenced to community custody can *never* exist, as a matter of law, prior to the moment the DOC decides to assign a CCO.

The Court of Appeals' decision conflicts with *Joyce* and *Taggart*, which held that the DOC's take charge duty arises from its "authority to supervise" the third party—an authority that can arise from a statute or a J&S (and the conditions of release contained therein). The Court of Appeals' decision requiring the assignment of a CCO as a prerequisite to the take charge duty conflicts with this Court's precedent and "drastically narrow[s] the State's duty of reasonable care as a matter of law"—a result this Court expressly rejected in *Joyce*. This Court should grant review under

RAP 13.4(b)(1) and (4) to clarify this conflict and settle this question of significant public interest and safety.

a. The Court of Appeals' decision conflicts with this Court's holding in *Taggart.*

The Court of Appeals disregarded this Court's decision in *Taggart* by concluding that the Smiths failed to demonstrate that the DOC "had a definite, established, and continuing relationship with the offender it failed to supervise" (App. A at 6-7) solely because the DOC had not assigned a CCO to Craven's case on the day of Meagan's murder—despite Craven having been sentenced to *immediate* DOC supervision 12 days earlier. Division One's holding plainly contradicts this Court's decision in *Taggart*.

In *Taggart*, this Court examined RCW 72.04A.080, under which parolees "shall be subject to the supervision of the department of corrections, and the probation and parole officers of the department shall be charged with the preparation of progress reports of parolees and to give guidance and supervision to such parolees within the conditions of a parolee's release from custody." This Court held that "*[t]his statute is sufficient to establish that parole officers have a 'definite, established and continuing relationship'* with their parolees." 118 Wn.2d at 219. This Court then expressly relied on the fact that "[p]arole officers have the statutory authority under RCW 72.04A.080 to supervise parolees" in concluding that the DOC was subject to a take charge duty under Section 319. 118 Wn.2d at 219.

There is no material difference between the statute at issue in *Taggart* and the residential DOSA statute under which Craven was sentenced. Similar to RCW 72.04A.080, the residential DOSA statute expressly requires the DOC to supervise offenders who, like Craven, have been court ordered into community custody: "The department *shall* supervise an offender sentenced to community custody . . ." RCW 9.94A.501(4)(f) (emphasis added); *see also* RCW 9.94A.501(1), RCW 9.94A.030(21). Just as RCW 72.04A.080 establishes a special relationship because it requires parole officers to supervise parolees and give them "guidance . . . .within the conditions of a parolee's release from custody," RCW 9.94A.704 requires the DOC to supervise those sentenced to community custody and "instruct the offender to . . . [r]eport as directed to a [CCO], [and] [r]emain within prescribed geographical boundaries." RCW 9.94A.704(3).

The Court of Appeals erred by holding that there could be no "definite, continuing and established relationship," and therefore no take charge duty, unless and until the DOC appoints a CCO. Under *Taggart*, a statute itself can give rise to that relationship; that statutory authority to supervise offenders may, in turn, impose a take charge duty upon the DOC.

b. The Court of Appeals' decision conflicts with this Court's holding in *Joyce*.

The Court of Appeals' decision conflicts even more blatantly with this Court's holding in *Joyce*. Thirteen years after *Taggart*, this Court further clarified the proper standard for a Section 319 duty:

> The duty arises from the special relationship between the government and the offender. The judgment and sentence and the conditions of release are critical because they create the relationship, which in turn creates the duty.

Joyce, 155 Wn.2d at 318.

In *Joyce*, the DOC "rightly" conceded that "the State's authority to supervise *arises* from the conditions of release contained in a judgment and sentence for a crime," but asked this Court "to hold that when it [the DOC] is not specifically *ordered* to do an act, it has no *duty* to do the act." 155 Wn.2d at 315, 320 n.3 (emphasis in original). This Court rejected the DOC's attempt "to drastically narrow the State's duty of reasonable care as a matter of law." 155 Wn.2d at 315. Instead, and consistent with the principles set forth in *Taggart*, this Court focused its inquiry on the DOC's "authority to supervise." 155 Wn.2d at 315. This Court noted that the DOC has a statutory authority to "monitor" offenders and is "authorized to report violations of the conditions of release to the sentencing judge, if they deem it appropriate" under the SRA. *Joyce*, 118 Wn.2d at 310-11 (citing RCW 9.94A.631). This Court concluded unequivocally concluded that the DOC's authority to supervise arises from the J&S and conditions of release.

Here, the Court of Appeals disregarded *Joyce* by erroneously holding that, "[u]ntil a CCO is appointed, there is no one to establish a relationship with the offender." (App. A at 8) The Court of Appeals' holding is fatally flawed for three critical reasons. (App. A at 8) First, *Joyce* expressly states that the "*judgment and sentence and the conditions of*

release . . . create the relationship, which in turn creates the duty." 155 Wn.2d at 318 (emphasis added). *Joyce* makes abundantly clear that the J&S and conditions of release "are critical because *they* create" "the special relationship between the government and the offender." 155 Wn.2d at 318 (emphasis added).[1]

Second, the SRA, which created the DOC's "authority to supervise" in *Joyce*, includes the residential DOSA statutes under which Craven was sentenced. Just as in *Joyce*, the DOC assumed its "authority to supervise" under the SRA upon entry of the J&S. Third, Division One misinterpreted *Joyce* in concluding that a CCO "assume[s] a duty" under Section 319 only "by taking steps to ensure that the offender complies with all conditions of release." (App. A at 6) Again, this Court has clearly held that it is the entry of the "judgment and sentence and the conditions of release" that "create the relationship" between the offender and the government, "which in turn creates the duty." 155 Wn.2d at 318. A CCO's individual actions to ensure that the offender then *complies* with the conditions of release do not <u>create</u> the duty; such actions simply go to whether the DOC <u>breached</u> its duty.

Division One's decision that *only* the assignment of a CCO can create a take charge duty directly contradicts *Taggart* and *Joyce*. This Court should accept review to resolve the Court of Appeals' "drastic" narrowing

[1] Division One has previously recognized that the entry of the J&S, not the DOC's awareness of it, creates the duty. *See Estate of Bordon ex rel. Anderson v. State, Dep't of Corr.*, 122 Wn. App. 227, 236, 95 P.3d 764 (2004) ("[t]he fact that the DOC never received the judgment and sentence on the eluding charge . . . does not affect its duty to control the offender's behavior"). Division One's July 26, 2021 opinion therefore also conflicts with *Bordon*. RAP 13.4(b)(2).

of "the State's duty of reasonable care *as a matter of law*." *Joyce*, 155 Wn.2d at 315 (emphasis added).

2. The Court of Appeals' decision conflicts with this Court's decision in *Volk*. (RAP 13.4(b)(1))

A separate special relationship exists under Section 315 of the Restatement, which imposes a more general duty "to protect others from third party criminal conduct if a special relationship exists between the defendant, the third party, or the third party's victim." *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 200, 943 P.2d 286 (1997). This duty under Section 315 is "related, but distinct" from the take charge Section 319 duty; the Section 315 duty arises where the parties have a "definite, established, and continuing relationship" even without "the assumption of a duty of supervision and a greater degree of control available to the supervising party in the § 319 take charge cases." *Volk v. DeMeerleer*, 187 Wn.2d 241, 256, 261, 386 P.3d 254 (2016). Specifically, Section 315 imposes a duty where the "nature of the relationship" provides "unique insight" into the offender's dangerousness, without "regard for the 'control' principle" in Section 319. *Volk*, 187 Wn.2d at 261.

The Court of Appeals erroneously held that the DOC did not have a special relationship with Craven under Section 315 solely because Craven's "recently ordered supervision had not commenced when the crime was committed." (App. at 10) But in so reasoning, Division One once again disregarded *Taggart*'s holding that a statute alone can be sufficient to establish a "definite, established, and continuing relationship." As

previously addressed, the residential DOSA statute under which Craven was sentenced is materially similar to the statute analyzed in *Taggart*. That alone demonstrates a "definite, established, and continuing relationship" under both Section 319 or 315.[2]

Critically, the Court of Appeals' decision fails to take into account that this Court's analysis in *Volk* did not depend on the length of the relationship, or the frequency of the encounters; rather, the analysis centers on whether the "nature of the relationship" gave the professional "unique insight into the potential dangerousness of his patient." 187 Wn.2d at 261. These factors are highly factual and materially disputed, thereby precluding summary judgment. *See Milson v. City of Lynden*, 174 Wn. App. 303, 312, 298 P.3d 141 (2013) ("[W]here duty depends on proof of certain facts that may be disputed, summary judgment is inappropriate.") (alteration in original) (quoting *Afoa v. Port of Seattle*, 160 Wn. App. 234, 238, 247 P.3d 482 (2011)). Like the trial court, the Court of Appeals erroneously weighed the parties' conflicting evidence in light most favorable to the DOC as the moving party on summary judgment. In so doing, the Court of Appeals disregarded that a reasonable juror could conclude that the DOC a "unique insight" into Craven's violent history that gave rise to a Section 315 duty.

[2] As this Court clarified in *Volk*, the State has "taken charge" where an offender is under state supervision or community custody, and therefore Section 319 is generally the more appropriate vehicle for analyzing the DOC's duty here. Nevertheless, the Court of Appeals' disregarded *Volk* by ignoring the numerous factual issues inherent in *Volk*'s "unique insight" analysis and holding as a matter of law that the DOC had no Section 315 duty. (*See* App. A at 9-10)

3. In disregarding the Smiths' evidence of causation, the Court of Appeals invaded the province of the jury by impermissibly weighing the parties' conflicting evidence and deciding as a matter of law an issue that should have gone to the jury.

Proximate cause consists of two distinct elements: (1) cause in fact, and (2) legal causation. *Joyce*, 155 Wn.2d at 322. In disregarding the Smiths' evidence of causation, Division One wrongly weighed conflicting evidence and impermissibly decided as a matter of law an issue that should have gone to the jury.

A plaintiff does not have to conclusively prove his or her case on the merits to avoid dismissal on summary judgment. Rather, "it is the duty of the . . . court to consider all evidence and all reasonable inferences therefrom in a light most favorable to the nonmovant." *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972) (reversing summary judgment dismissal). "Where different, competing inferences may be drawn from the evidence, the issue *must* be resolved by the trier of fact." *Versuslaw, Inc. v. Stoel Rives, LLP*, 172 Wn. App. 309, 320, 111 P.3d 866 (2005), *rev. denied*, 156 Wn.2d 1008) (2006) (emphasis added) (reversing summary judgment dismissal); *Busenius v. Horan*, 53 Wn. App. 662, 666, 769 P.2d 869 (1989) (the court does "not . . . resolve any existing factual issue" on summary judgment; reversing summary judgment dismissal); *Larson v. Nelson*, 118 Wn. App. 797, 810, 77 P.3d 671 (2003) (reversing summary judgment where "competing, apparently competent evidence demonstrates the need for a trial to resolve these factual issues").

Division One's holding that the DOC's breach of its duty could not have been the proximate cause of Meagan's death, because there was no evidence that would "support[] a conclusion that action by the DOC would have resulted in Craven's incarceration before [the murder]" (App. A at 16), perverts the legal standard on summary judgment. The Court of Appeals spent nearly a third of its 16.5-page opinion—approximately half of its legal analysis—weighing the parties' competing evidence. That Division One devoted such a substantial portion of its opinion to a discussion on the evidence underscores the fact that the Court of Appeals was, in actuality, improperly weighing the evidence. Moreover, in so doing, the Court of Appeals disregarded the Smiths' evidence and weighed the facts in the DOC's favor—despite the DOC being the moving party on summary judgment. All reasonable inferences should have been made in favor of the Smiths as the nonmoving party.

a. The Court of Appeals improperly weighed the evidence in the light most favorable to the DOC to conclude as a matter of law that the Smiths could not establish cause in fact.

"Cause in fact is usually a question for the jury." *Joyce*, 155 Wn.2d at 322. The record is replete with conflicting evidence under which a jury could conclude that the DOC proximately caused Meagan's death.

For instance, it is undisputed that Craven violated the conditions of his release when he failed to report for transport to treatment, assaulted a family member, and violated a no-contact order. (*See* App. A at 14) It is also undisputed that at least some of these violations were made known to

the police. (*See* App. A at 14-15) The Smiths also presented evidence from the sentencing judge that, "[i]f [she] had been informed at any time after Mr. Craven's June 25, 2015 sentencing that he had: failed to report to the DOC within 24 hours; failed to report for transportation to treatment on his scheduled bed date; violated his no-contact order; committed another crime; possessed a firearm; or was under the influence of an illegal substance or alcohol" that she "would have immediately issued a bench warrant for his arrest, held a hearing regarding his violation(s) as soon as possible, and in all likelihood revoked Mr. Craven's DOSA." (CP 814)

Any reasonable juror could conclude that the DOC's failure to act in the 12 days between when the J&S ordered Craven into DOC supervision and the day Meagan was murdered would have led to Craven's incarceration on July 7. The DOC failed to act by timely assigning a CCO—a delay that the Court of Appeals' decision not only blesses, but *encourages* the DOC to make again in the future. On July 1, 2015, Craven failed to report for treatment at ABHS and assaulted Luxton. ABHS notified the DOC of Craven's failure to report on July 2; the DOC did not conduct *any* investigation into Craven's whereabouts. Yet, as the Court of Appeals recognized, the DOC "had contact information and addresses for Luxton, *with whom Craven was to be staying*." (App. A at 14, emphasis added) It is an entirely reasonable inference to conclude that any competent investigation by the DOC would have included contacting Luxton and learning of his assault. It is just as reasonable of an inference for a juror to conclude that the DOC would have also contacted Hayden and Cunningham

in searching for Craven; the DOC had both of their contact information and they were known to the DOC as Craven's grandmother and ex-girlfriend, respectively. (App. A at 14) Moreover, both Luxton and Hayden reported their interactions with Craven to the police. A juror could reasonably infer that either or both Hayden and Luxton would have likewise reported their interactions with Craven to the DOC—had the DOC contacted either of them to inquire as to Craven's whereabouts,

Taking the evidence and all reasonable inferences in the light most favorable to the Smiths, a jury would not have to "speculate" to conclude that, had the DOC not breached its duty, Craven would have been incarcerated on July 7, 2015. The Court of Appeals' improper weighing of the competing evidence on summary judgment is rife with speculation and conflicts with fundamental principles of Washington law.

b. The Court of Appeals' conclusion that the Smiths could not establish legal causation as a matter of law conflicts with the legal standard on summary judgment and this Court's holding in *Taggart*.

The Court of Appeals also improperly weighed the evidence to conclude that there was no legal causation because "the Smiths have not demonstrated that Meagan was a foreseeable victim of Craven." (App. A at 16) This holding conflicts with this Court's direction in *Taggart*.

In *Taggart*, this Court considered whether a woman who had never met the offender before was a reasonably foreseeable victim. This Court reasoned that, given the offender's "history of alcoholism and violent attacks against women, and a poor prognosis for recovery from his mental

illness," "the questions of foreseeability were not so one-sided that they should have been decided by the trial courts." 118 Wn.2d at 224 . Crucially, this Court concluded that "[t]he fact that Taggart herself was not the foreseeable victim of Brock's criminal tendencies does not establish as a matter of law that her injury was not foreseeable." *Id*. at 225.

Craven had a well-documented history of mental illness, alcohol and drug abuse, and violent attacks against those close to him. (CP 330-31, 351-52, 386, 391, 860-61, 864) For instance, Craven assaulted Luxton—the individual he was supposed to be staying with, and who was known to the DOC—on the very same day that Craven was supposed to report for treatment. Craven then, unsurprisingly, contacted his grandmother, Hayden; he murdered her several days later. Craven also knew his ex-girlfriend's address, where Meagan was murdered. Moreover, Craven had previously threatened his ex-girlfriend, her family, and her friends---like Meagan. (CP 270) Viewing the evidence in the light most favorable to the Smiths, as the Court of Appeals was required to do, a jury could conclude that it was reasonably foreseeable that Meagan, a guest at the home of Craven's ex-girlfriend, would be injured while Craven remained unsupervised by the DOC. The Court of Appeals' holding that Meagan was not a foreseeable victim as a matter of law conflicts with *Taggart* and the well-established legal standard on summary judgment.

4. The Court of Appeals' decision addresses issues of substantial public interest as a matter of first impression. (RAP 13.4(b)(4))

This Court should accept review of the Court of Appeals' decision because it addresses issues of substantial public interest as a matter of first impression. Division One noted that none of the "leading Washington cases involving take charge relationships . . . addressed the question of the existence of a take charge relationship prior to the assignment of a supervisor." (App. A at 7). The Court of Appeals answered this question in the negative, finding as a matter of law that no such relationship could exist prior to the assignment of a CCO. In so holding, Division One drastically (and improperly) narrowed the DOC's duty as a matter of law.

The Court of Appeals' decision creates a perverse incentive for the DOC to delay assigning a CCO to avoid assuming any take charge duty over highly violent offenders ordered into immediate DOC supervision. As evidenced by this very case, the loophole created by Division One's decision allows the DOC to escape liability for crimes an offender commits prior to the assignment of a CCO, even when the DOC knows, or should know, that an offender with a lengthy criminal history was court ordered into treatment and failed to report to that treatment center. This issue of one of <u>significant</u> public interest and safety. The public relies on the DOC to supervise and monitor offenders, including highly violent offenders such as Craven. It is incomprehensible to allow the DOC to sit back and take no action if such an offender fails to report for treatment or is otherwise accounted for; at a bare minimum, the public expects (and public safety

demands) that the DOC will at least *attempt* to investigate the violent offender's whereabouts or report the situation to law enforcement.

The Court of Appeals' decision establishes a dangerous public policy. By linking the DOC's take charge duty to the assignment of a CCO, the Court of Appeals' decision encourages the DOC to maximize the amount of time between when it collects a J&S entered by the trial court and when the DOC finally assigns as CCO. Under the Court of Appeals' ruling, DOC could lose an offender's J&S and never assign a CCO, yet theoretically be absolved of any liability for its failure to supervise the offender. This Court should grant review and clarify when the DOC's duty to supervise attaches. Such guidance is critical to sentencing courts and the DOC, as well as public confidence in either institution.

E. Conclusion.

This Court should accept review and reverse the summary judgment dismissal of the Smiths' claims against the DOC.

DATED this 25th day of August, 2021.

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

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2. On August 25, 2021, I caused a true and correct copy of the foregoing document to be served on the following via the Washington State Appellate Courts' Portal E-Service:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of August, 2021 at Seattle, Washington.

s/ Donna Patterson
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No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 81246-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANTHONY SMITH and JULIE SMITH, a marital community, and ANTHONY SMITH as personal representative of the ESTATE OF MEAGAN SMITH,

Appellants,

WASHINGTON STATE DEPARTMENT OF CORRECTIONS and AMERICAN BEHAVIORAL HEALTH SYSTEMS, INC., a Washington corporation,

Respondents.

APPENDIX TO PETITION FOR REVIEW

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Pursuant to RAP 13.4(c)(9), Petitioners Anthony and Julie Smith, and Anthony Smith as personal representative of the Estate of Meagan Smith, submit this Appendix in support of their Petition for Review. The following document is attached to this Appendix:

1. The Washington Court of Appeals for Division I's July 26, 2021 Unpublished Opinion.

DATED this 25th day of August, 2021.

CORR CRONIN LLP

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

1. I am employed at Corr Cronin LLP, attorneys of record for Petitioners.

2. On August 25, 2021, I caused a true and correct copy of the foregoing document to be served on the following via the Washington State Appellate Courts' Portal E-Service:

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DATED this 25th day of August, 2021 at Seattle, Washington.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANTHONY SMITH and JULIE SMITH, a marital community; and ANTHONY SMITH as personal representative of the ESTATE OF MEAGAN SMITH, Appellants, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS; and AMERICAN BEHAVIORAL HEALTH SYSTEMS, INC., a Washington corporation, Respondents.	No. 81246-7-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — The Smiths appeal from two orders granting summary judgment for American Behavioral Health Systems and the Department of Corrections. They argue material issues of fact existed as to whether ABHS and the DOC breached a duty of care owed to their daughter, Meagan. We affirm.

FACTS

On September 8, 2014, Zachary Craven attacked his grandmother, Angelika Hayden. He demanded she drive him to the hospital to obtain pain medication, threatening to "'slit her throat'" and twice jerked the steering while she drove. At that time, Craven was under Washington State Department of Corrections (DOC) supervision for previous crimes against Hayden and others. The new offense did not violate the conditions of his DOC supervision. By

September 30, 2014, the DOC reported that Craven had been released from custody. On December 26, 2014, the DOC closed Craven's supervision on the prior offenses.

Craven was arrested and pleaded guilty to felony harassment – domestic violence and theft in the first degree – domestic violence. The court ordered a presentence examination to determine his eligibility for a residential drug offender sentencing alternative (DOSA). The DOSA statute provides that a court may sentence an eligible offender into community custody in lieu of serving their sentence in prison. RCW 9.94A.660(3). The DOC supervises offenders sentenced to community custody. RCW 9.94A.030(21); .501(1), (4)(f). The DOC contracts with American Behavioral Health Systems, Inc. (ABHS) to provide residential services for DOSA offenders.

On June 26, 2015, the court sentenced Craven to a residential treatment program under DOSA. The record indicates Craven was not in custody prior to his sentencing hearing. The DOSA sentence provided that Craven would serve 24 months in community custody under the supervision of the DOC, on the condition that he enter and remain in residential chemical dependency treatment for 3-6 months. It further provided that pending DOC placement in a residential treatment program, Craven was to report to a DOC day reporting center within 24 hours of release. The trial court was unaware that the DOC shut down all day reporting centers around 2008.[1]

[1] The DOC advocated to revise the law so that offenders can be detained between their sentencing date and their treatment dates. These efforts were ultimately successful, but the statutory revisions granting such authority to the

Craven's ABHS admittance date was scheduled for July 1, 2015. ABHS scheduled transportation for Craven to its treatment center for July 1, 2015. He did not show up on July 1, 2015 for transport to ABHS. ABHS reported to the DOC on July 2 that Craven failed to report for transport to treatment.

In King County, the DOC had a practice of picking up hard copies of judgments and sentences from the courts on Tuesdays and Thursdays.[2] After Craven's sentencing, his judgment and sentence was retrieved by the DOC on either the following Tuesday, June 30, 2015, or the following Thursday, July 2, 2015. Office Support Supervisor Della Callaghan reviewed it on Thursday, July 2, 2015. Court and state offices were closed on Friday, July 3, 2015 ahead of Independence Day. Callaghan sent Craven's judgment and sentence to the Kent field office on Monday, July 6, 2015 via campus mail. It was received by Community Corrections Officer (CCO) Wayne Derouin on Wednesday, July 8, 2015. Derouin was assigned to Craven that day.

sentencing court were not effective until January 1, 2021. LAWS OF 2020, ch. 252, §§ 3, 5 (revising RCW 9.94A.664).

[2] In her declaration DOC Officer Support Supervisor Della Callaghan, stated that King County Superior Court required DOC staff to physically retrieve judgment and sentences on only Tuesdays and Thursdays. There were typically 100 to 150 judgment and sentences each week. A manager in the King County Superior Court Clerk's office, David Smith, said that the judgment and sentence in this case was publically available when it was uploaded electronically on June 29, 2015. He stated that he was unaware of any requirement for retrieval of physical copies of judgment and sentences by the DOC on any particular day of the week. The copy of the judgment and sentence in the record has a handwritten note stating "scanned 7/8." It is unclear who wrote this note.

That same day, Craven was arrested on suspicion of murder. Between his sentencing hearing and July 8, 2015, Craven had not reported for supervision at any DOC facility.

On July 1, 2015, instead of reporting to supervision, Craven assaulted his grandfather, Bob Luxton. Luxton reported the assault the next day. On July 5, 2015, Craven violated a no-contact order by going to Hayden's home. Hayden reported the incident the next day.

On July 7, 2015, Luxton discovered Hayden deceased in her home. That same day, Theresa Cunningham and her family returned from a trip to find their house sitter, Meagan Smith, murdered in their kitchen. Cunningham was Craven's ex-girlfriend. She had broken up with Craven in June 2015 after his behavior became controlling and violent, but the record does not indicate that she reported the abuse to police. Craven contacted Cunningham while she was being interviewed by police. He asked her to pick him up at a nearby Walgreens store, where he was subsequently arrested by police.

On July 3, 2018, Meagan Smith's parents, Anthony and Julie Smith (the Smiths), brought suit against the DOC and ABHS. Their amended complaint sought judgments against the defendants for wrongful death. Both defendants moved for summary judgment, which the trial court granted.

The Smiths appeal.

DISCUSSION

The Smiths allege material issues of fact existed as to whether ABHS and the DOC breached a duty of care owed to their daughter, Meagan.[3] First, they argue ABHS and the DOC had a duty to supervise Craven at the time of Meagan's death. Next, they argue material issues of fact exist as to whether that duty was breached. Finally, they argue material issues of fact exist as to whether the DOC's alleged negligence proximately caused their daughter's death.

We review a trial court's grant of summary judgment de novo. Camicia v. Howard S. Wright Constr. Co., 179 Wn.2d 684, 693, 317 P.3d 987 (2014). Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court considers all facts and makes all reasonable factual inferences in the light most favorable to the nonmoving party. Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

To make a prima facie case for negligence, a plaintiff has the burden to demonstrate a duty was owed, a breach of that duty, and injury to the plaintiff proximately caused by the breach. Harper v. State, 192 Wn.2d 328, 340, 429 P.3d 1071 (2018).

I. Duty of Care

The Smiths argue that the DOC and ABHS had a take charge relationship with Craven pursuant to the Restatement (Second) of Torts § 319 (Am. Law Inst. 1965) that commenced upon the signing of the judgment and sentence. They

[3] We use Meagan's first name for clarity. No disrespect is intended.

argue a duty arose under either § 315 or § 302B of the Restatement, as adopted by Washington courts.

Existence of a duty is a question of law. Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 474, 951 P.2d 749 (1998). Questions of law are reviewed de novo. Sherman v. State, 128 Wn.2d 164, 183, 905 P.2d 355 (1995).

A. The DOC

Generally, the DOC is not responsible for preventing criminal defendants from harming others absent a special relationship. Harper, 192 Wn.2d at 341. Our Supreme Court has found that a special relationship can arise where the DOC "'takes charge of a third person whom [it] knows or should know to be likely to cause bodily harm to others if not controlled.'" Taggart v. State, 118 Wn.2d 195, 219, 822 P.2d 243 (1992) (quoting RESTATEMENT § 319). Under § 319, the take charge relationship creates a duty to protect others from reasonably foreseeable dangers engendered by supervised offenders' dangerous conduct. Id. at 224. In Joyce, the court held that CCOs assume a duty to take reasonable care in supervising an offender's conduct by taking steps to ensure that the offender complies with all conditions of release. Joyce v. State, 155 Wn.2d 306, 316, 119 P.3d 825 (2005).

The Smiths argue the DOC breached its duty with the assumption that because Craven was supposed to come into its care, such a duty had in fact attached. They argue the duty attached when the judgment and sentence was issued. But, as a threshold matter, they must demonstrate the defendant had a

definite, established, and continuing relationship with the offender it failed to supervise. Binschus v. State, 186 Wn.2d 573, 579, 380 P.3d 468 (2016).

The Smiths rely on Bordon, where the court held the duty to control the offender's behavior was not affected by the fact that it never received the judgment and sentence. Estate of Bordon ex rel. Anderson v. State, 122 Wn. App. 227, 236, 95 P.3d 764 (2004). But, unlike Craven, the offender in Bordon was already under active supervision. Id. at 231. There was evidence within the DOC's active file on the offender showing the supervising CCO should have known the offender had recently been convicted of an eluding charge, and supervised him accordingly. Id. at 237. Here, at the time of the incident, there was no active CCO file on Craven. And, no supervising CCO had been assigned to review such a file.

Other leading Washington cases involving take charge relationships under Restatement § 319 all involved supervision where a CCO or parole officer had been assigned and had engaged in contact and supervision of the offender. See Taggart, 118 Wn.2d at 198; Joyce, 155 Wn.2d at 316-17; Estate of Davis v. State, 127 Wn. App. 833, 842, 113 P.3d 487 (2005). None of those cases addressed the question of the existence of a take charge relationship prior to the assignment of a supervisor.

For example, in Taggart, the plaintiffs raised claims against the State and its agents for negligent parole supervision after being injured by parolees in separate assaults. 118 Wn.2d at 198. The court recognized the existence of a take charge relationship between parole officers and the parolees they supervise.

Id. at 220. In both instances, the parolee had already been assigned a parole officer. Id. at 200-01,

In Joyce, the court concluded a jury could find that a Restatement § 319 duty had been breached by the State's failure to report egregious violations of the conditions of release to the court. 155 Wn.2d at 316-17. At the time of the alleged negligent supervision, supervisee Stewart had already been assigned a CCO. Id. at 310. Whether the duty existed prior to this assignment was not before the court.

Davis likewise involved an offender who had already been assigned a CCO. 127 Wn. App. at 842. The court held a CCO "cannot take charge without a court order, and he can enforce the order only according to its terms and controlling statutes." Id. There is no suggestion in Davis or any other case provided by the Smiths that the DOC has a duty or relationship or is expected to enforce an order before it has actual notice of the content of the order.

And, the DOC carries out its supervisory duties through its CCOs. See RCW 9.94A.704(3)(a). Until a CCO is appointed, there is no one to establish a relationship with the offender. Here, Craven was not under supervision when he killed Meagan. The DOC received a copy of the order on June 30 or July 2. A CCO was appointed on July 8. Meagan was found dead on July 7, before the CCO was appointed. On these facts, a definite supervisory relationship between a CCO and Craven did not exist at that point in time.[4]

[4] The Smiths do not argue that the controlling statutes support the assertion that a duty attaches when the judgment and sentence is issued. The statute assigning supervision of DOSA offenders to the DOC does not provide when DOC supervision begins or when such a duty attaches. See RCW 9.94A.501(5), (7). The Smiths have not directly challenged the DOSA statute.

The authority relied on by the Smiths does not support their assertion that a take charge duty and relationship is necessarily created as of the issuance of a judgment and sentence. The Smiths have not established as a matter of law the existence of a take charge relationship between the DOC and Craven.

Next, the Smiths assert two alternate theories under which a duty existed. First, they argue the DOC had a special relationship with Craven under Restatement § 315, as adopted by Washington courts. Similar to Restatement § 319, a duty will be imposed under § 315 only where there is a "'definite, established and continuing relationship between the defendant and the third party.'" Hertog, ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 276, 979 P.2d 400 (1999) (quoting Taggart, 118 Wn.2d at 219). The Smiths argue the DOC's previous supervision of Craven gave it unique insight into his dangerous propensities, giving rise to a duty. But, the DOC owes a duty to those who are injured during an offender's active supervision, not after it ends. Hungerford v. State, 135 Wn. App. 240, 258, 139 P.3d 1131 (2006). The DOC is not liable for future crimes of previously supervised offenders.

The Smiths still must establish a continuing relationship with Craven, which they have failed to do here. They rely primarily on Volk v. DeMeerleer, which

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Further, DOC policy provided that a CCO must be assigned to supervise an offender within 5 working days of receipt of the offender's judgment and sentence. Under DOC Policy 310.100, the CCO then has 30 days to conduct an intake. DOC Policy 380.200 requires CCOs to verify the offender's address within 10 days of the assignment. The Smiths do not allege that CCO Derouin failed to follow DOC policies. As such, there would need to be evidence that the DOC policy was failing to supervise offenders at an institutional level by allowing the assignment and supervision to begin within 5 days of receipt. But, the Smiths also declined to challenge the DOC standards as negligent.

involved the victim of a man in outpatient treatment with a mental health provider. 187 Wn.2d 241, 386 P.3d 254 (2016). But, the patient and psychiatrist in Volk had a nine year relationship which was uncontested as "special" by both parties. Id. at 274. As discussed above, Craven's relationship with the DOC was not ongoing. The previous supervision had ended. The recently ordered supervision had not commenced when the crime was committed.

Next, the Smiths argue the DOC created a risk of harm to Meagan, owing her a duty under Restatement § 302B.

Section 302B imposes a duty where an "actor's own affirmative act has created . . . a recognizable high degree of risk of harm" to a third party. Robb v. City of Seattle, 176 Wn.2d 427, 434, 295 P.3d 212 (2013) (emphasis omitted) (quoting Restatement § 302B, comment e). Foreseeability alone is insufficient. Id. at 435. A failure to eliminate a danger is also insufficient. See id. at 436-38. An affirmative act that increases a danger is required. See id. at 429-30.

The Smiths again argue the DOC was aware of the dangers posed by Craven. They point to several actions, such as the alleged delay in appointing a CCO by the DOC. The DOC's actions described by the Smiths constitute acts of omission rather than commission.

The Smiths failed to identify issues of material fact as to whether a duty arose under any of these three theories. As a matter of law, they failed to establish a duty owed by the DOC to their daughter.

B. ABHS

The Smiths make the same arguments regarding the existence of a duty between Craven and ABHS. These arguments are even more tenuous in relation to ABHS, which had no prior relationship to Craven and never treated him.

First, they argue ABHS had a take charge duty under Restatement § 319. Because ABHS was under contract with the DOC to monitor offenders and restrict their movements, the Smiths argue it undertook the duty assumed by the DOC. They point to Hertog, where the court held that even if the entity lacks authority to arrest, a duty will arise once it has the responsibility of monitoring for compliance with the conditions of release. 138 Wn.2d at 276. Craven never reported to ABHS for transport to treatment. The record indicates Craven was not in custody prior to his sentencing hearing. The Smiths have not provided authority to demonstrate that ABHS had the responsibility to monitor Craven prior to him reporting to it or starting treatment. As ABHS notes, it lacks authority not just to arrest, but to even prevent a patient from leaving the facility once they are in treatment. The Smiths cite no case in which a facility such as ABHS has been found to have assumed a duty to a patient they have not yet had in person contact with, let alone treated. ABHS did not have a definite, established, and continuing relationship with Craven as contemplated by Restatement § 319. Binschus, 186 Wn.2d at 579.

Next, the Smiths argue ABHS had a special relationship with Craven under Restatement § 315. But, again, Craven never entered treatment at ABHS. No definite relationship was established and no duty commenced.

And, liability under Restatement § 302B must be based on affirmative actions. Robb, 176 Wn.2d at 434. The Smiths assert a breach of duty occurred when ABHS failed to adequately alert the DOC when Craven didn't report for transport, purchasing him a Greyhound bus ticket so he could report later that day. ABHS reported to DOC on July 2 that Craven failed to report for transport to treatment. The Smiths do not allege the only affirmative act taken by ABHS—purchasing the ticket to transport Craven to treatment—increased the danger of him harming others. They have not established any affirmative acts by ABHS necessary to create a duty to their daughter under this section or acts that could have been a breach of such duty.

The Smiths have failed to establish a material question of fact under any of their three theories that ABHS had assumed any duty to supervise Craven at the time of Meagan's death. As a matter of law, they failed to establish a duty owed by ABHS to their daughter.

II. Proximate Causation

Even if a duty to supervise had existed between Craven and either the DOC or ABHS,[5] the Smiths have failed to provide evidence of proximate causation.

Proximate cause is composed of two distinct elements: (1) cause in fact and (2) legal causation. Fabrique v. Choice Hotels Int'l, Inc., 144 Wn. App. 675, 683, 183 P.3d 1118 (2008). Cause in fact refers to the "but for" consequences of an

[5] The Smiths argue whether Meagan would be alive today "but for" the DOC's failure to supervise Craven is a question of fact for the jury. They do not offer the same argument for ABHS. As such, we address the argument as briefed, regarding only the DOC.

act, or the physical connection between an act and the resulting injury. Id. The plaintiff must establish that the harm suffered would not have occurred but for an act or omission of the defendant. Joyce, 155 Wn.2d at 322. Legal causation rests on policy considerations as to how far the consequences of a defendant's acts should extend and involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. Fabrique, 144 Wn. App. at 683. Both elements must be satisfied. Id.

Proximate cause may be determined as a matter of law only when reasonable minds could reach but one conclusion. See Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 203, 15 P.3d 1283 (2001).

The Smiths argue whether Meagan would have been killed "but for" the DOC's negligence is a question properly reserved for the jury. They assert the DOC received an e-mail that Craven did not report for treatment on July 2, and had the DOC attempted to locate Craven, they could have done so with ease. They point to the DOC's concession that it could have detained him even absent a bench warrant.[6]

The DOC counters the Smiths cannot prove proximate cause because they cannot demonstrate that but for its alleged gross negligence, the damages sustained by the plaintiff would have been avoided. The Smiths were required to

[6] In its motion for summary judgment, the DOC noted,

> CCO Derouin could also have sought to locate Craven and arrested [sic] him on a detainer, pending the DOSA Court's violation process, but there were no community reports that this was necessary, and there was no indication that Craven was actually staying with Mr. Luxton, the address provided on his [judgment and sentence], after Craven assaulted Mr. Luxton on July 1, 2015.

show that the offender would have been incarcerated on the date of the murder. Hungerford, 135 Wn. App. at 253 (affirming summary judgment when plaintiff presented "no evidence that [the offender] would have been in jail on the day of Hungerford-Trapp's murder had DOC acted differently").

The first notice that Craven was not complying with his judgment and sentence was received by the DOC on July 2, 2015. ABHS sent an e-mail to someone at the DOC indicating Craven had failed to report the day before. That same day, Luxton reported to police that he had been assaulted by Craven. Had the DOC begun investigating Craven's whereabouts, it had contact information and addresses for Luxton, with whom Craven was to be staying, and for Hayden, with whom he was to have no contact. It also had Cunningham's phone number which Craven had listed as a contact on his April 15, 2013 screening form.[7] The record provides information on what these people knew at the relevant times.

Craven assaulted Luxton on July 1. Luxton was not sure if Craven left that night. In the morning, Luxton left to stay at Hayden's. When he left, his Ford truck was parked in his driveway. Luxton contacted a neighbor, who he says told him the truck was gone and had been driven away by an unnamed male. Luxton asked police to report the truck missing, stating Craven did not have permission to drive

[7] The Smiths indicated below that CCO Derouin had been told on at least one occasion that Craven had been "aggressive toward the Cunningham family" during his supervision of Craven from 2013 to 2014. This citation appears to be to a DOC report indicating on October 7, 2014, while at Harborview Medical Center, Craven had "talked about his girlfriend's mom and his issues with her. . . . [H]e did not threaten her, but expressed anger towards her." The record does not indicate that the DOC had knowledge of the current relationship status of or abuse allegations between Cunningham and Craven. Cunningham had not reported any abuse by Craven to police.

it. On July 3, 2015, a Kent police officer reported that he had driven by the house and the truck was still gone. Police called Luxton on July 3, 2015 to get more information on the suspect. Luxton did not answer and had not called the officer back by Tuesday, July 7, 2015.

On July 7, 2015, Luxton was interviewed by police at the scene of Hayden's murder. He told police he had not seen Craven for about a week since the assault. Luxton had last spoken to Hayden on July 7, 2015, at 11:30 a.m. In the reports of their interview with Luxton, police do not make note of him mentioning any sighting of Craven by Hayden.

On July 6, 2015, Hayden reported to police that Craven had shown up at her house the previous day in violation of his no-contact order. He stayed for five minutes to pick up some personal items. She told police in a signed statement that she did not know where Craven was staying.

A suspicious vehicle had been spotted in the area by Hayden's neighbor on July 6, 2015. Her neighbor saw a man walk down the alley towards her house, returning with trash bags filled with something. He photographed the license plate number. The driver of the truck was located after Hayden was found murdered. The driver admitted to driving Craven as a favor to a mutual friend, Mike Garcia. Garcia told police that Craven had stayed with him for a week or so, but that he had kicked him out within the past couple of days for bringing a pistol into the home. Had the DOC spoken with him, the neighbor would have had nothing to report to the DOC prior to July 6. There is nothing in the record to suggest the DOC knew of Garcia or that Craven was staying with him. And, there is nothing to

suggest that an investigation into his whereabouts would have produced this information before July 7, the day Meagan was found murdered.

Had the DOC called Cunningham, they would either not have reached her at all or would have learned that she was out of town on vacation. When interviewed later she told police she had not seen Craven since June 24, 2015. She did not have a current phone number for Craven. He had destroyed his subscriber identity module (SIM) card around June 3, 2015 and did not have a working phone. Hayden left a voicemail message for Cunningham on July 1, 2015 asking if she had heard from Craven who was supposed to turn himself in that day and warning her "'if he comes around, do[not] see him.'" Nothing in the record indicates whether Cunningham heard this message before returning from vacation, and as a result would have been able to relay the information to the DOC or to Meagan.

The evidence gathered in the murder investigation included the contacts and sources that were available in the DOC file. None of the information they had, or could have had based on the investigation, provided a location for Craven. Because nothing in the investigation supports a conclusion that action by the DOC would have resulted in Craven's incarceration before July 7, the jury would be left to speculate on causation in fact.

The DOC had no reason to know that Meagan would be housesitting for Cunningham or that Craven would visit the home while she was there. Assuming there was a duty of care to foreseeable victims, the Smiths have not demonstrated that Meagan was a foreseeable victim of Craven within the scope of that duty. On

this record, the connection between the DOC's alleged gross negligence and Meagan's death is considerably attenuated.

Speculation and argumentative assertions are not sufficient to create a genuine issue of material fact. See Bordon, 122 Wn. App. at 246-47. Absent further evidence, the Smiths' theories of proximate causation call for a jury to engage in speculation.

The evidence is insufficient to create an issue of material fact that the gross negligence by the DOC proximately caused Meagan's death.

We affirm.

Appelwick, J.

WE CONCUR:

CORR CRONIN MICHELSON BAUMGARDNER FOGG &

August 25, 2021 - 4:28 PM

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