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SUPREME COURT
STATE OF WASHINGTON
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NO. 101824-0

SUPREME COURT OF THE STATE OF WASHINGTON

RICKEY FIEVEZ, individually, KYLE FIEVEZ, individually, and TYLER FIEVEZ, individually, Petitioners, v. STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, Respondent.	RESPONDENT'S MOTION TO STRIKE PORTIONS OF PETITIONERS' ANSWER TO *AMICUS* MEMORANDUM

I. IDENTITY OF MOVING PARTY

Respondent State of Washington Department of Corrections (DOC) respectfully asks the Court to grant the relief designated in Section II.

II. STATEMENT OF RELIEF SOUGHT

DOC moves to strike those portions of Petitioners/Plaintiffs' Answer to the Amicus Memorandum of Julie A. Kays that inappropriately reply to DOC's Answer to the Petition for Review. *See* Plaintiffs' Answer to Amicus at 5 & n.2,

8-12. DOC also requests that Plaintiffs be required to file a corrected answer to the amicus memorandum that does not include these inappropriate arguments.

In particular, Plaintiffs have improperly utilized their answer to the amicus memorandum (which was filed in support of Plaintiffs' petition, *see* Amicus Memo at 1) to make the following arguments in strict reply to the State's answer to the petition for review:

- At page 5, arguing: "This Court should give little credence to the effort by DOC in its answer at 3-9 to sanitize the facts to attempt to transform Day into a model offender and to make its negligent supervision of Day 'appropriate,' something that it decidedly was not."
- At page 5, arguing: "DOC effectively *concedes* that it owed a take-charge duty to Fievez where it exercised control over Day in its highly flawed community supervision of him." (Emphasis in original.)

- At page 5, footnote 2, arguing: "Contrary to DOC's contention, ans. at 1-2, Fievez did not confine his argument to merely the one facet of DOC's breach of duty. Division I *sua sponte* addressed breach. Op. at 13-18. Fievez's petition noted in detail that DOC breached its duty to him in *numerous* ways. As noted *infra*, breach was not even a basis for the trial court's decision. DOC's attempt to construct a bogus 'waiver' argument on duty/breach, when the issue in the case has always been proximate cause, should be rejected." (Emphases in original.)
- At page 8, arguing: "As noted *supra*, Fievez's duty/breach arguments are not limited to CCO Carrigan's failure to appreciate Day's violent criminal history or his past interactions with DOC."
- At page 9, arguing: "Notwithstanding DOC's effort to distinguish it, ans. at 18-19, 24, in *Joyce*, *supra*, this Court

rejected a similar proximate cause argument in the specific context of DOC's community custody of an offender."

- At pages 9-10, arguing: "While DOC tries to distinguish take-charge duty cases arising in the school setting, ans. at 16, those cases are, in fact, take-charge duty cases like the present case and they make clear causation is a fact issue. *N.L. v. Bethel School District*, 186 Wn.2d 422, 437, 378 P.3d 162 (2016); *Meyers v. Ferndale Sch. Dist*., 197 Wn.2d 281, 289, 481 P.3d 1084 (2021). Similarly, as to patient-therapist cases, another take-charge type duty setting, ans. at 17, this Court has held that causation is a fact question, rejecting arguments that the evidence of causation is too 'speculative.' *Petersen v. State*, 100 Wn.2d 421, 436, 671 P.2d 230 (1983); *Volk v. DeMeerleer*, 187 Wn.2d 241, 276-78, 386 P.3d 254 (2016)."

- At page 11, arguing: "Neither Division I nor DOC address the significance of the fact that CCO Carrigan was negligent in allowing Day to move in with Richmond."
- At page 12, arguing: "The thrust of DOC's argument is that virtually *any* testimony about what DOC or a court would have done to an offender in violation of the conditions of his/her community custody is 'speculation,' and that victims of such offenders can never prove causation, unless DOC actually disciplined the offender. In effect, only DOC's evidence in these cases is not 'speculation' in DOC's eyes." (Emphasis in original.)

III. GROUNDS FOR RELIEF

Pursuant to RAP 13.4(d), "[a] party may file a reply to an answer *only if* the answering party seeks review of issues not raised in the petition for review." (Emphasis added.) In addition, RAP 13.4(h) contemplates an amicus curiae memorandum and "answer *thereto.*" (Emphasis added.)

Here, DOC did not seek review of any new issues in its answer to the petition for review. Accordingly, the arguments by Plaintiffs in strict reply to DOC's answer to the petition for review – *i.e.*, those that do not otherwise answer arguments made by amicus – is neither permitted under the rules nor necessary. *See* Plaintiffs' Answer to Amicus at 5 & n.2, 8-12.

Improperly inserting reply arguments in the way that Plaintiffs have done prevents DOC from responding to those arguments and misuses the purpose of the amicus answer. This is particularly inappropriate and unduly prejudicial when Plaintiffs misconstrue and obfuscate DOC's arguments.

Two examples illustrate this point. Contrary to Plaintiffs' contention in footnote 2, DOC's answer to the petition does *not* assert that Plaintiffs confined their argument to "one facet of DOC's breach of duty." *See* Plaintiffs' Answer to Amicus at 5 n.2. Rather, DOC's answer to the petition specifically recognized that Plaintiffs continued their attempt to base causation on multiple alleged breaches *without* also seeking review of the

Court of Appeals' analysis on breach, which determined a material question of fact existed as to only one alleged breach. *See* DOC Answer to Petition at 1-2. Further, Plaintiffs incorrectly assert that Division I *sua sponte* addressed breach. Plaintiffs' Answer to Amicus at 5 n.2. In fact, DOC raised breach as an alternative basis for affirming summary judgment. *See* Br. of Respondent at 16-17 ("An appellate court may affirm summary judgment on any basis supported by the record."), 33-41 (arguing breach). Accordingly, the issue of breach was plainly before the Court of Appeals and its analysis on that issue is controlling absent review by this Court – which Plaintiffs have not sought.

IV. CONCLUSION

This Court should order the reply arguments identified above stricken and require Plaintiffs to submit a corrected answer to the amicus memorandum that omits this improper material.

This motion contains 951 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 21st day of June 2023.

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CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the RESPONDENT'S MOTION TO STRIKE PORTIONS OF PETITIONERS' ANSWER TO *AMICUS* MEMORANDUM with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

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

DATED this 21st day of June 2023, at Olympia, Washington.

s/ Beverly Cox
BEVERLY COX
Paralegal

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

June 21, 2023 - 11:55 AM

Transmittal Information

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