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No. 84230-7-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

RICKEY FIEVEZ, individually, KYLE FIEVEZ, individually, and TYLER FIEVEZ individually,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Ricky Fievez, individually, Kyle Fievez, individually, and Tyler Fievez, individually, are the petitioners.

B. COURT OF APPEALS DECISION

The Court of Appeals, Division I, filed its opinion in this case on March 6, 2023. A copy is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

> Did the trial court err in granting summary judgment to the Department of Corrections ("DOC") by resolving proximate cause as a matter of law in a case involving DOC's "take charge" duty to Rickey Fievez arising out of its special relationship with a high risk offender under its supervision with a long history of violence, mental instability, drug use, and fascination with firearms, where Fievez's shooting and attendant serious injuries resulted from DOC's negligent community custody of that offender?

D. STATEMENT OF THE CASE

Division I's opinion briefly addresses the facts in this case, op. at 1-2, but overlooks DOC's overall pattern of negligent supervision of Timothy Day, an offender DOC itself

deemed to be a "high violent" risk, on community supervision.[1]

First, the criticism of Community Corrections Officer ("CCO") Natalie Carrigan's *multiple* egregious failures in supervision emanated from DOC's own staff like CCO Ted Creviston, who knew Day, Community Corrections Supervisor ("CCS") Lisa Rohrer, Carrigan's supervisor, Regional Administrator Donta Harper, and Victim & Services Program Manager Shelia Lewallen, both DOC CR 30(b)(6) witnesses.

DOC's failure to supervise Day was egregious.

- Day had a *long* history of violent acts, often involving firearms (br. of appellants at 3-4);
- Day had a history of repeated, serious violations of community custody in connection with his prior convictions, indicating that his supervision needed to be *intensive* (br. of appellants at 5-6);
- DOC, in fact, knew that Day was mentally unstable, used drugs, and had no respect for the law (br. of appellants at 3-4);
- Day's latest conviction was felony level domestic

[1] On review of a summary judgment motion, Division I should have considered the evidence, and reasonable inferences from it, in a light most favorable to Fievez as the nonmoving party. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 485, 258 P.3d 676 (2011).

violence harassment in threatening to kill his ex-wife, Marceline Daarud (br. of appellants at 4);

- Day's judgment and sentence contained *extensive* conditions for his community custody including that he have *no* contact with Daarud (br. of appellants at 4-5);
- Day likely violated his community custody conditions and the attendant no contact order when Daarud received repeated hang up calls; she believed he took possession of his father's firearms, as she reported to DOC staff (br. of appellants at 5 n.3, 7-8, 19-23);
- DOC knew of Day's gun fetish (br. of appellants at 7) and characterized Day as "high violent" risk (resp't br. at 7);
- Neophyte CCO Carrigan was unprepared to supervise Day, as its own staff acknowledge, when she failed to become aware of Day's history (br. of appellants at 9-13);
- Contrary to DOC policy, Carrigan only interviewed the Stinsons, Day's roommates, *once* and never spoke with them again for 15 months, failing to leave contact information with them (br. of appellants at 14-18);
- The Stinsons believed Day was consuming alcohol and possessing firearms in violation of the conditions of his community custody, but had no contact from DOC staff or any DOC contact information (br. of appellants at 13);[2]

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[2] When Division I states that the Stinsons did not actually see Day possess firearms, and only saw a gun case, op. at 20 n.14, the reasonable inference from that fact is that he *possessed firearms*. It's unlikely the gun case the Stinsons observed Day carrying contained flowers or violins.

- Community Victim Liaison ("CVL") Sherina James never communicated to Carrigan Daarud's concerns about Day's hang up calls or that he possessed his father's firearms;
- Day had firearms (resp't br. at 10);
- Day moved into the home of his girlfriend, Annaliese Richmond, with his guns; Richmond also had guns, including the .357 Magnum used to later shoot Fievez (br. of appellants at 24-25, resp't br. at 14-15);
- Day failed to report his new address to Carrigan (resp't br. at 11).[3] Consequently, Day violated the conditions of his community supervision for the last 12 days of his community custody, as DOC's own staff testified (br. of appellants at 24-27);
- DOC itself identified 15 policy violations by Carrigan in an internal review (br. of appellants at 28), making it clear that far from a "model" offender or that Carrigan's violations were "minor oversights," as DOC has contended.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Division I correctly ruled that DOC owed a take-charge duty as to Timothy Day, op. 9-13, and that fact issues were present on the agency's breach of that duty. Op. at 13-18.

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[3] DOC admitted in its Court of Appeals brief at 14 that it was unaware of Day's move, but it *should have been* aware of it had Carrigan demanded information from him on that move at their September 20, 2017 meeting or addressed his failure to report to her the following week. Br. of Appellants at 24.

This Court has clearly established that a governmental defendant has a "take charge" duty to a third party victim of an individual over whom the government exercised control who commits violent acts against the victim. *Restatement (Second) of Torts* § 319.[4] *See, e.g., Taggart v. State,* 118 Wn.2d 195, 822 P.2d 243 (1992) (parolees); *Bishop v. Miche,* 137 Wn.2d 518, 973 P.2d 465 (1999) (county probationers); *Hertog ex rel. S.A.H. v. City of Seattle,* 138 Wn.2d 265, 979 P.2d 400 (1999) (city probationers); *Joyce v. State, Dep't of Corrections,* 155 Wn.2d 306, 119 P.3d 82 (2005) (offender under community supervision). As the *Joyce* court observed, the duty is rooted in negligence – DOC must take *reasonable* precautions to protect against *reasonably foreseeable* dangers posed by the supervised offender's dangerous propensities. *Id*. at 310.

The trial court's grant of summary judgment did not mention breach, specifically, RP 29-39, although DOC argued

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[4] *See also, Restatement (Third) of Torts, Liability for Physical and Emotional Harm* § 41.

below that it did not breach a duty of care to Fievez as a matter of law. CP 36-41. The trial court correctly believed that fact issues surrounded gross negligence, a breach question. RP 31-32.[5] Breach is ordinarily a fact question. *Hertog*, 138 Wn.2d at 275. Division I agreed with the trial court, identifying how Carrigan's failure to review Day's criminal history and records from his prior DOC supervisions failed to meet the "slight care" standard for gross negligence, op. at 13-18, creating a fact issue for the jury.

Division I erred in its treatment of proximate cause, however, meriting review by this Court. RAP 13.4(b).

(1) Division I's Decision Is Contrary to this Court's Decisions that Hold Proximate Causation Cannot Be Decided as a Matter of Law

[5] In the gross negligence context, experts regularly and properly testify on whether a defendant's actions met "slight care." *Swank v. Valley Christian School*, 188 Wn.2d 663, 686-87, 398 P.3d 1108 (2017); *Talley v. Fournier*, 3 Wn. App. 808, 817, 479 P.2d 96 (1970). As the *Swank* court observed, because the standard for gross negligence involves a "fine-grained factual analysis," issues of breach and proximate cause are generally not susceptible to summary judgment. 188 Wn.2d at 685.

The trial court erred in ruling on proximate cause as a matter of law. RP 32-38. Division I, agreed, op. at 19-22, intruding directly upon the jury's role, and ignoring this Court's controlling decisions on proximate cause in a take-charge duty setting. Review is merited. RAP 13.4(b)(1).

(a) Proximate Cause in Take Charge Duty Cases

Proximate cause in Washington has two elements: legal cause and cause-in-fact. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). "Cause in fact" refers to the actual, "but for," cause of the injury, *i.e.*, "but for" the defendant's actions the plaintiff would not be injured. *Id.* In Washington, proximate cause is classically a *question of fact, Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611, 257 P.3d 532 (2011).

In case after case where a take-charge type duty is present, this Court has refused to address causation as a matter of law. For example, in *Joyce, supra*, the Court *rejected* a similar proximate cause argument in the specific context of

DOC's obligation to supervise an offender in the community. There, Vernon Stewart was on DOC community supervision for two felony convictions, a domestic assault and possession of stolen property. While on that DOC supervision, high on cannabis, he stole a car in Seattle, ran a red light in Tacoma, and smashed into a vehicle operated by Paula Joyce, killing her. DOC knew of Stewart's dangerous propensities. From the beginning of his community supervision, he seldom reported to his CCO, did not perform his community service obligations, he did not undergo court-ordered domestic violence counseling, and he did not pay his financial obligations. He was actually arrested in Kittitas County for driving with excessive speed and charged with possessing a stolen car and driving with a suspended license. He was jailed when he did not appear at court hearings for his King County assault case and then for his Kittitas County case. He was in and out of psychiatric facilities, as DOC knew.[6]

[6] Unlike this case, DOC's CCOs did actually issue

This Court rejected DOC's contention that its failed supervision of Stewart was not the proximate cause of Joyce's death. 155 Wn.2d at 322-23. The Court relied on the fact that Stewart had been sentenced to jail for prior parole violations and the plaintiffs' expert testified that had DOC obtained a bench warrant for his arrest, he would have been in jail and would not have killed Ms. Joyce.

In the school setting where districts have a take-charge duty as to their students, it is no different. In *N.L. v. Bethel School District*, 186 Wn.2d 422, 378 P.3d 162 (2016), this Court held that a school district was liable for the off-campus sexual assault of a student by an older registered sex offender it failed to adequately supervise. The Court rejected the district's proximate cause argument, again emphasizing that causation is a jury question. *Id.* at 437. As the Court made clear yet again in *Meyers v. Ferndale Sch. Dist.*, 197 Wn.2d 281, 289-90, 481 P.3d 1084 (2021), proximate cause is for the jury, *id.* at 289, in

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notices of violation to Stewart. 155 Wn.2d at 313-14.

a case where a teacher took his class on an impromptu walking excursion and a driver fell asleep, plowing into the students, killing two. The Estate in that case adduced expert testimony that the walk should not have occurred at all, preventing the students' death and injuries. *Id.* at 290-91.

Finally, in the patient-therapist setting, causation is a fact question. In *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), this Court found a question of fact as to proximate cause where Larry Knox, a psychiatric patient, was improperly released from Western State Hospital, and later ran a red light at 50-60 mph, striking the car of plaintiff Petersen, injuring her. The Court held proximate cause was for the jury where "the facts of the case are disputed and the inferences to be drawn from them may vary." *Id.* at 436. Similarly, in *Volk v. DeMeerleer*, 187 Wn.2d 241, 386 P.3d 254 (2016), a therapist's outpatient killed his girlfriend and one of her sons, and attempted to kill a second son, this Court articulated a take-charge like duty under *Restatement (Second) of Torts* § 315 for

therapists/patients. The Court rejected the defendant's argument that an expert witness causation testimony was too "speculative," drawing a distinction between the basis for the expert formulating his conclusions, and the conclusions themselves. *Id.* at 276-78.

(b) Day Would Have Been Incarcerated for His Violation of the Conditions of His DOC Community Custody But For DOC's Negligence

Division I seemed to believe how Day should have been handled by DOC for his *multiple* violations of the terms of his community custody was "speculative." Op. at 20-21. Not so. All too often, parties resort to the blanket assertion that a witness's testimony is "speculative," without any justification for such an assertion.[7] The court focused inordinately on the

[7] Division III in *Behla v. R.J. Jung, LLC*, 11 Wn. App. 2d 329, 453 P.3d 729 (2019), *review denied*, 195 Wn.2d 1012 (2020) was appropriately critical of such "ubiquitous" arguments in the causation context, noting that labeling causation as speculative "plays a unique role in summary judgment jurisprudence." *Id*. at 334-35. That court criticized courts' willingness to intrude upon the jury's decision as to

testimony of Dan Hall to the exclusion of other key causation evidence.

If anything, there is *greater* support here for DOC's conduct being the proximate cause of Fievez's injuries than was true in this Court's decisions referenced above because Fievez's shooting would not have occurred for *two* reasons – competent DOC supervision of Fievez would have resulted in his arrest and incarceration for firearms violations or violations of the no contact order as to Daarud, *or* competent supervision would have prevented his access to Richmond's firearms specifically.

Relevant to DOC's breach of its supervisory duty and the resultant harm to Fievez were the facts that Day was a "high violent" risk who had a long history of mental instability, drug use, no respect for the law, and a fascination with guns. He *routinely* violated court-ordered conditions in his earlier DOC community supervisions. His supervision, according to DOC's

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causation in the guise of excluding "speculative" testimony. *Id*. at 335-37.

staff, should have been *intensive*. It was not.

Had Carrigan supervised him *intensely*, as she was obliged to do for a "high violent" offender, she would have learned of Day's regular violation of firearms restrictions while on community supervision from his ex-wife, Rachel Nicholson, CP 892, and similar firearms violations from another ex-wife, Marceline Daarud. CP 877-78. Day kept firearms at his father's house. CP 877. She would have learned of Day's possession of firearms at the Stinson home from Becky Stinson. CP 881-82. She would have also learned of his alcohol consumption, which was contrary to the conditions of his community supervision. CP 882-83.

And even though Division I excluded *parts* of Dan Hall's testimony, his opinion remained that DOC failed to closely monitor Day's behavior as to firearms, CP 803 (¶ 23), CP 805-06 (¶ 27), CP 810 (¶ 37); DOC failed to utilize information from the Stinsons to investigate Day's firearms possession and such information was "sufficient to establish reasonable cause

to search[8] any and all parts of the residence he had access to," CP 819 (¶ 54), CP 821 (¶ 58), and to search his father's McCleary residence. CP 819-20 (¶ 55). Nor did DOC follow up on Daarud's repeated concerns about her safety due to Day's access to firearms. CP 831 (¶¶ 76-77). Had a search occurred, Hall opined that firearms would have been found, and Day would have been arrested and incarcerated. CP 820-21 (¶ 57); CP 832 (¶ 77).

Similarly, Hall's testimony as to Day's continuing harassment of Daarud was important. Hall testified, unaffected by Division I's editing of his declaration, that a competent CVL would have communicated those hang up calls to her CCO. CP 825 (¶¶ 67-68).

More critical was the failure of CVL James to relate

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[8] DOC staff could search Day's person, residence, automobile, or other personal property upon "reasonable suspicion," a lower standard than probable cause, that he violated the conditions of his custody. Moreover, the CCOs had expansive authority to arrest Day for his violations of community custody. RCW 9.94A.631(1); CP 760-68 (DOC Policy No. 420.390 on CCO search and arrest authority).

Daarud's concerns about Day's access to firearms and her personal safety, having been the subject of his death threats, to Day's CCO. CP 823-33 (¶¶ 62, 64, 66, 69-78). In his opinion, had James relayed this firearms concern to Carrigan, it should have prompted investigation by Carrigan of Day's access to firearms. CP 828-29 (¶ 72). As Hall noted, this was consistent with the testimony of CCO Creviston, CCS Rohrer, and DOC's CR 30(b)(6) witness Sheila Lewallen. CP 829-30 (¶¶ 73-75).

Because of DOC's breaches of its "take charge" duty, Day was allowed room to roam free. Given his firearm violations and his continued harassment of Daarud, Day should have been immediately arrested and detained pending criminal charges, as corroborated by DOC's own staff.

Judge Gary Tabor, a former Thurston County deputy prosecutor, offered compelling testimony, based on that extensive experience and his service as a Thurston County Superior Court Judge, CP 861-63, 868, that Day would have been charged with illegal possession of a firearm, at a

minimum, CP 864, for which the standard range was 51-60 months. CP 864-65. He opined that Day would have been incarcerated, foreclosing his Tumwater shooting rampage. CP 865-66. That testimony created a genuine issue of material fact on causation. *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 301, 449 P.3d 640 (2019) (expert testimony creates a genuine issue of material fact on summary judgment).

Instead of crediting Judge Tabor's testimony, Division I merely dismissed it as speculative without discussing it. Op. at 20 n.16. It *weighed* the Tabor expert testimony, something its own precedents indicate it must not do. *Haley v. Amazon.com Servs., LLC*, __ Wn. App. 2d __, 522 P.3d 80 at ¶¶ 27, 23 (2023).

In sum, given the foregoing testimony, unaffected by Division I's evidentiary rulings, Day would have been charged, convicted, and sentenced for unlawful possession of a firearm prior to the closure of his community supervision had DOC properly supervised him. He would have been incarcerated in

2016 or 2017 and he never would have been able to injure Fievez in June 2018 but for DOC's negligence. As in *Joyce*, fact issues on proximate cause were present as to proximate cause with respect to Day's firearms possession and his continued harassment of Daarud.

(c) Day Would Have Been Incarcerated for His Violations While Residing with Richmond But For DOC's Negligence

The second aspect of causation–DOC's failure to properly address Day's change in residence to Richmond's home–was also consequential. He was not "homeless," as a cursory check of his truck would have revealed. The unexcised portion of Hall's declaration noted that a reasonably prudent CCO should not have closed out Day's supervision, and instead, should have located and arrested him for the violation of the residential condition of his community supervision, thereby gaining information about where he was living. The CCO then should have visited that new residential location, including speaking with any co-residents such as Richmond. CP

833-38. Richmond's declaration testimony, unaffected by Division I's opinion, op. at 5-6, is critical on what that conversation would have disclosed to a CCO.

Day moved all of his possessions into Richmond's home once he was allegedly "homeless." Day knew that Richmond had firearms in her house when he moved in, consciously violating the conditions of his DOC community supervision. CP 872 (¶ 5). More damning yet is Richmond's testimony that she had seen Day possess firearms *while at the Stinson home*. CP 873 (¶ 7). Day moved *his* guns into Richmond's home. CP 869-70 (¶ 3-4), CP 873 (¶ 9), CP 874 (¶ 10). She opined that those firearms were moved from the Stinson residence.[9] Richmond testified that had a CCO spoken with her, she would have not only divulged everything she knew (including Day's personal firearm possession), CP 873, but also, "would have immediately sold, gifted, or disposed of all the firearms [which

[9] This testimony also supports the first argument on proximate cause *supra*. It supports the critical factual point that Day had firearms at the Stinson residence *while he was there*.

belonged to Richmond], including the Ruger .357 magnum revolver [which was used in the shooting]," CP 873-74, and "done everything in power to make sure that Timothy never had access to firearms." CP 874. Had a CCO acted in a reasonably prudent manner as to Day's violation of the residential conditions of his community supervision, his possession of firearms would have been revealed and he would have been prosecuted and incarcerated for same.

In sum, given the Hall and Richmond testimony, there was a genuine issue of material fact on causation. But for DOC's negligence, Day would have never even had access to the Ruger .357 Magnum that he ultimately used in Fievez's shooting.

(2) Courts' Treatment of Causation in Take Charge Duty Cases Is a Significant Public Policy Issue for This Court

While Division I's treatment of causation contravenes *numerous* decisions of this Court, mandating review, RAP 13.4(b)(1), review is also merited under RAP 13.4(b)(4). In

these difficult take charge duty cases, a major tool in the State's litigation tool box is to urge trial courts to overlook *Joyce* and the other cases take charge-type duty cases and to urge those courts to decide causation, a jury issue, as a matter of law. In other words, the State all too often accomplishes by indirection what former Attorney General Rob McKenna and a former chief of the AGO Torts Division sought directly: "there should be no liability for government functions that have no counterpart in the private sector," i.e. offender supervision. Michael Tardif, Rob McKenna, *Washington State's 45-Year Experiment in Government Liability*, 29 Sea U.L. Rev. 1, 50-52 (2005). This Court needs to provide guidance to the lower courts and the bar on the necessary proof to establish the requisite link between DOC's conduct take charge duty in community supervision cases and the usually horrendous harm sustained by plaintiffs in such cases. RAP 13.4(b)(4).

(3) <u>The Trial Court Erred in Its Treatment of Dan Hall's Expert Witness Testimony</u>

Division I addressed certain evidentiary issues in its decision. This Court, of course, reviews the admissibility of evidence in connection with a motion for summary judgment *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Necessarily, this Court must consider the trial court's and Division I's treatment of the evidence accordingly.

Fievez contends that even with Division I's treatment of the evidence in this case, ample, admissible created a fact question on proximate cause. However, Division I's aggressive exclusion of certain aspects of the declarations before the trial court was error under ER 702-04, and this Court's decisions.

Since *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984), this Court has employed a three-part test to determine if expert testimony is admissible: (1) is the witness qualified to testify as an expert? (2) is the expert's theory based on a theory generally accepted in the scientific community? and (3) would

the testimony be helpful to the trier of fact?[10]

Hall's opinions were not "speculative" as to causation. First, Hall is remarkably qualified to render an opinion, having had the requisite experience, training, and expertise to opine on community corrections and supervision of offenders on probation. Hall worked for DOC from 1973-2002 as a CCO and a CCS; he supervised up to 26 CCOs and managed an entire DOC field office. CP 793, 849-50.

Second, Hall's opinions were rooted in the facts and his experience as our Supreme Court required in *Volk, supra*. There, the plaintiff's expert opined that a psychiatrist failed to meet the standard of care by failing to follow up with her patient, make a focused inquiry into her patient's condition,

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[10] As to the broad policy favoring admissibility of expert testimony, *see*, *e.g.*, *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 333 P.3d 388 (2014) (expert testimony on biomechanical forces admissible); *L.M. v. Hamilton*, 193 Wn.2d 113, 436 P.3d 803 (2019) (trial court properly admitted testimony of biomechanical engineer on the natural forces of labor in a malpractice claim against a midwife).

assess her patient's suicidal and homicidal risks, and monitor her patient's condition. The defendant's patient then went on to murder two others. The plaintiff's psychiatric expert based her opinion on DeMeerLeer's clinical records, law enforcement files and reports surrounding the attack, and the autopsy and toxicology reports. Based on this factual record alone, this Court held that the plaintiff's expert's opinions were not "speculative" and should not be excluded.[11]

Hall's opinions were expressly based on the factual record, his review of hundreds of pages of records, and the deposition/declaration testimony of numerous DOC employees and lay witnesses. CP 194-95. Hall provided painstaking detail in each sub-section of his 55-page declaration relating to the deposition testimony, record evidence, and other materials

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[11] *See also, e.g., Blomster v. Nordstrom, Inc*., 103 Wn. App. 252, 260-61, 11 P.3d 883 (2000) (the court held that the expert's opinions were sufficiently grounded on the facts and evidence in the record – and qualified based on the expert's background and experience – and thus the expert's declaration testimony should not be stricken).

obtained through discovery that form the basis of his opinions. CP 796-832. Hall's opinions are the antithesis of speculation or conjecture; rather, they were articulated in detail with specific reference to the evidence supporting his opinions, and his relevant experience and expertise, just as ER 702-04 and case law on expert testimony require.[12]

The trial court and Division I erred in excluding portions of the Hall testimony.

F. CONCLUSION

The trial court and Division I erred in ruling as a matter of law on proximate cause in this case where DOC's egregious failure to supervise Timothy Day while he was in DOC's community custody directly resulted in Fievez's shooting and horrendous injuries. Review is merited. RAP 13.4(b)(1), (4).

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[12] DOC's liability expert, Mario Paparozzi, rendered many of the same opinions relating to sufficiency of criminal processing. CP 56-62. However, those opinions associated with proximate cause did not trouble the trial court bent on granting summary judgment to DOC.

This Court should reverse the summary judgment and remand the case to the trial court for a trial by a jury of Fievez's peers. Costs on appeal should be awarded to Fievez.

This document contains 4,327 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 21st day of March, 2023.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RICKEY FIEVEZ, individually, KYLE FIEVEZ, individually, and TYLER FIEVEZ, individually, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS, Respondent.	No. 84230-7-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Appellants brought a negligence action against the Department of Corrections for injuries to Rickey Fievez caused by an individual who had previously been on community custody supervision. The trial court dismissed the claim on summary judgment, and Fievez appeals. Because Fievez fails to demonstrate a material issue of fact as to all four elements of negligence, we affirm.

FACTS

On January 8, 2015, Timothy Day was sentenced under a Special Drug Offender Sentencing Alternative (DOSA) after entering a guilty plea to one count

of felony harassment — domestic violence. Pursuant to the DOSA, Day was sentenced to 19 months in prison, immediately followed by 19 months on Department of Corrections (DOC) community custody supervision. The community custody portion of his sentence ran from March 2016 until October 2017, supervised by Community Corrections Officer (CCO) Natalie Carrigan. During the majority of his time on community custody, Day lived in a home owned by his employer, along with a couple, Becky and David Stinson. Prior to Day's release from prison, and throughout his time on community custody, DOC Crime Victim Liaison (CVL) Sherina James maintained contact with Marceline Daarud, Day's former wife and the victim of his crime of conviction. Day's active community custody supervision ended on September 30, 2017, and was officially terminated on October 2, 2017.

On June 17, 2018, Day stole his fiancée's revolver, shot open an ammunition case in a Walmart store, and attempted to carjack Rickey Fievez. Day shot Fievez through the neck causing tragic injuries and was rendering him quadriplegic. Shortly thereafter, Day was shot and killed by a bystander. Fievez and his children (collectively, Fievez) sued DOC, arguing that DOC staff James and Carrigan had been negligent, and that DOC's negligence proximately caused Fievez's injury. DOC moved for summary judgment dismissal, which was granted. DOC also moved to strike portions of several declarations submitted in support of Fievez's motion opposing summary judgment. The court granted the motion to strike in part. Fievez timely appealed and DOC cross-appealed.

ANALYSIS

Fievez and DOC each present several assignments of error. We review Fievez's challenge to the summary judgment ruling under a de novo standard. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). However, we first resolve the evidentiary issues raised by the parties so that we may consider the legal challenges based only on properly admitted evidence. See Id. ("Before we can consider the evidence in this case, however, we need to determine what evidence is before us.").

I. Admissibility of Evidence

We review the admissibility of evidence presented in connection with a summary judgment proceeding de novo. Am. Express Centurion Bank v. Stratman, 172 Wn. App. 667, 674-75, 292 P.3d 128 (2012). Affidavits submitted "shall be made on personal knowledge" and "shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e). An expert witness's opinion must be based on "sufficient foundational facts;" if an expert's opinion is based only on theoretical speculation, it must be excluded. Simmons v. City of Othello, 199 Wn. App. 384, 393, 399 P.3d 546 (2017) (quoting Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 126 Wn.2d 50, 103-104, 882 P.2d 703, 891 P.2d 718 (1994)). "[T]here is no value in an opinion that is wholly lacking some factual basis." Queen City Farms, Inc., 126 Wn.2d at 102-03.

A. Declaration of Dan Hall

We first turn to the challenged statements in the declaration of Dan Hall, "an expert in the field of community corrections and offender supervision" with "three decades of experience" with the Washington State DOC. He reviewed materials related to this case and provided expert opinions on DOC's standard of care, breach, and causation. He opined that DOC failed to adequately prepare for Day's supervision, failed to adequately obtain information about his possession of firearms or search his residence, failed to relay information between different DOC employees, and improperly ended Day's supervision "while he was in active violation of the conditions of his supervision." He concluded that had DOC exercised slight care, Day would have been incarcerated on the day of Fievez's injury.

Fievez contends the court erred in striking paragraphs 8, 55, 59, 62 (in part), 79, 80, 82, 90, 91, 95, 98, 100-103, 106 (in part), and 113 from Hall's declaration. DOC cross-appeals, arguing the trial court should have additionally stricken paragraphs 62, 65, and 94.[1] In several of his opinions, Hall fails to provide a sufficient basis rooted in his experience or the facts of this case. As such, paragraphs 8, 59, 62 (in part), 79, 80, 90, 91, 95, 98, 100, 101, 103, 106 (in part),[2] and 113 are inadmissible as speculative and the court did not err in striking them. Paragraph 65 should have been stricken as speculative as well.

[1] DOC contends that "the trial court may have misspoken in striking paragraph 95, which was not sought." It argues the trial court meant to strike paragraph 94 as speculative.

[2] While the court's oral ruling states it struck the entirety of paragraph 106, its written ruling strikes only a portion of the paragraph. "A written order controls over any apparent inconsistency with the court's earlier oral ruling." Pham v. Corbett, 187 Wn. App. 816, 830-31, 351 P.3d 214 (2015). We follow the court's written order.

Additionally, we strike paragraph 102 in part; the last sentence of paragraph 102 is speculative and therefore inadmissible.

However, some of the paragraphs the court struck do have a sufficient basis and we consider them in our analysis: paragraphs 55 and 82. We additionally hold that paragraph 94 is not speculative and decline to strike it.

B. Second Declaration of Annalise Richmond

DOC asserts in its cross-appeal that the trial court erred in failing to strike paragraph four in the second declaration of Annalise Richmond. Richmond was Day's fiancée at the time of his death; they began dating in June 2017, and she testified that Day moved into her home in either August or September 2017.[3] Richmond stated that she "had been a gun owner for many years," and she had "several firearms" in her home when Day moved in, including "a large rifle propped up behind my jewelry box in plain-sight." She also testified that Day "owned firearms prior to moving in" to her home, including ones she saw "at his prior residence."

DOC contends Richmond's declaration lacked personal knowledge. In paragraph four, Richmond admitted that she never accompanied Day to transport firearms but stated he "never mentioned any other location where he stored personal items," and she was "not aware of any other location that he kept personal items prior to August 2017." However, Richmond does not claim personal knowledge that Day kept firearms in a specific location. She simply

[3] In Richmond's first declaration, she testified that Day moved into her home in September 2017. In her second declaration, she testified that Day began moving into her home in August 2017.

stated, "it is my belief that Tim's firearms and personal belongings were more probably than not transported from his prior residence," before again stressing that she "was not with Tim when he moved these items," but rather this opinion was her "best and most informed reasonable inference." Richmond openly admits that her opinion is an inference based on her related knowledge, rather than firsthand information or observation of the subject matter of her declaration (such as where Day kept firearms, or how or when he moved them). Richmond's stated beliefs and inferences go to the weight of her testimony, not its admissibility. We decline to strike it as we do not weigh evidence in reviewing a summary judgment dismissal.[4]

C. Declaration of David Stinson

Finally, DOC argues the court should have stricken portions of David Stinson's declaration that were later contradicted by his deposition testimony. David[5] and his wife Becky lived in the same home as Day from March 2016 until June 2017. Day and the Stinsons rented the home from their then-employer. David testified that he had little contact with Carrigan. He also stated that "about 2 to 3 months after moving into the house, [Day] came into the house with — what appeared to be — a gun case."

David initially stated that he spoke with Day's CCO, Carrigan, prior to Day moving in, however, in his later deposition he admitted that was untrue. In paragraph seven of his declaration, David testified that Day told David he was

[4] Haley v. Amazon.com Services, LLC, No. 83010-4-I, slip op. at 10 (Wash. Ct. App. Dec. 27, 2022) (published in part), https://www.courts.wa.gov/opinions/pdf/830104.pdf.

[5] Because Becky and David Stinson share a last name, we use their first names when necessary for clarity. No disrespect is intended.

permitted to have a firearm since he inherited it. In his later deposition, David admitted that he could not recall that conversation ever taking place. In reply, Fievez does not contest that the statements are untrue; because David later testified that, to his knowledge, the events never occurred, we strike them.

With the admissible evidence clarified, we turn to the merits of the summary judgment dismissal of Fievez's negligence claim.[6]

II. Negligence Claim

This court reviews a summary judgment dismissal de novo, engaging in the same inquiry as the trial court. Davies v. MultiCare Health Sys., 199 Wn. 2d 608, 616, 510 P.3d 346 (2022). "'[W]e consider all the facts and make all reasonable factual inferences in the light most favorable to the nonmoving party.'" Schwartz v. King County, 200 Wn.2d 231, 237, 516 P.3d 360 (2022) (quoting Lockner v. Pierce County, 190 Wn.2d 526, 530, 415 P.3d 246 (2018)). "Summary judgment is appropriate only when a trial would be useless; there must be no genuine issues of material fact and the moving party must be entitled to judgment as a matter of law." Schwartz, 200 Wn.2d at 237. In ruling on a summary judgment motion, "the trial court may not weigh the evidence, assess credibility, consider the likelihood that the evidence will prove true, or otherwise resolve issues of material fact" because "our constitution protects the right to

[6] In briefing, Fievez argues the trial court improperly inserted its personal experience into the summary judgment proceeding in violation of ER 605. At oral argument, counsel conceded that our de novo review renders any reasoning by the trial court irrelevant and that this court need not reach the issue. Wash. Court of Appeals oral argument, Fievez v. Dep't of Corr., No. 84230-7-I (Jan. 19, 2023), at 18 min., 27 sec., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2023011201/?eventID=2023011201. We accept counsel's concession and decline to consider this assignment of error.

have factual issues decided by a jury."[7] This court may "affirm a grant of summary judgment on any basis supported by the record." Eylander v. Prologis Targeted U.S. Logistics Fund, 22 Wn. App. 2d 773, 776, 513 P.3d 834 (2022).

"The elements of a negligence cause of action are the existence of a duty to the plaintiff, breach of the duty, and injury to the plaintiff proximately caused by the breach." Est. of Bordon v. Dep't of Corr., 122 Wn. App. 227, 235, 95 P.3d 764 (2004). To "defeat a motion for summary judgment dismissal," the "plaintiff must establish an issue of material fact as to each element of negligence." Walter Fam. Grain Growers, Inc. v. Foremost Pump & Well Servs., LLC, 21 Wn. App. 2d 451, 460, 506 P.3d 705 (2022).

Generally, the elements of proximate cause and breach are "questions for the trier of fact." Est. of Bordon, 122 Wn. App. at 235. "However, if reasonable minds could not differ, these factual questions may be determined as a matter of law." Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Finally, an "expert opinion on an ultimate question of fact is sufficient to establish a triable issue and defeat summary judgment" as a general rule. Strauss v. Premera Blue Cross, 194 Wn.2d 296, 301, 449 P.3d 640 (2019). However, the expert's opinion must be more than a speculative conclusion or a conclusion based on assumptions. Id. (quoting Volk v. DeMeerleer, 187 Wn.2d 241, 277, 386 P.3d 254 (2016)).

[7] Haley, No. 83010-4-I, slip op. at 10.

A. Duty

Generally, an entity or individual owes no duty to prevent a third party from causing harm to another. Est. of Bordon, 122 Wn. App. at 235 (quoting Couch v. Dep't of Corr., 113 Wn. App. 556, 564, 54 P.3d 197 (2002)). However, "'[o]ne who takes charge of a third person whom [they know] or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent [them] from doing such harm.'" Taggart v. State, 118 Wn.2d 195, 219, 822 P.2d 243 (1992) (quoting RESTATEMENT (SECOND) OF TORTS § 319 (1965)). This duty also operates as an exception to the public duty doctrine: "To succeed in a negligence claim against a governmental entity, the plaintiff must demonstrate the government owed a duty to the individual plaintiff, rather than the public at large." Ghodsee v. City of Kent, 21 Wn. App. 2d 762, 769, 508 P.3d 193 (2022); see also Taggart, 118 Wn.2d at 219 (take charge duty is an exception to the public duty doctrine).

The take charge duty applies to the relationship between DOC and an individual on community custody. Husted v. State, 187 Wn. App. 579, 585, 348 P.3d 776 (2015). The duty is rooted in the CCO's ability "to exercise control" and monitor the supervisee. Id. at 587-88. DOC admits it had a take charge duty over Day during the period of time proscribed by his judgment and sentence; the parties' disagreement is rooted in the timing of the duty analysis. DOC argues that the duty element is analyzed at the time of the injury and, at that point in time, their take charge duty over Day had ended because the supervisory

relationship had terminated by the plain terms of his sentence. In reply, Fievez counters that analysis of duty is tied to the timing of the breach, not the injury.

Several cases have held that when an offender on supervision absconds and a warrant is issued, the take charge duty terminates because the supervisee "cannot be monitored, given direction or sanctioned." Husted, 187 Wn. App. at 588; accord Smith v. Dep't of Corr., 189 Wn. App. 839, 846, 359 P.3d 867 (2015). This Division of the Court of Appeals has recently held in an unpublished opinion that there is no take charge duty where an individual has been sentenced to community custody but DOC had not yet created an active file or assigned a CCO to supervise the individual.[8] Division Two has held, where DOC is supervising an individual solely for compliance with legal financial obligations (LFOs), there is no take charge duty because DOC is not authorized to intervene on any action or inaction by the supervisee other than paying LFOs. Couch, 113 Wn. App. at 569. However, in each of these cases the end of the duty, breach, and harm all took place close in time.

The most factually similar case to the one before us is Binschus v. State. 186 Wn.2d 573, 380 P.3d 468 (2016). There, several plaintiffs sued Skagit County after they were injured by Isaac Zamora, who had previously been incarcerated at the Skagit County Jail. Id. at 576. The plaintiffs argued the county "was on notice that Zamora was in need of mental health services," and had failed to provide a mental health evaluation and subsequent treatment for

[8] Smith v. Dep't of Corr., No. 81246-7-I, slip op. at 7 (Wash. Ct. App. July 26, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/812467.pdf. Unpublished opinions by this court "have no precedential value and are not binding on any court," though they "may be accorded such persuasive value as the court deems appropriate." GR 14.1(a).

Zamora. Id. Our State Supreme Court affirmed the summary judgment dismissal based on its analysis of the duty element. Id. at 583. The court stated "the take charge duty is fundamentally about control," and liability stems "from negligently failing to control, not failing to protect against all foreseeable dangers." Id. at 578-79. The court explicitly declined to expand the take charge duty into "a general duty to prevent a person from committing criminal acts in the future." Id. at 580-81. Applying Restatement § 319, the court held Skagit County only owed a duty to control Zamora "during the time when Skagit County had a take charge relationship with Zamora," and that duty was only owed to individuals "who might foreseeably suffer bodily harm resulting from the failure to control Zamora." Id. at 581. Because "the crimes Zamora committed after his lawful release were not a foreseeable consequence of any failure to control Zamora during incarceration," the county owed no duty. Id. However, the court went on to explicitly note that:

> This is not to say that jails can never be liable for a former inmate's actions. First, there may be situations in which a jail's failure to control an inmate results in foreseeable injury to others, and the jail may be liable even if that injury occurs after the duty to control ended. For instance, a jail could fail to control a violent inmate by negligently allowing him or her to escape one week before he or she was scheduled to be released. Even if the inmate injured others after the scheduled release date (and thus after the jail's duty to control had theoretically ended), the jail might still be liable if its failure to control the inmate during incarceration was the proximate cause of the injuries.

Id. at 581-82 (emphasis added). It likened that hypothetical to the scenario presented in Petersen v. State, where "the psychiatrist could be liable for that failure to control the patient, even though the injuries to the victim occurred after

the duty ended." Id. at 582 (citing Petersen v. State, 100 Wn.2d 421, 671 P.2d 230 (1983)). While Petersen was rooted in § 315 of the Restatement, the court analyzed the element of duty where the injury occurred five days after a patient was discharged. 100 Wn.2d at 424-26.

DOC contends that Division Two of this court "has already rejected an attempt to extend the duty past the period of supervision." In a 2006 case, Division Two stated that where an individual on DOC supervision did not murder the victim until "10 months after DOC's duty ended, DOC did not owe a duty of care to Hungerford-Trapp to control Davis's behavior at the time of her death." Hungerford v. Dep't of Corr., 135 Wn. App. 240, 257, 139 P.3d 1131 (2006). The court held that, "DOC owes a duty of care to those who an offender might injure while DOC is supervising the offender," and that "once that special relationship ends, the exception to the public duty doctrine expires." Id. at 258. In an unpublished July 2021 opinion, this court cited to Hungerford, holding that "the DOC owes a duty to those who are injured during an offender's active supervision, not after it ends" and "[t]he DOC is not liable for future crimes of previously supervised offenders."[9] The Hungerford court relies on Taggart, but nothing in Taggart at the referenced pin cite states the attributed rule. See Id. at 258 (citing Taggart, 118 Wn.2d at 220). Rather, page 220 of Taggart recites the general rule that parole officers have a take charge duty over parolees, before analyzing cases from other jurisdictions. 118 Wn.2d at 220. Nothing in Taggart states when the duty ends or at what point duty is to be analyzed. More critically,

[9] Smith, No. 81246-7-I, slip op. at 9.

Hungerford's holding seems to be contrary to the Binschus opinion, which is binding authority.[10] Accordingly, we decline to follow Hungerford and instead adhere to our State Supreme Court's language in Binschus.

DOC may be liable under its take charge duty for injuries that take place after its supervising relationship has ended so long as the breach occurs during the supervisory relationship. DOC cautions that such a rule "would require DOC to monitor offenders in perpetuity even when it has no authority to do so." However, the temporal separation between the end of the supervisory relationship and the injury is analyzed through the element of causation. The further an injury is from the end of DOC's ability to control an individual, the more tenuous the relationship between any breach and the injury. Fievez has, at a minimum, raised a material issue of fact as to duty.

B. Breach[11]

DOC and its CCOs are only liable for civil damages if "the act or omission constitutes gross negligence." RCW 72.09.320. "Gross negligence most obviously differs from simple negligence in that it requires a greater breach." Harper v. State, 192 Wn.2d 328, 340-41, 429 P.3d 1071 (2018). "[A] person acts with gross negligence when he or she exercises 'substantially or appreciably' less than that degree of care which the reasonably prudent person would exercise in the same or similar circumstances." Id. at 343 (alteration in original)

[10] As a general rule, the individual divisions of this Court of Appeals are not bound by the decisions of the others. In re Pers. Restraint of Arnold, 190 Wn.2d 136, 154, 419 P.3d 1133 (2018). Rather, decisions from other divisions are afforded persuasive authority. Id.

[11] While the trial court ruled Fievez had raised a material issue of fact as to breach, we are not bound by the trial court's reasoning or ruling as our review is de novo. As such, we analyze that element here.

(quoting Nist v. Tudor, 67 Wn.2d 322, 331, 407 P.2d 798 (1965)). In considering gross negligence, courts "must focus their analysis on 'the hazards of the situation confronting the actor.'" Id. at 344 (quoting Nist at 331). The court should examine what action the defendant allegedly failed to take along with "any relevant actions that the defendant did take." Id. at 343. To avoid dismissal on summary judgment, the plaintiff bears the burden to "provide substantial evidence of serious negligence." Id. at 345-46. The "[f]ailure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care." See 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 10.07 (7th ed. 2022).

Before the trial court, Fievez largely relied on the failures of James and Carrigan to discover violations of Day's community custody conditions. Fievez's expert, Hall, opined in his declaration that "DOC failed to exercise even slight care in the community supervision of Timothy Day" when: James failed to communicate Daarud's concerns to Carrigan, Carrigan failed to directly reach out to James regarding safety threats, Carrigan failed to review Day's criminal and community supervision history, Carrigan failed to more closely monitor Day's residence and communicate more frequently with the Stinsons, and Carrigan closed out Day's supervision while he was purportedly in violation of his community custody conditions.

Fievez additionally contends Carrigan committed "15 'policy errors'" which constituted a breach of her duty of care. Community Custody Supervisor (CCS) Liza Rohrer, Carrigan's supervisor, performed a case review in June 2018, and

reported that Carrigan failed to meet the contact standards for the first three months of Day's supervision. Carrigan was "not aware of the requirement for DOSA offenders to" submit to weekly urinalysis (UA) and therefore she "did not supervise offender Day in accordance with policy within the first 3 months of the offenders supervision period." Rohrer also reported that Carrigan failed to make the requisite monthly collateral contacts on three separate occasions during his supervision: June 2016, October 2016, and January 2017. Fievez makes much of this report but fails to accurately contextualize the "15 policy errors." Rohrer's report demonstrates that Carrigan's policy errors occurred early on in Day's supervision (the first three months), and, while she missed three collateral contacts, Carrigan made "frequent collateral contacts . . . during the months of March, April, May, June and July of 2017." The report also reflects that Day participated in the "T4C"[12] program, and he completed his substance use evaluation as required. Day's community custody records also provide context for the alleged policy violations in that they demonstrate his overall compliance with conditions of supervision. For example, Day maintained employment throughout his time on community custody, every breathalyzer and UA test he provided was negative, he showed Carrigan his room the two times he was asked, he informed Carrigan when he left the county and returned on several occasions, and he successfully completed domestic violence treatment.

As to the failure to review Day's criminal history and records from prior time on community supervision, Hall heavily relies on deposition testimony from

[12] "Thinking for a Change."

another CCO, Ted Creviston. Creviston testified that it was his practice to review records from prior community custody supervision, such as the "chronos" and "field discipline." Rohrer testified that "she expected CCOs to be familiar with an offender's criminal history." These opinions are sufficient to raise a question of material fact regarding breach of the duty of slight care based on Carrigan's alleged failure to review records related to Day.

Hall next opined that Carrigan failed to exercise slight care because she should have made more contacts with the Stinsons specifically and should have more closely monitored Day's residence. However, this is a far cry from the slight care standard we must apply under RCW 72.09.320. Hall contends Carrigan spoke with Becky and David Stinson each only one time: once with Becky "to confirm that there were no firearms or controlled substances in the home," and an introductory conversation with David. Hall also states Carrigan failed to exercise slight care by neglecting to leave a business card or contact information with the Stinsons. He relies on a statement by Creviston that he "'often' makes collateral contact with an offender's roommates," as well as DOC policy requiring CCOs to make monthly collateral contacts with third parties which "may include . . . [f]amily members, significant others or roommates." But, Hall provides no testimony, policy, or other factual basis to support the contention that Carrigan failed to exercise slight care by making collateral contacts with Day's employer (and landlord) rather than the Stinsons; effectively that Carrigan breached the duty of slight care because the collateral contacts she made should

have prioritized certain categories of people over others. As such, Fievez fails to raise a material issue of fact as to breach on this basis.

Hall also asserts that James was negligent in failing to relay concerns from Daarud to Carrigan. Daarud was concerned that Day could access firearms and "told James that she was receiving 'strange hang[-]up calls.'" Hall relies on testimony by Victim Services Program Manager Sheila Lewallen "that she would have created a 'community concern chrono' — which would be visible to Day's CCO — and personally reached out to Day's CCO if she had received and had access to the constellation of information in James' possession" during the relevant time period. Hall also relies on DOC Policy 390.300(IV) which requires a CVL to document threatening behavior or unwanted contact with a past or potential victim. But, as with Hall's opinion regarding the handling of collateral contacts, one witness's assertion that they would have exercised their discretion differently is not sufficient to demonstrate that James failed to exercise slight care.

James exercised her discretion in declining to enter a community concern chrono, particularly where Daarud's reports regarding hang-up calls took place during the same conversation where Daarud noted her concerns about Day's possible access to firearms, despite admitting she had not seen Day with firearms since before 2015. James had no information indicating that Day was responsible for the hang-up calls Daarud was experiencing, other than Daarud's assertions to that effect, and as such Policy 390.300(IV) is inapplicable. Further, while Fievez repeatedly refers to Day's "firearm fetish" in briefing, and at oral

argument before this court, the record does not demonstrate that a firearm was involved in the crime of conviction for which he was on community custody. Day's prohibition from accessing firearms was based upon his prior conviction history for felony crimes, which is true for many individuals subject to community custody.[13] Fievez fails to raise a material issue of fact as to breach on this basis.

As to Carrigan's closure of Day's community custody while he was purportedly out of compliance, Hall alleges Day was in active violation of his conditions by failing to make additional reports while homeless. However, the record does not support the assertion that Day ever definitively informed Carrigan he was homeless or living out of his truck; rather, he reported that he was considering living in his truck as he was struggling to afford the rent at his current residence. Hall does not opine that a failure by Carrigan to investigate or discover whether Day was truly homeless constitutes gross negligence; rather, his opinion presumes that Day was out of compliance and Carrigan terminated supervision despite that noncompliance. Hall does not contend that the failure to investigate further into Day's statement that he was considering living in his truck itself constituted gross negligence. Fievez fails to raise a material issue of fact as to breach on this issue.

Because Fievez raises a material issue of fact as to breach on one of the offered bases, we next turn to the question of proximate cause based only on Carrigan's failure to review records relevant to Day.

[13] Fievez provides no evidence that Day's firearm restriction was a function of anything other than his prior felony conviction history. Nearly all crimes of conviction which give rise to a community custody sentence are felonies, so it logically follows that most individuals serving community custody are subject to firearm restrictions. See RCW 9.41.040; RCW 9.94A.501, .701.

C. Proximate Cause

Fievez argues the trial court erred by ruling on proximate cause as a matter of law. The crux of Fievez's proximate cause argument is that had Carrigan exercised slight care in supervising Day, she would have discovered acts or behaviors that constituted criminal conduct and Day would have been incarcerated based on either revocation of his DOSA or new criminal charges.

While proximate cause is generally a jury question, it "may be a question of law for the court if the facts are undisputed, the inferences are plain and inescapable, and reasonable minds could not differ." Est. of Bordon, 122 Wn. App. at 239. Proximate cause consists of two elements: "legal causation and cause in fact." Id. "There is cause-in-fact if a plaintiff's injury would not have occurred 'but for' the defendant's negligence;" there is no cause in fact "if the connection between an act and the later injury is indirect and speculative." Id. at 240 (quoting Walker v. Transamerica Title Ins. Co., 65 Wn. App. 399, 828 P.2d 621 (1992)). To demonstrate cause in fact, "[t]here must be a direct, unbroken sequence of events that link the actions of the defendant and the injury to the plaintiff." Joyce v. Dep't of Corr., 155 Wn.2d 306, 322, 119 P.3d 825 (2005). Legal causation, in contrast, "rests on considerations of policy and common sense as to how far the defendant's responsibility for the consequences of its actions should extend." Taggart, 118 Wn.2d at 226.

Here, Fievez raised a material question of fact on the element of breach based only on Carrigan's failure to review Day's criminal history and records from previous community custody supervision. Hall opined that, had Carrigan

reviewed the records, she would have monitored Day's residence more closely and "prioritize[ed] collateral contacts with his roommates." Hall stated that, had Carrigan implemented this heightened monitoring, "more probably than not she would have discovered the firearms in Day's residence,[14] thereby leading to his immediate arrest, detainment, and incarceration pending criminal processing." But Hall presents no direct, unbroken sequence of events linking Carrigan's failure to review the relevant records before beginning supervision to Day's shooting of Fievez more than two years after this identified breach, over eight months after supervision ended.[15] Even affording Fievez all reasonable inferences, there is no material question of fact as to the element of causation. He fails to present more than a speculative theory that additional contacts or preparation by Carrigan would have led to the discovery of acts that constituted a violation of Day's community custody conditions, or that constituted criminal conduct, and that, based on these acts, Day would have been detained on the day of Fievez's injury.[16] Because "the facts are undisputed, the inferences are

[14] As a preliminary matter, Hall's declaration does not specify whether he is referring to Day's DOC-approved residence he shared with the Stinsons, or Richmond's home where he lived in the final months of his term of community custody. If the former, the Stinsons only noted that they saw Day with a rifle case, and that was in the spring of 2016. Neither ever observed an actual firearm in Day's possession while they resided together, nor did they report the rifle case incident to anyone until discovery was conducted pursuant to Fievez's lawsuit.

Richmond testified that she had a number of firearms in her home, where Day was residing beginning in August or September 2017. The firearm Day used in the shooting at issue belonged to Richmond, but based on Richmond's declaration as to the timeline of their relationship, Day's access to Richmond's firearms could not have occurred until well after the timeframe Hall appears to reference in his declaration.

[15] Day began supervision in March 2016, and completed supervision on October 2, 2017; the shooting took place on June 17, 2018.

[16] The claim that Day would have been incarcerated on the date Fievez was shot necessarily relies on layers of speculation on matters of prosecutorial discretion, discretionary rulings of the trial court, and Day's strategic choices as to the defense against what are ultimately fictional criminal charges. Asked at oral argument before this court whether the incarceration aspect of his theory would have been based on revocation of Day's DOSA sentence, pretrial

plain and inescapable, and reasonable minds could not differ," proximate cause was properly determined at the summary judgment phase. Est. of Bordon, 122 Wn. App. at 239.

While Fievez demonstrated that DOC breached the duty of slight care when Carrigan failed to review Day's criminal history and prior supervision records before undertaking his supervision in March 2016, he is unable to demonstrate a causal connection between that breach early in Day's supervision and the tragic events that occurred eight months after DOC closed out Day's file. Fievez's claim is likewise undercut by "considerations of policy and common sense as to how far the defendant's responsibility for the consequences of its actions should extend." Taggart, 118 Wn.2d at 226. The injury-causing act is so disconnected from the only breach by DOC for which Fievez was able to demonstrate a genuine issue of material fact that imposing liability on DOC would

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detention on a new charge, or a sentence on a new charge, Fievez replied that it could be any of those possibilities. Wash. Court of Appeals oral argument, Fievez v. Dep't of Corr., No. 84230-7-I (Jan. 19, 2023), at 1 min., 05 sec., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2023011201/?eventID=2023011201.

While Fievez is entitled to all favorable inferences based on the facts presented, this aspect of his argument rests entirely on speculation. Given Day's satisfactory completion of the other terms of the DOSA sentence, it is a leap to suggest that access to firearms (which could arguably support constructive possession under the law) would have resulted in immediate revocation of the remainder of Day's DOSA sentence, particularly within the framework of the DOC "swift and certain" sanction policy. DOC Policy 460.130. Even if Day had been revoked for noncompliance when he was living with Richmond without DOC approval, revocation alone could only have resulted in the imposition of the remainder of his sentence which, at that point in time, was only 40 more days.

The other possibilities regarding incarceration based on a new criminal charge rest on presumptions that fly in the face of the discretion held by each elected prosecutor, and their deputies by extension, as to the filing of charges and the presumption of release under CrR 3.2. These theories require a conclusion that Day would have either been denied pretrial release or unable to post bail, or, stretching credulity even further, that he would have not only proceeded to trial, but been convicted and sentenced so that he would have been serving time on the date of Fievez's shooting. Inferences in favor of the nonmoving party do not include such unrestrained chains of speculation.

be contrary to policy and common sense. We affirm the trial court's dismissal of Fievez's claim.[17] [18]

WE CONCUR:

[17] While DOC also contends Fievez fails to demonstrate a material question of fact as to proximate cause due to superseding, intervening causes, because we affirm the dismissal on the basis set out in this section, we need not reach that issue.

[18] Prior to oral argument, Fievez moved this court to strike a portion of DOC's cross-appellant reply brief as not sufficiently related to the issues raised on cross-appeal. Motion to Strike at 2-3. To the extent the brief was unrelated to the cross-appeal issues, we decline to consider it, but the motion to strike is denied.

DECLARATION OF SERVICE

On said day below I electronically served via Washington Appellate Portal a true and accurate copy of the ***Petition for Review*** in Court of Appeals Division I Cause No. 84230-7-I to the following:

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

DATED: March 21, 2023 at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
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TALMADGE/FITZPATRICK

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Appellate Court Case Title:	Rickey Fievez, et al, App/Cross Resp v. Department of Corrections, Res/Cross App
Superior Court Case Number:	19-2-02296-2

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