NO. 89662-3

SUPREME COURT OF THE STATE OF WASHINGTON

SABRINA RASMUSSEN,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON,

Defendant/Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington Department of Corrections (DOC) is the Respondent in this matter and hereby asks this Court to deny further review of the Court of Appeals decision that is designated in Section II of this Answer.

II. COURT OF APPEALS DECISION

Division One of the Washington State Court of Appeals affirmed the trial court decision granting summary judgment in favor of the State (and two other Defendants) and dismissed Plaintiff's complaint in an unpublished Opinion at Docket No. 67518-4-1 on April 1, 2013. A copy of the Opinion is attached as Appendix (App.) A.

On April 19, 2013, Plaintiff filed a motion for reconsideration. Defendant Department of Corrections filed its Answer to Motion for Reconsideration on May 15, 2013. The Court of Appeals denied the Motion for Reconsideration on November 1, 2013, but made one minor amendment to a footnote in its prior Opinion. The court's Order Denying Reconsideration and Amending Opinion is attached as App. B.

III. COUNTERSTATEMENT OF ISSUE ON REVIEW

Plaintiff fails to establish any of the criteria for review by this Court; this Court should therefore deny review. If the Court were to grant review, the issue would be: Did the Department of Corrections owe a duty

to Plaintiff for her injuries when those injuries were inflicted upon her by the intentional criminal acts of her assailant, when all supervision requirements relating to her assailant had terminated almost three years previously by order of the sentencing court and Plaintiff failed to establish proximate cause in any event?

IV. COUNTERSTATEMENT OF THE CASE

The Court of Appeals opinion below accurately sets for the facts in this case. *See* App. A at 2-10. Those facts are summarized as follows and are described in more detail in Section V herein.

Almost three years after Terapon Adhahn's sentencing court terminated DOC's supervision of him, Adhahn abducted and raped Plaintiff on her way to school. CP 2-3, 24-25, 150-56. Adhahn, however, was not arrested or charged with that crime until over seven years later when he was arrested for murdering a different, unrelated child: Zina Linnik. CP 3, 279. Adhahn was linked to Plaintiff's injuries through DNA evidence collected when he was arrested in the Linnik case.[1] CP 3. As the record below demonstrates, there were no circumstances under which Adhahn could have been in jail or not in the United States on the day he assaulted Plaintiff.

[1] Ms. Linnik's estate also filed a separate civil action, review of which was denied by this Court on October 2, 2013, No. 88928-7.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

This Court should deny review because the Court of Appeals' opinion below applied settled case law in reaching its decision. Plaintiff failed to demonstrate the existence of a legal duty. Duty of care is a question of law. *Osborn v. Mason County*, 157 Wn.2d 18, 23, 134 P.3d 197 (2006). Plaintiff attempts to reframe the issue of duty by arguing that "DOC is liable for prematurely releasing Adhahn from supervision . . . ." Pet. for Review at 8. However, DOC had neither the ability nor the legal authority to "release Adhahn from supervision" – that was exclusively the role of the sentencing court.[2]

Fatal to Plaintiff's claim is the fact that the sentencing court could not have extended Adhahn's supervision period, for, as discussed in more detail below, Adhahn had already served a longer supervision period than the law allowed. Plaintiff's request to expand the duty to control the actions of offenders after DOC supervision ends has already been properly rejected by the courts in this state. Likewise, Plaintiff failed to demonstrate proximate cause in any event. For these reasons, the Court should deny Plaintiff's petition.

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[2] Because termination of supervision was within the exclusive province of Adhahn's sentencing court, Plaintiff's policy argument that the decision below will encourage DOC to release offenders early in order to avoid liability (Pet. for Review at 19), is wholly unsupported.

A. Plaintiff Failed To Establish That DOC Owed Her A Duty As That Duty Is Defined By Washington Precedent, Therefore Review Is Not Supported By RAP 13.4

The Court of Appeals followed settled case law in concluding that Plaintiff failed to demonstrate a duty as a matter of law. First, "the State is not liable for its negligent conduct even where a duty does exist unless the duty was owed to the injured person and not merely the public in general." *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006). Second, "[a]s a general rule, our common law imposes no duty to prevent a third person from causing physical injury to another." *Id.* And it is beyond dispute that DOC did not directly cause the harm to Ms. Rasmussen – her attacker was Terapon Adhahn.

Courts in Washington have held that DOC owes no duty to potential future victims after an offender's supervision ends. *Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 258, 139 P.3d 1131 (2006); *see also Couch v. State*, 113 Wn. App. 556, 54 P.3d 197 (2002), *review denied*, 69 P.3d 874 (2003). In fact, Plaintiff agrees with that proposition. *See* Pet. For Review at 8.

Regardless of Plaintiff's concession, the Court of Appeals in *Hungerford* was unequivocal that DOC's duty ends when supervision ends. ". . . DOC did not owe a duty to [plaintiff] after DOC's take charge relationship with [the offender] ended." *Id.* at 258 (emphasis added).

That holding is derived from prior holdings of this Court. *See Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992); *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999).

Furthermore, the *Hungerford* court explained its holding as follows:

> We hold that the duty to supervise does not require DOC to prevent future crimes an offender might commit after his supervision ends even when the offender is placed on LFO status. DOC owes a duty to those who are injured during, not after, an offender's active supervision ends.

Id. at 258. The court's holding in *Hungerford* is not contrary to *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), as Plaintiff continues to suggest, nor is the Court of Appeals' Opinion below contrary to *Petersen.*

The facts in *Peterson* involved a psychiatrist's release of a patient while knowing that the patient posed a danger and a resulting accident that occurred only five days after that release. *Peterson*, 100 Wn.2d at 424. Later, in *Taggart*, this Court addressed both *Petersen* and the *Restatement (Second) of Torts* § 315 (1965) in its discussion on the issue of duty. That discussion demonstrates the legal consistency between the courts' analyses in *Hungerford, Couch, Peterson*, and *Taggart.*

In *Taggart*, this Court confronted the issue of whether DOC owed a duty of care to members of the public injured by parolees based upon the relationship between a parole officer and the offender under supervision.

Taggart, 118 Wn.2d at 217. This Court began its analysis by noting that Washington precedent normally precludes liability for breach of a duty that is owed to the public at large. *Id.*

This Court then focused its analysis on *Petersen* and the *Restatement (Second) of Torts*. *Taggart*, 118 Wn.2d at 218. This Court extended the special relationship exception that it had applied in *Petersen* (which was based upon the *Restatement (Second) of Torts* § 315) to the situations where DOC is supervising offenders. *Taggart*, 118 Wn.2d at 219.

However, in doing so, this Court specifically limited the imposition of a duty to cases involving a "definite, established *and continuing relationship between the defendant and the third party [offender].*" *Id.* at 219 (citing *Honcoop v. State,* 111 Wn.2d 182, 193, 759 P.2d 1188 (1988)). And, importantly, this Court found that the duty to exercise reasonable care to control a dangerous offender arises under § 319's definition of a special relationship, not simply under § 315 as in *Peterson.*

> Section 319 is most relevant in the present case: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Restatement (Second) of Torts § 319 (1965).

Taggart, 118 Wn.2d at 219. This Court then described the various features of why parole officers have "taken charge" of parolees, starting with the parole officers' statutory authority. *Id.* This Court further described that the "take charge" relationship existed because of the ability to regulate a parolee's movements, impose special conditions, and ensure the parolee obeys the conditions. *Id.* at 219-20. "Because of these factors, we hold that parole officers have 'taken charge' of the parolees they supervise for purposes of § 319." *Taggart*, 118 Wn.2d at 220. Since all of those "take charge" abilities necessarily end as a matter of law after supervision terminates, so, too, must the duty end.[3]

The *Couch* court applied that same analysis and reached the same conclusion when it held that the conditions of supervision determined whether DOC had "taken charge" of the offender and had a duty to prevent the crime by the offender. *Couch*, 113 Wn. App. at 565. That court stated:

> A community corrections officer must have a court order before he or she can "take charge" of an offender; and even when he or she has such an order, he or she can only enforce it according to its terms and applicable statutes.

Couch, 113 Wn. App. at 565 (emphasis added) (footnotes omitted). The

[3] Note also, however, "The mere existence of some ability to control a third party is not the dispositive factor in determining whether a take charge duty exists; rather, the purpose and extent of such control defines the relationship for purposes of tort liability." *Sheikh*, 156 Wn.2d at 453, (citing *Taggart*, 118 Wn.2d at 220).

Couch court further noted, if DOC is not authorized to intervene, it cannot have a duty to do so. *Couch*, 113 Wn. App. at 569; *see also Stenger v. State*, 104 Wn. App. 393, 404, 16 P.3d 655 (2001) (absent the ability, a defendant does not have the duty to control the conduct of a third person).

Further, the same argument Plaintiff made to the Court of Appeals below was also soundly rejected in *Hungerford*:

> [Plaintiff] argues that DOC breached that duty before [supervision ended], and that this breach caused [plaintiff's] death even though [the offender] was no longer under direct supervision. Although phrased as a question of proximate cause, [plaintiff's] argument also asks us to expand DOC's duty to supervise. [Plaintiff] would have us impose a general duty on DOC to report probation violations and extend probation in order to prevent crimes that may occur after active probation supervision ends. We decline to do so.

Hungerford, 135 Wn. App. at 257. The *Hungerford* court's reasoning, like that of the Court of Appeals below, is entirely consistent with *Taggart*.

Despite these holdings, Plaintiff requests that this Court accept review in order to further expand the duty of DOC (and every other municipality in Washington that supervises offenders) to face legal liability in perpetuity for every bad act a former offender may commit. Plaintiff's invitation to expand "negligent supervision" duty should be

rejected and review denied because it is unsupported by Washington precedent.

B. Because Plaintiff Failed To Establish A Causal Relationship Between Defendant's Inability To Jail Adhahn And Her Own Injuries, Dismissal Is Supported By Washington Precedent And This Court Should Deny Review Under RAP 13.4

The Court of Appeals opinion also applied settled law regarding proximate cause. Thus, even if this Court were to accept that DOC owed a duty to Plaintiff, Plaintiff's claim would still fail because she did not establish that a breach of the duty had proximately caused her injuries. "A plaintiff in a negligent parole supervision action must prove the inadequate supervision proximately caused the complained-of injuries." *Bell v. State*, 147 Wn.2d 166, 169, 52 P.3d 503 (2002). A cause is "proximate only if it is both a cause in fact and a legal cause." *Gall v. McDonald Industries*, 84 Wn. App. 194, 207, 926 P.2d 934 (1996). Plaintiff cannot prove causation.

In order to establish causation in negligent supervision cases, a plaintiff must prove that if a parole violation had been reported to the court, the offender would have been incarcerated up to and including the date that the plaintiff was injured. *Bell*, 147 Wn.2d at 179. Therefore, even if Plaintiff offered evidence that the offender here violated conditions of supervision, Plaintiff must still prove that reporting the violation would

have prevented the offender from being able to cause her harm. She failed to offer such evidence.

In point of fact, *as a matter of law*, Adhahn's sentencing court could have done nothing that would have removed the possibility of Adhahn's assault on Plaintiff.

> [E]ven if [the sentencing judge] had known more, he could not have done more; and if he could not have done more, the alleged failure to inform him bears no causal relation whatever to the harm later suffered by [plaintiff].

Couch, 113 Wn. App. at 573. Whatever the sentencing judge here could have done ended well prior to Adhahn's assault and thus bore no causal relation to Plaintiff's injuries.

Plaintiff offered no admissible evidence that Judge Strombom, the sentencing judge, would have revoked Adhahn's fourteen month suspended sentence based on the alleged supervision violations. In other words, regardless of the number and quality of the violations Plaintiff could have established Adhahn committed during his period of supervision, Plaintiff failed to establish that Adhahn would have been in jail as a result of those parole violations at the time he assaulted Sabrina Rasmussen in 2000, when Adhahn's supervision ended in 1997.

Contrary to Plaintiff's argument in her Petition that she submitted evidence demonstrating that Adhahn would have been incarcerated on the

day of her assault (Pet. for Review at 17), Plaintiff's proffered expert offered no such opinion. Instead, Plaintiff's expert merely opined that Adhahn "would never have been on the street at the time of the brutal rape and murder of Zinaida [Linnik]." CP 219, ¶12. Ms. Linnik's murder occurred in 2007 – seven years *after* Adhahn had assaulted Plaintiff here. CP 279.

There are no set of circumstances under which Adhahn could have been incarcerated for the 1990 incest conviction during the period encompassing both Ms. Rasmussen's assault in 2000 and Ms. Linnik's murder in 2007.[4]

Nevertheless, regardless of whether the misdemeanor intimidation charge in 1992 was reported to the court as a violation, the most that could have happened was that Adhahn's SSOSA sentence could have been revoked by the court and the remainder of the fourteen month suspended incarceration time imposed. App. A at 18. If those things were to happen, Adhahn still would not have been incarcerated at the time he assaulted Sabrina Rasmussen.

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[4] Of course, Mr. Stough's opinions about what a judge would have done have been previously ruled inadmissible in any event. *Estate of Bordon v. State, Dep't of Corr.*, 122 Wn. App. 227, 246, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005) ("The trial court was thus well within its discretion when it refused to allow Stough to testify about what a judge would have done in the SRA violation hearing if the CCO had reported Jones' driving condition violation to the court. This testimony would clearly have been beyond his expertise and merely speculative.").

Stated another way, had the sentencing court revoked Adhahn's SSOSA following the 1992 misdemeanor conviction, his supervision time would have been shorter than the nearly seven years it did last and would have ended well before Adhahn's assault on Ms. Rasmussen. Revocation of Adhahn's suspended sentence of fourteen months incarceration was the most serious sanction available to the court. Consequently, Adhahn would have been in jail until, at most, twelve months after September 9, 1992 (the date he was convicted of the intimidation with a weapon charge).

State v. Onefrey, 119 Wn.2d 572, 835 P.2d 213 (1992) is also dispositive of Plaintiff's claim. In *Onefrey*, this Court allowed a defendant to appeal his standard range sentence to argue that the trial court erroneously interpreted SSOSA to preclude him from eligibility. *Onefrey*, 119 Wn.2d at 573-74. The trial court had determined that Onefrey would benefit from treatment and that a prison sentence would not benefit society. But, because the treatment provider recommended a treatment term of ten years, the trial court found that it could not order community supervision for enough time to treat Onefrey successfully because SSOSA did not provide for an exceptional sentence at that time. *Onefrey*, 119 Wn.2d at 573-74. This Court agreed. *Onefrey*, 119 Wn.2d at 577. This Court held: "Under SSOSA, the trial court is not permitted to fashion

conditions such that the length of time spent in treatment exceeds that provided for in the statutory language." *Onefrey*, 119 Wn.2d at 576.

At the time Adhahn committed the crime for which he was under supervision, former RCW 9.94A.120(7)(a) provided that "the court may suspend the execution of the sentence and place the offender on community supervision *for up to two years*." Therefore, Adhahn's sentencing court did not have the authority to impose an exceptional sentence of five years supervision and treatment. Because Adhahn's treatment requirement was "60 months" (*see* CP 153), as a matter of law he did not qualify for the SSOSA sentence combined with an "exceptional sentence" as ordered in 1990. As this Court in *Onefrey* noted: "If Onefrey could not be treated within the requisite two years, then he was outside the population that the Legislature intended to be eligible for SSOSA." *Onefrey*, 119 Wn.2d at 577.

The result of those legal restrictions here are dispositive of Plaintiff's claims because they conclusively establish that Adhahn could not have been incarcerated on May 31, 2000, for any violations relating to his 1990 Incest conviction. This factual and legal reality is best illustrated as follows: Adhahn is sentenced on September 4, 1990. CP 155. The sentencing court imposed a term at the top end of the standard range of fourteen months. *See* CP 153 and 155. As the Court of Appeals properly

recognized, by statute, the sentencing court could only impose a supervision and treatment term of two years. App. A at 18 (citing former RCW 9.94A.120(7)(a); *Onefrey*, 119 Wn.2d at 574-77). Had a two year supervision term been imposed and all other sentence provisions remained the same, the supervision term would have expired on November 4, 1992, (two years plus two months tolling while Adhahn was confined in the Pierce County Jail).

Assuming for purposes of this illustration that the sentencing judge learned of the intimidation charge and then imposed the maximum sanction provided by law – revocation of the suspended sentence – Adhahn would have been confined for twelve months (fourteen months minus the two months [60 days] already spent in confinement), Adhahn would have been relieved of all legal obligations relating to his 1990 incest charge by approximately the end of 1993.

The above illustration is applicable to Plaintiff's case in at least four ways. First, it demonstrates that, as a matter of law, there was at a minimum, seven years of time that Adhahn would not have been supervised by DOC before he committed his assault on Plaintiff. Second, any violations alleged (but unproven) by Plaintiff beginning in 1994 are irrelevant to the negligent investigation claim. Third, it demonstrates the outside time limit that any deportation action would have had to have been

completed. (Plaintiff's deportation argument is discussed in more detail in Section C infra.) Fourth, the illustration demonstrates how completely speculative Plaintiff's liability claim is. There are simply no facts that can show that Adhahn would have been in jail on May 31, 2000.

Plaintiff seems to recognize that the record below demonstrates Adhahn could not have been in jail under any of her argued factual scenarios. Instead, Plaintiff speculates that if Adhahn's SSOSA had been revoked, he would have been deported or in ICE custody. Pet. for Review at 15-16. Plaintiff thus attempts to expand DOC's duty by asking this Court to accept review and now require DOC to not only report all crimes to the Immigration and Customs Enforcement (ICE) (which is contrary to RCW 10.70.140), but also to ensure that the offender is thereafter deported or removed from the United States by that or another federal agency. As discussed below, Plaintiff's proposition is preposterous and unworkable.[5]

[5] Plaintiff's deportation/removal argument is unsupportable also as a matter of policy. Deportation – unlike incarceration – protects no one other than potential victims in the jurisdiction from which the offender may be removed. Such a proposition is contrary to the premise of negligent supervision liability as it is generally applied in this State.

C. Because Plaintiff Failed To Establish A Causal Relationship Between Defendant's Inability To Ensure The Deportation Of Adhahn And Her Own Injuries, Dismissal Is Supported By Washington Precedent And This Court Should Deny Review Under RAP 13.4

Plaintiff fails to show any basis for review by this Court beyond anything but her own speculation that DOC's alleged negligence could have resulted in Adhahn being deported or in ICE custody on the day of her injuries – a proposition rejected by the Court of Appeals below. The Court of Appeals applied settled law in considering that DOC had no duty to report Adhahn to ICE. Further, the record shows that ICE was aware of Adhahn's arrests and immigration status and failed to act (CP 532-33), and given the uncertainties of predicting the enforcement actions of ICE and changing immigration law, it is pure speculation whether Adhahn would have been deported and when deportation would have occurred.

As the Court of Appeals below correctly found, DOC has no legal duty to report an offender's immigration status. App. A at 19. When an offender is not committed to DOC custody, DOC has no duty to inquire or report that offender's status to the INS. RCW 10.70.140. At the time of his assault on Plaintiff, Adhahn had never been incarcerated in a DOC facility.

Moreover, Plaintiff could not establish causation because the facts demonstrate that the INS knew of Adhahn's arrests at the time those

arrests occurred but chose to not act until 2007 (seven years after Plaintiff was assaulted) (CP 532-33), when Adhahn was suspected of abducting and murdering a separate child – well after the immigration laws had been changed several times.

The lack of interest by INS (ICE) in Adahan's misdemeanor weapons violation or the incest charge at the time those crimes happened is flatly inconsistent with Plaintiff's claim that if DOC had informed ICE of the charges, Adhahn would have been deported. In spite of this real-time evidence, Plaintiff would have this Court re-draft history on what the INS may have done in 1990 or 1992 based on the federal government's actions in 2007 when Adhahn was the suspect in the kidnapping and murder of another child. Plaintiff's recharacterization of what *did* happen in the early 1990s into what she says *could* have happened is insufficient to state a claim. As the Court of Appeals below properly noted:

> Because it is undisputed that Adhahn was never in DOC custody, DOC did not have a duty to report to the immigration authorities. [Citing RCW 10.70.140]. And, as a matter of law, neither the conviction in 1990 for incest in the first degree, the misdemeanor conviction, nor failure to register as a sex offender would have subjected Adhahn to deportation.

App. A at 19.

In addition, though Plaintiff states that her expert unequivocally opined that Adhahn would have been deported if INS knew of his crimes

or failure to register (Pet. for Review at 17), that expert's declaration does not show that same conviction. *See* CP 493-505. First, the record demonstrated that the immigration laws were in a state of flux during all relevant time periods – a proposition agreed to by Plaintiff's own expert. *See* App. B. That is, whether Adhahn was "deportable" at any given time varied throughout the time from his first conviction in 1990 until he was arrested for the murder of Zina Linnik in 2007. But, as discussed in Section B above, the relevant time period for Plaintiff's deportation argument must end in 1992 since Adhahn's supervision period was required by law to end at that time.

The case Plaintiff cites in support of her argument that incest was a crime of moral turpitude supports the volatility of the immigration laws during that seventeen year period. *See Gonzalez-Alvarado v. I.N.S.*, 39 F.3d 245, 246 n.2 (9th Cir. 1994) ("Section 1251(a)(4) has since been revised and recodified at 8 U.S.C. § 1251(a)(2)(A)(i) (Supp. IV 1992). The revision does not apply to Gonzalez because notice of his deportation proceeding was provided before March 1, 1991. *See* Pub. L. No. 101–649, § 602(d), 104 Stat. 5082 (1990)"). Second, Plaintiff's expert conceded that deportation was dependent upon when Adhahn came to the attention of the INS or ICE because the laws relating to immigration continued to change. *See* App. B; CP 498 ¶ 14.

The Court of Appeal's conclusion that Plaintiff's claim that Adhahn would have been deported or in ICE custody was speculative (App. B) is entirely consistent with this Court's precedent. As this Court has noted:

> Even if an undocumented immigrant is apprehended, removal from the United States is not a foregone conclusion. The immigrant still faces removal proceedings in front of an immigration judge. Even if an immigrant is deportable, removal can still be canceled in some cases.

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 670, 230 P.3d 583 (2010) (emphasis added, citations omitted). That is even more true here because Adhahn was a documented legal resident. *See* CP 534-39.

Perhaps more illustrative than this Court's finding in *Salas* that the certainty of deportation is tenuous at best, is that same court's recognition that "The Department of Homeland Security (DHS) estimates there were 11.6 million unauthorized immigrants residing in the United States as of January 2008." *Id.* Thus, Plaintiff has no factual basis to opine whether Adhahn would have been in Tacoma, Washington on a particular day eight years after a theoretical 1992 deportation. *See Estate of Bordon*, 122 Wn. App. at 246-47.

Plaintiff's deportation argument rests on a series of speculative and unpredictable variables. In addition, that argument is based on a flawed understanding of immigration law. CP 534-39. For Plaintiff's deportation

argument to withstand any level of scrutiny, the record would have to demonstrate that: (1) Adhahn would have been subject to mandatory detention *if* he was apprehended for, and/or convicted of, any of the crimes which Plaintiff assumes would have resulted in conviction, and (2) those crimes would have been reported to ICE, and (3) removal proceedings would been initiated against Adhahn, and (4) removal would have been ordered after a hearing, and (5) those removal proceedings would not have been overturned on appeal, and (6) Adhahn would have left the United States, and (7) Adhahn would not have returned to the United States prior to his assault on Plaintiff. And any and all of these causal links are wholly dependent on not only the year but the day they would have occurred since the immigration laws continued to change. *See also* the Court of Appeal's analysis of this speculative argument at App. A at 19.

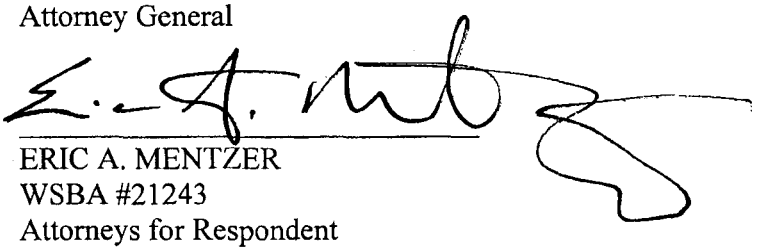
The Court of Appeals below was correct and following precedent when it found, given the pure conjecture inherent in each of these steps and the timing of them, Plaintiff failed to meet the burden of proving that DOC's actions caused, in fact, her injury. This Court should therefore deny review.

VI. CONCLUSION

The decision of the Court of Appeals is consistent with established precedent. Accordingly, the Petition fails to establish a basis for review under RAP 13.4(b). State Defendants respectfully request that this Court deny Plaintiff's Petition for Review.

RESPECTFULLY SUBMITTED this 24 day of December, 2013.

ROBERT W. FERGUSON
Attorney General



ERIC A. MENTZER
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PROOF OF SERVICE

I hereby certify that I caused the foregoing *Respondent's Answer to Petition for Review* to be electronically filed with the Supreme Court of the State of Washington and served a copy of the same on all parties or their counsel of record on the date below via email transmission and United States Mail, with proper postage affixed 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 24th day of December, 2013, in Tumwater, Washington.

Michelle Anderson

Michelle Anderson, Legal Assistant to
ERIC A. MENTZER
Assistant Attorney General

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SABRINA RASMUSSEN, Appellant, v. STATE OF WASHINGTON, by and through DEPARTMENT OF CORRECTIONS, Respondent, PIERCE COUNTY, a municipal corporation, and CITY OF TACOMA, Defendants.	)	No. 67518-4-I DIVISION ONE UNPUBLISHED OPINION FILED: April 1, 2013

SCHINDLER, J. — In 1990, Terapon Adhahn pleaded guilty to incest in the first degree. The court found he was eligible for a special sexual offender sentencing alternative (SSOSA),[1] and imposed a 14-month suspended sentence with an exceptional sentence of 60 months for sex offender treatment and supervision by the Department of Corrections (DOC). On July 8, 1997, the court entered an order terminating sex offender treatment and supervision. In 2007, Adhahn was arrested in the kidnapping and murder of 12-year-old Zina Linnik. DNA[2] testing linked Adhahn to the kidnapping and rape of 11-year-old Sabrina Rasmussen on May 31, 2000.

[1] Former RCW 9.94A.120(7) (1989). LAWS OF 1989 ch. 252, § 4. The SSOSA was recodified at RCW 9.94A.670 in 2001. LAWS OF 2001, 2d Spec. Sess., ch. 12, § 312.

[2] (Deoxyribonucleic acid.)

Rasmussen appeals summary judgment dismissal of her lawsuit against DOC for negligent supervision. Rasmussen contends DOC had a duty to take reasonable precautions to protect her from the foreseeable dangers posed by Adhahn even after the court terminated supervision on July 8, 1997. In the alternative, Rasmussen contends there are material issues of fact as to whether DOC's supervision from 1990 until July 1997 was the proximate cause of the kidnapping and rape on May 31, 2000. We affirm.

FACTS

Terapon Adhahn was born in Bangkok, Thailand on August 30, 1964. After his mother married a military officer, the family moved to the United States. After graduating from high school in 1983, Adhahn enlisted in the United States Army.

On March 26, 1990, the State charged Adhahn with rape in the second degree of his half sister. Adhahn pleaded guilty to incest in the first degree. With an offender score of zero, the standard sentence range was 12 to 14 months. The State agreed that if eligible, Adhahn should receive a SSOSA. The plea agreement states Comte and Associates, Inc. should evaluate Adhahn to determine whether he was eligible for a SSOSA. If not eligible, the State would recommend 14 months of confinement.

Sex offender treatment therapist Michael Comte conducted an evaluation of Adhahn. Comte described personality and behavior problems, but notes Adhahn had no prior criminal history and he recognized the need to address "his poor impulse control." The evaluation states, in pertinent part:

> Mr. Adhahn presents some symptoms characteristic of unresolved post-traumatic stress related to his childhood sexual victimization, which was probably an additional contributor to his later sexual deviancy. Personality and behavioral problems were influenced by parental

> abandonment, economic deprivation and the cultural adjustments necessitated by his move from Thailand to the United States when he was 12 years old. Apparently, he has always sought to compensate for over-stress, anger and frustration by escapist behavior. He sexually molested his half-sister when she was three and he later developed alcoholism. These compensations allow him temporary respite from inner turmoil and frustration. He has probably been depressed throughout his life.
>
> . . . .
>
> Unlike many rapists, Mr. Adhahn does not seem to have an antisocial (criminal) orientation. He does not have a criminal history and he has generally been conforming to societal expectations. He has some recognition of his poor impulse control and army life has provided him the external structure and control to contain him. He is alcoholic and he has some recognition that it is even more difficult to control himself under the influence. He is actively involved in treatment for his alcoholism and stress problems, but there is no question he has a long way to go.

Comte concluded Adhahn was "amenable to treatment and a manageable risk to be at large." However, because it was "unlikely treatment goals can be satisfied within the two years" authorized under the SSOSA, Comte recommended Adhahn agree to an exceptional 60-month sentence of sex offender treatment and community supervision.

> Very few offenders are able to accomplish their treatment goals within that time frame. I am, therefore, requesting Mr. Adhahn and his attorney stipulate to an exceptional five year probation sentence, which would allow adequate time to complete treatment goals and to de-escalate him from intensive weekly psychotherapy. Ongoing and active probation supervision would allow the criminal justice professionals to monitor his movements and activities in the community to ensure there is no relapse in his alcoholism and control of his anger and sexual impulses.

At the sentencing hearing on September 4, 1990, the court found Adhahn was eligible for a SSOSA. The court imposed a suspended sentence of 14 months on condition that he serve 60 days in the Pierce County jail. The judgment and sentence requires inpatient sex offender treatment with a "qualified provider; such treatment to be successfully followed - completed." Adhahn agreed to an exceptional sentence of 60

months for sexual offender treatment and community supervision.[3] The judgment and sentence states that "treatment provider of opinion 60 months necessary for treatment." The court also ordered Adhahn to successfully complete an alcohol counseling program, remain in the State of Washington "unless [he] receives military orders removing him from State," and no contact with the victim unless approval by the victim, her therapist, and Adhahn's therapist.

After entry of the judgment and sentence, Adhahn enrolled in an alcohol treatment program, registered as a sex offender, and contacted a certified sex offender treatment provider at Comte and Associates, Daniel DeWaelsche.

On March 19, 1991, DOC filed a notice of violation requesting the court schedule a hearing. DOC alleged Adhahn violated the terms of the judgment and sentence by failing to enter into sex offender treatment. According to the report, Adhahn had served 60 days in jail as ordered by the court. However, since his release, Adhahn had "spent a great deal of his time looking for employment" and was struggling financially. The report states that Adhahn "is currently involved in treatment for substance abuse at Tacoma TASC.[4] He goes in weekly for urinalysis . . . . He has not yet begun out-patient counseling but is expected to do so in the very near future."

By July 31, Adhahn had successfully completed the alcohol treatment program. The discharge report states, in pertinent part:

> Adhahn did very well at TASC, complied with all the terms of his TASC treatment contract. He completed all required sessions of outpatient counseling both at the Alliance and the Center. In addition, he faithfully attended AA[5] meetings, and met [his case manager] twice monthly.

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[3] Because Adhahn was in the military, the court allowed him to serve 30 days in one year and 30 days the following year.

[4] (Treatment Alternatives for Safe Communities.)

[5] (Alcoholics Anonymous.)

The discharge report recommends Adhahn begin sex offender treatment and continue to attend AA meetings. Adhahn began sex offender treatment with DeWaelsche on October 29.

At the violation hearing on November 27, the court entered an agreed order modifying the terms of the judgment and sentence. The order states that Adhahn shall enter sex offender treatment "no later than 11/01/91," and the exceptional sentence for 60 months of treatment and supervision should begin on November 1. Adhahn participated in sex offender treatment with DeWaelsche from November 1991 until July 1997. Throughout treatment, DeWaelsche submitted quarterly reports.

In 1992, the Washington State Patrol (WSP) contacted DOC to report Adhahn was arrested by Tacoma police in June for unlawful display of a weapon. In September 1992, the municipal court found Adhahn guilty of intimidation with a weapon and sentenced him to serve five days in the Pierce County jail.

In the quarterly report DeWaelsche sent to the community corrections officer (CCO) and the Pierce County Prosecutor's Office in January 1994, DeWaelsche expressed concerns about Adhahn's recent disclosure about driving home a woman, later identified as a prostitute, and the previous misdemeanor conviction for unlawful display of a weapon. The report states, in pertinent part:

> Throughout treatment, Terapon has made great efforts to complete all assigned work, participate in the group process and shows a genuine interest in his treatment. His progress in therapy has been commendable. However, during a recent group therapy session, he disclosed he had picked up a young woman on South Tacoma Way just after leaving work. . . .
>
> This may be cause for concern as it is the second issue within the past two years that involved Terapon being in highly questionable situations. As you will recall, approximately one year ago, he had gone to

> a local night club, which was off limits to him. He became involved that evening with an individual who had a weapon on him. The latest incident similarly involves an individual of questionable character, but whom he says he knows vaguely. He will be submitting to a polygraph examination in January. This issue will be addressed more thoroughly then.

On August 6, 1996, the court scheduled a treatment termination review hearing. The order states that by the time of the hearing, Adhahn shall complete a polygraph and plethysmograph exam. The judge also ordered "[t]he State is to check for any criminal charges against the defendant since 11/90." The termination review hearing took place on July 8, 1997.

Before the hearing, DeWaelsche submitted a letter stating Adhahn had "completed all aspects of the sex offender treatment program" and he would "graduate from treatment at the end of July 1997." The letter states, in pertinent part:

> Throughout treatment, Terapon has been an active and cooperative group therapy member. He has willingly participated in the treatment process, and offered valuable input during his group therapy sessions. He has exhibited empathy for his victim, and has a clear understanding of his offense cycle. Furthermore, Terapon has demonstrated that he is using the skills and techniques, gleaned in sex offender treatment, on a day-to-day basis to avoid recidivism. Terapon's treatment plan addressed the following issues:
>
> - Sexually deviant arousal
> - Identification of deviant behavior patterns
> - Disruption of deviant behavior patterns
> - Victim clarification awareness
> - Empathy training
> - Assertiveness/anger management
> - Thinking errors
> - Sex education
> - Social skills
> - Relapse prevention
>
> As long as Terapon positions himself by choice to remain offense-free, his potential to recidivate vastly diminishes. He is aware he may see me free of charge any time he feels there is a need in the future. It has been a pleasure working with Terapon.

At the review hearing on July 8, the prosecutor informed the court that Adhahn successfully completed sex offender treatment. The prosecutor also told the court that according to the CCO, Adhahn had "completed all other aspects" of his treatment and supervision.

> The defense provided me with a letter dated July 3rd of 1997, which a copy has been filed with the Court, from Dan DeWalshe [sic] which does indicate that the defendant has completed all aspects of the sex offender treatment program and he is set to graduate the end of July of 1997.
>
> I also made a phone call to [the CCO] in this case, to determine whether there were any other aspects of this file that needed to be completed in the form of legal financial obligations or otherwise, since I haven't been the prosecutor on this file, and [the CCO] indicated to me that the defendant had completed all other aspects of the file.

The court entered an order terminating sex offender treatment and DOC supervision. The order states, in pertinent part:

> IT IS HEREBY ORDERED, ADJUDGED and DECREED that:
>
> 1) The requirement of treatment in this cause is hereby terminated;
>
> 2) The requirement of supervision in this cause is hereby terminated;
>
> 3) All other conditions and requirements of the Judgment and Sentence dated 9/4/90, remain in full force and effect.

Adhahn was classified as a Level I sex offender, the lowest risk classification. In April 2002, the WSP stopped Adhahn for a traffic infraction. Adhanh re-registered as a sex offender with the WSP on April 2. Adhahn moved several times after April 2002 without re-registering as a sex offender.

In July 2007, Adhahn was arrested as a suspect in the kidnapping and murder of 12-year-old Zina Linnik. Adhahn confessed to kidnapping and murdering Linnik. DNA testing linked Adhahn to the kidnapping and rape of 11-year-old Sabrina Rasmussen on May 31, 2000. The Pierce County Sheriff's Office requested the prosecuting attorney to

issue a warrant to arrest Adhahn for failure to register as a sex offender. United States Immigration and Customs Enforcement notified Adhahn that he was subject to removal because he had been convicted of two crimes of moral turpitude. Adhahn did not contest deportation, and asked "to be deported as soon as possible." On July 19, the State charged Adhahn with the kidnapping and rape of Rasmussen on May 31, 2000.

On September 21, 2010, Rasmussen filed a lawsuit against DOC, Pierce County, and the City of Tacoma. Rasmussen alleged DOC failed to "adequately monitor or control" Adhahn after the court terminated supervision. Rasmussen also alleged that but for DOC's negligence before termination of supervision, Adhahn "could have been jailed or deported." Rasmussen alleged that Pierce County breached its statutory duty to report Adhahn to the United States immigration authorities when he was in jail for five days on the misdemeanor conviction in 1992.

Rasmussen also alleged Pierce County and the City of Tacoma breached the duty to require Adhahn to register as a sex offender. Rasmussen asserted that if Adhahn had been convicted of failure to register after July 2002, it was "less likely" he would have committed the kidnapping and rape.

> Had Adhahn been convicted of failing to register after July 1, 2002, his DNA would have been drawn and he would have been linked to the 2000 rape of Sabrina Rasmussen. Had Adhahn been registered at his 2000 address, he would have been linked to Ms. Rasmussen's rape at that time because registered sex offenders in the area are primary suspects in any new sex offense. If Adhahn had been compelled to register, it is substantially less likely he would have raped Ms. Rasmussen.

Rasmussen also alleged the City of Tacoma negligently misclassified Adhahn as a Level I sex offender.

Pierce County filed a CR 12(b)(6) motion to dismiss for failure to state a claim. Pierce County asserted that as a matter of law, neither the 1990 conviction for incest in the first degree nor a conviction for failure to register as a sex offender would have resulted in deportation. Pierce County also argued the claim that Adhahn would have been deported if the 1992 misdemeanor conviction for intimidation with a weapon had been reported, was speculative.

In opposition, Rasmussen argued Pierce County breached the duty to enforce the sex offender registration requirements, to properly classify Adhahn, and to report the 1992 misdemeanor conviction to the immigration authorities and to the court at the treatment termination hearing on July 8, 1997. The court granted the motion to dismiss the claims against Pierce County.

DOC filed a motion for summary judgment. DOC argued that as a matter of law, it did not have a duty to monitor or control Adhahn after the court terminated supervision on July 8, 1997. DOC also argued that any breach of the duty to supervise Adhahn before the court terminated supervision was not the proximate cause of the kidnapping and rape on May 31, 2000. DOC argued that even if the court had revoked the SSOSA, it would not have prevented the kidnapping and rape in 2000. DOC asserted that because the undisputed record showed Adhahn was never in DOC custody, it had no duty to report his immigration status or require him to register as a sex offender. DOC submitted the court order terminating supervision, evidence that Adhahn was "never committed to a state correctional facility," and the declaration of a corrections officer with the Pierce County Detention and Corrections Center stating that the United States Immigration and Naturalization Service came to the jail "every weekday" in 1992 but did

not place an immigration hold on Adhahn. DOC also submitted the declaration of an attorney with expertise on immigration law, Manuel Rios. Rios states that as a matter of law, neither the 1990 conviction for incest in the first degree, nor a conviction for failure to register as a sex offender, were offenses that would have subjected Adhahn to deportation.

In opposition, Rasmussen submitted the declaration of former CCO William Stough, the declaration of a former Pierce County deputy prosecutor, and the declaration of a former immigration officer, John Sampson.

The court granted summary judgment and dismissed the claims against DOC. Rasmussen appealed the orders dismissing Pierce County and DOC. Rasmussen later withdrew the appeal of the order dismissing Pierce County.

ANALYSIS

To establish DOC is liable for the May 31, 2000, kidnapping and rape, Rasmussen must establish (1) DOC owed her a duty, (2) breach of that duty, and (3) injury proximately caused by the breach. Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992).

Duty

Relying on Petersen v. State, 100 Wn.2d 421, 671 P.2d 230 (1983), Rasmussen contends DOC had a duty to protect her from the foreseeable danger posed by Adhahn after the court terminated supervision on July 8, 1997. The existence of a duty is a question of law that we review de novo. Sheikh v. Choe, 156 Wn. 2d 441, 448, 128 P.3d 574 (2006).

Unless a special relationship exists to control the third person's conduct, there is no duty to prevent a third person from causing harm. RESTATEMENT (SECOND) OF TORTS § 315 (1965). Absent a special relationship, "the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of third persons as to protect another from even the most serious harm." RESTATEMENT (SECOND) OF TORTS § 315 cmt. b.

Restatement (Second) of Torts section 315 states, in pertinent part:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.[6]

In Petersen, the patient had been involuntarily committed to Western State Hospital. Petersen, 100 Wn.2d at 422-23. The psychiatrist knew the patient was having hallucinations, would likely revert to using drugs and was dangerous, but did not seek additional commitment or take any other precautions. Petersen, 100 Wn.2d at 428-29. Five days after his release, while under the influence of drugs, the patient injured Cynthia Petersen when he ran a red light and struck her car. Petersen, 100 Wn.2d at 422-23.

Because the psychiatrist continued to exercise a high degree of control over the patient, the court held that under section 315 of the Restatement (Second) of Torts, the psychiatrist had "a duty to take reasonable precautions to protect anyone who might

[6] The special relationships indentified in the Restatement (Second) of Torts sections 316-20 (1965) are parent/child, master/servant, possessor of land or chattels/licensee, one who takes charge of a third person, and person having custody of another.

foreseeably be endangered" by the patient's drug-related mental problems. Petersen, 100 Wn.2d at 427-28.

DOC contends that unlike in Petersen, it did not have a duty to control Adhahn or protect Rasmussen from harm three years after the court entered an order terminating supervision. DOC relies on Hungerford v. Dep't of Corr., 135 Wn. App. 240, 139 P.3d 1131 (2006), review denied, 160 Wn.2d 1013, 161 P.3d 1027 (2007).

In Hungerford, DOC supervised an offender after his release from prison for a felony assault conviction. Hungerford, 135 Wn. App. at 247. The court later terminated supervision except for monitoring payment of his legal financial obligations. Hungerford, 135 Wn. App. at 248. Approximately ten months after termination of supervision, the offender murdered Hungerford-Trapp. Hungerford, 135 Wn. App. at 249. The Estate appealed summary judgment dismissal of the lawsuit against DOC for negligent supervision. Hungerford, 135 Wn. App. at 249. On appeal, the court concluded that monitoring an offender only for legal financial obligations did not create a special relationship, and held that DOC did not have a take-charge relationship after active supervision ended. Hungerford, 135 Wn. App. at 257-58.[7]

> We hold that the duty to supervise does not require DOC to prevent future crimes an offender might commit after his supervision ends even when the offender is placed on [legal financial obligation] status. DOC owes a duty to those who are injured during an offender's active supervision, not after it ends.

Hungerford, 135 Wn. App. at 258.

Rasmussen contends Hungerford was wrongly decided and conflicts with Petersen. We disagree. In Taggart v. State, 118 Wn.2d 195, 822 P.2d 243 (1992), the

[7] See also Couch v. Dep't of Corr., 113 Wn. App. 556, 54 P.3d 197 (2002), review denied, 149 Wn.2d 1012, 69 P.3d 874 (2003).

supreme court clarified Petersen and the type of special relationship necessary to create a duty to control the conduct of another to prevent harm.

In Taggart, two persons injured by parolees in separate assaults filed lawsuits alleging the State negligently released and supervised the parolees. Taggart, 118 Wn.2d at 198. In evaluating whether the State owed a duty to the plaintiffs, the court addressed Petersen.

> Petersen . . . stands for the proposition that a "special relation" exists between a state psychiatrist and his or her patients, such that when the psychiatrist determines, or pursuant to professional standards should determine, that a patient presents a reasonably foreseeable risk of serious harm to others, the psychiatrist has "a duty to take reasonable precautions to protect anyone who might foreseeably be endangered."

Taggart, 118 Wn.2d at 218-19 (quoting Petersen, 100 Wn.2d at 428). The court held that under section 319 of the Restatement (Second) of Torts (1965), the relationship between an offender subject to supervision and DOC creates a duty to exercise reasonable care of control to prevent reasonably foreseeable harm to others. Taggart, 118 Wn.2d at 219-20. Restatement (Second) of Torts section 319 states:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

But the court emphasized that the duty exists only where there is a " 'definite, established and continuing relationship between the defendant and the third party.' " Taggart, 118 Wn.2d at 219 (quoting Honcoop v. State, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988)). See also Hertog v. City of Seattle, 138 Wn.2d 265, 276, 979 P.2d 400 (1999); Joyce v. Dep't of Corr., 155 Wn.2d 306, 319-20, 119 P.3d 825 (2005).

Rasmussen argues that here, as in Petersen, DOC had a duty to take reasonable measures to guard against the foreseeable dangers posed by Adhahn after the take-charge relationship terminated. However, unlike in Petersen, there was no " 'definite, established and continuing relationship' " after the court terminated supervision on July 8, 1997. Taggart, 118 Wn.2d at 219 (quoting Honcoop, 111 Wn.2d at 193).[8] We hold that after the court terminated supervision, DOC did not have a take-charge duty under Restatement (Second) of Torts section 319.

Proximate Cause

In the alternative, Rasmussen contends there are material issues of fact as to whether DOC's negligent supervision from September 1990 until July 1997 was the proximate cause of the kidnapping and rape on May 31, 2000.

We review summary judgment de novo. Hartley v. State, 103 Wn .2d 768, 774, 698 P.2d 77 (1985). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

The defendant on summary judgment has the burden of showing the absence of evidence to support the plaintiff's case. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Once the moving party shows an absence of a genuine issue of material fact, the burden shifts to the nonmoving party. Young, 112 Wn.2d at 225.

[8] The out of state case cited by Rasmussen, Estates of Morgan v. Fairfield Family Counseling Center, 77 Ohio St. 3d 284, 1997-Ohio-194, 673 N.E.2d 1311, is also distinguishable. In Morgan, the court noted the importance of establishing the therapist's control over the patient; otherwise, "it would be tantamount to imposing strict liability to require the defendant to control a third person's conduct where he lacks the ability to do so." Morgan, 77 Ohio St. 3d at 298.

While we construe the evidence and reasonable inferences in the light most favorable to the nonmoving party, if the nonmoving party " 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' " summary judgment is proper. Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)); Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002).

The nonmoving party may not rely on speculation to create a material issue of fact. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). "[M]ere allegations, denials, opinions, or conclusory statements" do not establish a genuine issue of material fact. Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774 (2004).

To establish cause in fact, Rasmussen must show a direct, unbroken sequence of events that link the acts or omissions of DOC and the harm. Joyce, 155 Wn.2d at 322. Cause in fact is usually a question for a jury, but where reasonable minds cannot differ, it may be determined as a matter of law. Joyce, 155 Wn.2d at 322. Legal causation is grounded in the determination of how far the consequences of a defendant's act should extend, and focuses on whether the connection between the defendant's act and the result is too remote or inconsequential to impose liability. Hartley, 103 Wn.2d at 778-79.

Relying on Joyce, Rasmussen argues DOC's failure to investigate and report violations of the judgment and sentence was the proximate cause of the kidnapping and rape on May 31, 2000. Rasmussen argues that Adhahn violated a number of the

conditions of the judgment and sentence, including the failure to obtain an AA sponsor or attend AA meetings, consuming alcohol in 1992, and having contact with the victim. Rasmussen also asserts DOC did not monitor whether Adhahn re-registered as a sex offender, did not notify the court about the 1992 misdemeanor conviction for intimidation with a weapon, or provide that information to the court before the termination hearing.[9] Rasmussen contends that as in Joyce, but for breach of the duty to supervise and report violations of the judgment and sentence, Adhahn would have been in jail on May 31, 2000.

In Joyce, DOC was responsible for supervising an offender convicted of assault and possession of stolen property. Joyce, 155 Wn.2d at 309. Approximately one week after DOC filed a notice of violation and requested a court hearing, the offender stole a vehicle while under the influence of marijuana, struck the plaintiff's vehicle, and killed her. Joyce, 155 Wn.2d at 313-14.

The Estate sued DOC for negligent supervision. Joyce, 155 Wn.2d at 314. The evidence at trial showed the offender did not comply with any of the conditions of the judgment and sentence, and that DOC knew the offender had been admitted to psychiatric institutions and was using illegal drugs. Joyce, 155 Wn.2d at 312-14. Former CCO William Stough testified that if DOC had obtained a bench warrant, the offender would have been in jail on the date of the car accident that killed the plaintiff. Joyce, 155 Wn.2d at 322.

DOC appealed the jury verdict, arguing the court erred in denying its motion to dismiss because it did not owe a duty to the plaintiff. Joyce, 155 Wn.2d at 314-15. The

[9] Rasmussen also argues DOC breached its duty by incorrectly classifying Adhahn as a Level I sex offender. But it is undisputed that Adhahn was never in DOC custody and Rasmussen concedes she was unable to locate any documentation concerning the classification decision.

supreme court concluded the evidence supported the jury finding that but for DOC's breach of its duty to investigate and report numerous violations of the judgment and sentence, the offender would have been in jail. Joyce, 155 Wn.2d at 322. The court held there was "a direct, unbroken sequence of events" that linked the offender's actions with the injury to the plaintiff. Joyce, 155 Wn.2d at 322.

> It is undisputed that [the offender] committed numerous violations of his supervision that were not reported to the court or diligently pursued by community corrections officials. A court had previously sentenced [the offender] to jail time for reported violations. Joyce's expert, William Stough, testified that if [DOC] had obtained a bench warrant for [the offender] prior to the accident, he "would have been in jail, either awaiting a hearing or doing time on the violations" without bail on [the date of the car accident that killed Joyce].

Joyce, 155 Wn.2d at 322.

Here, construing the evidence in the light most favorable to Rasmussen, there is not a direct, unbroken sequence of events that linked the alleged violations of the judgment and sentence to the kidnapping and rape on May 31, 2000. There is no dispute that Adhahn successfully completed sex offender treatment and the court terminated supervision on July 8, 1997.

Further, unlike in Joyce, here, Stough did not testify that Adhahn would have been in jail when he kidnapped and raped Rasmussen on May 31, 2000. According to Stough, the court would have revoked Adhahn's SSOSA "on the spot." Stough states that if DOC had properly supervised Adhahn and reported violations to the court, including the 1992 misdemeanor conviction for intimidation with a weapon and failure to re-register as a sex offender, "the judge would have promptly revoked Adhahn's SSOSA and sent him off to prison." And according to a former Pierce County deputy prosecutor, the 1992 misdemeanor conviction, the allegation that Adhahn was

continuing to consume alcohol, and failure to register as a sex offender after changing addresses, "if proven by a preponderance of the evidence at a review hearing . . . , would have resulted in the court imposing harsh, additional sanctions on Mr. Adhahn, including periods of confinement in the Pierce County Jail."[10]

Even if DOC had reported the alleged violations of the judgment and sentence to the court and the court revoked the SSOSA, the maximum period of incarceration the court could impose was 12 months. And, as DOC points out, if the State proved Adhahn violated the terms of the judgment and sentence and the court had decided to not revoke the SSOSA, DOC supervision would have ended before July 1997. In State v. Onefrey, 119 Wn.2d 572, 835 P.2d 213 (1992), the supreme court held that the court did not have the authority to impose more than two years of treatment and supervision under a SSOSA, former RCW 9.94A.120(7). The explicit language of former RCW 9.94A.120(7)(a) limits treatment and supervision to two years. Onefrey, 119 Wn.2d at 574-577 ("If Onefrey could not be treated within the requisite 2 years, then he was outside the population that the Legislature intended to be eligible for SSOSA. The language of the statute limiting the term of treatment allowed is susceptible to no other interpretation.")

Rasmussen also claims that if DOC had notified the immigration authorities about his 1990 conviction for incest in the first degree and the 1992 misdemeanor conviction of intimidation with a weapon, as well as failure to register as a sex offender, Adhahn would have been deported.

[10] The former prosecutor also speculates that Adhahn could have been charged and convicted of felony charges based on the misdemeanor conviction. But the former Pierce County deputy prosecutor does not state that Adhahn would have been in jail on May 31, 2000.

Because it is undisputed that Adhahn was never in DOC custody, DOC did not have a duty to report to the immigration authorities.[11] And, as a matter of law, neither the conviction in 1990 for incest in the first degree, the 1992 misdemeanor conviction, nor failure to register as a sex offender would have subjected Adhahn to deportation.

Rasmussen's immigration expert Sampson admits that Adhahn was not subject to deportation for the 1990 incest conviction. Sampson mischaracterizes the misdemeanor conviction of intimidation with a weapon as a felony, and then speculates that if Adhahn had been convicted of felony possession of a firearm under federal law, he would have been subject to deportation. Sampson also claims that if Adhahn had been convicted of failure to register as a sex offender, he would have been subject to deportation. However, failure to register as a sex offender is not a crime that would have subjected Adhahn to deportation. Pannu v. Holder, 639 F.3d 1225, 1227-28 (9th Cir. 2011); Efagene v. Holder, 642 F.3d 918, 922-23 (10th Cir. 2011).[12] In sum, absent speculation, there is no direct, unbroken sequence of events that connect the alleged negligent supervision of DOC before the court terminated supervision and the kidnapping and rape three years later.

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[11] RCW 10.70.140 states:

> Whenever any person shall be committed to a state correctional facility, the county jail, or any other state or county institution which is supported wholly or in part by public funds, it shall be the duty of the warden, superintendent, sheriff or other officer in charge of such state or county institution to at once inquire into the nationality of such person, and if it shall appear that such person is an alien, to immediately notify the United States immigration officer in charge of the district in which such penitentiary, reformatory, jail or other institution is located, of the date of and the reasons for such alien commitment, the length of time for which committed, the country of which the person is a citizen, and the date on which and the port at which the person last entered the United States.

[12] The 2007 Federal Bureau of Investigation report Rasmussen relies on also provides nothing more than speculation that Adhahn would have been deported before 2000.

We affirm summary judgment dismissal of Rasmussen's claims against DOC.[13]

WE CONCUR:

[13] For the first time in the reply brief, Rasmussen makes an argument based on Restatement (Second) of Torts section 302B (1965). We do not address arguments raised for the first time in reply. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

APPENDIX B

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

SABRINA RASMUSSEN, Appellant, v. STATE OF WASHINGTON, by and through DEPARTMENT OF CORRECTIONS, Respondent, PIERCE COUNTY, a municipal corporation, and CITY OF TACOMA, Defendants.	)	No. 67518-4-I ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION

The appellant Sabrina Rasmussen filed a motion for reconsideration. The respondent State of Washington Department of Corrections filed an answer. The panel having determined that the motion should be denied but the opinion amended; now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied. The opinion of this court in the above-entitled case filed April 1, 2013 shall be amended as follows:

1. On Page 19, footnote 12 that states:

> The 2007 Federal Bureau of Investigation report Rasmussen relies on also provides nothing more than speculation that Adhahn would have been deported before 2000.

shall be deleted and replaced with the following:

> The 2007 Federal Bureau of Investigation report Rasmussen relies on also provides nothing more than speculation that Adhahn would have been deported before 2000. Further, Rasmussen's theory of causation is speculative because it depends on when exactly between 1990 and 1997 immigration learned of Adhahn. As Rasmussen's immigration expert Sampson admits, "Between 1990 and July 1997, immigration laws changed significantly."

The remainder of this opinion shall remain the same.

Dated this 1st day of November, 2013.

Schindler, J.

Appelwick, J.

Cox, J.

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