SUPREME COURT NO. 89[illegible]-3

IN THE WASHINGTON STATE SUPREME COURT

SABRINA RASMUSSEN

Plaintiff/Appellant,

vs.

STATE OF WASHINGTON,

Defendant/Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT NO. 10-2-30307-3 KNT
Court of Appeals – Division I Case No.: 67518-4-I

APPELLANT'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Sabrina Rasmussen, whose suit for damages against the State of Washington was dismissed on summary judgment.

II. CITATION TO THE COURT OF APPEALS DECISION

Petitioner seeks review of Sabrina Rasmussen v. State of Washington *et al.*, Case No. 67518-4-I (Appx. A).

III. ISSUES PRESENTED FOR REVIEW

3.1 Does the State have a duty to properly supervise dangerous offenders in accordance with the Supreme Court's holding in *Joyce v. State,* 155 Wn.2d 306, 119 P.3d 825 (2005)?

3.2 Does the State have a duty to protect third parties and particularly children from the foreseeable risk of harm when releasing sex predators back into the community consistent with the Supreme Court holding in *Petersen v. State,* 100 Wn.2d 421, 671 P.2d 230 (1983)?

3.3 Did the Petitioner produce sufficient evidence pursuant to CR 56 to demonstrate that the damages she suffered were proximately caused by the State's breach of its duty to supervise and control a dangerous sex offender?

3.4 Does public policy support the legal duties expressed by Washington courts in *Joyce* and *Petersen* when it comes to protecting children from dangerous sex offenders?

IV. STATEMENT OF THE CASE

On May 31, 2000, Sabrina Rasmussen was walking home from school when someone approached and threatened to stab her, forced her into a truck, and took her to a remote area near the Fort Lewis base in Pierce County. CP 207. The kidnapper bound Ms. Rasmussen's eyes, mouth and hands, ripped her clothes off, and raped her vaginally, anally,

and orally. CP 207 at ¶ 2. Following the rape, Sabrina was left blindfolded, her hands still bound with duct tape, until she was picked up by a soldier and taken to Mary Bridge Hospital. CP 208 at ¶ 4. Her injuries were so severe that she required stitches running from her vagina to her anus to repair the damage. CP 208 at ¶ 4. The rapist was Terapon Adhahn.

Adhahn first became known to authorities after violently raping his 15 year-old half-sister in March of 1990. CP 285-318. Per a plea deal, Adhahn was sentenced on September 4, 1990 to 60 months of community supervision. Sentencing conditions included: "Remain within the state of Washington unless receives military orders reporting him from state. No contact with victim unless victim, her therapist (if any) and defendant therapist agree. Also receive and successfully complete alcohol counseling program." Adhahn was also required to complete inpatient sex offender treatment and "consume no drugs or alcohol or have contact with minor children." CP 241-246.

For the next seven years, DOC's supervision was characterized by negligence and a willingness to ignore Adhahn's violations. CP 211-234. Adhahn was required to check in only once a month, and often did not even see his Community Corrections Officer ("CCO"), but merely filled out a form. The CCO rarely visited Adhahn's home or workplace, and

had no idea of Adhahn's activities or associates in the community. CP 332-344; CP 212 and 219 at ¶¶ 7, 10(i). Adhahn was allowed to go to Texas for a wedding in 1994 and visit Thailand for a month in 1995. CP 218 at ¶ 10(h); CP 332-344. In 1996, Adhahn was permitted to have contact with the victim, without repercussion. CP 332-344. The DOC failed to monitor Adhahn's continued alcohol use, failed to refer him to treatment when necessary, and failed to report Adhahn's violations to the sentencing judge. CP 211-234, CP 332-344.

The Sentencing Order states Adhahn was to receive inpatient sex offender treatment, and the evaluator recommended intensive individual counseling. CP 241-246; 247-257. Adhahn received neither. Nonetheless, Adhahn was deemed a success. CP 379-381. Adhahn was required to register as a sex offender, but had not registered since October 1990. CP 382-385. Adhahn moved over ten times while under active DOC supervision, yet the DOC never appears to have noticed that he had not been registering. CP 217; CP 451-457. The DOC further failed to follow up on Adhahn's apparent solicitation of a prostitute in 1994. CP 256-358.

Most glaringly, the DOC failed to follow up on Adhahn's 1992 conviction for brandishing a weapon outside a bar (RCW 9.41.270). CP 258-268, CP 353-355. Adhahn was convicted after a one-day public trial in Tacoma Municipal Court on September 9, 1992, and was sentenced to

five days in jail. CP 258-268, CP 353-355. The DOC failed to report the incident or later conviction to the judge supervising Adhahn's sentence, and further failed to report Adhahn's conviction to federal immigration authorities, who would have deported Adhahn for a second crime. CP 214 and CP 216 at ¶¶ 9, 10(c); CP 504-505 at ¶¶ 24-26; CP 513-521.

Had the arrest been reported, it is more likely than not that Pierce County prosecutors would have become aware of the incident, Adhahn's history, and the fact that he was failing his SSOSA and treatment plan, and as a result would have sought and obtained convictions for felon in possession of a firearm and failure to register as a sex offender. CP 513-521. In 2007 after Adhahn became a suspect in the murder of Zina Linnik, Immigrations and Customs Enforcement (ICE) detained him and prepared deportation proceedings solely on the basis of Adhahn's 1990 incest conviction and 1992 intimidation with a weapon conviction. CP 444-447.

In a 1996 order issued prior to Adhahn's release, Judge Strombom ordered the State to "check for any criminal charges against the defendant since 11/90." CP 269-270. Even then, when the DOC was specifically ordered to look for new convictions, the DOC failed to report the 1992 weapons conviction to Judge Strombom or to immigration authorities. CP 272-275. As a consequence, Adhahn's treatment and supervision were terminated on July 8, 1997. CP 216 at ¶ 10(c).

Less than three years after "successful" completion of community supervision and treatment, Adhahn, who should not have been in the United States at all, was free to kidnap and violently rape Sabrina Rasmussen. CP 258-268. It was not until 2007 after Zina Linnik was murdered, however, that police matched Adhahn's DNA to that taken from the rape of Sabrina Rasmussen in 2000. CP 412-420.

Sabrina Rasmussen filed a negligence action in King County Superior Court against the State of Washington, by and through the Department of Corrections. The State of Washington moved for summary judgment on all claims. After a hearing before the Honorable Regina Cahan, the Superior Court granted the State's motion for Summary Judgment, dismissing Appellant's claims in their entirety with prejudice on August 1, 2011. The reasons for dismissal are not included in the order. CP 557-558. On April 1, 2013, The Court of Appeals (CoA) affirmed the trial court's determination that the State of Washington, DOC, did not owe a duty to properly supervise Terapon Adhahn. Petitioner moved for reconsideration, and was denied on November 1, 2013. Petitioner timely seeks review with this Court.

V. ARGUMENT

Review should be accepted in this case because under RAP 13.4(b), considerations 1 2, and 4 apply. First, the decision of Division

One is in conflict with decisions of the Supreme Court and itself. Second, this petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Despite facts supporting each element of the State of Washington's negligence, the only elements discussed by the CoA in its decision are duty and proximate cause, which it determined were absent. In so doing, the CoA primarily relies upon the Division 2 decision in *Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 139 P.3d 1131 (Div. II, 2006). However, *Hungerford* as interpreted by Division One is in conflict with this Court's holdings in *Joyce* and *Petersen.* This petition will first examine the issue of duty as it relates to this conflict. This petition will next examine the CoA's analysis of proximate cause. Finally, this petition will examine the substantial public interest underlying this case.

A. The Court of Appeals' reliance on *Hungerford v. Dept. of Corrections* is in conflict with this Court's precedent and the basic law of negligence.

The decision here is in conflict with prior Washington case law. The CoA relies on *Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 139 P.3d 1131 (Div. II, 2006) for the proposition that no duty was owed to Sabrina Rasmussen. The CoA quotes *Hungerford* as saying:

> 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 obligations status. DOC owes a duty to those who are injured during an offender's active supervision, not after it ends.

Court's opinion at 12, quoting *Hungerford* at 258. This is entirely irrelevant to the situation in this case. It goes without saying that after supervision has ended the DOC has no continuing duty to try to take control. It is axiomatic that the DOC has lost control.

If the DOC could have prevented a dangerous offender from re-entering society as in *Petersen v. State*, 100 Wn.2d 421, however, then it has the duty to reasonably exercise the control that it has. In *Petersen* the patient had been released from supervision and then caused the damage. The *Petersen* court did not ask whether the take-charge relationship was in effect at the time the plaintiff suffered harm—it simply concerned itself with the control that the psychiatrist could have exercised, but did not. The releasing psychologist was therefore found liable.

Here, the DOC had the duty to inform the Court that Adhahn had violated every condition of his judgment and sentence. The DOC had the duty to stay in touch with ICE. CP 214, CP 216. The DOC had the duty to inform law enforcement when its offender was violating the law, such as when he was a felon in possession, or failing to register as a sex offender. It breached these duties. If *Hungerford* stands for the opposite, then it is contrary to *Petersen.*

Notwithstanding this, the CoA concluded its discussion of duty with the non-controversial statement: "[W]e hold that after the court terminated supervision, DOC did not have a take charge duty under Restatement Second of Torts." Rasmussen, at 14. Petitioner never argued to the contrary. Instead, Petitioner merely argued that the DOC is liable for prematurely releasing Adhahn from supervision, and for any injury he caused after his premature release into the community.

In the law of negligence, a duty of care "is defined as 'an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.' " *Transamerica Title Ins. Co. v. Johnson,* 103 Wn.2d 409, 413, 693 P.2d 697 (1985) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 331 (3d ed.1964)). The duty of care question implicates three main issues—"its existence, its measure, and its scope." DAN B. DOBBS, THE LAW OF TORTS § 226, at 578 (2000) *see also, Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 449-450, 243 P.3d 521, 525 - 526 (2010).The Court of Appeals collapses all of the issues of duty, adds an element of causation into its duty analysis, and also misapprehends Petitioner's claim. This is error.

In a negligence action, in determining whether a duty is owed to the plaintiff, a court must not only decide who owes the duty, but also to

whom the duty is owed, and what is the nature of the duty owed. *Wick v. Clark County,* 86 Wn.App. 376, 385, 936 P.2d 1201 (1997). The answer to the second question defines the class protected by the duty and the answer to the third defines the standard of care. *Id.* at 386, 936 P.2d 1201. The class protected generally includes anyone foreseeably harmed by the defendant's conduct. *Friend,* 118 Wn.2d at 484, 824 P.2d 483.

To decide if the law imposes a duty of care, and to determine the duty's measure and scope, courts weigh "considerations of 'logic, common sense, justice, policy, and precedent.' " *Snyder v. Med. Serv. Corp. of E. Wash.,* 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (quoting *Lords v. N. Auto. Corp.,* 75 Wn.App. 589, 596, 881 P.2d 256 (1994)).

"The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a 'plaintiff's interests are entitled to legal protection against the defendant's conduct.' " *Taylor v. Stevens County,* 111 Wn.2d 159, 168, 759 P.2d 447 (1988) (quoting W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS § 53, at 357 (5th ed.1984)). Courts in Washington using their judgment, balance the interests at stake. *See, e.g., Hunsley v. Giard,* 87 Wn.2d 424, 435, 553 P.2d 1096 (1976) (balancing the interests and holding that the defendant owed the plaintiff "a duty to avoid the negligent infliction of mental distress").

Here, the Court of Appeals' erroneous analysis begins with its misstatement of Petitioner's claim. It asserts that:

> Rasmussen contends DOC had a duty to protect her from the forseeable danger posed by Adhahn after the court terminated supervision on July 8, 1997.

Opinion at 10. This is not what Ms. Rasmussen claims. Rather, Ms. Rasmussen asserts that the DOC, like the psychiatrist in *Petersen v. State,* 100 Wn.2d 421, had a duty to exercise care to control the third party to the extent the actor, here the DOC, had the ability to exercise control. RESTATEMENT (SECOND) OF TORTS, section 315.

The DOC had the ability to exercise the same level of control as the psychiatrist in *Petersen* by informing the court of the numerous violations and continuing dangerousness of Adhahn. When directly asked whether Adhahn had committed any new crimes, the DOC, through the prosecutor it had lied to, denied any new crimes and also failed to report the numerous other violations of the conditions of supervision. In fact, Adhahn had violated every condition of supervision. The question then is not whether the DOC had a duty to do anything after supervision had been terminated, but rather to do what was in its power to prevent supervision from being terminated. Only by reformulating the question of duty in a manner inconsistent with Petitioner's claims and relying on an

interpretation of *Hungerford* contrary to *Petersen*, did the CoA conclude that the State did not have a duty to Sabrina Rasmussen.

By failing to exercise the control that it had over the offender, the DOC permitted Adhahn to be released, like the offender in *Petersen*, and thereafter commit a crime, the kidnap and rape of Sabrina Rasmussen. No reasonable argument can be made that the DOC did not have the duty to exercise the level of control that it lawfully had. It is irrelevant to the issue of duty when the injury subsequently occurred. Rather, the analysis is whether the DOC owed a duty, and to whom did it owe the duty. It was more than foreseeable that an untreated child rapist would rape another child. That the injury happened two years after Adhahn's release into the community is an irrelevant consideration when discussing whether the DOC had a duty during the time Adhahn was under its supervision.

Similarly, in *Bishop v. Miche,* 137 Wn.2d 518, 527-528, 973 P.2d 465, 470 (1999), this Court noted,

> In contrast, the court here directed that Miche be placed on probation with the King County District Court Probation Department and abide by all terms, conditions, rules and regulations of the probation department. The probation officer in this case therefore had the authority and the duty to supervise Miche and report to the court if he failed to comply with "all terms, conditions, rules and regulations of the Probation Department" during his two-year probation period.

Id. at 527. Contrary to this, the CoA held that if a CCO fails to inform the court of the violations and the supervision is then terminated due to the lack of information provided to the court, the State is immunized by the very negligent act of failing to inform the court of the violations. Such a holding defies logic, the duty that is imposed, and the law of this state.

B. Division One's holding on proximate cause contradicts Precedent.

The Court of Appeals' error continues under the heading called "proximate cause." Under this heading, this CoA assesses whether the Petitioner submitted sufficient evidence to support her negligence claim on the issue of proximate cause. In the analysis, the CoA committed a variety of errors, including improperly deciding contested facts in favor of the DOC, and making several erroneous conclusions of law contrary to the Supreme Court's most recent decision on proximate cause in negligent supervision cases, *Joyce v. Dept. of Corrections*, 155 Wn.2d 306. This Court should review and correct these errors.

"To establish cause in fact, a claimant must establish that the harm suffered would not have occurred but for an act or omission of the defendant. There must be a direct, unbroken sequence of events that link the actions of the defendant and the injury to the plaintiff." *Joyce* at 322. Washington courts have held that cause in fact can be established by

expert testimony, as in *Joyce*, where the plaintiff relied only on the testimony of William Stough, a corrections expert. *Id.* Mr. Stough's testimony was held sufficient to establish that but for the State's failure to obtain a bench warrant, the offender in *Joyce* would have been unable to harm the plaintiff because he would have been in jail. *Id.* at 322-23. Cause in fact in a take-charge case can thus be established by expert testimony that the State's negligence caused the injury. *Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections*, 122 Wn. App. 227, 243-44, 95 P.3d 764 (2004) (citing *Joyce*).

The CoA here begins its analysis by making a startlingly assertion of fact that was heavily contested, and should be resolved in favor of Sabrina Rasmussen. On summary judgment, all facts and all reasonable inferences are to be viewed in the light most favorable to the nonmoving party. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). The CoA nonetheless states, "There is no dispute that Adhahn ***successfully*** completed sex offender treatment and the court terminated supervision." Opinion at 17 (emphasis added).[1] In fact, Adhahn did not successfully complete sex offender treatment because he never even began the type of treatment ordered by the Court. Moreover, the treatment provider was unaware of the multiple violations of which Adhahn's CCO was aware but

[1] This assertion by the Court of Appeals is important to point out because it demonstrates that the Court did not view the evidence in a light most favorable to Sabrina Rasmussen.

never shared with the treatment provider. Thus, the treatment provider reported that Adhahn had successfully completed treatment when the actual facts show that, had the CCO been non-negligent, he should have instead been terminated from the program.

The sex offender evaluator advised that Adhahn needed not only group therapy but also intensive individual therapy. CP247-257. The Judgment and Sentence required "inpatient" sex offender treatment. Adhahn received neither. Rather, he received the sort of generalized group therapy specifically concluded to be insufficient.

The CoA's opinion makes it appear as if the sentencing judge was fully informed when she released the untreated, alcoholic, pedophile back into the community, but the facts show that DOC never informed the Superior Court of the numerous violations of the conditions of release. For instance, when the court specifically asked the DOC to reveal whether Mr. Adhahn had been convicted of any crimes, the DOC kept secret the intimidation with a weapon charge. And while the CoA's opinion glosses over that fact, it is a material issue.

Adhahn was forbidden under the terms of the Judgment and Sentence from possessing a firearm. He was also prohibited from committing any further law violations. When in 1992 Adhahn chased people down the streets of Tacoma with a weapon that he was forbidden to

possess, he violated both conditions. CP 258-268, CP 353-355. Additionally, the conduct took place outside of a bar. Adhahn was forbidden from drinking alcohol. Indeed, Mr. Comte had accurately predicted that Adhahn would become violent when using alcohol. The CoA should have found the above facts on summary judgment.

The opinion next discusses at some length the idea that Adhahn would not have been incarcerated on the original charge at the time Sabrina Rasmussen was kidnapped and raped. In doing so, the CoA again misapprehends Petitioner's argument. The DOC admits, as it must, that the evidence on summary judgment was that the Superior Court Judge would have revoked the suspended sentence and imposed some period of confinement. The CoA emphasizes in its opinion that Adhahn would not have been placed into ***DOC custody*** when he was then incarcerated. This misses the point.

Had Adhahn received even one day in prison or jail, then ICE would have been notified of his alien status pursuant to RCW 10.70.140. See footnote 11 of the Rasmussen Opinion at 19. On summary judgment, and as a matter of law, a court must presume that the various agencies would have performed the duties that they were charged with performing. *Smith v. Hollenbeck*, 48 Wn.2d 461, 465, 294 P.2d 921 (1956); *State ex rel. Longview Fire Fighters Union, Local 828, I.A.F.F. v. City of*

Longview, 65 Wn.2d 568, 572, 399 P.2d 1, 3 (1965). Had Adhahn been reported to Immigration & Naturalization Services ("INS") for his original incest conviction and weapon brandishing in 1992, he would have been subject to removal proceedings. CP 504-505.

The undisputed facts in this case demonstrate that when the federal government learned of Adhahn's incest and gun convictions, it incarcerated Adhahn and began removal proceedings. CP 444-447. The CoA ignores these facts and instead ruled that "as a matter of law, neither the conviction in 1990 for incest in the first degree, the 1992 misdemeanor conviction, nor the failure to register as a sex offender would have subjected Adhahn to deportation." Opinion at 19. This is simply wrong.[2] *See, e.g., Gonzalez-Alvarado v. I.N.S.*, 39 F.3d 245, 246 -247 (9th Cir. 1994) (interpreting Washington's incest statute to be a crime of moral turpitude); *Lopez-Amaro v. I.N.S.*, 25 F.3d 986, 989 (11th Cir. 1994) (pursuant to section 241(a)(2)(C) of the INA any alien who is convicted of using a firearm in violation of any law is deportable). Not only does case law clearly demonstrate that Adhahn's incest and intimidation with a weapon convictions were deportable offenses until 1997 as a matter of law, Petitioner's expert, Mr. Sampson, submitted a declaration accurately

[2] In addition to being wrong, this assertion is irrelevant since deportation proceedings were started and Adhahn testified that he would not have challenged such deportation proceedings.

citing the law that would have led to removal proceedings. Mr. Sampson also opined that Adhahn would have been incarcerated during the removal proceedings and therefore would not have been in the community on the day that he kidnapped and viciously raped Sabrina Rasmussen. CP 216.

Both the CoA and the trial court completely ignored not only the law that then existed, but also the evidence that Petitioner submitted by way of expert testimony demonstrating that Adhahn would have been incarcerated in May of 2000 rather than lurking near a school to abduct and rape Sabrina Rasmussen. CP 216, CP 504-505.

It is worth quoting the basis for the 2007 detention document dated July 11, 2007, which states:

> "ADHAHN was ordered to appear before an immigration judge because he was subject to removal from the United States because he was convicted to two crimes involving moral turpitude."

CP 282-283. At this time Adhahn's only two convictions were for incest and weapons. Thus, when the CoA held that "as a matter of law, neither the conviction in 1990 for incest in the first degree, the 1992 misdemeanors conviction nor failure to register as a sex offender would have subjected Adhahn to deportation," the CoA was in error.

Further, the CoA erroneously states that Mr. Sampson "admits that Adhahn was not subject to deportation for the 1990 incest charge."

Opinion at 19. This is inaccurate. Mr. Sampson did admit that the incest conviction alone was not enough to deport Mr. Adhahn until after 1996 when the law was amended. By the time Judge Karen Strombom asked the State directly whether there had been any other convictions, however, the incest charge had become retroactively sufficient to be a deportable offense by itself. By 1997, Adhahn had two convictions that could have resulted in removal proceedings.

The CoA goes on to claim that the failure to register as a sex offender did not constitute a separate basis for removal. The Court relies on *Pannu v. Holder,* a 2011 case that changed the previously law that failure to register subjected aliens to removal.[3] Because the law in 1997 permitted ICE to remove Adhahn based on his failure to register as a sex offender, the change in the law 14 years later is irrelevant. Thus, the CoA has committed a further error of law by concluding that such conduct does not constitute a deportable offense.

There is sufficient evidence in this record from which a reasonable jury could conclude that had the DOC not been negligent, on May 31, 2000 Ms. Rasmussen would have simply walked into her school because

[3] *Pannu v. Holder* 639 F.3d 1225, 1227 (9th Cir. 2011)("The law impacting this case has changed considerably since the BIA's decision. Shortly before we remanded to the BIA in the previous appeal, the BIA issued a precedential decision, *In re Tobar–Lobo,* 24 I. & N. Dec. 143 (BIA 2007), which held that a failure to register as a sex offender in violation of California Penal Code § 290(g)(1) categorically constituted a CIMT."

her rapist would have either been in Thailand or sitting in jail waiting for his removal proceedings to conclude. Because of the State's negligence, Ms. Rasmussen was kidnapped and viciously raped. This case should have been left to the jury because of the significant issues of material fact discussed above. It was error and contrary to established Washington law to find that no proximate cause existed.

C. The Court of Appeals holding creates a policy that encourages State negligence.

The Court of Appeals' holding has terrible policy implications. Under the CoA's opinion, if an offender commits a crime after release from DOC control, the State has no duty regardless of any prior breaches of its duty and regardless of the lack of any intervening factors. This creates a perverse incentive for the State to negligently release convicted criminals back into the community as soon as possible so as to avoid liability for its own failure to adequately supervise those same individuals.

It is established from the facts of this case that had the State non-negligently supervised Terapon Adhahn, he would not have been loose in the community on the day he kidnapped and viciously raped Sabrina Rasmussen. This is because any non-negligent supervision would have caught the remarkable number of violations that went unreported, and more likely than not, Adhahn would have already been deported or sitting

in a jail cell awaiting deportation. Yet under the CoA's ruling, the instant Adhahn was released from supervision, all liability for the State's many prior supervisory failures simply disappears.

The CoA's erroneous hardline rule cutting off liability at the moment of release is severely detrimental to Washington children who suffer predation at the hands of a known pedophile. There is no difference under the law whether Adhahn raped Ms. Rasmussen three minutes or three years after his release. Under the CoA's holding, the State has no duty to either victim. The policy should be the opposite: the State should ensure that violent pedophiles in its custody should not be released back into the community when those individuals have indisputably continued to violate every condition of their release, including failing to complete court-ordered treatment and being convicted of additional violent crimes. To hold otherwise defies the fundamental protections our society owes its children.

VI. CONCLUSION

Review should be accepted in this case because under RAP 13.4(b), considerations 1, 2, and 4 apply.

DATED this 26th day of November, 2013.

Tyler K. Firkins, WSBA No. 20964
Attorneys for Appellant

Certificate of Transmittal

I hereby certify that the foregoing Petition for Review was sent out to be filed with the Court of Appeals and a true and correct copy was sent to the following counsel by email (per previous agreement) and by US Mail:

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DATED this 26th day of November, 2013 at Auburn, Washington.

Diana Butler, Legal Assistant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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