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No. ~~89256-3~~

SUPREME COURT
OF THE STATE OF WASHINGTON

FRED BINSCHUS, individually and as Personal Representative of the Estate of JULIE ANN BINSCHUS; TONYA FENTON; TRISHA WOODS; TAMMY MORRIS; JOANN GILLUM, as Personal Representative of the Estate of GREGORY N. GILLUM; CARLA J. LANGE, individually and as Personal Representative of the Estate of LEROY B. LANGE; NICHOLAS LEE LANGE, Individually; ANDREA ROSE, individually and as Personal Representative of the Estate of CHESTER M. ROSE; STACY ROSE, Individually; RICHARD TRESTON and CAROL TRESTON, and the marital community thereof; BEN MERCADO; PAMELA RADCLIFFE, Individually and as Personal Representative of the Estate of DAVID RADCLIFFE; and TROY GIDDINGS, Individually,

Appellants,

vs.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS; SKAGIT EMERGENCY COMMUNICATIONS CENTER d/b/a "Skagit 911," an interlocal government agency,

Defendants,

and

SKAGIT COUNTY, a political subdivision of the State of Washington; and OKANOGAN COUNTY, a political subdivision of the State of Washington,

Respondents.

ORIGINAL

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Federal Cases

Statutes

Rules and Regulations

Other Authorities

A. INTRODUCTION

Isaac Zamora was incarcerated in the Skagit County Jail from April 4, 2008, until his transfer to the Okanogan County Jail on May 29, 2008, where he was held until August 2, 2008. He was also incarcerated in the Skagit County Jail on August 5 and 6, 2008. The Judgment and Sentence upon which he was held required that his mental condition be evaluated and that he must comply with any treatment that was ordered. Despite the sentencing court's judgment, his lengthy history of mental health problems, and pleas from his mother and himself for mental health treatment, neither Skagit County nor Okanogan County properly evaluated Zamora's mental health nor provided him any mental health treatment during his incarceration, and his mental health deteriorated.

As a direct result of Zamora's deteriorating mental condition during his incarceration in both jails without proper treatment, Zamora became a violent risk to the community, a ticking time bomb. That time bomb went off. Isaac Zamora shot and killed 6 people and wounded 4 others on September 2, 2008.

Both Counties had a take charge duty and a duty under § 302B of the *Restatement (Second) of Torts* as to Zamora and consequently owed a duty to the plaintiffs, the estates of the people Zamora killed, and the individuals he wounded ("violence victims") in his spree of violence.

The trial court erred in finding the Counties did not owe the violence victims a duty or that their breach of such duty did not result in the injuries to the violence victims.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its order on summary judgment on May 29, 2013.

(2) Issues Pertaining to Assignments of Error

1. Where counties incarcerate an inmate in their jails that they know has a long history of serious mental health problems and they have an obligation to evaluate him under his judgment and sentence and a general common law duty to provide him health care, but they then deny that inmate necessary evaluation or treatment, do the counties owe a duty of care to the inmate's victims when, upon his release, he engages in an act of untreated psychotic violence? (Assignments of Error Number 1)

2. Where counties provide some evaluation of jail inmate's deteriorating mental health condition but do not provide a proper evaluation or treatment of the inmate's mental health status, do the counties owe a duty to the victims of the inmate's later violence that was the result of his untreated deteriorated mental health condition? (Assignments of Error Number 1)

3. Where a duty exists as described above, did the trial court err in concluding as a matter of law that the counties' breach of their duty to the violence victims was not the proximate cause of the deaths and injuries by a mentally ill inmate they released without proper mental health evaluation and treatment? (Assignments of Error Number 1)

C. STATEMENT OF THE CASE

As described below, prior to his incarceration by Skagit County in its Jail on April 4, 2008, Isaac Zamora had a long history of involvement with the criminal justice system and evidenced unambiguous signs of mental instability. Beginning in 1999, Zamora had been arrested 21 times in Skagit County and he had been incarcerated in the Skagit County Jail 11 times. CP 2651-52, 2655. Zamora had mental health issues dating back at least to 2000 when he experienced insomnia, paranoia, and anger. CP 2538. He was involuntarily treated for mental health issues in 2003 when he had hallucinations and was prescribed Seroquel, an anti-psychotic medication often used to treat schizophrenia. CP 2538.

Skagit County law enforcement officials were familiar with Zamora. CP 2852-53, 2859-60, 2865, 2917, 3105-29, 3160-62.[1] He was known to have serious mental problems; Zamora's CAD file[2] was tagged with a 220 alert code, meaning that Zamora was mentally unstable or "crazy." CP 2844, 2864, 3105, 3202. The purpose of the alert code was to

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[1] Judicial officials were also aware of Zamora's mental health issues. On May 29, 2007, law enforcement officers filed a probable cause affidavit in Skagit County Superior Court regarding Zamora and a malicious mischief charge. CP 2639. Under the portion of the affidavit relating to the defendant's prior record, the affidavit listed: "Mental Health Issues." *Id.* The form asked, "Do you have any reason to believe Defendant has underlying mental health issues?" *Id.* The "Yes" box is checked. *Id.* At the bottom, the form says: "The jail staff will deliver the original to the court at the time of the preliminary appearance and a copy will be placed in the inmate's file." *Id.*

[2] In order to keep track of deputies in the field, Skagit 911, the entity that coordinates the dispatch of all police, fire and emergency services in Skagit County, operated a computer-aided dispatch ("CAD") system. CP 3185.

forewarn deputies of particular dangers involving individuals with whom they may come in contact; a 220 or mental health alert code identified an unstable person and alerted the deputies to be careful. CP 2843-44, 2864, 3105, 3202. Zamora's arrest history and alert code were readily available to all Skagit County sheriff deputies via the CAD system that could be accessed from the computers in the deputies' squad cars. CP 2845.

Skagit 911 and its dispatchers were aware that Zamora had mental problems:

> Q: Did you tell Jem Meehan when you did the pass down that this involved -- that Isaac Zamora had some mental problems?
>
> A: I don't remember if I mentioned that or not specifically, but we were all aware of it, as were the deputies.
>
> Q: You were aware that --
>
> A: Right.
>
> Q: -- Isaac Zamora had mental problems?
>
> A: All of us were.
>
> Q: Why was that?
>
> A: Because he had a history of other calls and he was flagged, I believe. The call was for a mental, I believe. He had a 220 alert in our Spillman [CAD] system, which means mental.

> Q: When you say that everybody knew because of other calls, had you had other calls regarding Isaac Zamora?
>
> A: There had been calls about him. I don't know that I took them specifically, but I was aware of him and that he was mental.

CP 3201.[3]

Skagit County Jail officials knew of Zamora's mental health issues. While incarcerated at the Jail, Zamora was housed in C-Pod, the section of the jail for inmates who were dangerous, assaultive, or have mental health problems. CP 2581, 2899. While incarcerated in the Skagit County Jail, Zamora's aggressiveness, anger, volatility, and dangerousness were noted to and acknowledged by Jail staff. CP 2408, 2410, 2412, 2414.

Zamora was arrested for, and pleaded guilty to drug possession on May 8, 2008. CP 2420. The Skagit County Superior Court's Judgment and Sentence sentenced Zamora to six months of confinement and twelve months of community supervision; the court ordered that Zamora undergo a mental health evaluation and further ordered that he must comply with all treatment recommendations. CP 3693, 3694. Despite the court's directive, Zamora was never actually seen or evaluated by a physician, psychiatrist, or psychologist at the Skagit County Jail. CP 2533, 2539.

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[3] Kruger further testified that "[t]here were calls about him. There was a call that day. His name screen was flagged as a mental, which is a 220." CP 3202.

After Zamora's incarceration in the Skagit County Jail that commenced on April 4, 2008, Denise Zamora, Isaac's mother, called the Jail on April 7, 2008 and requested that her son see a mental health counselor. CP 3681. She indicated that she felt he was bipolar and was "aggressive [and] has anger problems." CP 3681. She said that she and her husband were in fear of Isaac and that he was destroying the family. *Id.* "She begged that he stay in jail for a long time and get mental help." *Id.* Mrs. Zamora made at least *five* requests of County officials for mental health treatment for her son. CP 2591-93, 2928, 2930.

Zamora requested mental health treatment at least three times. Responding to a request from Zamora himself, Stephanie Inslee, a mental health worker who contracted with the Jail to provide mental health services, saw Zamora and on April 11, 2008 and wrote:

> Persecutorial thoughts, easily moved into rageful thinking, pressured speech, feels victimized by just about everyone in his world. ... Sounds like panic attack. He needs something! Recommend beginning Lamictal. He is paranoid about poison and not messing with his brain. Can a person in medical please meet with him if meds are approved and address his fears.

CP 3685. On April 14, 2008, a physician approved the Lamictal prescription. *Id.*[4]

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[4] Lamictal is prescribed for seizure disorders and is used as a mood stabilizer. It is not an anti-psychotic drug, but its prescription should have put jail personnel on notice that Zamora's use of it indicated he had mental health issues. CP 2539.

On April 25, 2008, Zamora again requested to be seen by a mental health professional. CP 3687. A contractor, Cindy Maxwell, responded and reported that Zamora appeared "upset, easily angered [and had] rambling style speech." CP 3687. Maxwell apparently only asked Zamora if he would like a contact from mental health staff; she did not ask a psychologist or psychiatrist to assess Zamora. CP 2539.

Subsequently, Zamora submitted another mental health request stating that he wanted to see a mental health worker because he "keep[s] seeing black dots and white flashes." CP 2958. He saw monsters and demons out the window of his room and believed his bed to be electrified. CP 2540. During April and May, Zamora's mother contacted the Skagit County Jail and requested mental health help for her son at least five times. CP 2591-93, 2928, 2930.

While in the Skagit County Jail, the staff there wrote Zamora up for a series of inappropriate behaviors. CP 2462, 2464, 2467, 2469-71.[5]

By a contractual arrangement between Skagit and Okanogan County,[6] Zamora was transferred on May 29, 2008 to the Okanogan

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[5] Zamora was also involved in an altercation with another inmate who purportedly assaulted Zamora. CP 2464. The other inmate explained to Jail staff that Zamora's conduct when he and Zamora were previously in the infirmary together prompted the retaliatory assault, stating "that man [Zamora] cut me in the infirmary what else could I do." *Id.*

[6] The contract between Okanogan and Skagit Counties paid Skagit County $40 per day to house Zamora. CP 3134.

County Jail. CP 5678. The contract required Skagit County to provide Okanogan County "a copy of all inmate records pertaining to the inmate's present incarceration at the Skagit County Jail," CP 3135, but when Skagit County transferred Zamora to Okanogan County, it withheld all of the records concerning Zamora's mental health, with the exception of a single mention of Lamictal in a medication log. CP 3146-51. Inexplicably, Skagit County culled Zamora's file[7] and sent only 5 pages of medical records to Okanogan County, none of which described Zamora's mental health problems. CP 3146-51.[8]

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[7] The registered nurse at the Skagit County Jail charged with sending Zamora's records to Okanogan County testified that she sent only the most recent medical records from the past two weeks prior to his transfer. CP 2912-13. She said that the Skagit County Jail provided no written guidelines regarding what to send to Okanogan County, and that the system was set up to send only the most recent medical records. CP 2914. Notably, the records sent did not only relate to the 2 weeks prior to Zamora's transfer to Okanogan; there was information from time periods prior to the 2 weeks before Zamora's transfer. CP 3146-51. Not all records pertaining to medical issues in the 2 weeks before Zamora's transfer were included in the information sent to Okanogan County (i.e. the mental health request slip dated May 18, 2008 where Zamora reports "seeing black dots and white flashes."). CP 2958.

[8] Those records were:

(1) A radiology report dated April 22, 2008 regarding Zamora's injured clavicle;

(2) The Skagit Medication log for the month of May, showing that Isaac Zamora was taking Hydrocodone, Lamictal, and Naproxen;

(3-4) An inmate medical history dated May 29, 2008 with notes going back to March 19, 1999, that made no mention of any seizures; and

(5) A handwritten note dated May 7, 2008 regarding his clavicle and request for pain medication.

If Okanogan County had requested more information from Skagit County, and if it then received the documentation available from Skagit County, it may not have agreed to house Zamora at all. CP 3138.[9]

The records provided by Skagit to Okanogan did reference Zamora's use of Lamictal, a prescription drug; CP 3148, and when Zamora arrived at Okanogan, he had a bubble-pack of Lamictal in his personal belongings. CP 2539, 2907.[10] But Okanogan County did not seek the background of what occurred with Zamora while he was at the Skagit County Jail, nor did it inquire why he was prescribed Lamictal. CP 2533-34. Kevin Mallory, the physician's assistant at the Okanogan Jail (who was the highest level medical professional who saw Zamora at Okanogan

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CP 3149-50. Skagit County did not advise Okanogan County of Inslee's conclusions, the contact from Zamora's mother, the fact that Zamora was housed in C-Pod, Zamora's request for mental health treatment, or that he had engaged in inappropriate behaviors.

[9] Noah Stewart, the Okanogan County Chief Corrections Deputy, testified:

> Q: If there were known psychiatric issues for an inmate, would Okanogan County take that inmate?
>
> . . . . .
>
> A: No.

CP 2395. The contract allowed Okanogan County "to refuse to accept any inmate from Skagit County who, in the judgment of Okanogan County, has a current illness or injury which may adversely affect the operations of the Okanogan County Jail." CP 3138.

[10] The violence victims' psychiatric expert, Dr. Csaba Hegyvary, testified that the fact that he arrived with a bubble-pack of Lamictal should have alerted Okanogan County that it should have looked further into Zamora's background - i.e., why he was prescribed Lamictal. "Provision of Lamictal to an inmate without an underlying seizure disorder *does* put subsequent treatment providers on notice that the inmate has mental health issues." CP 2539 (emphasis in original).

and who is not a trained mental health professional) did not seek more information from Skagit regarding why Skagit had prescribed Lamictal before discontinuing this medication. CP 2536-37, 2539-40.

Okanogan County's nurse assistant, Miranda Evans, testified that, at a bare minimum, the transfer of medical information packet from Skagit County should have contained "whatever medication that [the inmate was] prescribed -- prescribed to take daily and *the reasoning behind it.*" CP 2383-84 (emphasis added). Skagit County's transfer form did not include even this most basic information. CP 2447-52.

All medications that come into Okanogan County Jail with an inmate are logged into a computer upon an inmate's arrival. CP 2907. But, when Zamora arrived with a bubble-pack of Lamictal, contrary to Okanogan County's customary practice, the Lamictal was not logged into the computer because Mallory instructed Evans not to do so. CP 2383-87, 2907.[11]

On the morning after Zamora arrived, he was seen by Mallory. CP 2907. Mallory never conducted a mental health evaluation for Zamora. CP 2539-40. It is the regular practice at the Okanogan County Jail that if a medication were discontinued they would "document everything so that

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[11] In addition to not entering the Lamictal into the medication log on the computer, Okanogan County did not document the Lamictal or note any discussion of mental health in any of its chart notes, or anywhere else. CP 3504, 3700, 3706.

we usually can look back in the files if we need to know why we didn't set up a medication or not." CP 2387. Specifically, there would be some documentation that the inmate arrived with medication; but, that it was not being given. CP 2387-88. Generally, while Okanogan County documented medical conditions or treatment, CP 2383, the County's chart note on Zamora is silent regarding the Lamictal or his mental health. CP 2504.

The Okanogan County Jail's practice was that a medical doctor reviewed 10% of the inmates seen on "med call" each month. CP 2382. Notably, "anything that was psychiatric at that time was selected for [the MD's] review." CP 2382.[12] Since Mallory directed that Zamora's Lamictal was not to be logged in the computer and there was no chart note, there was no record that Zamora came in with the Lamictal, CP 2388, and no way for a physician to review Zamora's records and his psychiatric state. CP 2388, 2540.

During the time Zamora was in the Okanogan County Jail, he believed the jailers were trying to poison him and that they could control him by sending rays through the walls. CP 2540. He saw frightening

[12] Okanogan County did not screen for mental health issues beyond asking inmates if they had mental health issues. CP 2385. Notably, there was no cost to Okanogan County for making a call to Okanogan Behavioral Health. CP 2393.

images on the walls of the jail and believed the corrections officers there were making those images appear. *Id.*

Zamora received no treatment for his mental health condition at the Okanogan County Jail. CP 2539.

Zamora was released from the Okanogan County Jail on August 2, 2008. CP 2541. Zamora's psychiatric condition, untreated in either Jail, became significantly worse. CP 2541. His hallucinations were more intense and his mood swings more violent. *Id.* He believed people around him were evil; he spoke of God and his obligation to carry out God's will. *Id.*

Less than a month before the shootings and shortly after his release, on August 5, 2008, Deputy Larry Yonally and another deputy were dispatched to remove Zamora from his parents' property because of fears expressed by Denise Zamora arising from Isaac's aggressive and angry outbursts. CP 2568. In a telephone conversation that day, Denise Zamora told Yonally that her son had mental issues and was acting aggressive and angry towards family members. CP 2568. She told Yonally that she did not feel comfortable with Zamora in the home and that "Isaac is suffering from undiagnosed and untreated mental illness and ... has been a problem for some time." CP 2860.

While at the Zamora residence, Yonally learned of an outstanding warrant for Isaac Zamora and arrested him. CP 2569. While waiting to be processed at the Skagit County Jail, Zamora acted out, pounding the walls of the holding room. CP 2465. Nevertheless, Zamora was released on his own recognizance on August 6, 2008. CP 2655.

On September 1, 2008, a Zamora neighbor, Theo Griffeth, called authorities to report an incident with Isaac. CP 2851. Griffeth was on his way home from an outing on September 1 when he saw Zamora walking up the road near his house in a very agitated manner. CP 2852. According to Griffeth, Zamora was acting mad, his fists were clenched and he did not look up when he passed. *Id.* He was staring at the ground and was mad. *Id.* He had a gait or a walk of a "gorilla," "stiff legged." CP 2852.

When Griffeth got to his driveway, he saw that a sign had been ripped off the gate and became concerned because his wife had just arrived home. CP 2852. His wife was unharmed, but reported on a strange person who had come up to her and said "Who are you?" and when she answered, he said, "I know everyone around here . . . no one's here, there's not supposed to be anyone here." CP 2852.[13]

[13] Griffeth described his observations of Zamora over the preceding months: "I think that there's something going on up there that ain't quite right. . . ."); CP 2851.

Griffeth sensed "something wrong with the kid," and he wanted protection. CP 2852. He asked that a deputy be dispatched to his home, hoping Zamora would be arrested and get "some help." CP 2853. Three officers were dispatched to the Griffeth residence in response to Griffeth's call. CP 2854.

When Deputy Anne Jackson arrived at Griffeth's house, Griffeth described Zamora to her. CP 2853. He told her that Zamora was crazy and that something had changed in him and you could just see it and sense it. CP 2853. He told Jackson to be careful, "[t]his kid is ... he's over the edge." CP 2853.

That same day, Zamora was seen by a psychologist in the parking lot of the Alger Bar & Grill at his father's insistence so that he could qualify for DSHS assistance. CP 2541. When Silverio Arenas, Ph.D. met Zamora -- even with Zamora being *extremely* uncooperative -- he was able to correctly diagnose Zamora with a rule-out diagnosis of "psychotic disorder with paranoid tendencies." *Id.*; CP 2404.[14]

"[T]here was something just wrong. There was something that wasn't connecting and it was an aura of -- there was violence." CP 2853.

[14] This diagnosis was entirely consistent with that of Dr. Hegyvary, who testified that Zamora's actions on September 2 were the product of a "severe, untreated and long-standing mental disease, specifically schizophrenia, paranoid type with associated hallucinations and delusions." CP 2542.

At 2:09 p.m. on September 2, 2008, Skagit 911 received a call from Denise Zamora. CP 2231, 2257. She told the dispatcher that "[m]y son is just out of his mind, he is going in and out of people's houses up here, we're afraid he is going to get shot," and she further explained that a neighbor had called her to report that Isaac had just walked into his house and said "where is everybody?" CP 2285. Denise Zamora further told the dispatcher that "this happened yesterday with another neighbor but the lady was scared out of her wits." *Id.* She pleaded that "we're scared to death that he's gonna do something and they'll never find him out in the woods or that somebody's going to shoot him." *Id.* She described his mental state, offering that "He's just ... he's not getting it, he's totally ... he's talking to himself, he's seeing things, he's like totally out of it. And he scared Mrs. Griffith [sic] just to pieces the other day ..." *Id.* Denise Zamora told the dispatcher that "he told the neighbor yesterday to go hang himself, the kid had dumped his quad on the ... and it's just not like him, normally he would go over and say 'hey lemme help you with that.'" *Id.* She thought that he was in the woods, near Silver Creek. *Id.* The dispatcher coded the call as a "Mental Problem Call" and routed it to a Skagit 911 dispatcher. CP 2146, 2181, 2295.

At 2:20 p.m. Skagit 911 dispatched Deputy Jackson. CP 2257, 2295. Another deputy, Terry Esskew, left his previous location to join

Deputy Jackson at the Zamora residence. CP 2258, 2295, 2864. When the two deputies met on the way to what they believed to be Zamora's location at his mother's home, Jackson told Esskew what she knew about Zamora including his mental state. CP 2864. Reporting from the prior day's contact, she told Esskew what Griffeth had said about Zamora looking crazy and there having been a change in him. CP 2871. Esskew pulled up Zamora on his CAD computer monitor. CP 2864.[15] They arrived at the Zamora residence at 2:50 p.m. CP 2255.

After it was apparent that Isaac Zamora was not at his mother's house, Deputy Esskew left Jackson to proceed on her own alone to the Chester Rose property where Zamora had been reported a short time earlier. CP 2871. Esskew returned to headquarters. CP 2874.

At the Rose residence, Deputy Jackson engaged in a gun battle with Isaac Zamora in which 33 shots were exchanged, and Deputy Jackson was killed, as was Chester Rose. CP 2634-38. Thereafter, Isaac Zamora went on a spree of violence:

Between 3:02 p.m. and 4:04 p.m.:

- Zamora traveled by foot to the May residence where construction workers, Gregory Gillum and David Radcliffe, were working on a home addition. He shot both Gillum and Radcliffe. He also cut them with a Skillsaw. Zamora stole Radcliffe's vehicle;

[15] The CAD would have revealed Zamora's 220 (or mental health) designation. CP 2864.

- Zamora drove to the Binschus residence where he pursued Fred Binschus through the woods and shot him. Zamora then returned to the Binschus home where he was involved in a vehicle chase; he confronted and killed Julie Binschus;

- Zamora then traveled to the entry gate to Richard Treston's property where he rammed the car into Treston's vehicle, exited the car, and confronted Treston with a rifle. After failing to fire the rifle, Zamora stabbed Treston;

- At approximately 4:10 p.m., Zamora next drove to the Alger Shell station where he shot Ben Mercado in the arm as he drove by the station;

- Zamora then drove on to I-5 where he shot and injured Trooper Troy Giddings, and he shot and killed LeRoy Lange.

CP 2360. Zamora was finally subdued and arrested that afternoon.

The violence victims (exclusive of the estate of Deputy Jackson) filed the present action in the Snohomish County Superior Court on September 6, 2011. CP 3904. The case was ultimately assigned to the Honorable Ellen J. Fair. Skagit County, Okanogan County, and Skagit 911 moved for summary judgment on March 26, 2013. CP 2815, 3567, 3756.

On summary judgment, the violence victims presented evidence from James Esten, an expert with nearly 40 years of experience in corrections, that the Skagit County Jail had "clear notice" that Zamora

needed mental health evaluation and treatment, CP 2532, and that both Counties breached their duty to provide proper mental health evaluation or treatment to Zamora. *Id.* Esten testified that both Counties failed to meet reasonably prudent correctional policies, procedures, and practices for an inmate like Zamora. *Id.* In Skagit County's case, this was "the result of mismanagement and lack of qualification from the top down." CP 2535. He also testified that Okanogan County's lack of records and failure to inquire about Zamora's mental health history was a breach of duty. CP 2533-34. He stated that both Counties were "reckless" and breached standard correctional practice in delaying or denying mental health services to a patient like Zamora. CP 2534.

Additionally, Dr. Hegyvary testified that had the Jails properly evaluated and treated Zamora, he would not have undertaken his September 2, 2008 rampage:

> . . . I am of the strong opinion that Isaac Zamora was not provided with a proper mental health evaluation or with any mental health treatment during his time in the Skagit and Okanogan County Jails. Furthermore, had either of these two Counties provided Mr. Zamora with an adequate assessment and treatment, it is my opinion that Mr. Zamora would not have been in a psychotic state on September 2, 2008, and that he would not have engaged in acts of violence on that day. Put another way, Mr. Zamora's psychosis-fueled rampage could have been easily prevented via the provision of basic psychiatric care and low-cost antipsychotic medications, both of which should have been provided to him by Skagit and Okanogan Counties.

CP 2537-38. He stated that Zamora's psychiatric illness was long-standing and not a sudden aberration: he "had a long standing psychiatric disorder that began to emerge when Zamora was in his late-teens, more than a decade before the incident on September 2, 2008." CP 2538.[16]

Dr. Hegyvary testified that a proper evaluation would have revealed Zamora's psychosis: "Had either Okanogan County or Skagit County provided Mr. Zamora with a mental health evaluation by a qualified professional, it is my opinion that his psychosis would have been identified. Specifically, I believe that an average, ordinary psychiatrist could have identified Mr. Zamora's psychosis if given the opportunity." CP 2543.

The trial court, however, concluded that Skagit County had no duty under §§ 315 or 319 of the *Restatement (Second) of Torts* to the violence victims because any take charge responsibility was confined to the period during which Zamora was confined, citing *Hungerford v. State of Wash. Dep't of Corrs.*, 135 Wn. App. 240, 139 P.3d 1131 (2006). CP 207-08. *See* Appendix. The court also reasoned that Skagit County had no duty

[16] Dr. Hegyvary noted that Skagit County Jail had adequate information to alert personnel that Zamora needed a proper psychiatric evaluation: "In light of the available information, I find it truly appalling that a mental health evaluation was not undertaken prior to Zamora's release from jail in early August 2008." CP 2543. "Clinical interviews conducted after the shootings confirm that Zamora was, in fact, experiencing severe psychotic hallucinations and delusions during his time at both the Skagit County and Okanogan County Jails. For example, at Skagit County he saw monsters and demons out the window of his room and felt his bed was electrified." CP 2540.

arising out of its failure to provide complete mental health records to Okanogan County. CP 212-13.[17]

The court also determined as a matter of law that the violence victims failed to establish "but for" proximate cause on Skagit County's failure to provide mental health services. CP 210-11, 215.

With regard to Okanogan County, the trial court employed a similar analysis as to its take charge liability concluding that the County's duty was confined to the time period he was under the County's control and that duty "terminated at the conclusion of Okanogan's incarceration of Zamora." CP 208. The court distinguished the situation in *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), where the State was held liable for the post-incarceration traffic accident of a former Western State Hospital patient because the therapist, unlike Skagit County, could control the patient's conduct; the court found the ability to file an involuntary treatment petition for the patient to be salient. CP 208. The court explained its reticence for finding a duty to the violence victims by stating:

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[17] The trial court opined:

> At best, providing records would have led Okanogan to request a mental health assessment, which might or might not have led to treatment with which Zamora might or might not have participated. Even had Skagit County sent records to Okanogan, they had no ability to control the acts of Zamora while incarcerated, the acts of Okanogan County, or the acts of Zamora after his release.

CP 212.

> Plaintiffs' theory would require this Court to find that jails have a general duty to treat mentally ill offenders in order to prevent crimes that may occur after the jails release the offenders from their periods of incarceration. While jails may have an obligation to treat mentally ill offenders for known conditions while in custody, extending that duty to impose liability after release would impose an extension of liability that is not supported by the current case law or public policy.

CP 208-09.

On causation, the court again ruled as a matter of law that any breach of duty did not proximately result in the harm to the violence victims because there was no assurance Zamora would have continued in treatment after his release. CP 210-11.

Once the violence victims settled with the State, judgments were entered on those settlements. CP 2462. This timely appeal followed. CP 1-23.

D. SUMMARY OF ARGMENT

Skagit and Okanogan Counties had take charge liability arising out of their failure to evaluate and treat Isaac Zamora for his severe mental health problems during his incarceration in their respective Jails when they knew or should have known of Zamora's severe mental health problems. The trial court erred in finding no duty to the victims of Zamora's violent September 2, 2008 rampage because the violence occurred after the conclusion of his incarceration.

Further, the Counties had a duty to the violence victims under the *Restatement (Second) of Torts* § 302B where they engaged in misfeasance enhancing the degree of the risk to the violence victims by improperly evaluating and treating Zamora.

The trial court should not have ruled on "but for" proximate cause where there was ample expert testimony that the Counties' breach of duty resulted in the deaths and injuries that occurred in Zamora's spree of violence. The Counties' breach of their take charge duty to the violence victims was the proximate cause of the deaths and injuries that occurred. Had the Counties met their obligation to properly evaluate and treat Zamora's condition, his schizophrenia would not have worsened because appropriate steps could have been taken for his treatment. With such treatment, Zamora's rampage would not have taken place and the senseless deaths and injuries of his victims would have been avoided.

E. ARGUMENT

(1) Skagit and Okanogan Counties Owed a Duty of Care to Zamora's Violence Victims Because They Took Charge of Isaac Zamora When They Had Him in Incarceration[18]

Washington law generally provides that a party does not owe a duty to a crime victim unless there was a special relationship between the

[18] The existence of a duty is a question of law that this Court must review de novo. *N.K. v. Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 525, 307 P.3d 730 (2013).

party and the crime's perpetrator, or a special relationship between the party and the crime victim. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997). *See Restatement (Second) of Torts* § 315.[19]

This Court has found that a duty exists, however, in a series of cases beginning with *Petersen* and culminating in *Joyce v. State, Dep't of Corrections*, 155 Wn.2d 306, 119 P.3d 825 (2005),[20] where the defendant "takes charge" of the perpetrator of the crime.

Under a defendant's "take charge" duty over an offender or mental health patient, the defendant must control the conduct of the offender or patient as to prevent him from causing physical harm to another, because a special relationship exists between the defendant and the offender/patient which imposes a duty upon the defendant to control the offender's/patient's conduct. *Taggart*, 118 Wn.2d at 218 (citing *Restatement (Second) of Torts*

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[19] § 315 states:

> 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.

[20] *See, e.g., Petersen*, 100 Wn.2d at 428 (state psychiatrist and patient released from Western State Hospital); *Taggart v. State,* 118 Wn.2d 195, 217-19, 822 P.2d 243 (1992) (state patrol officers and offender on parole); *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999) (municipal probation counselors and county pre-trial release counselors and released accused); *Joyce*, *supra* (state community corrections officers and released offender); *Estate of Jones v. State*, 107 Wn.2d 510, 15 P.3d 180 (2000) (group care facility on contract with State and juvenile offender).

§ 315 (1965)). Such a relationship arises when a defendant "takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled," and the defendant is therefore "under a duty to exercise reasonable care to control the third person to prevent him from doing ... harm." *Id.* at 219 (quoting *Restatement Second of Torts* § 319 (1965)). As this Court noted in *Joyce*, the "relevant threshold questions are whether the State had a take charge relationship with the offender, and whether the State knew or should have known of the offender's dangerous propensities." *Joyce*, 155 Wn.2d at 318.

The duty is a broad one. The *Taggart* court found that the State had a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of the offenders. 118 Wn.2d at 217. This duty extends not just to readily identifiable victims, but *anyone foreseeably endangered by the offender's condition. Id.* at 219.

Coincidentally, in *Taggart, Hertog,* and *Joyce* the harm occurred during the take charge period, respectively during an offender's period of parole, a probationer's pretrial release, and an offender's period of community supervision. *Petersen* is different, and controls here. There, this Court held that a state psychiatrist owed a duty of care to the plaintiff, who was injured in a motor-vehicle collision with the psychiatrist's former

patient. The psychiatrist had diagnosed the patient with a schizophrenic-like reaction caused by consumption of the drug PCP or "angel dust." 100 Wn.2d at 424. After treating the patient with a drug called Navane, the psychiatrist concluded that the patient "was in full contact with reality, and was back to his usual type of personality and behavior." *Id.* When the accident occurred five days later, the patient appeared to witnesses to be greatly influenced by drugs, and it was later learned that he had flushed his supply of Navane down the toilet. *Id.* at 423-24.

Petersen sued the State, arguing that its psychiatrist had failed to take steps to protect her from the patient's dangerous propensities. *Id.* at 424. After a jury verdict in the plaintiff's favor, this Court rejected the State's argument that it owed no duty to Petersen. *Id.* at 424-28. This Court held that the psychiatrist "incurred a duty to take reasonable precautions to protect anyone who might foreseeably be endangered by [the patient]'s drug-related mental problems." *Id.* at 428.

Importantly, in *Petersen*, the State had "take charge" liability for activities that occurred during the "take charge" period, but were manifested subsequently, just as here. This Court noted, for example, that the State's psychiatrist could have petitioned for additional involuntary treatment for 90 days under RCW 71.05. *Id.* at 428-29. The *Petersen* court made very clear that a defendant with "take charge" responsibility

over an individual cannot disregard the fact the person is a ticking time bomb. A defendant has a duty, during the "take charge" period, to address the person's risk to others, even if that risk is manifested after the "take charge" period ends. Similarly, the *Taggart* court observed:

> The duty we announced in *Petersen* is not limited to taking precautions to protect against mental patients' dangerous propensities only when those patients are being released from the hospital, as suggested by the Maryland court in *Lamb*. The duty requires that whenever a psychiatrist determines, or according to the standards of the profession should have determined, that a patient presents foreseeable dangers to others, the psychiatrist must take reasonable precautions to protect against harm. *Whether the patient is a hospital patient or an outpatient is not important.*

118 Wn.2d at 223 (emphasis added).

The trial court here believed that the Counties' responsibility ended when Zamora was released, citing *Hungerford,* a case where Division II found the State had no "take charge" responsibility as to an offender who committed murder while he was under DOC supervisions for legal financial obligations ("LFO"). The trial court misread *Hungerford.* Division II actually held that there was no "take charge" liability for the State where a court ended the offender's active probation and limited any supervision to whether the offender paid his LFOs. Citing *Couch v. Dep't of Corrs.*, 113 Wn. App. 556, 54 P.3d 197 (2002), *review denied,* 149 Wn.2d 1012 (2003), the Court of Appeals concluded when an offender is

only being supervised for compliance with LFOs, there is no "take charge" duty. *Hungerford,* 135 Wn. App. at 257.

Here, as in *Petersen*, the liability-causing event took place during the Counties' "take charge" control over Zamora. Isaac Zamora had manifest mental health problems, well known to Skagit County judges, law enforcement, and jailors, that were exhibited in violent outbursts and aggressiveness. The Counties knew this, but did not properly evaluate or treat his mental health problems.

The Counties had a common law and statutory obligation to provide mental health evaluation and treatment to Isaac Zamora.[21] For example, in *Shea v. City of Spokane,* 17 Wn. App. 236, 562 P.2d 264 (1997), *aff'd,* 90 Wn.2d 43, 578 P.2d 42 (1978), this Court adopted the analysis of the Court of Appeals that a municipality operating a jail has a special relationship with an inmate whose liberty has been lost so that the municipality has a non-delegable duty to provide for the inmate's health. *Id.* at 242. The municipality's duty is to provide competent and adequate medical care and treatment for inmates; the acts and omission of the

[21] The trial court's effort to distinguish this obligation to inmates from the obligation owed to the victims of such inmates, if the inmate's condition is not properly evaluated and treated, CP 208-09, ultimately begs the question of the reason for such mental health evaluation and treatment. It is certainly clear that such treatment is designed to avoid further harm to the inmate himself or herself. It is foreseeable that such treatment will also avoid harm to others.

municipality's medical practitioners are those of the municipality and those practitioners must exercise the same standard of care of the average, competent practitioner in serving the inmates. *Id.* at 245-46. Similarly, in *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010), this Court reaffirmed that a jail has a special relationship with an inmate to ensure that inmate's "health, welfare, and safety." *Id.* at 635. *See also, Husah v. McCorkle*, 100 Wash. 318, 325, 170 Pac. 1023 (1918). By statute, local governments like the Counties here, must meet federal and state standards for inmate health, safety, and welfare. *Gregoire,* 170 Wn.2d at 636; RCW 70.48.071. Mental health standards are certainly part of that obligation, particularly where the deprivation of a prisoner's right to mental health services can constitute cruel and unusual punishment under the Eighth Amendment. *Brown v. Plata*, ___ U.S. ___, 131 S. Ct. 1910, 179 L.Ed.2d 969 (2011). *See also,* RCW 70.48.130(1) ("It is the intent of the legislature that all jail inmates receive appropriate and cost effective emergency and necessary medical care.").[22]

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[22] Skagit County argues in its answer to Binschus's statement of grounds for direct review that this Court has previously rejected a "duty to treat" theory in *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990). *See* Skagit County's Answer at 8. But *Melville* is clearly distinguishable. Therein, this Court rejected the appellant's reliance upon RCW 72.09.010(1)'s general policy statement that "[t]he [state corrections] system should ensure public safety," as establishing a duty to provide mental health treatment for inmates. *See Melville,* 115 Wn.2d at 38. By contrast, here, as discussed above, the Counties are now specifically required by statute to provide necessary medical care. RCW 70.48.130(1)'s operative language quoted above was enacted in 1993, *after* the

Finally, the Counties were explicitly put on notice of Zamora's individual mental health issues not only from his own requests and his mother's pleas for treatment, but by his Judgment and Sentence. As part of Zamora's Judgment and Sentence, the trial court ordered that he undergo "mental health eval[uation and] treatment" and that he "comply with all treatment recommendations." CP 841. This requirement appears as an added condition imposed by the trial court regarding a 12-month period of community supervision. *Id.* Nevertheless, because the order is part of Zamora's Judgment and Sentence, it put Zamora's jailers on notice that he needed mental health treatment.[23] They could not be oblivious to the fact that the sentencing judge understood he was mentally ill and needed treatment once released; they had an obligation to Zamora to take steps during his incarceration to avoid having his mental condition deteriorate, given their knowledge of his mental illness. As the violence victims' expert opined, "At that point, reasonably prudent corrections staff would have summoned a psychologist or psychiatrist to conduct a full evaluation of Mr. Zamora-without regard to whether Zamora ever sought

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Melville decision. The cases relied upon above, *Gregoire* and *Brown,* also post-date *Melville.*

[23] Additionally, both Counties also knew that Zamora was taking Lamictal, a "mood stabilizer" medication, and thus were on notice that Zamora had mental health issues based on his prescribed medications as well. CP 2539, 3673.

out or 'wanted' mental healthcare. Sadly, this was never done." CP 2533.[24]

In sum, the Counties here had "an affirmative duty to provide for inmate health, welfare, and safety." *Gregoire*, 170 Wn.2d at 639. That duty required, at a minimum, that Zamora be evaluated and treated for his psychotic condition, of which the Counties had notice in the Judgment and Sentence.

Once the Counties undertook their special "take charge" relationship with Zamora, they had a duty to use reasonable care to protect against reasonably foreseeable dangers he posed. This Court ruled that a community corrections officer supervising a felon with convictions for assault and possession of stolen property owed a duty to a woman killed when the offender stole a car, ran a red light, and collided with her vehicle.

> But as we have long recognized, once the State has taken charge of an offender, 'the State has a duty to take reasonable precautions to protect against *reasonably foreseeable dangers posed by the dangerous propensities of parolees.*' The existence of the duty comes from the special relationship between the offender and the State. Once that

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[24] In Skagit County's answer to Binschus's statement of grounds for direct review, it also argues that this Court should ignore the noted evaluation and treatment provision in Zamora's Judgment and Sentence, contending that such provision is "invalid." Answer at 10. But the Counties may not raise to this Court in the first instance a challenge to Zamora's Judgment and Sentence that was entered in May of 2008 and was never appealed. CP 836, 841-42. *See* RAP 5.2.

> special relationship is created, the State has a duty of reasonable care and may be liable for lapses of reasonable care when damages result.

Joyce, 155 Wn.2d at 310 (citations omitted) (Court's emphasis).

"[T]he scope of this duty is not limited to readily identifiable victims, but includes anyone foreseeably endangered" by the offender's dangerous propensities, such as Zamora's victims. *Taggart*, 118 Wn.2d at 219. In *Taggart*, while on parole, the offender assaulted Taggart, a woman with whom he had not been previously acquainted. *Id.* at 200-01. To establish that the duty described by the court extended to her, Taggart had only to show that she was "foreseeably endangered," not that she herself was "the foreseeable victim of [the offender's] criminal tendencies..." *Id.* at 224-25.

In this case, both Counties owed a duty to Zamora's victims. By failing to properly evaluate and treat Zamora's mental health condition and by withholding critical mental health information from Okanogan County, Skagit County increased the likelihood that Zamora would go without the mental health medication he needed, that he would slip into "rageful thinking" and that he would act on his dangerous propensities. Skagit County further exacerbated the problem by failing to convey accurate information about Zamora to Okanogan County. Okanogan County failed in its duty to evaluate and treat Zamora's mental health problems, even

though it had incomplete information from Skagit County, when it failed to conduct proper follow-up with Skagit County to accurately determine Zamora's mental health status and treat him.

Just as it was foreseeable[25] that the State's failure to properly supervise the offender in *Joyce* or the patient in *Petersen* would result in the traffic accidents that occurred in those cases, it was entirely foreseeable that the Counties' failure to evaluate and treat Isaac Zamora's severe mental health problems would cause that ticking time bomb to go off, as it did to the severe prejudice of the violence victims. For these reasons, the trial court erred in finding that the Counties owed no duty to the violence victims.

(2) The Counties Owed a Duty of Care to Zamora's Violence Victims Because Their Improper Evaluation and Treatment of Zamora Created an Unreasonable Risk of Harm

Skagit and Okanogan Counties also owed a duty to Zamora's violence victims because their improper evaluation and treatment of

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[25] The Counties may argue that Zamora's rampage was an unforeseeable consequence of their failure to evaluate and treat his mental health condition. That argument will not help them. As the Court of Appeals noted in *N.K.*, the existence of a duty based on take charge liability requires only that the harm be in the general field of danger. 175 Wn. App. at 526 (*citing McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953)). Foreseeability limits the scope of duty. *Id.* at 530. Foreseeability is a *question of fact* for a jury. *Id. See also, Niece*, 131 Wn.2d at 50. Here, it was foreseeable that Isaac Zamora, with his propensity for aggressive, violent outbursts would do harm to the violence victims when his mental condition was left untreated and allowed to deteriorate. In any event, the foreseeability of his conduct was for a jury to decide, not the trial court.

Zamora dramatically increased the risk of harm to those victims. The trial court erred in addressing this aspect of the Counties' duty in its decision; essentially determining that neither County engaged in an "affirmative act" of negligence. CP 209-10, 213-14.

Washington has long recognized the application of § 302B of the *Restatement (Second) of Torts*. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 230, 802 P.2d 1360 (1991). That rule is the basis for "take charge" liability: "An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." *Restatement (Second) of Torts* § 302B (1965). Comment e to § 302B makes the rule even clearer:

> There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; *or where the actor's own affirmative act has created or exposed the other to a recognizable high degree or risk of harm through such misconduct, which a reasonable man would take into account.*

(emphasis added). Take charge liability is the essence of the first of the two aspects of duty described in comment e. The latter aspect constitutes

an independent basis for a duty: The Counties could not take steps that enhanced the risk of harm to Zamora's violence victims, as they did by improperly evaluating and treating his mental health condition.

This Court has drawn the distinction for this type of duty between nonfeasance and misfeasance by the defendant, defining misfeasance as actions creating or enhancing the risk of harm. In *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013), the Court found no duty for the city to crime victims where a *Terry* stop did not constitute a taking charge special relationship over a person. Moreover, the acts of the city's police officers who failed to retrieve certain shotgun shells disposed of by the person during the *Terry* stop and later retrieved and used by that person in a killing did not create a new risk of harm, as required for a 302B duty, but only failed to eliminate a risk. The Court specifically contrasted the nonfeasance of the officers in *Robb* with the misfeasance of a METRO bus driver who exited his bus and left the keys in the ignition, with the bus running, to a person high on PCP alone in the bus.[26] That person then took the bus and crashed it into the car of unsuspecting plaintiffs. The Court indicated that such affirmative acts that increased the risk of harm were misfeasance: " ... the driver's affirmative act of getting off the bus and leaving the engine running with an erratic passenger alone on board

[26] *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007).

exposed motorists to a recognizable high degree of risk that a reasonable person would have foreseen, imposing on the county a duty of care to the injured motorists to guard against the man's criminal conduct." *Id.* at 435.

Recently, in *Washburn v. City of Federal Way*, ___ Wn.2d ___, 310 P.3d 1275 (2013), this Court reaffirmed its misfeasance/nonfeasance analysis of 302B duty. There the Court held that an officer's failure to properly serve and enforce an anti-harassment order was misfeasance; the officer failed to read the order or the accompanying instructions on the order, and the beneficiary of the order was brutally murdered by its subject. This Court stated:

> The City argues *Restatement* § 302B creates no duty here because, like *Robb*, this is a case of nonfeasance rather than one of misfeasance. In support of this argument, the City cites jury instruction 5, which the City argues frames Washburn's claims in terms of nonfeasance. The City's argument mischaracterizes Washburn's claims. The bulk of testimony offered by Washburn at trial concerned Hensing's misfeasance in serving the antiharassment order. Washburn does tend to frame it in terms of a failure to perform, such as the failure to read the LEIS, the failure to bring an interpreter, and Hensing's decision to walk away instead of standing by to monitor Kim. Washburn, however, offers these examples as a list of the ways Hensing served the anitharassment order improperly.

Id. at 1290.

In this case, the Counties engaged in misfeasance by increasing the risk of harm to others from Zamora's deteriorating mental health when

they failed to properly evaluate or treat him. Their "evaluation" of Zamora's mental health condition was in adequate. In Skagit County, Stephanie Inslee and Cindy Maxwell both saw Zamora in connection with his mental health condition, but neither performed the type of evaluation that should have been undertaken in connection with his deteriorating status.[27] Similarly, Kevin Mallory at Okanogan County saw Zamora but did not properly evaluate his condition given Zamora's Lamictal prescription and he, in fact, suppressed the Lamictal prescription in the

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[27] Dr. Hegyvary was quite explicit in finding both Counties failure to conduct proper evaluations of Zamora's condition to be negligent:

> Had either Okanogan County or Skagit County provided Mr. Zamora with a mental health evaluation by a qualified professional, it is my opinion that his psychosis would have been identified. Specifically, I believe that an average, ordinary psychiatrist could have identified Mr. Zamora's psychosis if given the opportunity. The evaluation should have included a thorough psychiatric interview and history and would have lasted three to four hours minimum. Any claimed "assessments" that were substantially shorter in duration were not sufficiently thorough enough to meet the standard of care for Mr. Zamora. The evaluation would have also included-at a minimum-a review of the records from his incarceration at Skagit County, including the documentation of his judgment and sentence, calls from his mother describing his mental state, and all other records from his incarceration at Skagit County regarding his mental state. In light of the available information, I find it truly appalling that a mental health evaluation was not undertaken prior to Zamora's release from jail in early August 2008.

CP 2543. Similarly, James Esten testified that a complete mental health evaluation and appropriate treatment for Zamora were required as a matter of proper correctional policy. CP 2617.

Okanogan County computer system. Apart from a Lamictal prescription, neither County treated Zamora.[28]

The Counties' conduct increased the risk to others by improperly evaluating or treating Zamora's mental health condition, a condition manifest in his arrest record, his prior involuntary treatment, his mother's pleas for treatment, his status on Skagit County's CAD, his housing in the C-Pod at the Skagit County Jail, his Judgment and Sentence, and in his behavior in both Jails. Zamora was a ticking time bomb that both Counties tinkered with, but chose not to defuse. The Counties' conduct dramatically increased Zamora's risk to others and they owed a duty to the violence victims as a result under section 302B of the *Restatement*.

(3) The Trial Court Erred in Ruling As a Matter of Law that the Counties' Breach of Duty Was Not the Proximate Cause of the Death and Injuries to Zamora's Crime Victims

The trial court here ruled as a matter of law that but for the Counties' breach of their duty to the violence victims, those victims did not experience harm. The trial court's conclusion was largely based on its perception that neither County could compel Zamora to be treated, i.e., to use any medication prescribed for him. CP 210-11, 215. The trial court was wrong.

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[28] Dr. Hegyvary also clearly testified that the Counties' failure to treat Zamora resulted in the deaths and injuries he inflicted on September 2, 2008. CP 2544-45.

Proximate cause consists of both "but for" causation and legal causation. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). "Cause in fact concerns 'but for' causation, events the act produced in a direct unbroken sequence which would not have resulted had the act not occurred." *Hertog*, 138 Wn.2d at 282-83 (citing *Taggart*, 118 Wn.2d at 226). It has long been a cardinal principle of Washington law that proximate causation--"but for" causation[29]--is generally a fact question for the jury. Issues of "but for" causation in "take charge" liability cases are classically *questions of fact. E.g., Joyce*, 155 Wn.2d at 322; *Taggart*, 118 Wn.2d at 225-28. In *Joyce*, the jury determined that DOC's negligence in failing to supervise an offender who had serious psychiatric problems was the cause of Joyce's injuries. 155

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[29] Skagit County argues legal causation in its answer to the violence victims' statement of grounds for direct review at 12-14, but the trial court did not resolve this case on principles of legal causation. CP 210-11, 215. Legal causation is a question of law resting on considerations of policy and common sense as to how far the defendant's responsibility for the consequences of its actions should extend. *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013). "The question of legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter." *Taggart*, 118 Wn.2d at 226 (citing *Hartley v. State*, 103 Wn.2d 768, 779-80, 698 P.2d 77 (1985)).

Even if this Court were to address legal causation, where a jailor takes charge of an inmate's mental health, fails to evaluate or treat that inmate, negligently withholds his medication, and makes no further inquiry or assessment of his mental health, liability of such a jailor to third persons injured by the individual's psychotic behavior a short time after the individual is released is well within the range of consequences for which such a jailor may be responsible. *Cf. Joyce*, 155 Wn.2d at 316 ("the government has the duty of reasonable care in executing its duties"). *Id.* at 316-20 (once a take charge relationship is created, a duty to prevent foreseeable injury to others follows).

Wn.2d at 312-14, 322-23.[30] This Court rejected the State's contention that the evidence was insufficient to sustain the jury's determination. *Id.* at 322-23.[31]

The Counties' negligent failure to evaluate and treat Zamora's psychotic condition resulted in the injuries caused by his psychotic outburst on September 2, 2008. There was *ample* testimony on causation from Dr. Hegyvary, an experienced psychiatric practitioner, that but for the Counties' negligence, in failing to properly evaluate and treat Isaac Zamora, he would not have engaged in his violent rampage. Dr. Hegyvary testified that had Zamora's psychotic illness been identified, effective treatment would have been available: "had Zamora been subjected to a mental health evaluation during his time at either the Skagit County Jail or Okanogan County Jail, the examiner would have discovered Mr. Zamora's psychosis and begun the process of formulating a diagnosis. At this point the standard of care required administration of one or more of the antipsychotic medications discussed below." CP 2540-41. He further noted:

> Based on Mr. Zamora's behavior while incarcerated at Skagit and Okanogan Counties, it is unreasonable to

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[30] The offender stole a car in Seattle and operated it recklessly in Tacoma, running a red light and killing an innocent driver. *Id.*

[31] This Court, nevertheless, reversed and remanded based on other erroneous jury instructions. *See id.* at 323-25.

> assume that Mr. Zamora would have rejected antipsychotic medications if offered. Mr. Zamora may have had difficulty complying with an oral regime of antipsychotic medications requiring daily administration, but there are long-acting, injectable medications for use in these situations. Haloperidol Decanoate is one such antipsychotic commonly used in the treatment of schizophrenia and acute psychotic states. The medication is a long-acting injection given only once every four weeks.... The positive, therapeutic effects of the Haloperidol Decanoate last for longer than four weeks, thus, even if an injection was not given at the four week mark the medication would continue to work to subdue or eliminate psychosis for up to six weeks.... It is likely that either of these medications would have been effective in reducing or completely eliminating Mr. Zamora's psychosis, including his hallucinations and delusions.

CP 2544-45. "Importantly, we know that Zamora's schizophrenia *was*, in fact, treatable with antipsychotic medications -- as evidenced by his course upon admission to Western State Hospital after the shootings." CP 2545.

Finally, Dr. Hegyvary concluded that if Zamora had been properly evaluated and treated, the events of September 2nd likely could have been avoided:

> I am of the opinion that had *either* Skagit County or Okanogan County provided Mr. Zamora with a proper mental health evaluation, his psychosis would have been identified, and he would have been placed on a treatment plan to include long-acting antipsychotic medication. Had this occurred, Mr. Zamora would not have been in a psychotic state on September 2, 2008, and it is highly unlikely that he would have undertaken to kill six individuals (and injure a number of others) on that date.

CP 2545.

The trial court's causation analysis was rejected by this Court in *Hertog*. The plaintiff, who was raped by a person while he was on municipal court probation and pretrial release for sexually related charges, sued Seattle and King County, alleging that the offender's probation and pretrial release counselors negligently supervised him. *Hertog*, 138 Wn.2d at 269. The City argued that "but for" causation was lacking because, based on the knowledge he had, the counselor could have done nothing to prevent the rape. *Id.* at 283. With respect to the plaintiff's theory of liability, the City claimed that even if the counselor had known about the offender's drug and alcohol use (in violation of his probation), a petition to revoke his probation could not have been accomplished before the date of the rape. *Id.*

This Court observed, however, there was more that the counselor could have done to learn about the probation violations earlier. *Id.* For example, the counselor could have attempted to learn earlier whether monitoring by random urinalysis was being done and then might have been able to seek revocation earlier. *Id.* The Court explained that the offender's treatment records were discoverable, and the fact the counselor "did not actually know of probation violations does not answer the question whether he should have known of any such violations." *Id.*

Similarly, here, the Counties knew or must be charged with knowledge of Zamora's mental health history, violent propensities and his need for Lamictal. Both Counties should have known that Zamora needed mental health evaluation and treatment given the severity and frequency of Zamora's problems.

Further, the trial court labored under the misconception that the Counties could not have obtained treatment under the Involuntary Treatment Act, RCW 71.05 ("ITA") for Zamora. CP 208. That is not true. As in *Petersen*, County staff could have sought involuntary treatment for Zamora. Under RCW 71.05.150, either County could have reported Zamora's condition to a county-designated mental health professional who could have sought a court order mandating 72-hour involuntary evaluation and treatment period, RCW 71.05.150(2), to begin the process for Zamora's treatment. More critically, RCW 71.05.153 permitted either County to seek emergency steps for treatment of an individual like Zamora whose risk of harm to himself or others was "imminent." RCW 71.05.153(1).[32] A county-designated mental health professional could have ordered emergency custody for 72 hours for treatment. *Id.* Alternatively, a peace officer could take a person like

[32] RCW 71.05.020(20) defines "imminent" as "the state or condition of being likely to occur at any moment or near at hand, rather than distant or remote." Zamora's risk to the public was "imminent."

Zamora directly to one of a number of emergency treatment facilities. RCW 71.05.153.[33] "Peace officers" plainly includes deputy sheriffs. RCW 71.05.020(29). Of course, the failure of either County to formally evaluate Zamora's patient mental health condition forestalled the ability of either County to pursue RCW 71.05 treatment for Zamora.[34]

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[33] Zamora's untreated schizophrenia qualified for emergency involuntary treatment. *See, e.g., State v. Dempsey*, 88 Wn. App. 918, 923-24, 947 P.2d 265 (1997) (defendant called police twice for protection from imaginary homicidal pursuers; parents called police for protection from defendant and defendant assaulted father in front of officers); *Luchtel v. Hagemann*, 623 F.3d 975 (9th Cir. 2010) (officers had probable cause to take person to hospital for treatment where she was hiding under car with her son, she screamed that someone was trying to kill her, she asserted officers were assassins sent to kill her, and indicated that she would kill herself); *Hudson v. Spokane County*, 2013 WL 147812 (E.D. Wash. 2012) (person threatened to kill himself or anyone who came onto his property, had access to weapons, and was unresponsive to anyone for a number of days).

[34] In response to the violence victims' statement of grounds for direct review, the Counties' misrepresented what occurred below concerning the treatment options under RCW 71.05. The Skagit County's answer contended that the Counties' summary judgment motion on the issue of whether Zamora could have been the subject of an ITA evaluation was unopposed, and thus any issue concerning application of the ITA was resolved and any challenge thereto waived. *See* Skagit County's Answer at 3, 14. That is not what happened. The Counties did not present a separate motion based on the ITA. However, the statute was referenced in the context of the proximate cause arguments presented in the summary judgment motions. For example, Okanogan County's motion for summary judgment argued that causation is lacking because it is "speculation" to say what would have happened if mental health interventions had been attempted. CP 3750-52.

Skagit County contends that the violence victims bore the burden of proving Zamora qualified for involuntary treatment under RCW 71.05. Answer to Statement of Grounds for Direct Review at 2, 3. The County misses the point that this is a *duty* argument, a legal argument. It is important to note that this Court discussed the ITA in connection with the duty issue in *Petersen*, but did not require Petersen to prove that the hospital patient was eligible for involuntary treatment factually.

Skagit County also argued on summary judgment and in reply that a gross negligence standard would apply to any decisions taken under RCW 71.05.120(1). *See* CP 2135, 3592-93. The exemption statute, RCW 71.05.120(1), generally provides for no

Dr. Hegyvary's testimony makes clear that there is a question of fact as to causation. Additionally, the availability of involuntary treatment for Zamora under RCW 71.05 undercuts the trial court's causation analysis. The trial court should have denied any motion for summary judgment as to causation as such issue was for a jury to resolve.

F. CONCLUSION

The trial court erred in ruling that the Counties had no duty to the victims of Isaac Zamora's violent rampage even though those Counties knew of his deteriorating mental health and yet they failed to evaluate or treat his problems when he was incarcerated in their Jails. Similarly, the trial court erred in ruling on proximate causation as a matter of law.

This Court should reverse the trial court's summary judgment and remand the case to the trial court for a trial on the merits of the violence

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liability regarding the decision on whether to detain a person for evaluation and treatment, *provided* such decision was performed in good faith and without gross negligence. The violence victims' position in opposing these motions was that the ITA's "gross negligence" provision, which applies to a decision regarding *detaining* a person for evaluation and treatment, never came into play because the Counties never even attempted to have Zamora assessed while he was in their custody. *See* CP 2521-23. *See also*, RP (4-23-13) at 46-47.

Judge Fair discussed the proximate cause arguments in her May 29, 2013 order granting summary judgment. *See* CP 210, 215. But the only mention in the order related to the ITA is the court's conclusion that Okanogan County could not have detained Zamora past his release date, and that "RCW 71.05.120(1) [i.e. the ITA's exemption provision] does not apply." CP 210. The order is otherwise silent regarding the ITA. Thus, to the extent the Counties are claiming that they prevailed on any ITA issue, as unopposed and thus waived, they are being disingenuous.

victims' case against the Counties. Costs on appeal should be awarded to the violence victims.

DATED this 5th day of December, 2013.

Respectfully submitted,

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APPENDIX

FILED

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SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

CL15917817

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

FRED BINSCHUS, individually and as Personal Representative of the Estate of JULIE ANN BINSCHUS; TONYA FENTON; TRISHA WOODS; TAMMY MORRIS; JOANN GILLUM, as Personal Representative of the Estate of GREGORY N. GILLUM; CARLA J. LANGE, individually and as Personal Representative of the Estate of LEROY B. LANGE; NICHOLAS LEE LANGE, Individually; ANDREA ROSE, individually and as Personal Representative of the Estate of CHESTER M. ROSE; STACY ROSE, Individually; RICHARD TRESTON and CAROL TRESTON, and the martial community thereof; BEN MERCADO; PAMELA RADCLIFFE, Individually and as Personal Representative of the Estate of DAVID RADCLIFFE; and TROY GIDDINGS, Individually, Plaintiffs, vs. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS; SKAGIT EMERGENCY COMMUNICATIONS CENTER d/b/a "Skagit 911," an interlocal government agency; SKAGIT COUNTY, a political subdivision of the State of Washington; and OKANOGAN COUNTY, a political subdivision of the State of Washington, Defendants.	Case No.: 11-2-08078-0 ORDER ON SUMMARY JUDGMENT

ORDER ON SUMMARY JUDGMENT

231

This matter comes before the Court on Defendants Okanogan County, Skagit County, and Skagit 911's motions for summary judgment. Also before the Court is Plaintiffs' motion for summary judgment on the issue of duty. The Court has reviewed the motions, the responses, the replies, the motions to strike, and all related papers in this matter. The Court GRANTS Defendant Okanogan's motion for summary judgment on the issues of duty and proximate cause. The Court GRANTS Defendant Skagit County's motion for summary judgment on the issue of duty. The Court DENIES Skagit County's motion for summary judgment, in part, on the issue of proximate cause as it relates to Deputy Esskew's actions, and GRANTS summary judgment, in part, on the issue of proximate cause as it relates to Skagit County Jail's actions. The Court GRANTS Defendant Skagit 911's motion for summary judgment on the issue of duty and DENIES summary judgment on the issue of proximate cause. The Court DENIES Plaintiffs' motion for summary judgment on the issue of the public duty doctrine.

Background

This is a civil case arising from the shooting spree and multiple homicides committed by Isaac Zamora ("Zamora") on September 2, 2008 in and around Alger, Washington. This lawsuit is brought by the estates of five people killed by Zamora including Chester Rose, Gregory Gillum, David Radcliffe, Julie Binschus, and Leroy Lange. Joining in the suit are four of the people injured by Zamora including Fred Binschus, Richard Treston, Ben Mercado, and Troy Giddings.

Prior to his shooting spree, Zamora was incarcerated by Skagit County Jail and Okanogan County Jail ("Okanogan") for non-violent crimes. Skagit County Jail incarcerated Zamora from April 4, 2008 through May 29, 2008. On May 29, 2008, Skagit County Jail transferred Zamora to Okanogan to serve the remainder of his sentence. When Skagit County Jail transferred Zamora it

sent some, but not all, of Zamora's medical files to Okanogan. Okanogan never requested the missing records from Skagit County Jail. During his time at Okanogan, Zamora met with medical personnel, but did not receive a mental health assessment. Zamora's stay at Okanogan was without incident. Okanogan released Zamora on August 2, 2008.

On September 2, 2008, after receiving two calls concerning alleged incidents of trespassing involving Zamora, Skagit 911 dispatched Deputy Ann Jackson and Deputy Terry Esskew to the Zamora residence. (Compl. ¶ 89.) After speaking with Zamora's mother about the incidents, Deputy Jackson and Deputy Esskew split up. Deputy Jackson went to Chester Rose's residence to give him a witness statement form. Deputy Esskew left Zamora's home and drove through the area looking for Zamora. When he did not find Zamora, Deputy Esskew returned to the Sherriff's Department.

During this time, Deputy Jackson radioed Skagit 911 and reported she was leaving the Zamora residence to head to the Rose residence. (Compl. ¶ 91; Flewelling Decl., Ex. C.) Deputy Jackson told Skagit 911 of Deputy Esskew's departure. Id. That was the last communication Deputy Jackson had with Skagit 911. Skagit 911's policies required dispatchers to perform a status check on deputies for routine investigative calls after twenty minutes of silence. (Id., Ex. F.) It is undisputed that Skagit 911 did not make the required status check on Deputy Jackson during the requisite time period. (Compl. ¶ 93.) Skagit 911 eventually radioed Deputy Jackson to check her status, but she did not respond. Id. It appears that Zamora shot and killed Mr. Rose and Deputy Jackson during this time period. Zamora then killed or injured the other victims and finally surrendered himself at the Skagit County Sherriff's Office.

Okanogan moves for summary judgment on Plaintiffs' negligence claim on the theory that it had no duty to third persons injured after Zamora's release based on a failure to identify,

diagnose, and treat Zamora's mental illness. Skagit County moves for summary judgment on Plaintiffs' negligence claim on the theory that it had no duty to control Zamora after his release. Further, Skagit County argues that Sherriff Deputy Esskew's actions in leaving Deputy Jackson alone did not create a recognizable high degree of harm to Plaintiffs. Skagit 911 moves for summary judgment on Plaintiffs' negligence claim on the theory that it had no duty to Plaintiffs because its actions in failing to perform the status check on Deputy Jackson did not create the opportunity for Zamora to commit his crimes nor provide Zamora with the instrumentality to commit his crimes. Plaintiffs move for summary judgment only on the issue of duty. No party presented any dispute over material facts. The motions considered only matters of law. The Court will address each motion separately. The Court finds as follows:

Analysis

A. Summary Judgment Standard

A court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Cummins v. Lewis County, 156 Wn.2d 844, 852 (2006); CR 56(c). A court views the underlying facts in the light most favorable to the party opposing the motion. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 784 (2011).

The elements of a negligence cause of action are duty, breach, causation, and damages. Couch v. Wash. Dep't. of Corr., 113 Wn. App. 556, 563 (2002). In a negligence action, the threshold determination is whether defendant owed an actionable duty to plaintiff. Id. That determination is a question of law. Cummins, 156 Wn.2d at 852.

B. Okanogan County

The Court grants Okanogan's motion for summary judgment on Plaintiffs' negligence claim. The Court finds that Okanogan did not owe a duty with regard to the actions of Zamora toward Plaintiffs. The Court also finds that Okanogan's actions were not the proximate cause of Plaintiffs' injuries.

1. Duty

Plaintiffs argue Okanogan had a duty under two theories in this case. First, Plaintiffs argue Okanogan had a special relationship with Zamora and therefore a duty toward third persons who might forseeably be endangered by him under Restatement (Second) of Torts §315 and §319. Second, Plaintiffs argue Okanogan had a duty toward Plaintiffs because Okanogan's failure to treat Zamora created a recognizable high degree of risk of harm under Restatement (Second) of Torts §302B. The Court finds Okanogan did not owe either duty in this case.

a. No Duty Under Restatement (Second) of Torts §315 and §319

Plaintiffs argue Okanogan had a duty to control Zamora and prevent any harm he might inflict. In general, an actor has no duty to "prevent the criminal conduct of a third person." Restatement (Second) of Torts §315. An exception exists, however, when a "special relationship" between the actor and the third person "imposes a duty upon the actor to control the third person's conduct[.]" Id.; Couch, 113 Wn. App at 564. Such a relationship must be definite, established, and continuing, but need not be custodial. Id. Thus, the Restatement provides that "[o]ne 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; Couch, 113 Wn. App. at 564-65. Any take charge duty a corrections entity owes under Restatement

(Second) of Torts §319 exists only to the extent that entity controls or has the ability to control the actions of the third person. See Hungerford v. State of Wash. Dep't of Corr., 135 Wn. App. 240, 253 (2006).

Here, Okanogan incarcerated Zamora from May 29, 2008 through August 2, 2008. (Brunson Decl., Ex. 1 at 7-8.) During the time Okanogan incarcerated Zamora, it had a take charge duty towards him. Any Restatement (Second) of Torts §319 duty Okanogan owed Zamora during this time terminated at the conclusion of Okanogan's incarceration of Zamora. The parties did not cite any case to the Court establishing a duty owed to protect unidentified victims in a situation where the entity has no ability to control the behavior of the actor.

Plaintiffs cite to Petersen v. State for the contention that Okanogan owed a duty to use reasonable care to protect any potential victims of an inmate. 100 Wn.2d 421 (1983). Under Petersen, if a therapist determines or should determine a patient presents a serious danger of violence to another, the therapist has an obligation to use reasonable care to protect the potential victim. Id. In Petersen, the court found that the defendant therapist owed a duty to potential victims of his patient because he had an ability to control the future behavior of his patient. For example, the therapist could file a petition to detain the potentially violent patient. In this case, Okanogan could have, at most, assessed Zamora for mental health issues and prescribed medication. Based on the undisputed facts, Okanogan had no ability to require Zamora to take his medication. More importantly, Okanogan had no ability to even file a petition to commit Zamora past the end of his incarceration. Therefore, the Court finds Okanogan had no ability to control Zamora's behavior after his release from custody.

Plaintiffs' theory would require this Court to find that jails have a general duty to treat mentally ill offenders in order to prevent crimes that may occur after the jails release the

offenders from their periods of incarceration. While jails may have an obligation to treat mentally ill offenders for known conditions while in custody, extending that duty to impose liability after release would impose an extension of liability that is not supported by the current case law or public policy.

b. No Duty Under Restatement (Second) of Torts §302B

Plaintiffs argue Okanogan committed affirmative acts which created a duty toward Plaintiffs. The Restatement (Second) of Torts §302B states in pertinent part: "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." See, e.g., Robb v. City of Seattle, 176 Wn.2d 427, 433 (2013). Courts will find an affirmative act created a recognizable high degree of risk of harm where the defendant created an opportunity for a third party to commit a crime and provided the third party with the instrumentality to commit the crime. For example, in Parilla v. King County, the court found a city bus driver acted in an affirmative manner which created a recognizable high degree of risk of harm where the bus driver left a running bus unattended with a noticeably volatile and unstable individual onboard and the individual immediately stole the bus and proceeded to collide with another vehicle. 138 Wn. App. 427 (2007). In contrast, in Robb v. City of Seattle, the court found the police's actions did not create a recognizable high degree of risk of harm where the police failed to pick up bullets from the ground during a *Terry* stop when the person detained returned to scene of the stop and picked up the bullets which he later used to shoot a third party. 176 Wn.2d at 433.

Here, Plaintiffs allege Okanogan committed the following affirmative acts which created a duty towards Plaintiffs: Okanogan (1) accepted responsibility for Zamora's mental healthcare

when it incarcerated him, (2) ignored the gaps in Zamora's health records contrary to county practices, (3) decided not to enter Zamora's seizure medication into his records, despite knowing he did not have a seizure condition, (4) chose not to write chart notes about Zamora's health condition, and (5) failed to perform a mental health assessment. Plaintiffs contend these actions constitute affirmative acts which created a recognizable high degree risk of harm to others when Okanogan released Zamora. However, nothing in the record indicates Okanogan knew or should have known of any mental health issues of Zamora, which would create a recognizable high degree of risk of harm to others upon release. Further, Okanogan did not provide the instrumentality or opportunity for Zamora to commit his crimes. Nothing in the record supports Plaintiffs' contention that Okanogan's lack of mental health treatment somehow constitutes an affirmative act contemplated by Robb and Parilla. Further, the Court finds there is no evidence in the record that Okanogan could have detained Zamora under RCW 71.05.120(1) past his release date. Therefore, RCW 71.05.120(1) does not apply. The Court finds Okanogan had no duty under §302B of the Restatement.

2. **Proximate Causation**

Plaintiffs allege that Okanogan's acts proximately caused their injuries. A claim for negligence requires that the breach of a duty be a proximate cause of the claimed injury or damages. Hartley v. State, 103 Wn.2d 768, 777 (1985). The issue of proximate cause can be decided on summary judgment where reasonable minds could not differ. Bowers v. Marzano, 170 Wn. App. 498, 506 (2012).

Here, Plaintiffs' proximate cause theory is that Zamora suffered from mental illness while incarcerated at Okanogan and his illness worsened as a direct result of Okanogan's failure to treat him which led to Plaintiffs' harm. Plaintiffs argue that if Okanogan appropriately

assessed Zamora, he would have received treatment and cooperated with that treatment. Plaintiffs' arguments also assume that Zamora would have continued the appropriate medication and treatment after his release. Further, Plaintiffs argue that such appropriate medication and treatment would have prevented the horrific events of September 2, 2008.

Even if the Court accepts that the jail had enough information to result in a thorough mental health assessment and that Zamora would have taken any medication dispensed by the jail, there is nothing in the record to show he would have had medication available to him after his release. Okanogan had no ability to supervise him post release. The only medication that seemingly would have been effective post release, as delineated by declaration, was injection. Nothing in the record indicates this medication was available in the jail or would have been prescribed in the jail. Therefore, the Court finds that because the causal relationship between Okanogan's failure to provide mental health treatment to Zamora while incarcerated and the events occurring a month after his release has not been established, Okanogan's actions were not the proximate cause of Plaintiffs' injuries.

3. **Conclusion Re: Okanogan County**

Okanogan did not owe a duty under Restatement (Second) of Torts §302B, §315, and §319. Further, Okanogan's actions were not the proximate cause of Plaintiffs' injuries. Therefore, the Court GRANTS Okanogan's motion for summary judgment on the issues of duty and proximate cause.

C. Skagit County

Plaintiffs' allegations include two theories against Skagit County. The Court will address each matter in turn. First, the Court will address Plaintiffs' allegations regarding the conduct of

Skagit County Jail and its employees. Second, the Court will address Plaintiffs' allegations regarding the conduct of Skagit County Sherriff Department's Deputy Esskew.

1. Skagit County Jail

a. No Duty Under Restatement (Second) of Torts §315 and §319

Plaintiffs argue Skagit County Jail had a duty under Restatement (Second) of Torts §315 and §319. The Restatement provides that "[o]ne 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; Couch, 113 Wn. App. at 564-65. Any take charge duty an entity owes under Restatement (Second) of Torts §319 must be based on the presumption that the entity can control the actor. In the case of a jail, this duty would exist only during the period of incarceration. See Hungerford, 135 Wn. App. at 253.

Here, Skagit County jail incarcerated Zamora from April 4, 2008 through May 29, 2008. Plaintiffs argue that Skagit County had a duty while Okanogan jail incarcerated Zamora; however, there is no evidence that Skagit County Jail had any authority over Zamora or an ability to direct him or Okanogan to do anything after he was transferred out of Skagit County Jail. It appears Plaintiffs base their argument mainly on Skagit County Jail's failure to provide complete records detailing Zamora's mental health issues to Okanogan upon transfer. At best, providing records would have led Okanogan to request a mental health assessment, which might or might not have led to treatment with which Zamora might or might not have participated. Even had Skagit County sent records to Okanogan, they had no ability to control the acts of Zamora while incarcerated, the acts of Okanogan County, or the acts of Zamora after his release. As to both Okanogan and Skagit County Jails, the Plaintiffs also argue that if the breach occurs

while the duty is in existence, and the injury occurs later, then liability would still apply, citing language in Couch. 113 Wn. App. 556 (2002). However, Hungerford v. State of Wash. Dep't of Corr. makes it clear that once the special relationship giving rise to the duty ends, the duty ends as well. 135 Wn. App. at 253. It is logical that if that concept applies to DOC supervision cases, it should certainly apply to incarceration cases. Therefore, Restatement (Second) of Torts §319 and §315 duties would not have been in effect after Skagit County jail transferred Zamora to Okanogan. Nor were those duties in effect after his release on August 2, 2008.

b. No Duty Under Restatement (Second) of Torts §302B

Plaintiffs also argue that Skagit County Jail's failure to provide medical records to Okanogan was an affirmative act under Restatement (Second) of Torts §302B. Under §302B, "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." See, e.g., Robb, 176 Wn.2d at 433. Courts will find an affirmative act created a recognizable high degree of risk of harm where the defendant created an opportunity for a third party to commit a crime and provided the third party with the instrumentality to commit the crime. Id. For example, in Robb v. City of Seattle, the court adopted an analogy posed by the plaintiff to illustrate how a new or increased risk could be an affirmative action. In the hypothetical situation, a negligent driver fails to apply his or her brakes as a pedestrian crosses the street in front of the car. Such a situation, the Robb court noted, would lead to a finding of an affirmative act because the driver affirmatively created a new risk to the pedestrian by failing to stop his or her car.

The Court finds a distinction between this case and the hypothetical posed by the Robb court. While the court in that case may have found that the failure to brake a moving vehicle can

be an affirmative act, here, Skagit County Jail's failure to provide medical records to Okanogan was not an affirmative act. Further, the applicable test delineated under Parilla and Robb centers on whether the affirmative act creates a recognizable high degree of risk of harm. Skagit County Jail's failure to provide medical records did not create a new, direct, and immediate risk to Plaintiffs similar to the risk created by the driver that failed to brake for a pedestrian. Similarly, that test asks whether the defendant created an opportunity for a third party to commit a crime and provided the instrumentality to commit the crime. In no way did the action or inaction of Skagit County Jail create the opportunity for Zamora to commit his crimes, nor did it provide Zamora with the instrumentality to commit his crimes. Thus, the actions of Skagit County Jail do not constitute affirmative acts under §302B.

2. **Skagit County Sherriff Deputy Esskew**

Plaintiffs only theory of liability with respect to Deputy Esskew's actions is that his failure to accompany Deputy Jackson constituted an affirmative act under §302B. Plaintiffs' argument is that Deputy Esskew and the Sherriff's department knew Zamora had a history of mental illness, knew Zamora had been wandering into at least two neighbors' homes and was acting strangely, knew Zamora had been at the location where Deputy Jackson was headed approximately one hour to one and a half hours previously, and did not know Zamora's current location. The facts show that Deputy Jackson was going to the Rose residence to speak to Mr. Rose. Mr. Rose indicated Zamora was not aggressive. The neighbor who called the previous day told Deputy Jackson to "be careful" as he felt Zamora was acting so strangely. There is no evidence that this information was communicated to Deputy Esskew. Deputy Esskew drove through the area looking for Zamora without success and returned to the Sherriff's department.

Under these facts, Deputy Esskew's acts did not create a recognizable high degree of risk of harm nor create an opportunity and instrumentality for a third party (Zamora) to commit a crime. While the benefit of hindsight might suggest a different course of action, the evidence must be viewed based on what was known at the time. Deputy Esskew's actions prior to Deputy Jackson's arrival at the Rose residence did not create a recognizable high degree of risk of harm. Zamora was not provided with an instrumentality to commit his crimes by Deputy Esskew's absence. Therefore, the Court cannot find that Deputy Esskew's actions created a duty under §302B.

e. Proximate Cause

Had this Court found that a duty existed, this Court would find it more appropriate for a finder of fact to decide the issue of proximate cause with respect to Deputy Esskew's actions only. Therefore, this Court DENIES Skagit County's motion for summary judgment on the issue of proximate cause as to Deputy Esskew's actions only. Based on the reasoning the Court set forth regarding proximate cause concerning Okanogan County, this Court GRANTS summary judgment on the issue of proximate cause as to Skagit County's actions of not forwarding mental health records.

3. Conclusion Re: Skagit County

Skagit County Jail's actions did not create a duty under Restatement (Second) of Torts §302B, §315, and §319. Further, Skagit County Deputy Esskew's actions did not create a duty under Restatement (Second) of Torts §302B. Therefore, the Court GRANTS Skagit County's motion for summary judgment on the issue of duty.

D. Skagit 911

1. Duty

The public duty doctrine applies to Skagit 911. The special relationship exception to the public duty doctrine cannot be established under the facts of this case. The Plaintiffs argue that under Restatement (Second) of Torts §302B, Skagit 911's acts constituted affirmative acts which created a recognizable high degree of risk of harm to the Plaintiffs. See, e.g., Robb, 176 Wn.2d at 433. The undisputed facts are: Skagit 911 was aware that (1) Zamora had a history of mental illness, (2) Zamora had been wandering into neighbors' houses and acting strangely, (3) Zamora had been at Mr. Rose's residence approximately one hour before the shootings, (4) Deputy Jackson was going to Mr. Rose's residence to speak with Mr. Rose, (5) Deputy Jackson was alone, (6) dispatchers were to perform status checks every twenty minutes, and (7) Deputy Jackson had not communicated with dispatch since 3:02 p.m. Skagit 911's policies required dispatchers to perform a status check on deputies for routine investigative calls after twenty minutes of silence. From 3:02 p.m. to 3:51 p.m., Skagit 911 did not make the required status check on Deputy Jackson. At 3:51 p.m., Skagit 911 radioed Deputy Jackson to check on her status, but she did not respond. When units arrived at the Rose residence they found Deputy Jackson and Mr. Rose deceased. According to determinations submitted by investigators, after shooting Mr. Rose and Deputy Jackson, Zamora went to a different residence and shot Plaintiffs David Radcliffe and Gregory Gillum, stole Mr. Radcliffe's truck, shot Fred Binschus and killed Julie Binschus, drove to Richard Treston's home and stabbed him, shot Benito Mercado, Leroy Lange, and Trooper Giddings, and finally surrendered himself.

There can be no question that Skagit 911's failure to perform the status check was a failure to follow its own policies, and that it certainly created a recognizable risk to Deputy

Jackson. The question is whether or not the failed status check was an affirmative act, and if it was, whether it created a recognizable high degree of risk to Plaintiffs that any reasonable person would have considered? Articulated another way, did the failure to provide the status check create an opportunity for Zamora (the third party) to commit a crime and provide the third party (Zamora) with the instrumentality to commit the crime? Having reviewed both Parilla and Robb, this Court finds the factual situation in this case to be more similar to the Robb case. As in Robb, the failure to perform the status check on Deputy Jackson, at most, failed to eliminate a situation of peril, but did not increase the danger by an affirmative act. Skagit 911's failure to perform a status check was an act of nonfeasance; Skagit 911 did not create a new risk of harm to Plaintiffs, but instead failed to lessen or eliminate risk to Plaintiffs by not doing a status check. This failure resulted in deputies being dispatched to the Rose residence later than if the status check had been performed at the correct time. As in Robb, the situation of peril existed prior to the time of the status check. Therefore, this Court cannot find that Skagit 911's actions created a duty to Plaintiffs under §302B.

2. **Proximate Cause**

Had this Court found that a duty to Plaintiffs existed, the Court would find that a trier of fact should decide the issue of proximate cause with respect to Skagit 911's actions. Therefore, the Court DENIES Skagit 911's motion for summary judgment on the issue of proximate cause.

3. **Conclusion Re: Skagit 911**

It is undisputed that none of the recognized exceptions to the public duty doctrine apply. Under the facts of this case, Skagit 911 owed no duty to Plaintiffs under §302B. Therefore, the Court GRANTS Skagit 911's motion for summary judgment on the issue of duty.

E. Plaintiffs' Motion for Summary Judgment

Plaintiffs move for summary judgment asking the Court to find that the public duty doctrine does not apply in this case. All parties appear to agree at this point that the source of duties in the case are §§ 315, 319, and 302B of the Restatement (Second) of Torts. Further, all parties appear to agree that the recognized exceptions to the public duty doctrine do not apply. As to Okanogan, Skagit County, and Skagit 911, the Court finds that §§ 315, 319, and 302B do not give rise to duties toward the Plaintiffs in this case. Therefore, in the absence of common law duties under the Restatement and any exception to the public duty doctrine, the public duty doctrine would apply to bar the actions with respect to Okanogan, Skagit County, and Skagit 911. The Court DENIES Plaintiffs' motion for summary judgment with respect to those entities.

Conclusion

The Court GRANTS Defendant Okanogan's motion for summary judgment on the issues of duty and proximate cause. The Court GRANTS Defendant Skagit County's motion for summary judgment on the issue of duty. The Court DENIES Skagit County's motion for summary judgment, in part, on the issue of proximate cause as it relates to Deputy Esskew's actions, and GRANTS summary judgment, in part, on the issue of proximate cause as it relates to Skagit County Jail's actions. The Court GRANTS Defendant Skagit 911's motion for summary judgment on the issue of duty and DENIES summary judgment on the issue of proximate cause. The Court DENIES Plaintiffs' motion for summary judgment on the issue of the public duty doctrine.

DATED this 24 day of MAY, 2013.

ELLEN J. FAIR, JUDGE

DECLARATION OF SERVICE

On said day below I emailed a copy for service a true and accurate copy of the Brief of Appellants in Supreme Court Cause No.89256-3 to the following:

Nathan Roberts John Connelly Vickie Shirer Connelly Law Offices, PLLC 2301 North 30th Street Tacoma, WA 98403	Jaime D. Allen Jeffrey D. Dunbar Ogden Murphy Wallace PLLC 901 5th Avenue, Suite 3500 Seattle, WA 98164-2008
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Original emailed for filing with:
Washington Supreme Court
Clerk's Office
415 12th Street W
Olympia, WA 98504-0929

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

DATED: December 5, 2013, at Tukwila, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

From: TLG Assistant <assistant@tal-fitzlaw.com>
Sent: Thursday, December 05, 2013 10:11 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Nathan Roberts; Vshirer@connelly-law.com; jallen@omwlaw.com; jdunbar@omwlaw.com; gene@genemoses.net; jjustice@lldkb.com; wmc@cnrlaw.com; sue@cnrlaw.com; pault@atg.wa.gov; joshuac1@atg.wa.gov; tadr@atg.wa.gov; Graces1@atg.wa.gov; dianah@atg.wa.gov; ckerley@ecl-law.com; dbrett@brettlaw.com; amchugh@brettlaw.com; itaylor@brettlaw.com; arned@co.skagit.wa.us; jconnelly@connelly-law.com
Subject: Brief of Appellants Cause No. 89256-3
Attachments: Brief of Appellants.pdf

Good Morning:

Attached please find the Brief of Appellants in Supreme Court Cause No. 89256-3 for today's filling.

Sincerely,

Roya Kolahi
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