

NO. 67475-7-1  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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THE ESTATE OF ZINA LINNIK, and MIKHAIL and VALENTINA  
LINNIK, a married couple, and STANISLAV M. LINNIK, and NINA  
LINNIK, and MIKHAIL LINNIK, as parent and guardian for PAVEL  
LINNIK, SVETLANA LINNIK, OKSANA LINNIK, VADIM LINNIK,  
SAMUEL LINNIK, his minor children,

Appellants

vs.

STATE OF WASHINGTON, by and through its various state agencies  
and subdivisions, including DEPARTMENT OF CORRECTIONS and  
CHILD PROTECTIVE SERVICES, and PIERCE COUNTY, a  
municipal corporation, and CITY OF TACOMA,

Respondent.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
NO. 10-2-13557-2 KNT

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**REPLY BRIEF OF APPELLANT RE: STATE OF WASHINGTON**

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## **I. INTRODUCTION**

The State of Washington continues to argue that no liability can be found in a circumstance where its continued failures to investigate, monitor, or supervise a known child rapist, Terapon Adhahn, resulted in Adhahn being free to kidnap, rape, and murder Zina Linnik, because it never owed a particularized duty toward her and that her murder is too remote in time for liability to attach to the State. Under Washington law, the State is liable just as any other individual who breaches a duty, and without intervening acts or circumstances, that breach is directly responsible for harm to another.

The State argues that as a matter of policy, no liability should attach because it “places no limit whatsoever on potential State liability for acts committed by offenders who have been released from DOC supervision.” Adopting the State’s argument would create a perverse incentive for the State to negligently release offenders from supervision as soon as they can, however, so as to avoid liability for their acts. This is contrary to policy and common sense, and this Court should not so hold.

## **II. STATEMENT OF ADDITIONAL FACTS**

Between 1992 and 2007, Terapon Adhahn committed four counts of rape in the first degree, three counts of rape in the second degree, three counts of rape in the third degree, one count of kidnapping in the first

degree, and failure to register as a sex offender, to which he pled guilty in 2007.<sup>1</sup> Adhahn's convictions do not reveal the true level of his abuses. Adhahn abducted Sabrina Rasmussen by laying in wait in his car while children walked past on their way to elementary school. Just as he would do with Zina Linnik years later, he grabbed her and dragged her back to his waiting vehicle where he bound her hands and feet. He then took her to a secluded area and anally raped her inflicting upon her as much pain as he possibly could. Indeed, his victim required surgery to repair her torn and mangled body. Adhahn also admitted that he purchased the twelve year old girl, L.T.N. for \$2,000.00. Adhahn raped her continuously over a four year reign of terror. Adhahn is also a suspect in the kidnap and murder of Adre' Anna Jackson in late 2005. CP 2658-2663.

Adhahn is legal permanent resident, or "green card" holder. He first entered the U.S. in 1976. CP 2676. Legal permanent residents who have been in the U.S. more than five years may be deported for two crimes of moral turpitude or for one aggravated felony. CP 1723, CP 3008. Incest is a crime of moral turpitude. CP 3010-3011. So is brandishing a weapon with intent to cause intimidation or fear of harm. CP 3008, CP 2676. Adhahn was convicted of incest in 1990, and of intimidation with a

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<sup>1</sup> Plaintiffs also rely on the facts of their opening brief and other replies on file with this Court.

weapon in 1992. Thus, had the INS been informed of these convictions, Adhahn would have been deported or refused re-entry to the U.S. at any time after his 1992 conviction. CP 3008. In addition, under changes to immigration law that took effect in 1997 but are applied retroactively, the incest conviction is an aggravated felony and thus rendered Adhahn subject to mandatory deportation, because it involved incest with a minor. CP 3008, 3011. Adhahn's half-sister had just turned 16 years old at the time of the rape—under federal definitions applied in immigration court at that time, incest with a child under age 18 was an aggravated felony for purposes of federal immigration law. *Id.*

Thus, based on the crimes of which Adhahn had actually been convicted by 1992, he was deportable anytime after his 1992 conviction, and subject to mandatory deportation anytime after April 1997. CP 3024, Cp 3026-3027, CP 3005-3022. An alien subject to mandatory deportation has very limited options for contesting deportation—all of which would not have mattered, because Adhahn has repeatedly said that he would not have contested deportation. CP 2953, 2971, 2984. This is so even if he had not been convicted for rapes of L.T.N. reported to CPS in 2004; this is so even if he had not been convicted of failure to register as a sex offender, and this is so even if he had not been convicted of the kidnapping and rape of Sabrina Rasmussen in 2000. Had Adhahn been

pursued and convicted for those crimes, it is only more likely that he would have been deported or incarcerated. CP 3024, CP 3008-3009. And in fact, when Adhahn was apprehended for Zina's murder, he was initially detained on immigration charges for the 1990 and 1992 convictions because ICE viewed both as crimes of moral turpitude. Notably, Adhahn did not contest the deportation, but instead "submitted a request...to be deported as soon as possible." CP 2729.

Department of Corrections officers, including Community Corrections Officers, have a standard practice of maintaining contact with immigration authorities and advising them of any new convictions. CP 3033, CP 3014. Jails and prisons in Washington have a statutory obligation under RCW 10.70.140 to report non-citizens to immigration authorities. In fact, Corrections Officers working for the State system will often become aware of additional convictions via immigration authorities, who learn of them via the jails. CP 3033. This flow of information results, as it should, in deportation of repeat offenders. Stough CP 3033, CP 3014.

As a consequence of the State's failure to act, children were raped and murdered. In 2004 CPS received remarkably accurate and detailed referrals reporting that Adhahn, a registered sex offender, was living with a young girl who he purchased. CP 2976. CPS improperly designated the case as a third party referral and sent the initial referral to Pierce County.

CPS claims it sent follow up referral information to Pierce County when the referents phoned in additional information. Pierce County denies that CPS sent any additional information. Regardless, CPS did not investigate this referral itself, but “screened it out” to law enforcement. The Children’s Administration Practices and Procedures guide in effect in January, 2004 states that:

- D. CA must provide CPS only to a child alleged to have been abused or neglected by:
  - 1. The child’s parent or a person acting in loco parentis. Such persons include...but are not limited to:
    - a. Parents (custodial and non-custodial)
    - b. Step-parents.
    - c. Guardians
    - d. Legal custodians
  - 2. The child’s sibling, when the child’s parent has failed to protect the child.
  - 3. Any person residing with and/or having care-taking responsibilities for the child.

*Id.* § 2210(D) (emphasis added). CPS never assigned a caseworker to investigate whether a mother truly had sold her daughter into slavery, an allegation that was later confirmed. CPS also failed to investigate Adhahn as the girl’s apparent caretaker. CPS did not cross reference Adhahn’s name to determine that he was in fact an absconded registered sex offender.

The evidence indicates that, had CPS non-negligently investigated the 2004 referral, it is likely, if not certain, that Adhahn would have either

been deported or in jail by July, 2007. Any competent prosecutor, faced with a new child rape from a previous child rapist, would have pursued the investigation and charged for the crime if possible. CP 3088-3093. Even if L.T.N. had refused to cooperate, a charge for failure to register would have been both possible and desirable as a means of deterring Adhahn and getting his DNA into the state database. *Id.* Even the minimum conviction likely to result from an adequate investigation of the 2004 referral—a conviction for failure to register—would have resulted in the collection of Adhahn’s DNA under RCW 43.43.754. Adhahn never registered at the address where he and L.T.N. were living when he assaulted her. CP 2646-2657. Since 2002, Adhahn’s DNA from the 2000 rape of Sabrina Rasmussen had been processed and was documented in the “John Doe” Information in that case. CP 2636-2645. Law enforcement officials have stated that if Adhahn’s DNA were on file, he likely would have been picked up for the Rasmussen rape before he kidnapped Zina Linnik in 2007. CP 2689-2690. An adequate investigation would have led to Adhahn’s conviction for the Rasmussen rape and kidnapping in 2004, rather than in 2008.

Had Adhahn been convicted of raping L.T.N. in 2004, that would have been an aggravated felony resulting in his mandatory deportation. CP 3024, 3029, CP 3009. So would any conviction for the Rasmussen

kidnapping and rape. CP 3009. A conviction for the assaults on L.T.N. would have resulted in a prison term of between 15 and 160 months, depending on whether the conviction rested only on L.T.N.'s age, or whether forcible compulsion was proven. See RCW 9.94A.510, .515, .525. A conviction for the kidnapping and rape of Sabrina Rasmussen would have resulted in a prison term of between 120 and 160 months on the rape, and 67 to 89 months on the kidnapping. *Id.* Even a conviction for failure to register would more likely than not have resulted in deportation, because at that time immigration courts were treating failure to register as a crime of moral turpitude, and ICE was eager to deport sex offenders. CP 3024, CP 3012. Any sentence of 42 months or more would have put Adhahn behind bars at the time he raped and killed Zina. As set forth above and in the declarations of Carlos Sosa and John Sampson, any additional conviction was also highly likely to result in Adhahn's deportation because he was already subject to mandatory deportation for the 1990 incest—an additional sex crime against a child would only have brought him to ICE attention and made him a higher priority for deportation.

### **III. ARGUMENT**

The legislature of the State of Washington has continually emphasized that protecting children of this state is of paramount

importance. Yet the State repeatedly failed to supervise, report, or otherwise investigate Terapon Adhahn while he was under its control and when later faced with specific information that Adhahn was again raping children. Because of these failures, numerous opportunities to remove a dangerous child rapist from the community were missed, and children were injured. Contrary to the State's assertions, Plaintiffs here have presented evidence from which a reasonable jury could find that the State had a duty to protect children from the predations of a violent rapist, that this duty was breached when the State did not do what it could to keep Adhahn off the streets and away from foreseeable victims, and that this breach proximately resulted in the kidnapping and murder of Zina Linnik.

The State proposes a new radical rule re-imposing sovereign immunity. It asserts that a duty of care can only be judicially imposed upon the State if the legislature says so. The State argues that because "state agencies are creatures of statute; the role of creating new legal duties and obligations owed by government agencies is constitutionally delegated to the legislature, not the superior court." State's Response at 10 (citing *Murphy v. State*, 115 Wn. App. 297, 317, 62 P.3d 533 (2003)). This argument is absurd in light of the legislature's choice, by statute, to abrogate sovereign immunity and make state agencies liable "to the same extent as if they were a private person or corporation." RCW 4.94.010. It

also ignores the voluminous precedent in which state agencies and other political divisions are routinely held liable for violating common law duties. See, e.g. *Brown v. MacPherson's, Inc.* 86 Wn.2d 293, 545 P.2d 13 (1975) ) (common law duty under the rescue doctrine, Restatement (Second) of Torts §§ 323, 324); *Joyce v. State*, 155 Wn.2d 306, 119 P.3d 825 (2005) (common law take-charge duty under Rest. 319); *Robb*, 159 Wn. App. 133. Under RCW 4.94.010 and Washington precedent, the State owes common law duties where the plaintiff can demonstrate a duty running to the plaintiff as an individual, rather than to the general public.

**A. The State acts are cumulatively responsible for harm to Zina Linnik.**

The State, like the other defendants in this case, continues to argue that its various acts of negligence should be parsed out and divided into separate negligence torts, each of which would then require a separate duty and chain of causation. Under the government's analysis, each negligent act must sit alone and be fully sufficient to cause the plaintiffs' damages. Tort law, however, does not operate this way. Multiple negligent acts, each of which would by itself be insufficient to be a more-than-likely but-for cause of the plaintiff's harm, may be considered together where, as here, they combine to cause an indivisible harm.

Further, the plaintiffs are not bound to the facts of other cases to demonstrate the existence of a duty in this case. There is no requirement that the case law previously establishing a duty be factually identical with the case at issue, only that it give defendants fair warning that the alleged conduct could create liability. *U.S. v. Lanier*, 520 U.S. 259, 271 (1997) (“There has never been... a section 1983 case accusing welfare officials of selling foster children into slavery [but] it does not follow that if such a case arose, the officials would be immune from damages.”) In determining whether the duty at issue was clearly established at the time of the injury, the court is not restricted to any particular jurisdiction, but may look to the law of other circuits to determine whether the constitutional right exists. *See Lanier*, 520 U.S. at 268. Plaintiffs here have asserted negligence claims against each of the defendants, including the State. The existence of a duty is a question of law. The existence of a prior identical case is not a requirement for deciding whether a duty exists in a particularized case.

In *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (1987) the Colorado Supreme Court noted that when determining whether the law imposes a duty on a particular defendant, many factors are to be considered. These factors may include, for example, “the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the [defendant's] conduct, the magnitude of the burden of guarding against

injury or harm, and the consequences of placing the burden upon the [defendant].” *Id.* citing, *Iverson v. Solsbery*, 641 P.2d 314, 316 (Colo.App.1982). Other considerations may also be relevant, depending on the circumstances of each particular case. *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* §§ 31, 53 (5th ed. 1984). No one factor is controlling, and the question of whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards—whether reasonable persons would recognize a duty and agree that it exists. *See* W. Keeton, § 53, at 359. *Taco Bell, Inc. v. Lannon*, 744 P.2d at 46; *see also*, Prosser, *Palsgraf Revisited* (1953) 52 Mich.L.Rev. 1, 15.

In this case, the State argues that because it is the government, it should receive special consideration beyond that given to an individual tortfeasor. The State is no different than any other individual or corporate defendant, however. The existence of a duty is a particularized assessment in each case. *Osborn v. Mason County*, 157 Wn.2d at 27-28..

Requiring State agencies to act with elevated caution to protect children is the stated policy of the Washington State Legislature. It has repeatedly affirmed that the overriding public policy in nearly all matters is the protection of children. Requiring State agencies to non-negligently supervise and investigate known child predators does not create an undue

burden for the State. Rather it is the legislative priority of the State of Washington. There is virtually no social utility to permit the State to negligently supervise child rapists, or to ignore accurate reports of child abuse as happened in this case. The opposite is true. Releasing predators back into the community will foreseeably result in harm. Failing to properly investigate accurate reports that a child has been sold to a sex offender offers virtually no benefit, and will in fact insure generational injury to the State. There are virtually no competing interests of policy at stake here.

The State was negligent, when it failed to supervise Adhahn properly, when it negligently permitted a court to release Adhahn from supervision, when it negligently classified Adhahn as a Level I sex offender, and as it permitted Adhahn to continuously refuse to register for more than a decade without consequence. The State also negligently failed to contact immigration officials to report Adhahn's initial conviction for the violent rape of his half sister, and also failed to report the 1992 weapons charge. The State negligently failed to investigate CPS referrals that specifically named Adhahn, as a suspect. The State did not even bother to assign for investigation an accurate report wherein a child was sold as a sexual object for \$2,000 to an unrepentant, absconded sex offender. Each act of negligence by the State in this case built upon and

made worse its prior acts of negligence and significantly increased the risk of harm to 11-14 year old girls. In sum, the State's negligence began upon first contact with Adhahn and continued unabated for over a decade. As a direct consequence of the State's innumerable errors and omissions, multiple children were raped and at least one child was raped and killed.

**B. The State owed a duty to Zina under RCW 26.44.050, and breached that duty by negligently failing to investigate the 2004 referral about L.T.N.**

RCW 26.44.050 establishes that the State has a duty to investigate reports of child abuse. The State argues that it had no duty to Zina because she was not the subject of the 2004 CPS referral, and because a duty under RCW 26.44.050 only extends to family members. The investigation requirement of RCW 26.44.050 exists, in part, to protect the integrity of the family. The duty owed to parents under the statute is the duty not to disrupt familial integrity without first conducting a reasonable investigation. However, the primary duty under the statute is to protect children from abuse under RCW 26.44.050 and .030.

Although the State argues here that there is no duty that runs to Zina Linnik under *M.W. v. Department of Health and Social Services*, Washington Courts have held the duty to children under the statutes is broader. *M.W.*, 40 Wn. App. 577, 699 P.2d 793 (1985); *Lewis v. Whatcom County*, 136 Wn. App. 450, 460, 149 P.3d 636 (2006). Zina Linnik, a child

who was “abused or neglected,” is of the class intended to be protected by the Statute. *See Id.* at 454-57 The *Lewis* court also explicitly stated that the language in *M.W.* limiting liability to damages arising from a placement decision “address[ed] only the issues presented in *M.W.*” *Id.* at 458.

The Legislature intended RCW 26.44.030 and .050 to impose a duty to protect children from known abusers. In *Schooley v. Pinch’s Deli Market, Inc.*, the court examined related statutes to determine that a vendor’s duty regarding sales of alcohol to minors extends not only to the minor to whom the alcohol is sold, but to all persons foreseeably endangered by the sale because to hold otherwise “would be an arbitrary distinction not supported by the recognized purpose of the statute.” *Schooley*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998) (citing *Purchase v. Meyer*, 108 Wn.2d 220, 737 P.2d 661 (1987)). In *Tyner v. Department of Health and Social Services*, the court examined whether an implied remedy in tort was consistent with the legislative intent found in the underlying statute. *Tyner*, 141 Wn.2d 68, 78, 1 P.3d 1148 (2000). The court held that the Legislature’s intent under RCW 26.44 was to imply a statutory tort remedy extending beyond a child. *Id.* Because RCW 26.44.030 and .050, in their purpose and mechanism, are part and parcel of the state’s means of enforcing laws against child sex abuse, it is therefore proper, under *Tyner* and *Schooley*, to look to those statutes to determine

what circumscribed class of citizens the statutes are intended to protect.

Under the legislative intent exception to the public duty doctrine, a plaintiff suing the State can demonstrate a duty running to her individually by showing that she is within the class of citizens these statutes intend to protect. Here, there is a clear intent to protect child victims of sexual predators, and Zina Linnik falls into that class. Rather than being arbitrarily limited to the child named in a CPS abuse referral, the State's duty should instead be limited by whether Zina was a foreseeable victim.

The State's contention would lead to absurd and unacceptable results. If two foster children were placed into the foster home of a child rapist, but only one child was named in the referral, the State suggests that only the child named in the referral is owed a duty of care. Similarly, if a pedophile who is also a football coach is preying on children at a major university, is the State's duty limited to only the child named in the referral. Or rather when the State fails to act to protect children should its liability be limited instead by principles of foreseeability, as suggested in *Schooley and Lewis*.

Stated another way, there is little doubt that a duty was owed by CPS to non-negligently investigate an allegation that Adhahn was raping a child. The duty exists. The scope of the duty is limited by the foreseeable risk of harm. If as here, the plaintiff is within the class of

foreseeable victims, then the duty extends to her. If injury to Zina was not a reasonably foreseeable consequence of the State failing to investigate a referral pertaining to a sadistic serial child rapist, then liability is terminated.

This Court has held that it is only necessary that it be foreseeable to a reasonable person that an unreasonable risk of harm to someone is created. Thus, in *Robb v. City of Seattle*, the City was liable when a mentally ill man, known to the police to be mentally unstable and in possession of a shotgun, killed a random passerby after officers stopped him on suspicion of burglary and then released him after noticing shotgun shells on the ground near him. *Robb*, 159 Wn. App. at 135-37. In *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987), the city was liable to a previously unknown driver in the area where an officer failed to apprehend an intoxicated driver. Neither of these plaintiffs was previously, individually, known to the defendants. Both were reasonably foreseeable under the circumstances. Thus principles of foreseeability limit the scope of the duty, not an arbitrary assertion that only children mentioned in a CPS referral are owed a duty of care.

Taking the facts in the light most favorable to the Plaintiff here, Zina Linnik was a reasonably foreseeable victim to whom a duty should run. Sex predators, if not stopped, will victimize still other children. The

only burden imposed by the legislature is for the State to non-negligently investigate referrals, something the State failed to do in this case.

**C. Under the facts of this case, the State also owed Zina a common-law duty to non-negligently investigate the 2004 referral under Restatement (Second) of Torts § 302.**

In addition to the two duties found in RCW 26.44, on the facts of this case, CPS also owed Zina a duty under Restatement (Second) of Torts § 302B, which provides that:

An act or an omission may be negligent if that actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of...a third person which is intended to cause harm, even though such conduct is criminal. Rest. (2d) 302B.

This is the duty at issue in *Robb v. Seattle*. Under that section, as adopted by *Robb*, a public entity owes a duty to foreseeable victims where “the actor’s own affirmative act has...exposed the other to a recognizable high degree of risk of harm...through [third-party] misconduct, which a reasonable man would take into account.” *Robb* at 140 (quoting Restatement). In *Robb*, the officers owed the duty because they had allowed a mentally disturbed man known to have a shotgun go free after cursorily investigating him for involvement in a robbery. *Id.* at 138. He then shot a previously unknown passerby. *Id.* The *Robb* court concluded that the officers’ action in first frisking, then abandoning the mentally disturbed man on the street was an “affirmative act” giving rise to a duty

under Restatement (2d) 302B because the officers had begun to act in the situation, but had failed to act with reasonable care. *Id.* at 147. In so holding, the Court of Appeals followed its own decision in *Parrilla v. King County*, 138 Wn. App. 427, 436, 157 P.3d 879 (2007), in which it was held that when a bus driver left a disturbed passenger on a bus and the passenger later crashed the bus into the plaintiffs' car, the driver's decision to leave the passenger on the bus was an affirmative act giving rise to a duty under § 302B.

Here, like the defendants in *Robb* and *Parilla*, the State failed to act with reasonable care. Like the defendant in *Robb*, the State began to act—it took the referral—but failed to act with reasonable care in abandoning the investigation. In *Robb*, the officers knew or should have known that the mentally ill man was dangerous and armed. In this case, CPS knew or should have known that Terapon Adhahn was a repeat child rapist. In *Robb*, the defendant was liable because it was foreseeable that the mentally ill, armed man would harm someone if left on the street. Here, the State should be liable under the same analysis.

**D. The State of Washington is liable to the plaintiffs for its negligence during Terapon Adhahn's time in community custody.**

The State's incorrectly analyzes the plaintiffs' negligence claim as it relates to the conduct of the Department of Corrections ("DOC")

hereafter). The claim against the State involves nothing more than an analysis of basic negligence principles, including duty, breach, proximate cause and damages. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). There is nothing distinctive about the manner in which negligence claims are analyzed as they relate to the State. Indeed, the State is liable under negligence principles to the same degree as any private person. See RCW 4.92.090.

**1. When Adhahn was in community custody, the State had a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by Adhahn's dangerous propensities.**

The State asks this Court to hold that the State may create its own immunity by acting negligently. The State argues that its duty to non-negligently supervise Adhahn was terminated when Adhahn was released from DOC supervision, either because the court order terminating supervision terminated its liability, or because liability terminates when supervision does. For these propositions, the State relies on dicta from *Hungerford v. Dept. of Corrections*, 135 Wn. App. 240, 139 P.3d 1131 (2006).

It is not the law in Washington that a take-charge duty terminates when the take-charge relationship does. Under *Petersen v. State*, where a party having a duty to take reasonable measures to guard against the

foreseeable dangerous propensities of another fails to do so, he may be held responsible for those failures even after the take-charge relationship has terminated. *Petersen*, 100 Wn.2d 421. In *Petersen* the patient had been released from supervision and then caused the harm. In finding liability, *Petersen* court only asked what control that the psychiatrist could have exercised, but did not. The *Petersen* holding is not possible if the State's theory of liability is accurate.

The *Hungerford* dicta conflicts with *Petersen*'s binding precedent, and would defy basic tort principles by prematurely terminating liability for foreseeable harms based on a technicality. It would also create a perverse incentive for the State to negligently terminate supervision. A simple hypothetical demonstrates the circular nature of the State's argument:

Assume that a probation officer negligently fails to inform a court that a parolee has been convicted of a serious crime that violates the parolee's conditions of release. And assume that as a consequence the court closes or terminates supervision. Then assume that the parolee goes out and murders a twelve year old girl. The State contends that it owes no duty to the little girl because it no longer had any take-charge relationship after supervision was terminated.

The exact same erroneous argument argued by the State here was unsuccessfully asserted by the defendant in *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 77 Ohio St.3d 284, 312, 673 N.E.2d 1311, 1332 (1997). In that case, the court dealt with the argument as follows:

This argument commingles two distinct issues, that of duty and proximate cause. The control portion of the argument goes to the issue of duty. In this regard, the argument may be reduced to a proposition that there can be no duty unless the patient was under the care of the therapist at the time the harm was inflicted. Dr. Brown cites no authority for this position. Moreover, such a proposition runs counter to negligence principles. Viewing the facts most favorably to plaintiffs-appellants, Civ.R. 56(C), the gravamen of Dr. Brown's alleged negligence in this case is the very act of withdrawing medication and relinquishing care of Matt. It is clearly unsound to absolve a negligent defendant because of the very act which made his conduct negligent. *Estates of Morgan*, 77 Ohio St.3d at 312.

In *Littleton v. Good Samaritan Hosp. & Health Center*, 39 Ohio St.3d 86, 92, 529 N.E.2d 449, 455 (1988), the Court indicated that the existence of a duty depends, instead, on the foreseeability of the injury. In that case, a psychiatrist was held liable for releasing from voluntary commitment a mother suffering from post-partum depression. After her release, the mother killed her infant daughter. *Id.* at 92. Again, the Court refused to adopt the illogical concept that the psychiatrist's duty was terminated upon the technical termination of the take-charge relationship.

Here, the State breached its take charge duty to non-negligently supervise Adhahn. *Joyce*, 155 Wn.2d at 322; CP 1734-1741. Part of the

supervision includes taking what actions it can to prevent Adhahn from harming children. The State could have, but did not, accurately report Adhahn's behaviors while under its supervision to the sentencing court. As in the *Tyner* case, if the court ignored this information and released Adhahn, then the superior court's order cuts off liability. But as in *Tyner*, if the superior court acts in the absence of accurate information the State remains liable. *Tyner v. Dep't of Social and Health Services*, 141 Wash.2d 68, 71 1 P.3d 1148 (2000).

**2. But for the State's negligent supervision, Terapon Adhahn would have been unable to harm Zina Linnik.**

The State ignores entirely the Supreme Court's most recent decision on proximate cause in negligent supervision cases, *Joyce v. Dept. of Corrections*, 155 Wn.2d 306, 322-323, 119 P.3d 825, 833 - 834 (2005). Instead, the State relies primarily on the *Hungerford* case to argue that the plaintiffs cannot show cause in fact. *Joyce*, however, is dispositive.

Proximate causation includes both cause in fact and legal causation." *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 256, 978 P.2d 505 (1999). "To establish cause in fact, a claimant must establish that the harm suffered would not have occurred but for an act or omission of the defendant. There must be a direct, unbroken sequence of events that link the actions of the defendant and the injury to the plaintiff." *Joyce*, 155

Wn.2d at 322. In most cases, cause in fact is a jury question. *Id.* Here, the State contends that the plaintiffs are unable to establish cause in fact. This is incorrect.

To survive summary judgment on cause in fact, the plaintiffs must come forward with evidence from which a reasonable jury could conclude that, but for the State's negligence, Terapon Adhahn would have been unable to harm Zina Linnik. Washington courts have held that cause in fact can be established by expert testimony, as in *Joyce*, where the plaintiff relied only on the testimony of William Stough a corrections expert. *Joyce*, 155 Wn.2d at 322. Mr. Stough's testimony was held sufficient to establish that but for the State's failure to obtain a bench warrant, the offender in *Joyce* would have been unable to harm the plaintiff because he would have been in jail. *Id.* at 322-23. Cause in fact in a take-charge case can thus be established by expert testimony that the State's negligence caused the injury. *Bordon*, 122 Wn. App. at 243-44 (citing *Joyce*). Cause in fact can also be established by "expert testimony about how judges rule in particular proceedings, factual evidence that the very nature of the negligence led to an offender's release, testimony of the sentencing judge, or expert testimony that the State's negligence directly caused the injury." *Id.* In this list, *Bordon* summarized evidence that Washington courts had previously held sufficient. The list is not exhaustive or exclusive.

Here, the plaintiff comes forward with facts and expert opinion from which a reasonable jury could conclude that but for the State's negligence, Adhahn would have been unable to harm Zina Linnik because he would have been deported sometime in the 1990s. The facts establish that Adhahn's original incest conviction was for a violent sexual assault on a minor, and was considered a crime of moral turpitude by immigration authorities. CP 1724-1725, CP 3024, CP 1715. They also establish that he was convicted of a weapons charge in 1992 and that the State failed to pursue him for failure to register. William Stough's declaration establishes that it was negligence for Adhahn's CCOs to fail to establish and maintain contact with immigration authorities and report Adhahn's violations, original crime, and new crimes to them. CP 1734-1741. Carlos Sosa's declaration establishes that if Adhahn's original violent rape of his minor and his later weapons conviction had been reported to immigration authorities, it is more likely than not that Adhahn would have been deported, and that deportation is also the likely result if Adhahn had been convicted for failure to register as a sex offender. CP 1724-1725. This conclusion is bolstered by the fact that in July 2007, when Adhahn's only two convictions were the incest conviction and the intimidation conviction, ICE regarded him as deportable. CP 1715.

**3. Where the original act or omission is negligent when committed, mere passage of time does not defeat legal causation.**

The State argues that its failures should not, as a matter of policy, be held to be legal causes of Zina's death because they are too remote in time and because Adhahn was not under supervision at the time the crimes were committed. None of the cases cited by the State establish that the sheer passage of time will destroy legal causation. Whether legal causation exists is at heart a policy question. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 43, at 283 (5th ed. 1984). Here, the State negligently supervised and monitored Adhahn. Foreseeably, he continued to rape children. There is no intervening factor breaking the chain because no one did anything. Further, Legal causation should also be found as a matter of policy. As pointed out above, to impose an absolute bar on liability for failure to supervise whenever a harm takes place after an offender had been released from supervision would be to encourage DOC to prematurely release its most dangerous offenders.

DATED this 25h day of June, 2012.

VAN SICLEN, STOCKS & FIRKINS

/s/ TYLER K. FIRKINS  
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DATED this 25h day of June, 2012.

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## CERTIFICATE OF SERVICE

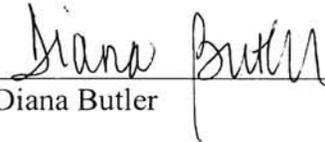
The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on June 25, 2012, she caused the foregoing *Reply Brief of Appellant re: State of Washington* to be served on the following parties of record and/or interested parties by regular US Mail and email transmission the same day:

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