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NO. 67475-7-I

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

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

v.

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, Respondents

BRIEF OF RESPONDENT PIERCE COUNTY

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I. INTRODUCTION

This is an appeal by the estate, parents, and siblings of Zina Linnik seeking to reverse summary judgment on their claim that every level of state and local government is responsible for her kidnapping, murder, and rape by Terapon Adhahn. In order to pursue their appeal, plaintiffs disregard the Court's rules, the facts of record, the applicable law, and the issues actually litigated below.

First, assuming -- against all appearances otherwise -- that plaintiffs have listed "the issues pertaining to the assignments of error" as required by RAP 10.3(a)(4), *but see* AB 2-3, neither their "Assignments of Error" nor "Argument" sections contest dismissal of the Linnik siblings for lack of standing under RCW 4.20.020. *See id.* *See also* CP 901, 903-04, 927-31, 966-89, 1353. Accordingly, Pierce County's responsive brief likewise does not discuss the unappealed dismissal of the siblings. RAP 10.3(g).

Second, contrary to the appellate rules, plaintiffs' "Statement of the Case" mentions in passing only one of their factual allegations against Pierce County -- *i.e.*, the January 2004 Child Protective Service (hereinafter "CPS") referral -- and does so by argumentatively misstating the record. *Compare* AB 13-14 *with* RAP 10.3(a)(5). *See also infra.* at 6, 37-38. Similarly, their "Argument" section provides few if any record citations for their other often mistaken and always conclusory factual asser-

tions about the County. AB 31-32, 37-39, 43. Therefore, the County's responsive brief provides a separate "Statement of the Case" supplying both the actual facts relevant to plaintiffs' current allegations against it as well as the otherwise absent relevant citations to the record. *See infra* 3-8.

Third, plaintiffs' "Argument" section also attempts to dispute fundamental principles of negligence by seeking to redefine the elements of "duty" and "causation." *See* AB 22-27. Hence, before the County can apply the law to the actual facts of record here, it must dispel any confusion plaintiffs have sown as to what a negligence suit actually requires. *See Hostetler v. Ward*, 41 Wn.App. 343, 349, 704 P.2d 343 (1985) (negligence requires "(1) the existence of a duty owed to the complaining party; (2) a breach thereof; (3) a resulting injury; and (4) a proximate cause relationship between the claimed breach and the resulting injury"); *infra*. at 10-18.

Finally, when applying their erroneous legal analysis to their unsupported factual speculations, plaintiffs' brief mistakenly claims "defendants argued for summary judgment dismissal on two primary bases: that they owed no duty to Zina, and that their errors were not the proximate cause of the harm she suffered." AB 1. As both the record and the analysis below show, the County instead asserted the absence not just of duty and proximate cause, but also of any factual basis to claim it committed "errors" (i.e., breached any standard of care) to begin with. *Infra*. at 18-19, 37-38.

II. RESTATEMENT OF THE ISSUES

A. Did plaintiffs meet their burden of showing that in 1992, before either Zina Linnik's birth or her immigration to the United States, Pierce County breached a duty owed them to report Terapon Adhahn's state conviction to federal immigration authorities and thereby caused her kidnapping, murder, and rape 15 years later in 2007?

B. Did plaintiffs meet their burden of showing that Pierce County in 2002 breached a duty owed them to further investigate Terapon Adhahn's updating of his sex offender registration and thereby caused Zina Linnik's kidnapping, murder, and rape five years later in 2007?

C. Did plaintiffs meet their burden of proving Pierce County in 2004 breached a duty owed them to investigate and refer to the prosecutor an anonymous report that an unknown man at an incorrect address was living with a different female and thereby caused Zina Linnik's kidnapping, murder, and rape three years later in 2007?

III. STATEMENT OF THE CASE

On appeal, plaintiffs assert four theories of liability against Pierce County based on three occasions over a period of 15 years when its agents either had contact or supposed opportunities to have contact with Zina Linnik's killer Terapon Adhahn. AB 13-14, 31-32, 37-39, 43. Because plaintiffs provide neither the actual facts of record concerning those al-

leged incidents nor the history of their litigation, the County now does so.

A. 1992 REPORTING OF ADHAHN'S INCARCERATION TO INS

In September of 1992, before Zina Linnik was born or had immigrated to the United States, *see* CP 2129, Adhahn served five days in the Pierce County Detention and Correction Center (hereinafter "PCDCC") on a misdemeanor firearms violation. AB 6, 32. *See also* CP 394-403, 490-91. At that time, and throughout the 1990's, the PCDCC supplied the United States Immigration and Naturalization Service (hereinafter "INS") notice of potential non-citizens in its custody by placing each morning's inmate roster in an inbox dedicated exclusively to the INS, and INS officers that same day would review it and interview any inmate that interested them. *See e.g.* CP 1845-46. The record contains no evidence PCDCC officials failed to follow this practice as to Adhahn. However, the record does indicate a reason the INS might not have placed an immigration hold on Adhahn in 1992 despite such notice; according to plaintiffs' own expert, Adhahn would not have been deportable at that time. *See* CP 1015-16.

B. 2002 UPDATED SEX OFFENDER REGISTRATION

A decade later in April of 2002, when Adhahn updated his 1990 sex offender registration and provided the Pierce County Sheriff's Office (hereinafter "PCSO") his current address, the Sheriff's Office obtained information he previously had moved into unincorporated Pierce County

without providing advance notice as required. *See* CP 935, 938. Later, in 2005, a Sheriff's Deputy attempted to confirm that address and learned from a neighbor that "several men moved out 4-5 days ago" but could not determine if Adhahn still remained there, if Adhahn was among the men who had "moved out" just days before, or if Adhahn had moved to another County and registered there. *See* CP 2718. However, even if there had been ground to arrest Adhahn, deputies would not have known where he was so as to be able to make an arrest, and there is no evidence he would have been found within the next two years before the July 2007 murder.

In any case, the record shows that had the PCSO referred Adhahn to the Prosecutor for failing to update his registration: a) no charges would have been filed in either 2002 or 2005 due to lack of sufficient evidence of a crime; b) if charged, he likely would not have been convicted of a felony; and c) if somehow convicted of a felony, any sentence would not have been long enough to prevent his release before the 2007 Linnik murder. *See* CP 940-41, 957-959. Further, the record is silent as to whether an extraction of a DNA sample from Adhahn after a hypothetical failure to register conviction would have guaranteed another hypothetical conviction for other alleged sex crimes because there was no evidence at that time that: 1) DNA samples were in fact being taken; or 2) DNA samples *ipso facto* guaranteed the discovery of, much less conviction for, a previous sex

crime. Indeed, the record shows that a DNA sample had been taken from Adhahn in the 1990's and that by 2005 it still had not linked him to any prior crime. *See* AB 11; CP 1051-55, 2976, 2984.

C. 2004 COUNTY INVESTIGATION OF CPS REFERRAL

Finally, in January of 2004, another division of the PCSO received from the State's Child Protective Service (hereinafter "CPS") a single anonymous referral reporting that an unknown man was having sex with a different female of unstated age. *See* CP 961-63, 965, 2739, 2741, 2845-47, 2880-81. The report nowhere mentioned Adhahn, his particular address, nor any allegation of rape. *See* CP 2847. Though it stated no crime, out of an abundance of caution a PCSO detective nevertheless was sent to the only address given and found no one there meeting the description. *See* CP 943-49, 952-55, 959, 961-63. Though in February CPS obtained a second, more detailed referral identifying Adhahn by name and giving his actual address and the female's age, it was never provided to Pierce County. *See* CP 961-62, 965, 2683, 2739, 2741, 2744, 2845, 2880.

D. 2010 LAWSUIT BY LINNIK ESTATE, PARENTS, AND SIBLINGS

Over six years later on April 21, 2010, the estate, parents, and siblings of Zina Linnik sued Pierce County as well as the State of Washington and the City of Tacoma for her July 4, 2007, kidnapping, murder, and rape by Adhahn. *See* CP 1. The complaint alleged that in the 15 years prior to the

2007 murder the County had acted, or failed to act, in three ways:

- 1) "[V]iolated its statutory obligation to report him to U.S. immigration authorities as a criminal alien under RCW 10.70.140;"
- 2) "[N]ever pursued him for failure to register or made any attempt to locate him" despite "RCW 9A.44.135;" and
- 3) "[F]ailed to investigate a 2004 a specific and credible 2004 referral stating that Adhahn was raping a young girl in his care."

See CP 22-23. On May 17, 2010, Pierce County moved to dismiss under CR 12(b)(6) for failure of the complaint on its face to state a claim upon which relief could be granted. *See* CP 61. Though expressly conceding their complaint did "not make a free-standing claim regarding Pierce County's failure to report Adhahn's 1992 conviction to immigration authorities," plaintiffs asserted -- over the County's objection -- a new fourth claim; i.e., "Failure to report results of the 2004 investigation to the prosecutor" under "RCW 26.44.030(5)." CP 87, 105-08, 117, 128. In opposing dismissal, plaintiffs argued -- among other things -- that the suit should not be dismissed without discovery. *See* CP 89, 108, 117, 233. *See also* CP 175. On September 10, 2010, the County's motion was denied. CP 667.

On December 22, 2010, after the extensive discovery plaintiffs demanded, the County moved for summary judgment pursuant to CR 56 because the record contained no genuine issue of material fact and plaintiffs' claims could be dismissed as a matter of law. *See* CP 900. In response,

plaintiffs did not contest dismissal of the Linnik siblings but otherwise opposed dismissal as well as attempted to revivify their claim for the alleged but still unproven 1992 failure to notify the INS of Adhahn's conviction. *See* CP 971-72, 987, 927-31, 981-83. Over the next several months, yet more discovery was conducted and numerous further evidentiary materials and legal briefs were submitted on plaintiffs' remaining three claims against Pierce County. *See e.g.* CP 2543-2560, 3343-3425. On July 21, 2011, the County's motion was granted and the action against it dismissed. *See* CP 3465-3467.¹

IV. ARGUMENT

On appeal, plaintiffs now assert four negligence theories -- two of which they either abandoned or left out of their complaint -- for making the County responsible for the 2007 Linnik murder. Specifically, plaintiffs currently allege the County supposedly: 1) in 1992 "failed to report either of Adhahn's convictions to immigration authorities;" 2) in 2002 and 2005 failed to "monitor Adhahn and forward information to the sex offender registry" under RCW 9A.44.135; 3) in 2004 breached its "duty to investigate reports of child abuse" under RCW 26.44.050; and 4) in 2004 did not "refer the results of such investigation[] for prosecution" under

¹ Though the Superior Court that same day also denied plaintiffs' motion to reconsider their requested amendment to the complaint, *see* CP 3462, their proposed new complaint "did not amend any allegations related to Pierce County." *See* CP 3246.

RCW 26.44.030. AB 31-32, 37-39, 43. These claims were properly abandoned or dismissed because the undisputed record and the well-settled law demonstrated there was no genuine issue of material fact under CR 56.

Under CR 56, it is well settled that parties moving for summary judgment meet their burden "by 'showing' -- that is pointing out ... that there is an absence of evidence to support the nonmoving party's case." *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225 n. 1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). A suit should be dismissed then where plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Young, id.* at 225 (citing *Celotex, id.* at 322). As this Court has explained:

A defendant in a civil action is entitled to summary judgment when that party shows that there is an absence of evidence supporting an element essential to the plaintiff's claim. The defendant may support the motion by merely challenging the sufficiency of the plaintiff's evidence as to any such material issue. In response the nonmoving party may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists.

Las v. Yellow Front Stores, 66 Wn.App. 196, 198, 831 P.2d 744 (1992).

The test is not met just by presenting some evidence on a claim because a "scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for

the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). See also *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 736, 150 P.3d 633 (2007) ("if ... the non-moving party, can only offer a 'scintilla' of evidence, evidence that is 'merely colorable,' or evidence that 'is not significantly probative,' the plaintiff will not defeat the motion"). Because there was no -- much less "sufficient" -- evidence of the essential elements of plaintiffs' claims, on appeal they attempt to recast this state's tort law.

Accordingly, fundamental principles of negligence must be examined before plaintiffs' theories of County liability can be directly confronted.

A. PLAINTIFFS MISSTATE FUNDAMENTAL PRINCIPLES OF NEGLIGENCE

1. Public Duty Doctrine Merely Applies Duty Requirement to Government

Plaintiffs imply defendants' reference to the "public duty doctrine" is a form of "sovereign immunity" and claim *Osborn v. Mason County*, 157 Wn.2d 18, 27–28, 134 P.3d 197 (2006), and *Robb v. City of Seattle*, 159 Wn.App. 133, 245 P.3d 242 (2010), *rev. granted*, 117 Wn.2d 1024 (2011), supposedly show "so called exceptions" to the public duty doctrine do not "exhaust the universe of public entity liability." AB 24. Hence, plaintiffs advocate an amorphous and unworkable test for duty; i.e., "essentially one of fairness under contemporary standards -- whether reasonable persons

would recognize a duty and agree that it exists." *Id.* 26.

First, the County nowhere claimed it was "immune." Second, it had no need to do so because "the legislature's abolition of sovereign immunity did not affect the public duty doctrine" since the "abrogation of sovereign immunity merely allows suits against governmental entities; it does not create a duty where none existed before." *Vergeson v. Kitsap County*, 145 Wn.App. 526, 538 n. 9, 186 P.3d 1140 (2008) (citing *Chambers-Castanes v. King County*, 100 Wn.2d 275, 288, 669 P.2d 451 (1983)). In dismissing a similar wrongful death claim when it found no public duty exception applied, the Supreme Court in the cited *Osborn* case actually held:

The public duty doctrine simply reminds us that a public entity -- like any other defendant -- is liable for negligence only if it has a statutory or common law duty of care. And its "exceptions" indicate when a statutory or common law duty exists. "The question whether an exception to the public duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff." *Taggart [v. State]*, 118 Wash.2d [195,] 218, 822 P.2d 243 [(1991)]. *See also Bishop v. Miche*, 137 Wash.2d 518, 530, 973 P.2d 465 (1999) ("Exceptions to the doctrine generally embody traditional negligence principles and may be used as focusing tools to determine whether a duty is owed"). In other words, the public duty doctrine helps us distinguish proper legal duties from mere hortatory "duties."

157 Wn.2d at 27 (emphasis added).

Accordingly under Washington law: "Whether the defendant is a governmental entity or a private person, to be actionable, the duty must be one

owed to the injured plaintiff, and not one owed to the public in general."

Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 785, 30 P.3d 1261 (2001) (emphasis added). See also *Alexander v. Walla Walla County*, 84 Wn.App. 687, 692-93, 929 P.2d 1182 (1997) (citing *Taylor v. Steven's County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988)) (the threshold determination in any negligence action "is a question of law; that is, whether a duty of care is owed by the defendant to the plaintiff"). Because the "general rule at common law is that a private person does not have a duty to protect others from the criminal acts of third parties," *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 199, 943 P.2d 286 (1997) (quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 223, 802 P.2d 1360 (1991)), the government likewise "has no duty to prevent a third person from causing physical injury to another." *Couch v. Dep't of Corr.*, 113 Wn.App. 556, 564, 54 P.3d 197 (2002), *rev. denied*, 149 Wn.2d 1012 (2003) (dismissal of wrongful death suit). See, also, *Sheikh v. Choe*, 156 Wn.2d 441, 448, 577, 128 P.3d 574 (2006) (reversing ruling that government should have prevented assault because "our common law imposes no duty to prevent a third person from causing physical injury to another" so the "State is not liable for its negligent conduct even where a duty does exist unless the duty was owed to the injured person and not merely the public in general"); *Estate of Davis v. Dept of Corr.*, 127 Wn.App. 833,

841, 113 P.3d 487 (2005) (wrongful death claim dismissed since there "is no general duty to protect others from the criminal acts of a third party").

This Court's decision in *Robb*, even apart from its ongoing review by the Supreme Court, does nothing to change the above Supreme Court and appellate precedent. Far from creating a "universe of public entity liability," *Robb* simply quoted comment "e" to Restatement (Second) of Torts § 302(B) (1965), that a person can be liable if their "own affirmative act has created or exposed the other to the high degree of risk of harm." 159 Wn. App. 140 (emphasis added). Hence, there police were liable because just before the crime they took "control of a situation and then depart[ed] from it leaving shotgun shells lying around within easy reach of a young man known to be mentally disturbed and in possession of a shotgun." *Id.* at 147 (emphasis added). *Robb* expressly recognized "an individual has no cause of action against law enforcement officials for failure to act," *id.* (emphasis added), and cited *Coffel v. Clallam County*, 47 Wn.App. 397, 403, 735 P.2d 686 (1987), which affirmed dismissal of police for failure to protect others because such a suit "based on the inaction of these defendants, fits squarely within the rule of the public duty doctrine."²

² Plaintiffs in passing later claim *Robb* created a new "special circumstances exception" imposing a duty when the County supposedly "allowed ... a repeat child rapist, to remain free in the community even after receiving information in 2004 indicating he was still assaulting children" and "when it failed to monitor Adhahn as a sex offender" in 2002. AB 43. Apart from the fact plaintiff never argued at the Superior Court that *Robb* created

Therefore, neither *Osborn* nor *Robb* change our State's standard for finding municipal "duty" or expand the "universe of public entity liability." Further, plaintiffs' reference to "fairness under contemporary standards" is a "policy question," not a test for determining the existence of a duty.³ See *Hutchins v. 1001 Fourth Ave. Associates*, 116 Wn.2d 217, 237, 802 P. 2d 1360 (1991) ("the policy question is one of fairness under contemporary standards") (emphasis added). Both the test and policy for a duty to protect against the crimes of others is well settled in Washington. See *id.* ("Even if some increased risk of harm might be attributed to defendants' acts or omissions here, that alone is an inadequate basis to impose upon defendants the duty plaintiff urges was breached here") (emphasis added).

2. Plaintiffs Must Prove a County Action Was a Cause of Damage

Plaintiffs next attempt to fundamentally change Washington tort law by arguing proof of causation is unnecessary because:

[M]ultiple negligent acts, each of which would by itself be insufficient to be a more-than-likely but-for cause of the

such a duty regarding the PCSO's sex offender monitoring as required by RAP 2.5(a), see CP 985-87, and has been shown above not to create such duty, the County below also demonstrates the record disproves as well the assertion any such duty was "breached," the decedent was "foreseeable" or the PCSO's handling of Adhahn's registration was a "proximate cause" of the 2007 murder. See *infra.* at 21-35.

³ As the authority cited by plaintiffs notes regarding such articulations of the standard of care: "As a formula this dictum is so vague as to have little meaning, and as a guide to decision it has had no value at all." W. Keeton, C. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts*, § 35 at 359 (5th ed. 1984).

plaintiff's harm, may be considered together where, as here, they combine to cause an indivisible harm -- Zina's death.

AB 26. Plaintiffs' only asserted support for this radical attempt to abolish the need to prove causation is an archaic law review article and two decisions applying the toxic tort doctrine of "concurrent causation" among multiple tortfeasors. *See id.* at 26-27. Such extrapolation is mistaken.

Plaintiffs' citation to a 1935 out-of-state law review article not only fails to support the principle they seek to establish but rejects it. *See id.* at 26-27. Far from supporting the abolition of the proximate cause requirement, the depression era article expressly recognized: a "plaintiff must establish in the civil action the existence of each element of liability by a preponderance of evidence; i.e., that its existence is more likely than not" and the "requirement of proof of causation is no exception to this rule." Charles E. Carpenter, *Concurrent Causation*, 83 U. Pa. L. Rev. 941-42, (1935) (emphasis added). Contrary to plaintiffs' claim, the cited article expressly recognized that "each negligent act, considered alone, must be sufficient to cause the harm on a more likely than not basis." *Id.* at 947 ("It seems too clear for argument that a defendant should never be held liable to a plaintiff for a loss where it appears that his wrong did not contribute to it, and no policy or moral consideration can be strong enough to warrant the imposition of liability in such case") (emphasis added).

Plaintiffs' only other cited support for their argument are two inapplicable Washington decisions addressing the disparate issue of the specialized rules in product liability for toxic torts. See AB 27 (citing *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 896 P.2d 682 (1995) (pesticides); *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn.App. 22, 935 P.2d 684 (1997) (asbestos)). Indeed, the cited *Mavroudis* product liability decision expressly notes that even when applying the special standard to toxic tort claims it "is normally justified only when a plaintiff is unable to show that one event alone was a cause of the injury." 86 Wn.App. at 31 (emphasis added). See also *Daugert v. Pappas*, 104 Wn.2d 254, 262, 704 P.2d 600 (1985) ("Such a change in the test for cause in fact is normally justified only when a plaintiff is unable to show that one event alone was the cause of the injury"). Here plaintiffs admitted in the Superior Court "we have a single agent of harm: Terapon Adhahn." See CP 2057 (emphasis added).

Finally, as even plaintiffs' cited 1930's era review noted: "As yet the courts have not so relaxed" the "requirement of proving proximate cause." 83 U. Pa. L. Rev. at 952. Indeed, it has been recognized that this Court rejects the "concurrent causation" doctrine outside the toxic tort context. See *Beckman By and Through Beckman v. Connolly*, 79 Wn.App. 265, 275, 898 P.2d 357 (1995) ("Division One has rejected the so-called concurrent causation rule") (citing *Krempl v. Unigard Sec. Ins. Co.*, 69

Wn.App. 703, 707, 850 P.2d 533 (1993)). Hence, in similar wrongful death cases involving more than one alleged tortfeasor, even where a duty exists, dismissal has been required where causation was absent. *See e.g. Estate of Bordon ex rel. Anderson v. State Dept. of Corrections*, 122 Wn.App. 227, 241-42, 95 P.3d 764, *rev. denied*, 154 Wn.2d 1003 (2004) (suit dismissed because no proximate cause that death was result of convict's release); *Lynn v. Labor Ready, Inc.*, 136 Wn.App. 295, 311, 151 P. 3d 201 (2006) (dismissal because to "prove cause-in-fact, [plaintiff] had to be able to show that, but for [defendant's] breach of duty, Owens would not have killed Cordova" but he "cannot meet this burden"); *Hungerford v. State Dept. of Corrections*, 135 Wn.App. 240, 253, 139 P. 3d 1131 (2006) (state's "negligence was not a but-for cause of Hungerford-Trapp's death because even had the trial court imposed Davis's misdemeanor sentence, Davis would have been released in time to kill Hungerford-Trapp").

As our state Supreme Court notes: "Proof of negligence in the air, so to speak, will not do," because "there also must be a causal connection between the negligence arising from the violation of the ordinance and the [event] itself before a cause of action arises" so that "when, as here, the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion, [cause in fact] is a question of law for the court" and grounds for summary judgment. *Hansen v.*

Washington Natural Gas Co., 95 Wn.2d 773, 779, 632 P.2d 504 (1981) (granting summary judgment) (*quoting* F. Harper & F. James Torts § 18.2 at 1019 (1956)) (emphasis added). Plaintiffs' inability to confront established authority -- holding that "proximate cause" is an essential element to all tort claims -- with anything but an out-of-state article from the first half of the last century and two decisions involving inapplicable product liability specialty claims, only emphasizes the baselessness of their novel attempt to change Washington's tort law so as to make causation optional.

B. PIERCE COUNTY IS NOT LIABLE FOR ADHAHN'S CRIMES

1. 1992 Report to INS Did Not Create County Liability

In the Superior Court, plaintiffs expressly disavowed any "free standing" or "independent negligence claim" against Pierce County for supposedly not notifying immigration officials in 1992 of Adhahn's short, five-day incarceration at the PCDCC. *See e.g.* CP 87, 117, 128, 901 n. 1. Nevertheless, on appeal plaintiffs do assert this claim -- though they devote a mere four sentences of fact-free discussion to it. AB 32, 49.

Plaintiffs' first problem is not just that their brief nowhere cites any factual support showing the PCDCC actually failed to report Adhahn to the INS in 1992, *see Stewart v. State*, 92 Wn.2d 285, 300, 597 P.2d 101 (1979) ("appellant's brief ... asserts that it is supported by the facts of the case, but makes no reference to the record. This is inadequate.") (*citing*

RAP 10.4(f)), but also that there is nothing in the record they could cite. Instead, the only admissible evidence was submitted by the County which disproved plaintiffs' bald allegation.⁴ See CP 1845-46. Hence, had there been a duty to report to the INS, the only evidence disproves any breach.

Plaintiffs' second problem is that as a matter of law there was no County duty to report to the INS in 1992 -- much less one owed plaintiffs. Plaintiffs' legal analysis consists of nothing more than the mere statement that "a duty ... arose when Adhahn was in the County's custodial control, and is thus, also, a take-charge duty" because *Osborn v. Mason County* supposedly holds an entity "charged with the supervision of a dangerous individual owes a duty to plaintiffs whose harms are foreseeable from the supervised individual's dangerous tendencies." AB 28, 32. However, plaintiffs nowhere explain how it was "foreseeable" in 1992 that Adhahn would rape the yet to be born Zina Linnick 15 years later if he was not reported to the INS or how this duty could be individually owed her or her family who had yet to enter the United States. See CP 2129. See also

⁴ Plaintiffs argued to the Superior Court that the County's uncontested evidence did not prove the "INS was actually informed" because unsworn hearsay upon hearsay in an inadmissible newspaper article -- that the County moved to strike -- stated "the INS was not notified by prosecutors." Compare CP 3349-3350, 3407 (emphasis added) with CP 1316-17. However, the indisputably admissible evidence is that PCDCC correctional deputies, not prosecutors, did advise the INS. See CP 1845-46. Regardless, it was plaintiffs burden "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). However, plaintiffs offered no -- much less any admissible -- evidence on the issue of reporting to the INS.

Sheikh, 156 Wn.2d at 448, 577 (reversing decision government should have prevented assault because the "State is not liable for its negligent conduct even where a duty does exist unless the duty was owed to the injured person and not merely the public in general"); *Babcock*, 144 Wn.2d at 785 ("no liability may be imposed for a public official's negligent conduct unless it is shown that 'the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one)"); *Vergeson*, 145 Wn.App. at 535 (government "is not liable for a public official's negligence unless the plaintiff shows that the government breached a duty owed to her individually rather than to the public in general").

Plaintiffs also ignore the limited scope of a "take charge" duty even when one does exist. The cited *Osborn* case required dismissal of the County because a "take charge" duty exists only "to the extent [the government] has authority to control" the wrongdoer and it has no such duty where "it had no authority to control him." 157 Wn.2d at 24-25. Hence, any "take charge duty" is only to "control" the one detained while in custody and warn on release if he made a "specific threat against a specific, identifiable victim or group of victims." *Id.* (citing *Couch*, 113 Wn.App. at 571 to note "authority to control limits duty to control" and rejecting any duty to warn general public). Plaintiffs nowhere explain how Ad-

hahn's five-day incarceration in 1992 gave "authority to control him" 15 years later.

Plaintiffs' final problem on their INS claim is the lack of proximate cause. Though they argue "Adhahn would have been deportable starting" in 1992 if he had been reported immediately to the INS, and do finally cite the record as alleged support, AB 49, their citation is to their "expert" who instead expressly testified that "[p]rior to April 1, 1997, Mr. Adhahn was not deportable [even] for having been convicted of an aggravated felony." *See* CP 1015-16 (emphasis added). Hence, the only evidence in the record on causation is that Adhahn could not have been deported at the time of any supposed "take charge" duty and therefore any unproven failure to report to the INS in 1992 would have had no effect on Adhahn's ability to commit crimes 15 years later. Because there "must be a causal connection between the negligence ... and the accident itself before a cause of action arises," and "as here, the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion, [cause in fact] is a question of law for the court." *See Hansen, id.* at 779. Indeed, the record only shows the absence of causation.

2. 2002 Sex Offender Registration Update Did Not Create Liability

As with their INS reporting claim, plaintiffs provide no record citation for any alleged fact supporting their claim that the County violated RCW

9A.44.135 in the updating of Adhahn's sex offender registration in 2002 and 2005. AB 31-32, 38-39, 49. Accordingly, their second claim also lacks any factual basis upon which to claim duty, its breach, or proximate causation. As demonstrated below, any sex offender registration claim also lacks a legal basis for finding duty, foreseeability, or proximate cause.

a. No RCW 9A.44 "Take Charge" or "Failure to Enforce" Duty

Plaintiffs claim the sex offender registration statute, RCW 9A.44.135, created a "take charge duty running to Zina Linnik as a foreseeable victim" because it supposedly imposed "a duty to monitor Adhahn and forward information to the sex offender registry," as well as a duty under the "'failure to enforce' exception to the public duty doctrine" since in some unidentified way the County "possessed actual knowledge of Adhahn's failure to register as a sex offender, and ... failed to take the statutorily required corrective action (making reasonable attempts to locate Adhahn)." AB 31-32, 38-39. Even apart from the missing facts, these arguments fail.

First, as to any "take charge" duty, despite their repeated citation to *Osborn*, plaintiffs overlook that there the Supreme Court ordered a RCW 9A.44 *et seq.* claim against a County dismissed because, among other things, requiring law enforcement to "forward this information ... for inclusion in the central registry of sex offenders" is not a "take charge" duty to "control" a sex offender. 157 Wn.2d at 24-25. Hence, the "County did

not 'take charge' of [the sex offender/murderer] because it had no authority to control him" under RCW 9A.44 *et seq.* *Id.* See also *Hungerford*, 135 Wn.App. at 253 (no "take charge duty" by "limited felony LFO supervision"); *Terrell C. v. DSHS*, 120 Wn.App. 20, 28, 84 P.3d 899 (2004) (social workers lacked "take charge" duty over sexual assailants); *Couch*, 113 Wn.App. at 569 (no "take charge" duty where agency supervised murderer's legal financial obligations). Hence, controlling Supreme Court authority precludes any "take charge" theory here.

As to any alternative "failure to enforce" exception to the public duty doctrine, such requires proof: "(1) governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, (2) these agents fail to take corrective action despite a statutory duty to do so, and (3) the plaintiff is within the class of persons the statute intended to protect." *Vergeson*, 145 Wn.App. at 538 (emphasis added). Such "failure to enforce" claims are "narrowly construed," *Donohoe v. State*, 135 Wn.App. 824, 849, 142 P.3d 654 (2006) ("We construe this exception narrowly"); *Ravenscroft v. Washington Water Power Co.*, 87 Wn. App. 402, 415, 942 P.2d 991 (1997), *rev. in part on other grounds*, 136 Wn.2d 911 (1998) ("'failure to enforce' exception is construed narrowly"), because in its absence, "duties of public officers are normally owed only to the general public" so "breach of such a duty will not support a cause of

action by an individual injured thereby." *Hostetler, supra.* at 361, 363-64.

As to the first prerequisite of having "actual knowledge" of a violation, plaintiffs cite no evidence the PCSO had "actual knowledge" Adhahn had moved without registering after he updated his registration in 2002. *See e.g. Atherton Condominium Apartment-Owners Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 532-33, 799 P.2d 250 (1990) (actual knowledge "does not encompass facts which the ... official should have known"); *Moore v. Wayman*, 85 Wn.App. 710, 723, 934 P.2d 707 (1997) ("constructive knowledge ... is not enough" for "actual knowledge"); *Zimbelman v. Chaussee Corp.*, 55 Wn.App. 278, 282, 934 P.2d 707 (1989) ("Knowledge does not include what an official might have known if he had performed his duties more effectively or vigilantly").

As to the second requirement of a statutorily dictated "corrective action," RCW 9A.44.135(2) requires only that if the offender "cannot be located at the registered address" relevant agencies should make "reasonable attempts to locate any sex offender" and then simply "forward this information ... for inclusion in the central registry of sex offenders" -- it does not require an arrest. Here, plaintiffs cite no fact showing Adhahn had actually moved in 2005 or that the Sheriff's Office failed to make "reasonable attempts" to locate him. Plaintiffs likewise cite no authority holding there would have been a duty to arrest Adhahn even if he had been a

known registration violator and had been located. This is so because the "failure to enforce" exception "applies only where there is a mandatory duty to take a specific action to correct a known statutory violation," and "does not exist if the government agent has broad discretion about whether and how to act." *Donohoe*, 135 Wn.App. at 849. *See e.g. also Torres v. City of Anacortes*, 97 Wn.App. 64, 74, 981 P.2d 891 (1999) (statute did not create duty to arrest assailant before murder where domestic violence act did not apply and there was "no other statute creating a mandatory duty to arrest and therefore did not establish a duty based on a failure to enforce"); *Donaldson v. Seattle*, 65 Wn.App. 661, 671, 831 P.2d 1098, *rev. dismissed*, 120 Wn.2d 1031 (1993) (no claim for failure to arrest for assault before girlfriend was murdered because though "the DVPA clearly establishes a mandatory duty to arrest ... when the abuser is on the premises," no such duty exists where the "violator is absent" since "the act does not so provide"). Here, RCW 9A.44 *et seq.* does nothing to change the general rule "officers have discretion as to whether they will ... make an arrest once they have probable cause." *State v. Fry*, 168 Wn.2d 1, 8-9, 228 P.3d 1 (2010). Hence, here there could be no failure to take "corrective action despite a statutory duty to do so."

Finally, as to this "narrow exception's" requirement that "plaintiff is within the class of persons the statute intended to protect," plaintiffs no-

where explain how RCW 9A.44.135 was "intended to protect" any "particular circumscribed class of persons" rather than "the public in general." Rather, the entirety of plaintiffs' analysis as to whether their decedent "was within the class of foreseeable victims the statute was intended to protect" consists of two words; i.e., "She was." AB 39. As a matter of law, the Court "will not consider issues on appeal that ... are not supported by argument and citation of authority." *McKee v. American Home Products, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989). See also RAP 10.3(a)(6). In any case, as noted above, "duties of public officers are normally owed only to the general public," *Hostetler*, 41 Wn.App. at 363-64, and RCW 9A.44 *et seq.* was not "intended to protect" any "class of persons" but to benefit the public in general. Compare *Bailey v. Town of Forks*, 108 Wn.2d 262, 271, 737 P.2d 1257 (1987) ("failure to enforce" created duty "owed to a particular plaintiff or a limited class of potential plaintiffs, rather than the general duty of care owed to the public at large," where statute protected "users of public highways from accidents caused by intoxicated drivers") with *Jamison v. Storm*, 426 F.Supp.2d 1144, 1160 (W.D. Wash. 2006) (statute did not "protect a particular circumscribed class of persons" so plaintiff "cannot establish that she is within the class of persons intended to be protected" so "failure to enforce" claim "fails as to the 'duty' element as a matter of law").

b. Decedent Was Not a Foreseeable Victim as a Matter of Law

"Failure to enforce" claims are "also limited by the requirements of foreseeability." *Bailey*, 108 Wn.2d at 271. As a matter of law it was not foreseeable Adhahn would kill and rape the decedent years later if his address was not updated. Plaintiffs' only argument that their decedent was Adhahn's "foreseeable" victim is that the "Legislature has repeatedly recognized that sex offenders have a high rate of recidivism." AB 39. However, such was also the case in *Osborn* where a County also was sued over registration obligations and was claimed to owe a duty concerning the rape and murder of a minor girl -- there by a level III "high risk" sex offender only eight months after release from prison from his second conviction for a violent sexual offense. 157 Wn.2d at 21. There our Supreme Court held the decedent minor girl "was not a foreseeable victim," *id.* at 20 & 25, and here the record nowhere contains any fact showing plaintiffs' decedent somehow was a more foreseeable victim than the decedent in *Osborn*. Instead, plaintiffs' complaint affirmatively concedes that in 2002 Adhahn instead was a "low risk" level I sex offender, had a single non-violent conviction for incest against his sister a decade before, and had been out of jail without any known offense for the decade following. CP 5-6.

As was the case under *Osborn's* far more egregious facts, the decedent here also "was not a foreseeable victim" as a matter of law.

c. Failure to Update Registration Not a Cause in Fact of Murder

Without citation to any fact of record, plaintiffs first boldly speculate:

Had the County pursued Adhahn for failure to register in 2005, and had he spent any time in jail or under DOC for that conviction, it is more likely that DOC or the Jail would have reported his offenses to immigration, and that he would have been deported

AB 49 (emphasis added). However, as a matter of law, "recovery cannot be based upon a claim of what "might have happened." *Kristjanson v. Seattle*, 25 Wn.App. 324, 326, 606 P.2d 283 (1980) (affirming summary judgment for lack of proximate cause and quoting *Johanson v. King County*, 7 Wn.2d 111, 122, 109 P.2d 307 (1941)). *See also Marsh v. Commonwealth Land Title Ins. Co.*, 57 Wn.App. 610, 622, 789 P.2d 792 (1990) ("Whenever cause in fact is too speculative ... there is no proximate cause"). Rather, to "prove cause-in-fact, [plaintiff] had to be able to show that, but for [defendant's] breach of duty, [the criminal] would not have killed [the victim]" yet plaintiff "has not and cannot meet this burden." *Lynn*, 136 Wn.App. at 311.

Here, ignoring that the record is devoid of any actual factual support, plaintiffs rely on a cascading chain of assumptions; *i.e.*, 1) the Sheriff would have been able to locate and arrest Adhahn; 2) then the Prosecutor would have charged him; 3) then the jury would have convicted; 4) then the judge would have sentenced him to jail; 5) then the INS upon notice

would have pursued deportation; and 6) then deportation proceedings would have been successful. Such extended speculation is not "proof" of proximate cause but impermissibly requires "a jury to guess not only whether and when the violation would have been pursued but also whether a judge would have done something ... and what that different result would have been." *Estate of Bordon ex rel. Anderson*, 122 Wn.App. at 241-42 (dismissing wrongful death claim after killer's release). *See also e.g. Garcia v. State, Dept. of Transp.*, 161 Wn.App. 1, 607, 270 P.3d 599 (2011) (no proximate cause because claim required "the City ... to request a permit" but there was "nothing in the record showing that if the City had exercised its discretion to apply for a permit ..., the permit would have been granted, or that if granted, the City could have obtained funding ... before the accident"); *Charbonneau v. Wilbur Ellis Co.*, 9 Wn.App. 474, 477, 512 P.2d 1126 (1973) (summary judgment where "trier of fact would be unable to do any more than speculate or guess"). Hence, in *Walters v. Hampton*, 14 Wn.App. 548, 550, 543 P.2d 648 (1975), a County was sued on speculation that "had [the assailant] been prosecuted" in 1970 "plaintiff would not have been injured in 1972," but it was dismissed because:

[T]here are too many gaps in the chain of factual causation to warrant submission of that issue to the fact finder. It would require a high degree of speculation for the jury or the court to conclude that some sort of prosecutorial action by the police against Hampton in September 1970 would

have prevented plaintiff's injuries at Hampton's hands in February 1972. Such a conclusion would require the assumption of a successful prosecution of Hampton. ... Finally, we would have to assume that Hampton would be incarcerated for the offense Factual causation requires a sufficiently close, actual connection between the complained-of conduct and the resulting injuries. [Citations omitted.] Where inferences from the facts are remote or unreasonable, as here, factual causation is not established as a matter of law.

Id. at 553 & 556.

Plaintiffs' conjecture also ignores that even if all their list of predicates had occurred, *but see Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 670, 230 P.3d 583 (2010) (an immigrant's "removal from the United States is not a foregone conclusion" because he "still faces removal proceedings in front of an immigration judge," and even then "if an immigrant is deportable, removal can still be canceled in some cases"), any deportation for failure to register then would have been overturned. *See Plasencia-Ayala v. Mukasey*, 516 F. 3d 738, 747-49 (9th Cir. 2008), *overruled on other grounds*, *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) ("failure to register as a sex offender cannot constitute morally turpitudinous behavior" for deportation under 8 U.S.C. § 1227(a)(2)(A)(i) because "it is the sexual offense that is reprehensible, not the failure to register").

In any case, the actual factual record instead affirmatively shows any theoretical conviction -- one of plaintiffs' first *a priori* assumptions essen-

tial to their chain of conjecture -- would not have occurred because, even if Adhahn had been found and arrested: 1) no charges would have been filed in either 2002 or 2005 due to lack of sufficient evidence of a crime; 2) if charged, Adhahn likely would not have been convicted of a felony; and 3) if somehow convicted of a felony, any sentence would not have been long enough to prevent his release before the 2007 Linnik murder. *See* CP 940-41, 957-959. *See also* *Hungerford*, 135 Wn.App. at 253 (no cause in fact since even if a "trial court would have imposed Davis's suspended sentence but for DOC's alleged negligence, he presents the court no evidence that Davis would have been in jail on the day of [the] murder had DOC acted differently" so killer "still would have been released in time to commit the murder" and plaintiff "failed to meet his burden").

Plaintiffs' other theory of causation -- again made without support in the record -- speculates that once the above chain of assumptions occurred and Adhahn had been "convict[ed] for failure to register after 2002, [it] would have resulted in Adhahn's DNA being drawn -- DNA that was already on file with the John Doe Information in Rasmussen, again, a deportable crime." AB 49. However, nothing in the record shows that in 2002 DNA actually would have been taken from Adhahn -- much less that at that time it could automatically link him to other crimes. Indeed, the only evidence is that a DNA sample had been taken from Adhahn in the

1990's yet it had not linked him to the 2000 Rasmussen rape. See AB 11; CP 1051-55, 2976, 2984. Plaintiffs' DNA theory is what this Court in *Theonnes v. Hazen*, 37 Wn.App. 644, 649, 681 P.2d 1284 (1984) criticizes as "reasoning in a circle. It assumes a fact ... [i.e., DNA test would have identified Adhahn], but concerning which assumed fact there is no evidence, and then employs the supposititious fact as the basis for a conjecture [i.e., he would have been convicted]." As a matter of law, such speculation cannot create a genuine issue concerning proximate cause.

Where "the facts do not admit of reasonable differences of opinion, proximate cause is a question of law to be decided by the court." *Pratt v. Thomas*, 80 Wn.2d 117, 119, 491 P.2d 1285 (1972). See also *Granite Beach Holdings, LLC v. State ex rel. DNR*, 103 Wn.App. 186, 195, 11 P.3d 847 (2000) (summary judgment affirmed because "[w]here reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law"). Further, "the nonmoving party may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists." *Yellow Front Stores*, 66 Wn.App. at 198 (emphasis added). See also CR 56(e). Here, the record contains no evidence a hypothetical arrest, prosecution, conviction, and jailing for failure to update a registration in 2002 or 2005 would have prevented the 2007 murder. The evidence only disproves this speculation.

d. Failure to Update Registration Not Legal Cause of Murder

In reversing a failure to dismiss for lack of legal causation, our Washington Supreme Court notes that even where "the factual elements of the tort are proved, determination of legal liability will be dependent on 'mixed considerations of logic, common sense, justice, policy, and precedent.'" *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985) (failure to revoke intoxicated driver's license was too remote and insubstantial to impose liability for later accident). Hence, "legal causation" is a question of law for the court, *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 51, 176 P.3d 497 (2008); *Alger v. Mukilteo*, 107 Wn.2d 541, 545, 730 P.2d 1333 (1987); *LaPlante v. State*, 85 Wn.2d 154, 159-60, 531 P.2d 299 (1975), and focuses "on 'whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.'" *Kim v. Budget Rent A Car Sys.*, 143 Wn.2d 190, 205, 15 P.3d 1283 (2001). *See also Garcia*, 161 Wn.App. at 606 ("legal causation ... focuses on whether the connection between the defendant's act and the result is too remote or inconsequential to impose liability"); *Lynn*, 136 Wn.App. at 210 ("court must decide "whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability"); *Hungerford*, 135 Wn.App. at 255 (upholding summary judgment because "[a]s a

matter of legal causation, we hold that Davis's future crimes were too remote for DOC's actions to be a proximate cause of Hungerford-Trapp's murder"). Here, the connection between the 2007 murder and the act of not arresting Adhahn for failing to update his registration in 2002 or 2005 "is too remote or insubstantial to impose liability" on Pierce County.

Indeed, in *Kim v. Budget Rent A Car Sys*, where a third party's crime occurred only a day after the defendant's alleged negligence, our Supreme Court held "the remoteness in time between the criminal act and the injury is dispositive to the question of legal cause...." 143 Wn. 2d at 205 (emphasis added). This was so because, even where there is negligence, "the responsibility for such negligence must terminate at some time in the future" and the defendant "should not be 'answerable in perpetuity for the criminal and tortious conduct of others'" *Id.* (quoting *Gmerek v. Rachlin*, 390 So.2d 1230, 1231 (Fla. App. 1980) (defendant not legal cause of harm "occurring some five and one-half months after" because "responsibility of a tortfeasor for the consequences of his negligent acts must end somewhere, and under our legal system the liability of the wrongdoer is extended only to the reasonable and probable, not the merely possible, results of a dereliction of duty") and *Devellis v. Lucci*, 697 N.Y.S. 2d 337, 339, 266 A.D.2d 180 (App. Div. 1999) ("passage of 24 days between the theft of the vehicle and the injury-producing event viti-

ated any proximate cause between the purported negligence and the accident as a matter of law"). *See also* Restatement (Second) of Torts § 433 (1965) ("lapse in time" an "important" consideration in determining proximate cause). Hence, when criminal acts did not occur until months after an assailant was allowed to escape, such negligence is "too remote or attenuated 'as to be insignificant and unsubstantial as compared to the aggregate of the other factors which have contributed' to the circumstances of [the] criminal actions." *Holt v. Navarro*, 932 A.2d 915, 924 (Pa. Super., 2007).

Where months or even a day between an alleged negligent act and later crimes are too remote to be a legal cause, the several years here between the alleged negligence and crime at issue is only more so.

3. Vague 2004 Anonymous CPS Referral About Unidentified Man and Different Female at Wrong Address Did Not Create Liability

Though plaintiffs last argue "CPS improperly referred ... to Pierce County for investigation" an anonymous January 2004 report that admittedly "did not" -- among other things -- include "Adhahn's name" or the age of a different female living with him, AB 13, they somehow still claim the "County knew, or should have known, that Adhahn was in the County and was raping another child in his care" and in some way had a "take-charge duty" to "control Adhahn by arresting him" AB 32. However,

plaintiffs never argued to the Superior Court that the CPS referral created a County "take-charge" duty, *see* CP 981-85, 2540-43, and cannot do so now under RAP 2.5(a). *See e.g. Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 728, 189 P.3d 168 (2008) ("we will not consider arguments not first raised below"); *Brower v. Pierce County*, 96 Wn.App. 559, 567, 984 P.2d 1036 (1999) ("[w]e will not consider arguments that are made for the first time on appeal"). Further, in violation of RAP 10.3(a), even now on appeal plaintiffs nowhere explain how the County had a "take-charge duty" for Adhahn when it only received an anonymous CPS referral that nowhere mentioned him, his actual address, the age of the different female living with him, or any crime. *See* CP 961-63, 965, 2739, 2741, 2845-47, 2847, 2880-81. *See also e.g. McKee*, 113 Wn.2d at 705 and discussion *supra.* at 20, 22-23. In addition to the referral giving no reason to arrest Adhahn at that time,⁵ the County has already shown under *Osborn* it had "no authority to control" him and the decedent was "not a foreseeable vic-

⁵ Even had a name and accurate address been provided, an uncorroborated report that gives no factual foundation for its claims does not support even a "well founded suspicion" of a violation. *See e.g. State v. Sieler*, 95 Wn.2d 43, 47-48, 621 P.2d 1272 (1980) (no "well founded suspicion" where tip by "unknown but named telephone informant" is "merely a bare conclusion unsupported by a sufficient factual basis which is disclosed to the police"); *State v. Hart*, 66 Wn.App. 1, 7-9, 830 P.2d 696 (1992) (no "well founded suspicion" existed where citizen's report neither included any factual basis for its supposition nor had been corroborated); *Campbell v. State Dept. of Licensing*, 31 Wn.App. 833, 835, 644 P.2d 1219 (1982) (where "uncorroborated tip constitutes the sole justification ..., the tip must possess an 'indicia of reliability'" by having both a "source of information [that is] reliable" and disclosing "enough objective facts to justify the pursuit and detention of the suspect").

tim" as a matter of law. *See* 157 Wn.2d at 25; *supra.* at 22-23, 27-28.

Plaintiffs next claim the vague January 2004 CPS referral created duties under "RCW 26.44.050 ... to investigate reports of child abuse" and "under RCW 26.44.030 to refer the results of such investigations for prosecution." AB 37-38. However, as discussed below, the record shows the County breached no standard of care, case law shows it had no such duties, and the record and law show it did not proximately cause the murder.

a. PCSO Breached No Standard of Care in Its Investigation

Because the undisputed record establishes the County in 2004 never had reason to even suspect Adhahn "was raping another child in his care," CP 961-63, 965, 959, 2739, 2741, 2845-47, 2847, 2880-81, plaintiffs instead speculate that if Sheriff's Detective Brian Lund had gone further than investigating the given address and also "called DSHS on the day Pierce County claims he investigated the allegation (either January 29, 2004, or January 30, 2004), he would have been told Adhahn's name and would by his own testimony, have conducted an investigation on Adhahn" which somehow would have revealed his crimes and actual location so that he supposedly would have been arrested, convicted, deported, etc. AB 13-14. However, plaintiffs' brief fails to cite any such alleged "testimony" by the detective but only that of his supervisor who said nothing of the kind. *See*

AB 13 (citing "CP 2739" -- testimony of Detective Sergeant Berg). Instead, Detective Lund's uncited testimony actually concerned his attempt to answer -- over objection -- plaintiffs' improper questions about his "typical practice" under a hypothetical factual scenario different from that actually existing at the time; i.e., if he had instead had a CPS referral with more information than was provided here. *Compare* CP 961 with CP 2762. In any case, plaintiffs cite nothing in the record showing the detective did not in fact call DSHS to "follow up" and still had insufficient information. AB 13. Indeed, the record shows that if the detective called the CPS worker taking the referral, the undisclosed information would not have been given since policy prevents workers from doing so. CP 2848.

Further, there was no testimony that failing to call the DSHS worker -- much less thereafter his supervisor in order to overrule his refusal -- violated any recognized "standard" for investigating such a vague non-criminal referral. After confirming the address given to PCSO was false, there was no factual basis for the detective to expend further Sheriff's resources chasing yet more wild hares where at that time he still had no information any crime had been committed. *See supra.* n. 5. Indeed, in light of its heavy workload and the fact no crime was disclosed, the devotion of scarce manpower for this vaguest of referrals speaks well of the PCSO.

b. No Duty of Care Was Owed to Plaintiffs

This Court recognizes "Courts frequently deny recovery for injuries caused by the failure of police personnel to ... investigate properly or to investigate at all," *Torres*, 97 Wn.App. at 74, and the "policy of the law ... should not countenance suits ... for the basic discretionary action of its police chief relating to potential criminal prosecutions." *Walters*, 14 Wn. App. at 553. This is because:

[T]he amount of protection afforded by any individual police department is necessarily determined by the resources available to it. The determination of how these resources can most effectively be used is a legislative-executive decision. Were we to hold a police chief's failure to prosecute every alleged violation of a city ordinance exposes a municipality to civil liability in tort, we would be placing ourselves in a position of having to determine how limited police resources are to be allocated. [Citation omitted.] This is neither a traditional nor appropriate role for the courts to assume. Moreover, such a holding would, in effect, make the City an insurer against every harm imposed by a criminal act

Id. See also *Fondren v. Klickitat Cy*, 79 Wn.App. 850, 853, 863, 905 P.2d 928 (1995) (dismissal should have been granted because a "claim for negligent investigation is not cognizable under Washington law"); *Donaldson*, 65 Wn.App. at 671 (the "overall law enforcement function ... does not generate a right to sue for negligence" in murder by a third party). Indeed, imposing a duty to allocate scarce police resources to investigate "would impair vigorous prosecution and have a chilling effect upon law enforcement." *Dever v. Fowler*, 63 Wn.App. 35, 45, 816 P.2d 1237 (1991).

In that there is no common law claim for negligent investigation, plaintiffs must show -- as also is required to sue any private defendant -- a statutory cause of action instead. To imply such a suit requires examining:

[F]irst, whether the plaintiff is within the class for whose "especial" benefit the statute was enacted; second, whether the legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Roe v. TeleTech Customer Care Management (Colorado) LLC, 171 Wn.2d 736, 753-54, 257 P.3d 586 (2011) (quoting *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990)). Here, these requirements preclude any implied cause of action under RCW 26.44.050 or RCW 26.44.030.

1) RCW 26.44.050 Created No Duty Owed Plaintiffs

As to the first question of "whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted," a "review of Washington court holdings shows consistency in the determination that under Chapter 26.44 RCW, [the] duty to conduct a reasonable investigation of allegations of child abuse is owed to a particular, circumscribed class; children who are alleged to be abused, and their parents." *Blackwell v. State Dept. of Social and Health Services*, 131 Wn.App. 372, 376, 127 P.3d 752 (2006) (emphasis added). Hence a statutory duty to investigate is owed only to "children who are suspected of being abused and their parents" who alone

"compromise a protected class under RCW 26.44 and may bring action for negligent investigation under that statute." *Tyner v. State Dept. of Social and Health Services*, 141 Wn.2d 68, 80, 1 P.3d 1148 (2000); *Rodriguez v. Perez*, 99 Wn.App. 439, 445, 994 P.2d 874 (2000). Our courts have repeatedly refused to extend that duty under RCW 26.44.050 to anyone else. See *Ducote v. State, Dept. of Social and Health Services*, 167 Wn.2d 697, 222 P.3d 785 (2009) (no duty owed stepparents of abused children); *Blackwell v. Dep't of Soc. & Health Servs.*, 131 Wn. App. 372, 379, 127 P.3d 752 (2006) (no duty to foster parents); *Pettis v. State*, 98 Wn.App. 553, 560, 990 P.2d 453 (1999) (no duty to child care workers). Here, at the time of the January 2004 CPS report, the decedent was not a child "alleged to be abused" and neither she nor her parents were "within the class for whose 'especial' benefit the statute was enacted."

Ignoring the above precedent as well as the facts both here and in *Lewis v. Whatcom County*, 136 Wn.App. 450, 452, 149 P.3d 686 (2006), plaintiffs quote the latter's vague statement that "[n]othing in our previous opinions limiting the rights of alleged abusers to sue for negligent investigation can or should be read to limit the duty of law enforcement to protect children from abuse." AB 34. However, *Lewis* never claimed to overturn Supreme Court and Division One precedent holding the statute applied only to "children who are suspected of being abused and their par-

ents." Indeed, *Lewis* itself concerned a child who was previously suspected of being abused by her uncle yet he "continued to molest her" because a prior report about her was not investigated. *Id.* at 454-55 (state's argument that statute limited "to children who have been abused by their parents" rejected since "[n]owhere in the language of chapter 26.44 is there any reference to protecting children only from abuse by their parents.") (emphasis added). Rather, the statute's declaration of purpose states:

[T]he state is justified in emergency intervention based upon verified information; and therefore the Washington state legislature hereby provides for the reporting of such cases to the appropriate public authorities. It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children.

RCW 26.44.010 (emphasis added). Because its express purpose is to prevent "further abuses" of "such children" who have been the subject of "such reports," Courts without exception have limited any RCW 26.44.050 claim to those victims who were previously suspected of being abused.

Plaintiffs offer no basis to extend the duty to all children who might be abused untold years in the future and no precedent supports extending this "narrow" and "limited" statutory duty to include investigating potential future third-party victims who were not the subject of a report but instead

are abused years later. Instead, this Court has made clear it rejects the claim "the State must somehow prevent all child abuse" and has held that "services required by RCW 26.44 are for children and adult dependents who may be abused or neglected, and their families, not all children and their parents." *Yonker v. State Dept. of Social and Health*, 85 Wn.App. 71, 79 & 81, 930 P.2d 958 (1997).

As to the additional requirement of "whether implying a remedy is consistent with the underlying purpose of the legislation," the Supreme Court holds a "negligent investigation cause of action ... is a narrow exception that is based on, and limited to, the statutory duty" and hence applies "in limited situations ... only when [government] conducts a biased or faulty investigation that leads to a harmful placement decision, such as placing the child in an abusive home, removing the child from a nonabusive home, or failing to remove a child from an abusive home." *M.W. v. Department of Social and Health Services*, 149 Wn.2d 589, 591, 70 P.3d 954 (2003) (emphasis added). *See also Petcu v. State*, 121 Wn. App. 36, 56 & 58, 86 P.3d 1234 (2004) (statutory action "for negligent investigation is a narrow exception" that "arises when the state conducts an incomplete or biased investigation that results in a harmful placement decision" so that a "claimant must prove that the allegedly faulty investigation was the proximate cause of the harmful placement" and rejecting "a much broader

cause of action for negligent investigation than has been recognized by our courts") (emphasis added). This is so because "a cause of action inferred from a statutory duty is limited by the harm the statute is meant to address," and the harm RCW 26.44.050 addresses "is the abuse of children within the home and unnecessary interference with the integrity of the family," so it naturally follows that "a claim for negligent investigation against [government] is available only" where it "results in a harmful placement decision" and our Courts "decline to expand this cause of action beyond these bounds because the statute from which the tort of negligent investigation is implied does not contemplate other types of harm." *Id.* at 602 (reversing court for "finding a general duty to investigate reasonably implicit in the statutory duty to investigate, instead of analyzing the stated purpose of the statute" so dismissal proper when a "harmful placement decision is not the type of harm alleged") (emphasis added).

Indeed, the Supreme Court has unambiguously stated the statute "un- equivocally requires that the negligent investigation to be actionable must lead to a 'harmful placement decision.'" *Roberson v. Perez*, 156 Wn.2d 33, 47, 123 P.3d 844 (2005) (no claim exists even for a "constructive placement" decision) (emphasis added). *See also* D. DeWolf & K. Allen, 16 Wash. Prac. Tort Law and Prac. §1.27 (3rd Ed. 2006 & Supp. 2009-10) ("not all harm caused by negligence during the course of a DSHS investi-

gation will support a recovery; the harm must arise from an erroneous placement decision"). Here a "harmful placement decision is not the type of harm alleged" but rather that three years before the 2007 murder Adhahn was not investigated, prosecuted, etc., for his unknown abuse of a different child outside the placement system.

Ignoring the above unequivocal binding Supreme Court precedent, plaintiffs nevertheless summarily claim that *Lewis* also "rejected" that "the statutory duty only encompassed harms arising from placement decisions." AB 34. Of course, a panel of the Court of Appeals could not overrule the Supreme Court's decision in either *M.W.* or *Roberson*. Rather, it is the Supreme Court that overruled a lower court when arguments similar to plaintiffs were erroneously accepted that there is a "general duty to investigate reasonably implicit in the statutory duty to investigate, instead of analyzing the stated purpose of the statute." *See M.W.* 149 Wn.2d at 591. In any case, *Lewis* did not hold contrary to precedent but expressly applied the "placement decision" principle by rejecting any claim that "leaving a child in an abusive situation in which the parent sends her to an uncle who molests her is not a placement decision." *Id.* at 458. Even after *Lewis*, commentators and courts still agree RCW 26.44.050 requires that "the harm must arise from an erroneous placement decision." 16 Wash.Prac. at 28 (emphasis added). *See also Walker v. King County*, 630 F.Supp.2d

1285, 1295 (W.D.Wash. 2009) ("The Washington Supreme Court has rejected the notion of a 'general statutory duty of care' for child abuse investigations and has severely limited the scope of the duty to investigate ... 'only to children, parents, and guardians of children who are harmed because [the investigating party] has gathered incomplete or biased information that results in a harmful placement decision'") (*quoting M.W., supra.*).

Here both the narrow class of those "suspected of being abused" and the limitation of such actions to "placement decisions" preclude plaintiffs from making any claim under RCW 26.44.050.

2) RCW 26.44.030 Created No Duty Owed to Plaintiffs

Not only is any separate RCW 26.44.030 statutory cause of action outside the complaint,⁶ but such a theory again requires that plaintiffs be

⁶ The complaint neither alleges failure to report to the prosecutor nor mentions RCW 26.44.030, *see* CP 23, and the County so objected from the beginning. *See* CP 130, 163-64, 175-76, 917-18. *See also Pacific Northwest Shooting Park Ass'n v. Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006) ("inexpert pleadings may survive a summary judgment motion, insufficient pleadings cannot"); *Lundberg v. Coleman*, 115 Wn.App. 172, 180, 60 P.3d 595 (2002) (because claim was "not substantiated in any of the pleadings" plaintiff was barred from raising it); *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn.App. 18, 26, 974 P.2d 847 (1999) (party failing to plead cause of action "cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along"). Such alone is ground for upholding dismissal of a RCW 26.44.030 claim on appeal. *See Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480 (1976) (an "inveterate and certain" rule is an "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it") (*quoting United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924)); *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998) ("It is a general rule ... that the judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in

"within the class for whose 'especial' benefit the statute was enacted." *Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn.App. 407, 422, 167 P.3d 1193 (2007). Here, the County has shown the statutory purpose of RCW 26.44 *et seq.* is only to prevent "further abuses" of "such children" that had been the subject of "reports," and case law expressly warns "services required by RCW 26.44" do "not [apply to] all children" *Yonker*, 85 Wn.App. at 79 & 81. *See also* discussion *supra*. at 40-45. Here there is no claim -- much less evidence -- decedent was the subject of any previous report of abuse.

c. 2004 Investigation Not Proximate Cause of 2007 Murder

As to "cause in fact," the same defects previously identified as to any claim for failure to update sex offender registration under RCW 9A.44.135 apply equally to any claim under RCW 26.44.050 or 26.44.030. *See* discussion *supra* at 28-33. In fact, any claim that three years before the murder the County is alleged to have negligently investigated and failed to send the Prosecutor a report about a different female is even more speculative and attenuated than plaintiffs' claim for updating Adhahn's registration because an even longer chain of additional hypothetical events is required.

Specifically, in addition to the chain of conjecture concerning an arrest

the decision of the trial judge") (*quoting Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985)).

that would lead to Adhahn's prosecution, that would lead to "some kind of [felony] conviction," that would lead to a sentence, that would lead to deportation or to blood sampling that would lead to DNA matching, AB 49, a jury also would be asked to speculate as to an additional series of hypothetical events necessary even to identify Adhahn as the violator and arrest him. Hence, this theory would also require that: 1) CPS eventually reveal the name of the offender to the Sheriff's Detective; 2) and such result in an unspecified "better" investigation that somehow would: a) connect a mere name to the records of the actual known past sex offender Adhahn; b) confirm he actually was committing a crime; c) discover his current address; and d) find him to arrest him. Despite this, plaintiffs somehow state "Adhahn's incarceration and deportation were not merely likely, but inevitable." AB 49. However, it is evidence -- not mere unsupported and argumentative assertions -- that is required to overcome summary judgment. *See Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 507, 182 P.3d 985 (2008) (a "nonmoving party may not rely on speculation or argumentative assertions"). *See also Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) ("nonmoving party may not rely on speculative or argumentative assertions that unresolved factual issues remain"). Again the RCW 26.44.050 and RCW 26.44.030 claims are supported only by speculation and argumentative assertion.

As to "legal causation," it too is absent for the same reasons as discussed in relation to the sex offender registration claim. *See supra.* 33-35. An alleged failure, more than three years before the murder, to "properly" investigate and report an anonymous tip regarding an unnamed man and different female at a mistaken address that describes no crime is simply "too remote or insubstantial to impose liability." *See Kim*, 143 Wn.2d at 205. *See also Garcia*, 161 Wn.App. at 607; *Lynn*, 136 Wn.App. at 210; *Walters*, 14 Wn.App. at 550. As previously noted above, where a third party's crime occurring merely a day after a defendant's alleged negligence made "the remoteness in time between the criminal act and the injury ... dispositive to the question of legal cause," *Kim, supra.*, the three years between the single January 2004 CPS referral and the July 2007 murder is at least as "dispositive."

V. CONCLUSION

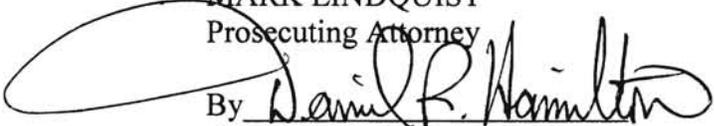
The record shows Pierce County did not just "point out" the "absence of evidence to support the nonmoving party's case" as required for summary judgment, *Young, supra.*, but went further and affirmatively demonstrated there is literally no evidence -- much less the required evidence upon which a fact finder "can properly proceed to find a verdict for the party producing it" -- to prove the necessary elements of the claims asserted here. *Id.* Similarly, it has been shown that the law precludes plain-

tiffs' effort to "in effect, make the [government] an insurer against every harm imposed by a criminal act" *Walters, supra.* at 553. Instead the record shows, as plaintiffs admitted, "we have a single agent of harm: Terapon Adhahn." *See* CP 2057. Hence, under both the facts and the law, it is not the County as an insurer -- but Terapon Adhahn as the confessed kidnapper, murderer, and rapist -- who is singularly responsible here.

Because the Superior Court did not err in granting Pierce County's motion for summary judgment, the latter respectfully requests its dismissal be affirmed.

DATED this 24th day of May, 2012.

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By 

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing BRIEF OF RESPONDENT PIERCE COUNTY was delivered this 24th day of May, 2012, to ABC-Legal Messengers, Inc., with appropriate instruction to forward the same to the following parties:

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