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COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

NANCY MILLER, personal representative of the Estate of
HEATHER DURHAM,

Appellant,

v.

PIERCE COUNTY,

Respondent,

and

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS,

Defendant.

BRIEF OF APPELLANT

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A. INTRODUCTION

Heather Durham was severely beaten by her estranged husband, Abel Robinson, while he was allegedly under electronic home monitoring (“EHM”), but not actually monitored by either Pierce County (“County”), the Department of Corrections (“DOC”). When the trial court granted the County’s CR 12(b)(6) motion dismissing “take charge” liability claims against the County, her estate (“Estate”) sought discretionary review of the trial court’s order, which this Court’s Commissioner granted, finding the trial court committed obvious error.

Numerous controlling Supreme Court decision recognize the County’s “take charge” duty to Durham. Nevertheless, the County disclaims any duty to have monitored Robinson despite the fact that had he not been under EHM, *he would have been incarcerated in the County’s Jail*. Moreover, if he was not on EHM or no EHM program existed, the County should have incarcerated him pursuant to the sentencing court’s Warrant of Commitment. These facts belie the County’s oft-repeated assertion that Robinson was not “in custody” for purposes of the County’s “take charge” duty to Durham.

The public ought to be very concerned that neither the County nor DOC appears to take *any responsibility* for monitoring the whereabouts or

conduct of offenders on EHM.¹ If offenders are free to casually ignore compliance with EHM, the public is obviously at risk.

The trial court prematurely dismissed this case on a CR 12(b)(6) motion without any significant discovery having been undertaken. It erred in concluding the County had no duty to monitor Abel Robinson's compliance with the terms of his custody in EHM. The Court should reverse the trial court's decision and give the Estate its right to try its case to a jury.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting the County's CR 12(b)(6) motion on March 1, 2019.

2. The trial court erred in denying Durham's motion for reconsideration by its March 15, 2019 order.

(2) Issue Pertaining to Assignments of Error

Where the court orders that a convicted offender be subjected to EHM in lieu of incarceration in a county jail, the County historically supervised such offenders, and there was, at a minimum, a fact question as to whether the County, and not DOC, should have monitored the offender, did the trial court err in granting the County's CR 12(b)(6) motion dismissing the Estate's take charge liability case against the County where an offender, the

¹ DOC, too, denies any legal obligation to have monitored Robinson while he was on EHM. DOC resp. at 1 ("...DOC did not have jurisdiction to supervise Robinson and its duty to do so, if any, did not trigger until he had completed his sentence with Pierce County—either through original jail time or EHM.").

former husband of the decedent, beat her mercilessly?
(Assignments of Error Numbers 1, 2)

C. STATEMENT OF THE CASE

On July 22, 2016 Heather Durham's estranged husband, Abel Robinson, was convicted of two felonies involving unlawful possession and solicitation to sell methamphetamines.² He was sentenced by the Honorable Kitty Van Doorninck of the Pierce County Superior Court ("sentencing court") to 364 continuous days of custody in the County's Jail or EHM in lieu of incarceration in the County's Jail, followed by 12 months of community custody. CP 235-52. The Warrant of Commitment specified that Robinson had to be on EHM by August 5, 2016, or report to the County Jail by 9:00 a.m. on that day to serve his sentence. CP 254-55. *See* Appendix. Robinson did neither, and the County did *nothing* to compel Robinson to comply with the terms of the sentencing court's Warrant of Commitment. CP 195, 227-31.

For the next several months, Robinson went completely unmonitored by the County or DOC, and was free to move about the County at will, flouting the terms of his sentence. On numerous occasions, Robinson left his home in violation of the court's order and roamed the community. CP 219-25. For example, Robinson harassed and

² That Robinson was dangerous is evidenced by his long and violent history with 16 prior convictions for assault, weapons offenses, theft, domestic violence, and harassment. CP 236-39.

attacked Durham at her residence prior to the subject incident; in one instance, Robinson punched Durham in the face and slammed her head into a wall. CP 195. On December 30, 2016 and January 3, 2017, DOC Community Corrections Officers (“CCO”) checked on Robinson at his residence and reported that Robinson was still not on his court-ordered EHM. CP 197-98, 229. The CCO then asked the County about Robinson’s EHM status. *Id.*

That exchange was but one example of the *multiple* times that the County communicated with DOC or others about Robinson’s EHM status. The County sent Robinson’s criminal defense attorney an email asking about his EHM status. The Tacoma Police Department called DOC asking who had jurisdiction over Robinson and was informed DOC did not have jurisdiction because Robinson had not completed his EHM. DOC contacted the County requesting the status of Robinson’s EHM. DOC deferred to the County on how to deal with Robinson’s noncompliance with EHM; Robinson was to report to the County Jail on August 5, 2016 with his EHM order. The County sent an email to DOC indicating that Robinson would be serving his 364-day sentence in its Jail; the County sent an email to DOC indicating that community custody—and DOC supervision—would begin after Robinson service his 364-day sentence in the County Jail. DOC sent an email to the County asking if there was any

way to address Robinson's EHM status sooner than March 24, 2017. DOC stated that Robinson was still under County's control as Robinson had not completed his 364-day sentence, either at the County Jail or on EHM, and therefore DOC did not have jurisdiction. CP 207-08.

Three days after the DOC/County exchange on January 3, 2017, Robinson, still openly violating the terms of his sentence and free from any supervision or oversight by the County or DOC, drove to Durham's house and savagely beat her with a wrench. CP 199-200. This attack left her hospitalized and blind in one eye. *Id.*

The County has not disputed that no County personnel monitored Robinson who then freely roamed anywhere in the County, despite being subject to alleged EHM. Nor does it deny that Robinson beat Durham within an inch of her life.

Durham filed suit in the Pierce County Superior Court on January 15, 2019. CP 1-7.³ On February 14, 2019, the County filed a 12(b)(6) motion asking the trial court to dismiss Durham's take charge liability action against it arguing that Durham failed to state a basis for any claim. CP 8-24. Durham responded. CP 166-78. However, following argument by the parties, the trial court, the Honorable Susan Serko, granted the County's motion without much in the way of analysis, merely ruling that

³ An amended complaint was filed on February 14, 2019. CP 76-84. A second amended complaint was filed on March 8, 2019. CP 193-204.

the County did not have a take charge relationship as to Robinson during the subject time period. CP 187-89, 216; RP 12-13. Durham's Estate⁴ moved for reconsideration or CR 54(b) certification. CP 205-15. DOC did not oppose CR 54(b) certification, but the trial court, nevertheless, summarily denied that relief by a brief order entered on March 15, 2019 that offered no explanation for its decision. CP 266.

Durham sought discretionary review, CP 269-75, which this Court's Commissioner granted, concluding the trial court committed obvious error. *See* Appendix.

D. SUMMARY OF ARGUMENT

The County had a well-established "take charge" duty as to Abel Robinson under §§ 315, 319 of the *Restatement (Second) of Torts* under multiple Washington decisions when the trial court sentenced him to 364 days of continuous detention either in the County's Jail or under an EHM regime. Robinson was plainly entrusted to the County's supervision. The County neither incarcerated Robinson, nor monitored him in accordance with the sentencing court's Warrant of Commitment. This allowed Robinson to savagely beat Heather Durham, Robinson's ex-wife whom he had previously subjected to his violence.

⁴ Heather died on February 24, 2019. CP 256, 259-65. Her Estate has been substituted for her. CP 267-68.

This Court should reject the County's contention that it had no supervisory responsibility over Robinson on review of the trial court's erroneous CR 12(b)(6) ruling where the Estate contended such a program existed in Pierce County and there was evidence adduced below in support of that contention. In any event, regardless of whether the County maintained such a program, it had an obligation to incarcerate Robinson in its Jail if it had no EHM program, and it failed to do, allowing Robinson to commit his brutality on Heather.

The Estate should be afforded its day in court before a jury.

E. ARGUMENT

(1) Standard of Review

This Court is fully familiar with the standard of review as to CR 12(b)(6) dismissal orders. A "motion to dismiss for failure to state a claim can be granted only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717-18, 189 P.3d 168 (2008); *Rossiter v. Moore*, 59 Wn.2d 722, 724, 370 P.2d 250 (1962). Dismissals for failure to state a claim are considered a drastic remedy and are granted only sparingly by Washington courts. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

Critically, all facts alleged in the Estate's complaint are presumed true and "any" hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support the Estate's claims. *Id.* at 750 (quoting *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)). Hypothetical facts may be introduced to assist the court in establishing the conceptual backdrop against which the challenge to the legal sufficiency of the claim is considered. *Id.* Thus, for the purposes of the motion before the trial court, it should have assumed that the County had an EHM program in place.

This Court then reviews the dismissal order *de novo*. *Trujillo v. Northwest Trustee Servs., Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015).

(2) The "Take Charge" Duty to Durham under Restatement (Second) of Torts §§ 315, 319

Our Supreme Court has made it unambiguously clear that a governmental defendant has a duty to a third party victim of an individual over whom the government exercised control who commits violent acts against that victim. In *numerous* cases, our courts have applied *Restatement (Second) of Torts* § 319 that provides: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise

reasonable care to control the third person to prevent him from doing such harm.” See, e.g., *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) (patient released from Western State Hospital); *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992) (parolees); *Bishop v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999) (county probationers); *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999) (city probationers); *Joyce v. State, Dep’t of Corrections*, 155 Wn.2d 306, 119 P.3d 825 (2005) (offender under community supervision); *Volk v. DeMeerleer*, 187 Wn.2d 241, 257-62, 386 P.3d 254 (2016) (drawing distinction between take charge duty under § 319 of the *Restatement*, and mental health professional’s special relationship duty as to patient under § 315). See also, *Estate of Jones v. State*, 107 Wn. App. 510, 15 P.3d 180 (2000), review denied, 145 Wn.2d 1025 (2002) (group care facility on contract with State and juvenile offender).

Once the County undertook its special “take charge” relationship with Robinson, it had a duty to exercise reasonable care to protect against reasonably foreseeable dangers he posed. As the Supreme Court stated in *Joyce*:

.... once the State has taken charge of an offender, “the State has a duty to take reasonable precautions to protect against the foreseeable dangers posed by the dangerous propensities of the parolees.” The existence of the duty comes from the special relationship between the

offender and the State. Once this special relationship is created, the State has a duty to use reasonable care when damages result.

155 Wn.2d at 310 (emphasis added). The scope of the take charge duty includes all persons who were foreseeably endangered by a breach of that duty. “[T]he scope of this duty is not limited to readily identifiable victims, but includes anyone foreseeably endangered” by the person’s dangerous propensities. *Taggart*, 118 Wn.2d at 219. Under facts not dissimilar to those here, Brock assaulted Taggart, a woman with whom he had not been previously acquainted. *Id.* at 200-01. To establish a “take charge” duty, the Court concluded that Taggart had only to show that she was “foreseeably endangered,” not that she herself was “the foreseeable victim of Brock’s criminal tendencies...” *Id.* at 224-25.

To have a “take charge” duty over a person because a special relationship exists between the governmental defendant over whom the government exercises control, the governmental defendant must control the conduct of the person so as to prevent him/her from causing physical harm to another. *Taggart*, 118 Wn.2d at 218. Such a relationship arises when a defendant “takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled,” and the defendant is therefore “under a duty to exercise reasonable care to control the third person to prevent him from doing...harm.” *Id.* at 219

(quoting *Restatement (Second) of Torts* § 319 (1965)). As the Supreme Court summarized in *Joyce*, the “relevant threshold questions are whether the State had a take charge relationship with the offender, and whether the State knew or should have known of the offender’s dangerous propensities.” *Joyce*, 155 Wn.2d at 318.

Here, there is little question that Robinson was a dangerous man with a *long* history of criminal offenses, and someone, whether the County or DOC, had a clear-cut obligation to control his conduct during his sentence. He was either to be in the County’s Jail or monitored by EHM. This was not a situation where “control” was lacking, as in the case of LFOs or absconding offenders.⁵ Rather, it was a question of who should have exercised that control. The County did not do so.

⁵ Certain kinds of relationships do not amount to a “take charge” relationship where there is no real behavioral control over the person. But this is decidedly not one of those instances. For example, in *Hungerford v. State, Dep’t of Corrections*, 135 Wn. App. 240, 139 P.3d 1131 (2006), *review denied*, 160 Wn.2d 1013 (2007), for example, this Court found the State had no “take charge” responsibility as to an offender who committed murder while he was under DOC supervision for legal financial obligations (“LFO”). This Court concluded that there was no “take charge” liability for the State at all where a court ended the offender’s active probation and limited any supervision to whether the offender paid his LFOs. When an offender is only being supervised for compliance with LFOs, there is no “take charge” duty. *Hungerford*, 135 Wn. App. at 257. In *Husted v. State*, 187 Wn. App. 579, 348 P.3d 776, *review denied*, 184 Wn.2d 1011 (2015), Division I determined that the State had no “take charge” duty to the victims of an offender on community supervision where the offender, prior to committing a murder and assault, failed to obey the terms of his community supervision, absconded, and a warrant for his arrest had been issued. The court concluded that the take charge duty no longer existed. Similarly, in *Smith v. Wash. State Dep’t of Corrections*, 189 Wn. App. 839, 359 P.3d 867 (2015), *review denied*, 185 Wn.2d 1004 (2016), this Court affirmed the trial court’s dismissal of a victim’s estate’s take charge liability case where an offender murdered a victim while on community supervision after absconding from supervision. As in *Husted*, DOC had sought, and a court issued, a warrant for the

(3) The County Had a “Take Charge” Duty Here Because It Had Custody Over Robinson

The trial court erred in its “take charge” duty analysis either by failing to recognize that the County had to have a functional EHM program to supervise Robinson,⁶ or the County had to incarcerate him in its Jail.

The County argued below that in the absence of a specific court order directing it to monitor Robinson, it had no take charge duty. There is *no authority* for such a position, a position that strains credulity, given the County’s past history of monitoring offenders on EHM, in lieu of incarcerating them in its Jail.⁷

In any event, the sentencing court, in fact, made it clear that the County had a special relationship and a duty as to Robinson, and that such

offender’s arrest, this Court determined no “take charge” duty existed once the offender absconded and a warrant issued, but it then correctly considered whether the State owned a duty to the victims in connection with its negligent conduct *during the time period the offender was under DOC’s supervision*. The court concluded that while such a duty existed, its breach was not the proximate cause of the victim’s death as a matter of law, rejecting the proposition that DOC might have terminated the offender’s community supervision and incarcerated him, thereby preventing his criminal behavior or that DOC might have rehabilitated the offender, preventing his crimes. Importantly, this Court noted that the estate failed to present admissible evidence on the former argument. *Id.* at *6 n.9.

⁶ If the County had no program for EHM compliance, it seems rather obvious that the County’s deputy prosecutor at the time of sentencing should have so advised the sentencing court as it was committing Robinson to the County’s custody by imposing a sentence of less than a year.

⁷ If the County is correct, both it and DOC can escape liability for what was patently a supervisory failure as to a dangerous offender. This Court needs to make clear that counties have monitoring responsibilities for offenders released on EHM in lieu of incarceration in a county jail.

a relationship was definite and continuing as the Supreme Court mandated in *Taggart and Hertog*. See 138 Wn.2d at 277. By virtue of the Judgment and Sentence and the Warrant of Commitment that would have placed him in County custody for 364 continuous days, either in the County Jail or EHM. Robinson was the County's responsibility. As the *Joyce* court noted:

Again, at the heart of the State's argument in this case is that its authority to supervise is limited by the judgment and sentence and the conditions of release. It argues that since these documents must be related to the underlying crime, its *duty* should similarly be limited. But the State misconstrues the relationship between the underlying conviction that triggers the special relation with the offender, and its own consequent duty. The *duty* arises from the special relationship between the government and the offender. The judgment and sentence and the conditions of release are critical because they create the relationship, which in turn creates the duty.

155 Wn.2d at 318. Specifically, under the Judgment and Sentence and Warrant of Commitment, Robinson served either 364 days under EHM **or** 364 days in the County Jail. If Robinson was not on EHM by August 5, 2016, then he was to report to Jail to being serving his sentence. Indeed, it could not be clearer that the County had the requisite control of Robinson where the Warrant committed Robinson to the custody of the *County's Director of Adult Detention*. CP 254. As alleged in the Estate's complaint (and presumed to be true for the purposes of a CR 12(b)(6) motion), it was

the County's responsibility to ensure Robinson either (a) was on EHM by the appointed date, or (b) was serving his sentence in its Jail.

By its very nature, the County's EHM program was a *custodial program* it offered in lieu of incarceration. Where Robinson's sentence was for less than a year, *the County*, by statute, had custody over him:

[A] sentence of not more than one year of confinement *shall* be served in a facility operated, licensed, or utilized under contract, *by the county*, or if home detention or work crew has been ordered by the court, in the residence of either the offender or a member of the offender's immediate family.

RCW 9.94A.190 (emphasis added). That the County had responsibility to monitor Robinson in this custodial setting is evidenced by the fact that the Legislature provided that *counties* could immediately transfer offenders subject to EHM who violate the EHM terms "to the appropriate *county* detention facility without further court order..." RCW 9.94A.731(2) (emphasis added). RCW 9.94A.736 establishes standards for electronic monitoring. The County was subject to these standards as a "supervising agency," defined there as the public entity that manages an EHM program "and has jurisdiction and control over the monitored individual." RCW 9.94A.736(8)(a). Indeed, the Legislature even carved out a reduced standard of liability, gross negligence, only for local governments in situations "arising from incidents involving offenders who are placed on

electronic monitoring...” The Legislature plainly contemplated that counties would operate EHM programs for offenders.

The County does not deny that no one monitored Robinson while he was on EHM. It should have done so.

In practice, the County had a program for monitoring individuals on EHM pursuant to RCW 9.94A.731(2). Significantly, in *State v. Cole*, 122 Wn. App. 319, 93 P.3d 209 (2004), the County aggressively enforced a violation of its EHM program. CP 99-125. There, a County officer actually asked if he could transport the offender who violated EHM requirements to the County Jail, evidencing its control over EHM offenders. CP 124.

Additionally, the County has studied how best it, not DOC, should monitor and enforce offenders on EHM, reinforcing its control over offenders on EHM supervision. A Pierce County Jail Issues Planning study states: “The Pierce County Sheriff’s Department oversees an Electronic Home Detention (EHD) program whereby certain defendants are allowed to serve their sentence at their residence rather than jail.” CP 131. Further, the Pierce County Sheriff’s Corrections and Detention Center Mission Statement recommends “increasing the Electronic Home Monitoring Program,” indicating one is already in place. CP 135. Pierce County’s 2017 Budget states that “[i]n June 2016, referrals to Pre-Trial

Services expanded to include Electronic Home Monitoring (EHM),” CP 138, again demonstrating an EHM program run by Pierce County was already in place at the time Robinson attacked Heather Durham.

From the above documents, it is clear that there are at least fact issues on the County’s “take charge” responsibility over Robinson. The County (a) has an EHM Program, (b) under which it monitors/supervises offenders on EHM, (c) and which gives the County the authority to arrest an offender in violation of the terms of his EHM.

The trial court’s refusal to find that the County had a “take charge” duty to Durham was error.

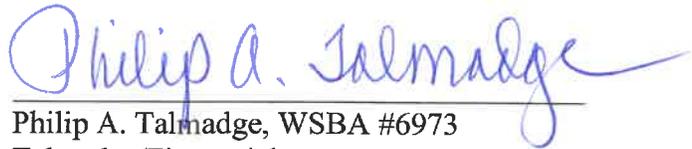
F. CONCLUSION

The County was irresponsible in failing to monitor Abel Robinson, a dangerous offender with a long history of convictions for violent offenses and a known inclination to harm Heather Durham who was committed to its custody either under its EHM program or its Jail. The County blithely ignored its responsibility to monitor Robinson while he was on EHM in lieu of incarceration in the County Jail, leaving him free to harm Heather. The County should not be rewarded for its patent failure to do its job, as the sentencing court ordered, to protect Heather and the public from Robinson.

This Court should reverse the trial court's dismissal order and afford the Estate its day in court before a jury. Costs on appeal should be awarded to the Estate.

DATED this 15th day of August, 2019.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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DIVISION II**

2019 MAY 20 PM 4:32

**STATE OF WASHINGTON
BY
DEPUTY**

NANCY MILLER, personal
representative of the Estate of
HEATHER DURHAM,

Petitioner,

v.

PIERCE COUNTY, and STATE OF
WASHINGTON, DEPARTMENT OF
CORRECTIONS,

Respondents.

No. 53344-8-II

RULING GRANTING REVIEW

Nancy Miller, the personal representative of the Estate of Heather Durham (Estate), seeks discretionary review of the trial court's order granting Pierce County's motion to dismiss under CR 12(b)(6) for failure to state a claim. Concluding the Estate demonstrates discretionary review is appropriate under RAP 2.3(b)(1), this court grants review.

FACTS

On July 22, 2016, in an exceptional sentence below the standard ranges for his two drug felonies, the trial court sentenced Abel Robinson to 364 days of "total confinement in the custody of the county jail", to be followed by 12 months of community custody under the supervision of the Department of Corrections (DOC). Mot. for Disc.

Rev., Appendix at 157 (highlighting omitted). The court considered Robinson a low-risk offender because he is paralyzed from the waist down and suffers from HIV and chronic skin and blood infections requiring frequent medical attention. The Judgment and Sentence also provided that Robinson could serve the sentence, if eligible and approved, on home detention. The court issued a Warrant of Commitment to the "Director of Adult Detention of Pierce County" and designated, via check mark, the "County Jail" as the associated institution, rather than DOC or other custodial entity. Mot. for Disc. Rev., Appendix at 169 (capitals and highlighting omitted). The Warrant of Commitment directed that "YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence (Sentence of confinement in Pierce County Jail)." Mot. for Disc. Rev., Appendix at 169 (capitals in original). In a handwritten notation, the Warrant of Commitment provided that Robinson "must be on EHM [electronic home monitoring] by 8-5-16 at 9 am or report to the [Pierce County] jail on 8-5-16 at 4 pm." App. at 169 (underscore omitted).

Unsurprisingly, Robinson did not begin EHM by August 5, 2016 at 9 A.M. or report to the Pierce County Jail by August 5, 2016 by 4 P.M. Robinson remained unmonitored and left his residence repeatedly, including to harass and attack his estranged wife, Heather Durham. On one occasion, he punched her in the face and slammed her head into a wall.

A Department of Corrections Community Corrections Officer (CCO), Roger Hanson, met Robinson at his home in December 2016 to check on his EHM status. CCO Hanson gave Robinson his assigned CCO number and told him to call his CCO Monique Gholston on January 3, 2017. Robinson did not call. On January 3, 2017, CCO Marki

Schillinger became aware Robinson was not on EHM and had not received any compliance extensions. Schillinger e-mailed the Pierce County Prosecutor's Office to check on Robinson's EHM status.

Three days later, on January 6, 2017, Robinson showed up at Durham's residence and beat her with a wrench. She was hospitalized and the attack left her blind in one eye. Later that month, Durham filed suit alleging that Pierce County and DOC breached a duty of care by failing to supervise, monitor, and control, or incarcerate Robinson for the violations of his conditions of confinement.

Pierce County filed a motion to dismiss under CR 12(b)(6), alleging that Durham had failed to state a claim because it did not owe a duty of care to her. DOC did not take a position on Pierce County's motion to dismiss. The trial court heard argument and granted Pierce County's motion to dismiss in March 2019 without explanation. Durham had passed away on February 24, 2019 and the Estate was substituted as the plaintiff. The trial court subsequently denied the Estate's motion for reconsideration and CR 54(b) certification. The Estate seeks discretionary review.

ANALYSIS

This court may grant discretionary review only when:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of

law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

The Estate seeks review under 2.3(b)(1), arguing that the trial court obviously erred in granting Pierce County's motion to dismiss under CR 12(b)(6).

This court reviews decisions to dismiss under CR 12(b)(6) *de novo*. *Future Select Portfolio Mgmt., Inc. v. Tremont Group Holdings, Inc.*, 175 Wn. App. 840, 865, 309 P.3d 555 (2013), *affirmed*, 180 Wn.2d 954 (2014). Dismissal under CR 12(b)(6) is proper only where "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Future Select*, 175 Wn. App. at 865 (internal quotation marks omitted) (quoting *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986)) (quoting *Bowman v. John Doe Two*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985))). All facts in the plaintiff's complaint are presumed to be true and even a hypothetical set of facts are sufficient to defeat a CR 12(b)(6) motion. *Bravo v. Dolsen Cos.* 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

Here, the Estate alleges that Pierce County was negligent in failing to supervise, monitor or control Robinson. The first question in any negligence action "is a question of law; that is, whether a duty of care is owed by the defendant to the plaintiff." *Alexander v. Cty. of Walla Walla*, 84 Wn. App. 687, 692-93, 929 P.2d 1182 (1997) (citing *Taylor v. Stevens Co.*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988)). The Estate claims that the Warrant of Commitment and the Judgment and Sentence established a "take charge" relationship between Pierce County and Robinson, which, under *Restatement (Second)*

of Torts § 319,¹ created a duty of reasonable care from Pierce County to Durham. *Taggart v. State*, 118 Wn.2d 195, 219-20, 822 P.2d 243 (1992). Here, the question is whether under any conceivable set of facts, Pierce County entered into a “take charge” relationship with Robinson.²

Pierce County argues application of the “take charge” doctrine requires a (1) court order and (2) statutory authority:

To determine whether a supervising officer has “taken charge” of an offender . . . , a court must examine “the nature of the relationship” between the officer and that person, including all of that relationship’s “various features.” In most cases, two of the most important features, though not necessarily the only ones, will be the court order that put the offender on the supervising officer’s caseload and the statutes that describe and circumscribe the officer’s power to act. A community corrections officer must have a court order before he or she can “take charge” of an offender; and even when he or she has such an order, he or she can enforce it only according to its terms and applicable statutes.

Couch v. Washington Dep’t of Corr., 113 Wn. App. 556, 565, 54 P.3d 197 (2002), *review denied*, 149 Wn.2d 1012 (2003) (footnotes omitted).

This court concludes a conceivable set of facts exists in which Pierce County entered into a “take charge” relationship with Robinson, and therefore, the trial court obviously erred in dismissing the Estate’s claims against Pierce County under CR 12(b)(6). Through its Warrant of Commitment, the trial court ordered the “Director of Adult

¹ *Restatement (Second) of Torts* § 319 provides: “One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.” (Boldface omitted.)

² Consistent with its position before the trial court, DOC takes no position on the Estate’s motion for discretionary review.

Detention of Pierce County . . . to receive [Robinson] for classification, confinement and placement as ordered in the Judgment and Sentence (Sentence of confinement in Pierce County Jail)." Mot. for Disc. Rev., Appendix at 169 (capitals and highlighting omitted). The Warrant of Commitment also designated, via check mark, the "County Jail" as the associated institution, rather than DOC or other custodial entity. Mot. for Disc. Rev., Appendix at 169. And the Judgment and Sentence report also indicate Robinson was to serve his confinement "in the custody of the county jail." Mot. for Disc. Rev., Appendix at 56. Thus, the Warrant of Commitment and Judgment and Sentence conceivably constitute court orders by which Pierce County should have taken steps to assure that Robinson either was in EHM or was in the Pierce County Jail. And as for statutory authority, RCW 9.94A.190 gives Pierce County custody over defendants sentenced to confinement for under a year:

[A] sentence of not more than one year of confinement shall be served in a facility operated, licensed, or utilized under contract, by the county, or if home detention or work crew has been ordered by the court, in the residence of either the offender or a member of the offender's immediate family.

RCW 9.94A.190. EHM is a form of confinement, and the trial court sentenced Robinson to 364 days, just under a year.

Thus, under the high standard for motions to dismiss under CR 12(b)(6), the trial court obviously erred in dismissing the Estate's claims against Pierce County for failure to state a claim. And without Pierce County as a defendant, further proceedings are

rendered useless. The Estate satisfies the requirements for discretionary review under RAP 2.3(b)(1).³

CONCLUSION

The Estate demonstrates review is appropriate under RAP 2.3(b)(1). Accordingly, it is hereby

ORDERED that the Estate's motion for discretionary review is granted. The Clerk will issue a perfection schedule.

DATED this 20 day of May, 2019.



Eric B. Schmidt
Court Commissioner

cc: Philip A. Talmadge
Julie A. Kays
Evan T. Fuller
Matthew J. Wurdeman
Michelle Lina-Green
Frank Cornelius
Zebular J. Madison
Hon. Susan K. Serko

³ Because this court grants review of the order of dismissal, it does not need to reach the question of whether the trial court erred in failing to certify that order for immediate appellate review under CR 54(b).

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Brief of Appellant* in Court of Appeals, Division II Cause No. 53344-8-II to the following parties:

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Court of Appeals, Division II
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 15, 2019 at Seattle, Washington.



Sarah Yelle, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

August 15, 2019 - 11:57 AM

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