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**COURT OF APPEALS, DIVISION II  
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.

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**RESPONDENT'S ANSWERING BRIEF**

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MARY E. ROBNETT  
Prosecuting Attorney

By  
FRANK CORNELIUS  
Deputy Prosecuting Attorney  
WSBA #29590  
955 Tacoma Ave. S., Ste. 301  
Tacoma, WA 98402  
(253) 798-6514

MICHELLE LUNA-GREEN  
Deputy Prosecuting Attorney  
WSBA #27088  
955 Tacoma Ave. S., Ste. 301  
Tacoma, WA 98402  
(253) 798-6380

Attorneys for Respondent Pierce County

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**I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR**

1. Did the trial court properly grant CR 12(b)(6) dismissal of Appellant's negligence claim where Pierce County did not owe a duty to Ms. Durham because it did not have custody, control, or supervision of Mr. Robinson at the time of the alleged assault and where Pierce County had no knowledge of his dangerous propensities?

2. Did the trial court properly grant CR 12(b)(6) dismissal of Appellant's negligence claim where even assuming there was a duty owed, Appellant has failed to plead that Pierce County was the proximate cause of her alleged injuries?

**II. STATEMENT OF THE CASE**

**A. FACTS**

**1. Sentencing of Abel Robinson on an Exceptional Sentence Down Based on Medical Conditions**

Abel Robinson came before the court on July 22, 2016, for sentencing on a drug crime. At the time of sentencing, the court grossly deviated<sup>1</sup> from a standard sentence of 45-90 and 90-120 months and ordered him to serve 364 days of Electronic Home Monitoring (EHM), followed by 12 months of community custody under the supervision of the

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<sup>1</sup> Indeed, it appears that pursuant to RCW 9.94A.734(1)(c), the court was not authorized to order home detention since this was a drug offense.

Department of Corrections (DOC). CP 2, 77, 194 at ¶2.1; CP 49-64 at ¶4.5-4.6; CP 33-37.

At the time of sentencing, the court telegraphed that it considered Robinson a low-risk offender and all but washed its hands of any kind of monitoring or serious accountability due to his unique medical condition, which rendered him paralyzed and medically vulnerable:

On 9/1/15, Mr. Robinson pled guilty to one Count of Unlawful Solicitation to Deliver a Controlled Substance and one count of Unlawful Delivery of a Controlled Substance. Mr. Robinson was facing a sentencing standard range of 45 to 90 months on Count I and 90 to 120 months on Count II. Both charges involved the same undercover informant and a small amount of methamphetamine. The State indicated they were seeking a mid-range sentence.

The Court continued sentencing in this matter 12 times between 9/11/2015 and 7/22/2016. The purpose for the continuances related to Mr. Robinson's on-going serious medical conditions. Through testimony and documentary evidence, it **is clear Mr. Robinson is paralyzed from the waist down from being the victim of a gunshot wound. Mr. Robinson suffers from HIV and, as a result, suffers from a serious and chronic skin infections and serious blood born infections.**

During the pendency of sentencing Mr. Robinson received both in-patient and out patient intensive antibiotic treatment and had kidney surgery. As of the day sentencing on 7/22/16, Mr. Robinson had additional medical procedures scheduled including a post operative MRI and a planned hospital admission for treatment of a new leg infection. At one point, in October 2015, the Court sought to take Mr. Robinson into custody and Jail Staff, which was familiar with Mr. Robinson's various medical issues, expressed great reluctance to take Mr. Robinson into

custody as they were concerned that they had sufficient resources and services to meet Mr. Robinson's medical needs.

While awaiting sentencing, Mr. Robinson attended all hearing and provided updated proof of his medical condition from his providers to the Court. Mr. Robinson also appears to have been in compliance with his conditions of release and maintained law abiding behavior.

CP 33-37 (*emphasis added*) (errors in original).

As a result of the sentencing, there was no formal County probation and no formal court monitoring. Robinson was not in the custody of Pierce County at the time Judgment and Sentencing was issued (CP 39-41; CP 43-45) and the Warrant of Commitment provided that Robinson must be on electric home monitoring by August 5, 2016, at 9 a.m. or report to the Pierce County jail on that date at 4 p.m. CP 2 and 77 at ¶2.2; CP 194 ¶2.3; CP 47-48.

The court could have ordered Robinson immediately into custody and released him only once EHM was set up or set a court date to ensure compliance with conditions. Instead, the court determined that medical appointments were Robinson's main priority and entrusted Robinson to report to either EHM or jail by a certain date. It is this discretionary decision that is at the heart of Appellant's claims. The Judgment and Sentencing provided that Robinson's community custody after his release

from custody would be under the jurisdiction of the DOC, not Pierce County. CP 57 at ¶4.6.

After the July 22, 2016, sentencing, the Warrant of Commitment was delivered to the DOC. CP 2 at ¶2.3; CP 78 at ¶2.4; CP 195 at ¶2.4. On August 1, 2016, a Community Corrections Officer (CCO) with the DOC sought a Secretary's Warrant for Robinson's arrest, but the warrant was denied. CP 2 at ¶2.4; CP 78 at ¶2.5; CP 195 at ¶2.5. Robinson did not start EHM and did not report to the Pierce County jail by August 5, 2016. CP 3 at ¶2.5; CP 78 and 195 at ¶2.6. On December 30, 2016, a DOC CCO met with Robinson at his home, and later on January 3, 2017, another CCO noted that Robinson was not on EHM per court order. CP 3-4 at ¶2.10-2.11; CP 79 at ¶2.11-2.12; CP 198 at ¶2.18-2.19.

## **2. Pseudo/Historical Probation**

In briefing, Appellant attempts to create the existence of a pseudo/historical probation system. However, the actual information as *pled* in the Complaint, as well as the institutional knowledge of the court in Pierce County, contradicts any fictional probation department.

Below, Appellant cited to the case of Nancy Cole<sup>2</sup> and Brenda Alsup, Pierce County Superior Court No. 03-1-00151-3 – a case which is

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<sup>2</sup> In the Motion for Discretionary Review, Appellant cites to the appellate case involving Ms. Cole. *See* Motion for Discretionary Review at 12 (*citing, State v. Cole*, 122 Wn.App.

over 16 years old – and posits that this shows there is a Pierce County Probation Department and a Pierce County EHM program. There is a fundamental difference between superior court and district court. A careful examination of the documents shows there is a Pierce County District Court Probation. The documents submitted show a District Court agency. *See* CP 107, 119, 121-122, (*emphasis added*) ("... Corrections Officer Jones ... who monitors inmates on Home Detention program ... confirmed ... Alsup is on home detention with [PCSD] for a DWLS conviction from District court #1").

Appellant also asserts that the Sheriff's Department oversees an EHD program. However, the point of reference refers to a program *over 20 years old*, run by a private agency, BI Incorporated, and would appear to only apply to misdemeanants. (CP 127, 131 (Jail Issues Planning Study, Pierce County, Washington.)) The passing reference to a private EHD<sup>3</sup> program, which was district court ordered over 16 years ago or a 20-year-old planning study, does not support an inference that a 2016

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319, 93 P.3d 209 (2004). The appellate opinion omits the fact that Cole was on probation for a district court matter, as opposed to superior court.

<sup>3</sup> The court-ordered EHM here does not specify that it is a "Pierce County" EHM program. A list of EHM programs is located on the Pierce County District Court website. The cite makes clear these are not Pierce County agencies. [https://www.co.pierce.wa.us/DocumentCenter/View/1967/EHM\\_Company\\_List](https://www.co.pierce.wa.us/DocumentCenter/View/1967/EHM_Company_List); *See, also*, <https://www.co.pierce.wa.us/899/Probation-Violation> (listing the procedure for Superior Court Probation Violations (CDPV docket) and that DOC is responsible for such violations).

sentencing out of superior court included a similar program where the judgment and sentence is devoid of any such language.

Appellant also cites to a 2017 study (CP 138) which refers to a "Pre-Trial Services" expansion to include Electronic Home Monitoring. Again, Pierce County concedes that there is a Superior Court pretrial services probation department, but not post-trial, as evidenced by the code.

None of the aforementioned material was plead in the Complaint, nor is there a nexus to the current case. An examination of the actual Second Amended Complaint, which is the basis of the 12(b)(6) dismissal, demonstrates the illusory nature of any Pierce County Supervision. CP 194 at ¶2.2 ([U]pon information and belief, Pierce County *appears* to have had primary supervision and confinement responsibilities); CP 195 at ¶2.3 ([W]ith regard to Pierce County's role in Robinson's confinement and supervision during this time period, the Warrant of Commitment notes that it was "PC [Pierce County] Jail" to whom Robinson was to report); CP 195-196 at ¶2.9 (*citing*, RCW 9.94A.190, which provides that when sentenced to confinement of less than one year, confinement shall be served in a facility operated, licensed, or utilized under contract by the county (but no such reference for a home detention facility run by the county)); CP 201 at ¶2.33 ("Based on the aforementioned facts, there is a substantial basis to create a reasonable *inference* ... that Pierce County was

responsible for the conferment [sic], electronic home monitoring and supervision of Robinson during the time period ....") (*emphasis added*).

However, the actual court documents, management of the courts, and as the trial court ruled below, shows there is no Pierce County probation supervision or Pierce County EHM. Pierce County agrees that:

- (1) Pierce County District Court Probation exists, and that a byproduct is a contractual relationship with private EHM companies to monitor;
- (2) There is Pierce County Superior Court *Pretrial* Monitoring; and
- (3) EHM is not the same as probation.<sup>4</sup>

There is no PC **Superior Court** Probation for offenders post-conviction. As pointed out by Respondent in the opening brief, there are pre-trial services and a Pierce County District Court Probation. And Robinson's Judgment and Sentence did not order Robinson to report to Pierce County Superior Court Probation – nor could it.

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<sup>4</sup> It is immaterial for this court's analysis whether Pierce County is responsible for EHM. Without a corresponding probation arm of the court for either jail or EHM, there is no mechanism to report, and thus no duty to report, the failure to comply. However, pursuant to CR 11, any pleading or brief which alleges that Pierce County operates an EHM program is not based on a good faith inquiry. *See* [https://www.co.pierce.wa.us/DocumentCenter/View/1967/EHM\\_Company\\_List](https://www.co.pierce.wa.us/DocumentCenter/View/1967/EHM_Company_List); *See, also,* <https://www.co.pierce.wa.us/899/Probation-Violation> (listing the procedure for Superior Court Probation Violations (CDPV docket) and that DOC is responsible for such violations).

### **3. Procedural History**

On January 16, 2019, Appellant filed a Complaint in Pierce County Superior Court. In the Complaint, the Plaintiff alleged that Pierce County and the Department of Corrections breached a duty of care by failing to supervise, monitor, control, and violate and/or incarcerate Robinson for the violations of his conditions of confinement. CP 6 at ¶5.4-5.6.

On February 14, 2016, Defendant Pierce County filed a motion to dismiss alleging that Appellant failed to state a claim where there was no duty of care owed to Ms. Durham. CP 8. Defendant DOC filed an Answer to Plaintiff's Complaint. CP 68.

On February 14, 2016, Appellant filed an Amended Complaint, after the filing of Pierce County's Motion to Dismiss. CP 76. As a result, Pierce County filed "Supplemental Briefing in Support of Pierce County's Motion to Dismiss," on February 21, 2019, whereby Pierce County incorporated the language in the Amended Complaint in its 12(b)(6) motion and continued to maintain the position that dismissal was required as a matter of law. CP 85. Appellant filed an Amended Response in Opposition to Defendant Pierce County's Motion to Dismiss on February 27, 2019. CP 166. DOC filed a response taking no position to the 12(b)(6). CP 163. Pierce County filed a Reply to the Motion to Dismiss on February 27, 2019. CP 179.

On March 1, 2019, the matter came before the Honorable Pierce County Superior Court Judge Susan Serko, Department 14, who has been a member of the Pierce County Bench since 2006. PCLR 0.2. The court granted the Motion to Dismiss. On March 12, 2019, Appellant filed an untimely Motion for Reconsideration or in the Alternative Certification Under CR 54. CP 205. On March 15, 2019, the court reviewed and denied the Motion for Reconsideration and denied certification to this Court. CP 266. On March 21, 2019, the court granted Plaintiff's Motion to Substitute Party and Amend Complaint pursuant to CR 25(a)(1) to substitute the Personal Representative of the Estate of Heather Durham, who is now deceased. CP 256, 267. On April 3, 2019, Appellant filed a timely Motion for Discretionary Review pursuant to RAP 2.3(b).

### **III. LAW AND ARGUMENT**

#### **A. SUMMARY OF ARGUMENT**

Whether Robinson was a dangerous offender who required probation, custody, control, and monitoring was a discretionary decision left with the trial court. Once the trial court decided to not take Robinson into immediate custody and allowed him to attend medical appointments, self-report to EHM or jail, and comply with conditions without formal probation or even court probation, any duty or legal obligation to control Robinson was forfeited at the hands of the court, and there is no liability

for the alleged tortious conduct. Dismissal at 12(b)(6) was required as a matter of law, and no amount of discovery will change the legal duty analysis in this case.

**B. STANDARD OF REVIEW**

An appellate court reviews CR 12(b)(6) dismissals *de novo*. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Dismissal is proper if the court concludes that the plaintiff can prove no set of facts that would justify recovery. *Id.* A court presumes that the plaintiff's factual allegations are true and draws all reasonable inferences from the factual allegations in the plaintiff's favor. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.3d 1082 (2012) (citing *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998)).

"While a court must consider any hypothetical facts when entertaining a motion to dismiss for failure to state a claim, the gravamen of a court's inquiry is whether the plaintiff's claim is legally sufficient. A proffered hypothetical will 'defeat[ ] a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim.'" *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311, 320 (2005) (quoting *Halvorson v. Dahl*, 89 Wn.2d at 674, 574 P.2d 1190 (1978)). If a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate. *Id.*

**C. THE TRIAL COURT PROPERLY HELD THAT THERE WAS NO DUTY TO PREVENT HARM TO A THIRD PARTY FROM A PERSON WHO IS NOT IN THE CARE, CUSTODY, OR CONTROL OF PIERCE COUNTY**

The first 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." *See, e.g., Alexander v. County of Walla Walla*, 84 Wn. App. 687, 692-93 (1997) (citing *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988)). The existence of a duty is a question of law. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998).

Under the public duty doctrine, "recovery from a municipal corporation is possible *only* when the plaintiff can show that the duty breached was owed *to her individually*, rather than to the public in general." *See Bratton v. Welp*, 145 Wn.2d 572, 576 (2002) (*emphasis added*). It "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 "helps us distinguish proper legal duties from mere hortatory 'duties.'" *Osborn v. Mason Cy*, 157 Wn.2d 18, 27 (2006).

Thus, a "County has a 'duty' to protect its citizens in a colloquial sense, but it does not have a legal duty to prevent every foreseeable injury" because "a broad general responsibility to the public at large rather

than to individual members of the public' simply does not create a duty of care." *Osborn*, 157 Wn.2d at 28 (*citations omitted*). *See, also, Babcock v. Mason Cy Fire Dist. No. 6*, 144 Wn.2d 774, 785 (2001).

"As a general rule, people and institutions are not responsible for preventing a person from physically harming others." *Binschus v. State*, 186 Wn.2d 573, 380 P.3d 468 (2016), *citations omitted*. Appellant alleges that a duty exists where there is a relationship between the actor and third party which imposes a duty upon the actor to control the third person's conduct. This is also known as a "take charge relationship." *Id.* (*citations omitted*). However, this argument fails where there was no definite, established, and continuing<sup>5</sup> relationship between Pierce County and the third person. *Id.* As articulated in *Couch*, there must be two important features in a relationship to invoke this narrow doctrine – a **court order**

**PLUS 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

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<sup>5</sup> "Continuous" defines the nature of the established relationship but does not contemplate a custodial or hourly connection to the person under the care of the agency. *See Taggart v. State*, 118 Wn. 2d 195, 223–24, 822 P.2d 243, 257 (1992) ([A] probation officer may have a "take charge" relationship "despite the absence of a custodial relationship and without exercising the 'continuing hourly or daily dominance and dominion' over that parolee.").

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, 202 (2002), *as amended* (Nov. 8, 2002), (emphasis added).

**1. No Take Charge Relationship**

The pivotal question for this Court is whether an institution who never exercised control or custody over an offender may be held liable for the acts of this offender. Here, neither a court order nor a statute provided authority for a Pierce County agency to monitor Robinson. Nor was there any order or statute giving Pierce County control over Robinson prior to him availing himself of custody:

(1) Robinson was not in custody at the time this order was entered, and the order only required the Jail to "receive" Robinson and required Robinson to "report." CP 159. It did not require Pierce County to pick up Robinson or bring him into custody;

(2) The court did not order "Pierce County" probation;

(3) There is no Pierce County Superior Court probation;

(4) There is no statutory authorization of Superior Court probation, like DOC probation;

(5) The court expressly made findings of facts and conclusions of law finding Robinson a low risk and a poor candidate for confinement. CP 33-37;

(6) The only statutory authority and court order pertained to DOC and the assignment of a community corrections officer (CCO). *See* RCW 9.94A.505,<sup>6</sup> CP 145 – Judgment and Sentence, ¶ 4.1 (payments), CP 147 – ¶4.4 (Other per CCO attachment), CP 148 – ¶4.6 (Order Community Custody 12 months and "Defendant shall report to **DOC** ... not later than 72 hours after release from custody"), CP 148 – ¶4.7 (Off Limits Order per CCO), CP 148 – ¶4.8 (Off Limits Order – drug trafficker, per CCO), CP 149 – ¶5.2 (Length of **DOC** Supervision), CP 154 – Appendix F (Conditions Outlining CCO Obligations).

Therefore, on the face of the Complaint, the "take charge relationship" exception fails. In fact, Pierce County took the opposite of a "take charge" relationship. 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

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<sup>6</sup> Notably, Robinson was not placed on a form of superior court probation as contracted with DOC here for misdemeanors, because he was not convicted of a misdemeanor. The Complaint is devoid of any mention of a statutorily authorized county probation. The presumptive probationary authority is State DOC probation, which may have not been triggered yet. RCW 9.95.204 outlines the statutory authority for Superior Court Misdemeanor Probation; *See, also*, RCW 9.92.060 – Suspending Sentences, which also references misdemeanor convictions.

to exercise reasonable care to control the third person to prevent him from doing such harm." (*emphasis added*). Given the unique medical conditions<sup>7</sup> of Robinson, the fact that the underlying charge was a drug charge, and there was no assessment of violence, the court determined that the *least amount of oversight* was warranted for this offender:

During the pendency of sentencing Mr. Robinson received both in-patient and out patient intensive antibiotic treatment and had kidney surgery. As of the day sentencing on 7/22/16, Mr. Robinson had additional medical procedures scheduled including a post operative MRI and a planned hospital admission for treatment of a new leg infection. At one point, in October 2015, the Court sought to take Mr. Robinson into custody and Jail Staff, which was familiar with Mr. Robinson's various medical issues, expressed great reluctance to take Mr. Robinson into custody as they were concerned that they had sufficient resources and services to meet Mr. Robinson's medical needs.

CP 33-37 (FOF/COL, Exceptional Sentence Down) (errors in original).

Typically, someone like Robinson would be taken into custody at the time of sentencing then following release report to DOC.<sup>8</sup> CrR 3.2 outlines conditions of release, including post-convictions, and authorizes the court to set many conditions – or post-conviction – simply to revoke bail and take into custody. *See* CrR 3.23.2(h); *See, also*, RCW

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<sup>7</sup> *See* RCW 9.94A.734:

The home detention program may also be made available to offenders whose charges and convictions do not otherwise disqualify them if **medical or health-related conditions**, ...

(*emphasis added*).

<sup>8</sup> *See* RCW 9.95.220 (Violation of probation, arrest, reimprisonment – DOC).

10.64.025(1) (A defendant who has been found guilty of a felony and is awaiting sentencing shall be detained unless the court finds by clear and convincing evidence that the defendant is not likely to flee or to pose a danger to the safety of any other person or the community if released."). Indeed, Robinson's offender score dictated a sentence of 45-90 and 90-120 months, respectively. CP 33, Findings of Fact and Conclusions of Law.

While it appears that by virtue of the exceptional sentence down, future medical appointments, and lack of formal probation, there was no mechanism in which to flag Robinson's failure to report to either EHM or jail – this does not result in liability. The Pierce County probation model only provides for Pierce County District Court probation and not Superior Court. *See* PCC 2.24.010; CP 24 ("... there is established a Probation Department of the Pierce County District Court (District Court) to provide presentence investigations, probation and parole services"); *See, also*, CP 24, PCC 2.24.020 (For purposes of administration, the Probation Department is established as a division of the District Court. The District Court Administrator shall be responsible for implementation and management of policy and operating guidelines as established, reviewed and modified from time to time by the judges of the District Court.).

The only duty of a jail is the duty to "receive" prisoners and arrestees. "Jail" is defined by statute as "any holding, detention, special

detention, or correctional facility as defined in [RCW 70.48.020]." RCW 70.48.020(5). Counties are authorized to locate and operate jails and certain other correctional facilities. RCW 70.48.180. A county may establish a department of corrections to be in charge of its jail, but if it does not create such a department, the chief law enforcement officer of the county has charge of the jail and of persons confined therein. RCW 70.48.090(3). Thus, while Pierce County had a duty to "receive" Robinson, it did not have a duty to grab Robinson off the streets and place him in custody.

The Supreme Court's recent case, *Binschus v. State*, illustrates the importance of the existence of a continuing, ongoing relationship as a necessary predicate to a finding of a take charge duty. *Binschus v. State*, 186 Wn.2d at 576. In *Binschus*, an inmate was released from custody in the Skagit County Jail for nonviolent crimes and then was transferred to Okanogan County Corrections Center. Within a month of release, the former inmate "had a psychotic episode and went on a shooting spree in Skagit County," killing six people and injuring several others. 186 Wn.2d at 576. Plaintiffs claimed that the jail failed to fully evaluate and treat the inmate's mental illness and that as a result, he had a psychotic break. *Id.* The Supreme Court affirmed the trial court's grant of summary judgment finding that this "take charge" duty exists only during the time when

Skagit County had a relationship with him, and therefore, at the time of the killings the former inmate's acts were subject to the public duty doctrine, and Skagit County did not owe a general duty to prevent such inmate from committing crimes after he was released. *Id.* at 579, 581, 583.

As the court recognized, there is a "fundamental limit on duties arising from a take charge relationship: such a duty will be imposed 'only upon a showing of a "definite, established and *continuing* relationship between the defendant and the third party.'" *Binschus v. State*, 186 Wn.2d at 579 (*quoting Taggart v. State*, 118 Wn.2d at 219 (*quoting Honcoop v. State*, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988))). If a supervising agency has no relationship with the offender, there can be no duty. "DOC owes a duty to those who are injured during an offender's active supervision, not after it ends;" – or here – if it *never began*. *Hungerford v. Department of Corrections*, 135 Wn. App. 240, 258, 139 P.3d 1131 (2006).

Similarly, in *McKenna* where a rape and shooting victim survivor sued Spokane Corrections in negligence, for failure to supervise during pretrial release on a statutory rape charge, the court concluded there was no duty, reasoning, "there is no order to supervise, no statute which would mandate supervision and no agreement to supervise." *McKenna v.*

*Edwards*, 65 Wn. App. 905, 913, 830 P.2d 385, 392 (1992) (*emphasis added*). The court also concluded that there was no special knowledge of dangerous propensities that would warrant imposition of a duty on Corrections or the treatment facility. *McKenna*, 65 Wn. App. at 916; *See, also, Bishop v. Miche*, 137 Wn.2d 518, 527, 973 P.2d 465, 470 (1999) (contrasting that the court in *McKenna* was faced with a probationary officer who had "no statutory mandate to supervise," no "special knowledge of dangerous propensities " and that Corrections lacked the knowledge necessary to warrant imposing a duty to control Edwards because nothing in his history portended murder and rape)."

Here, Appellant fails to allege that there was *any* relationship between Pierce County and Robinson at the time of the incident. There is some evidence, however, of a court-ordered State/DOC relationship. (Complaint ¶2.3, 2.4.)

While there is no denying that an established, continuing relationship with a probation or community corrections officers creates a "take charge" duty, the judgment and sentence itself outlines that any conditions and ability to supervise did not rest with Pierce County, but rather Robinson ultimately fell under the control of a Community

Corrections Officer.<sup>9</sup> CP 145-149 (J & S, ¶4.1, 4.4, 4.6-4.8). Conversely, where a probationer is under the control of a county or city probation agency, duty may arise. See *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 281, 979 P.2d 400, 409 (1999); *Bishop v. Miche*, 137 Wn.2d 518, 528, 973 P.2d 465, 470 (1999).

Appellant's Complaint seems to theorize that the County, by and through phantom probation officers, the jail, or the prosecutor, had a duty to report to the court that Robinson did not report to jail. However, having the ability or opportunity to do so does not equal a legal responsibility or duty. For example, in *Mock v. State of Washington*, 200 Wn. App. 667, 403 P.3d 102 (2017), plaintiffs were injured in an armed attack by an offender who was serving a term of community custody under supervision by the Department of Corrections. 200 Wn .App. at 669. The issue was whether the department could be held liable for failing to report the offender's previous community custody violations to the court, rather than just through the department's administrative process. *Id.* The court concluded that just because the officer could have reported to the court, did not mean there was an obligation to act:

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<sup>9</sup> See, also, RCW 9.94A.736:

Electronic monitoring—Supervising agency to establish terms and conditions—Duties of monitoring agency.

Again, here, the court did not assign a "supervising agency," and at best, it was court-monitored probation, which does not trigger statutory duty.

A reporting obligation was not imposed on [CCO] by the relevant statutes, by McKay's sentence conditions, or by an order of the court. In hindsight, [the CCO] was one of many people who theoretically could have recommended against releasing McKay or taken other steps that might have prevented McKay's criminal attack on the plaintiffs. But having the opportunity to prevent another's criminal conduct does not by itself impose a duty to do so.

200 Wn. App. 679; *See, also, Husted v. State of Washington*, 187 Wn.App. 579, 348 P.3d 776 (2015) (affirming trial court's dismissal of a negligence action brought by an estate where offender had absconded from supervision and violently murdered a woman).

Here, there was even less of a theoretical duty to report this to the court because there was no probation. The only line in the Complaint which vaguely references Pierce County was that during January 2017, "Pierce County and DOC were all *aware* that Robinson was not in compliance with his Court-ordered EHM for over five months." (*Id.* ¶ 2.11.) But allegedly being *aware* and having a legal *duty* to act are two separate theories. Moreover, the only allegation involving a Pierce County body being aware is the prosecutor, who is subject to immunity. *See* Argument, *infra*, citing *Gilliam v. D.S.H.S.*, 89 Wn.App. 569, 582, 950 P.2d 20, *review denied*, 135 Wn.2d 1015 (1998).

Nor has the Appellant stated a cause of action against the court for its imposition of a non-custodial sentence or failure to order Robinson to

report to a probation officer. "Judges are absolutely immune from civil damages suits for acts performed within their judicial capacity." *Mock v. State by & through Dep't of Corr.*, 200 Wn. App. 667, 674, 403 P.3d 102, 106–07 (2017), *review denied sub nom. Mock v. State, Dep't of Corr.*, 190 Wn. 2d 1003, 413 P.3d 8 (2018). "Judicial immunity extends to witnesses, prosecutors, and other participants at judicial hearings." *Id.*, *citing Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989), *accord, Anderson v. Manley*, 181 Wash. 327, 331, 43 P.2d 39 (1935); *Gilliam v. D.S.H.S.*, 89 Wn.App. 569, 582, 950 P.2d 20 ("Public prosecutors enjoy absolute judicial process immunity for their advocacy functions[.]" *review denied*, 135 Wn.2d 1015 (1998)).

Appellant also preys on the fear of this Court that without County liability there is no liability. (Brief of Appellant at 1, 12, f.n. 6 "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 ..."). However, there is no common law duty owed to Ms. Durham nor a common law duty to supervise persons not in your custody, and this Court should reject the argument to create a new area of liability in order to compensate every wrong or harm that occurs in society. If this were the case, then every time a District or Superior Court

across the State imposes sentencing conditions, and those conditions are later violated – regardless of whether there is formal probation – such court or county would fall under a general duty of care and be liable for all of the nefarious acts committed by persons post-conviction. This is not the law.

Because there are no allegations of a Pierce County relationship at the time of the incident, Appellant fails to plead the essential element – Duty – and dismissal is required.

2. **Pierce County Had No Knowledge That Robinson Was Likely to Cause Bodily Harm When Serving an Exceptional Sentence Down Due to Medical Conditions**

Even if one were to assume that Robinson was under Pierce County control or probation, there is nothing in the record to indicate knowledge of a dangerous propensity. Under the "take charge" theory, an actor is compelled to act only where the actor knows or should know that the third person they have control over is likely to cause bodily harm to others if not controlled. *See* Restatement (Second) of Torts § 319; *Couch v. Washington Dep't of Corr.*, 113 Wn. App. 556, 565, 54 P.3d 197, 202 (2002), *as amended* (2002); *Taggart*, 118 Wn.2d at 219, 822 P.2d 243 (*quoting* Restatement (Second) of Torts § 319 (Am. Law Inst. 1965)). The Supreme Court has described this take charge duty as the "duty to take reasonable precautions to *protect* against reasonably foreseeable dangers

posed by the dangerous propensities of [the person supervised]." *Harper v. State*, 192 Wn.2d 328, 341–42, 429 P.3d 1071, 1076 (2018), quoting *Taggart* at 217, 822 P.2d 243. If a controlling agency determines that an offender "is likely to cause bodily harm to others if not controlled," then it "is under a duty to exercise reasonable care to control the [offender] and to prevent him or her from doing such harm." *Id.*

Here, Robinson was on probation for a simple delivery charge and was given an exceptional sentence down because of his dire medical circumstances (paraplegic, HIV, and leg infection requiring hospitalization). Everything about this case said that he was not a danger<sup>10</sup> to anyone. *See, also*, Proximate Cause Section, *infra*. As stated by the court in *Couch*, "a legal duty must be breached while it is in effect; it cannot be breached before it has commenced or after it has ended." *Couch v. State*, 113 Wn. at 572.

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<sup>10</sup> It is unclear why Appellant repeatedly asserts that Robinson was a "dangerous" or "violent" offender. Brief of Appellant at 11, 16. A review of his criminal history indicates that his only felony adult crimes were for property, drugs, or a felony elude, and were decades old. CP 50-53. There are no adult felony violent convictions. *Id.* The misdemeanor history, although lengthy, is similarly full of mainly driving crimes, a smattering of assaults, and most date to the 80's and 90's. *Id.* As indicated in the court's findings regarding an exceptional down sentence, any propensity for violence, now decades old, was likely eviscerated by his medical conditions. This also underscores the argument regarding "duty" and whether Robinson showed a propensity for violence, as well as the lack of proximate cause.

**D. EVEN ASSUMING A DUTY AROSE HERE, THERE ARE NO FACTS TO ESTABLISH PROXIMATE CAUSE OR CAUSE IN FACT**

Alleged negligence of Pierce County in failing to supervise, monitor, control, and violate and/or incarcerate Robinson was not a proximate cause of Robinson's alleged assault against Ms. Durham. Proximate cause consists of two elements: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Cause in fact concerns the "but for" consequences of an act: those events the act produced in a direct, unbroken sequence, and which would not have resulted had the act not occurred. *Hartley*, 103 Wn.2d at 778, 698 P.2d 77. The question of cause in fact is generally a question left for the jury, but if "reasonable minds could not differ, th[is] factual question[ ] may be determined as a matter of law." *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Legal cause is the second prong of proximate causation and "[is] a question of law" for the court. *McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 359, 961 P.2d 952 (1998). Legal causation rests on considerations of logic, common sense, policy, justice, and precedent as to how far the defendant's responsibility for the consequences of its actions should extend. *Hartley*, 103 Wn.2d at 779, 698 P.2d 77.

**1. Cause in Fact**

Given Robinson's medical history and the importance of attending medical appointments, the Complaint as pled does not put forth that Robinson would have been in custody at the time of the alleged assault and unable to commit the crime. Electronic home monitoring, standing alone, does not prevent harm. *See Estate of Borden v. Department of Corrections*, 122 Wn.App. 227, 240-244, 95 P.3d 764 (2004) (outlining cause in fact in a parole setting).

For example, the Complaint shows that irrespective of Robinson's noncompliance with his sentence, the Superior Court did not care to remedy the matter. CP 81 (Complaint ¶2.19) (alleging that after the assault, the CCO emailed the prosecutor to inquire into the EHM status and that such email shows that Robinson "was still free to roam the community as he pleased, even after he blinded Heather in one eye"). Even when DOC did make inquiry into EHM status, everyone understood the medical limitations. *See* CP 228-229 (12/30/16, CCO Hansen spoke with Robinson who explained he was not on EHM yet because the program was upstairs and he could not reach them – girlfriend was with him at time of contact); (1/3/17 Prosecuting Attorney advised that he was unaware whether Robinson was given an extension on EHM and CCO noted that Robinson does have "medical limitations"); (1/4/17 Attorney

for Robinson emailed about getting court date for Robinson). This indicates that prosecution was aware and made a discretionary decision to not get a warrant. That decision is insulated in immunity, as argued *supra*.

Finally, even if Robinson was monitored, there are no facts pled that shows a court would issue a warrant, that a warrant would successfully be served, and that this low-level drug offender would remain in custody rather than be re-released given his medical condition. In other words, all of these acts are too remote and attenuated to establish a "but for" relationship to the injuries suffered here. Robinson's drug conviction, which is a non-violent offense, did not indicate any risk of violence against Ms. Durham that would warrant protection. Appellant pleads no facts showing the alleged assault on Ms. Durham was caused by a danger that was known to Pierce County.

## **2. Legal Causation**

The clearest test of legal causation is foreseeability: whether the result of the action or inaction is within the general field of danger covered by the duty imposed on the defendant. *Rikstad v. Holmberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969).

Here, the alleged duty imposed on Pierce County was to have in custody a low-level offender who suffered with grave medical conditions. It was not within the "general field of danger" that Robinson would turn to

assaultive behavior while trying to tend to his medical needs. Thus, legal causation also fails.

#### IV. CONCLUSION

Robinson was not in the care, custody, or control of Pierce County at the time of his alleged assault on Ms. Durham. This lack of control was a choice made by Pierce County Superior Court, and a Pierce County Superior Court Judge later affirmed that it had no control over Robinson by granting dismissal of the instant matter. Appellant needlessly preys on the fears of this Court and asks this Court to shift responsibility from a severely disabled man who committed an unforeseen act to a government actor who had no control over him. This Court should affirm dismissal and remand for further proceedings.

RESPECTFULLY SUBMITTED: September 16, 2019.

MARY E. ROBNETT  
Prosecuting Attorney

s/ FRANK CORNELIUS  
FRANK CORNELIUS, WSBA # 29590

s/ MICHELLE LUNA-GREEN  
MICHELLE LUNA-GREEN, WSBA # 27088  
Pierce County Prosecutor / Civil  
955 Tacoma Avenue South, Suite 301  
Tacoma, WA 98402-2160  
Ph: 253-798-6732 / Fax: 253-798-6713  
E-mail: frank.cornelius@piercecountywa.gov  
E-mail: michelle.luna-green@piercecountywa.gov  
Attorneys for Respondent Pierce County

## CERTIFICATE OF SERVICE

On September 16, 2019, I hereby certify that I electronically filed the foregoing RESPONDENT'S ANSWERING BRIEF with the Clerk of the Court and I delivered a true and accurate copy by electronic mail pursuant to the agreement of the parties to the following:

- **Julie A. Kays:** jkays@connelly-law.com; vshirer@connelly-law.com
- **Evan T. Fuller:** efuller@connelly-law.com; vshirer@connelly-law.com
- **Matthew J. Wurdeman:** mwurdeman@connelly-law.com; vshirer@connelly-law.com
- **Zebular J. Madison:** zebularm@atg.wa.gov; TORTacEF@atg.wa.gov; KelseyR1@atg.wa.gov; SharonJ@atg.wa.gov
- **Philip A. Talmadge:** phil@tal-fitzlaw.com

s/ CHRISTINA WOODCOCK  
CHRISTINA WOODCOCK  
Legal Assistant  
Pierce County Prosecutor's Office  
Civil Division, Suite 301  
955 Tacoma Avenue South  
Tacoma, WA 98402-2160  
Ph: 253-798-7732 / Fax: 253-798-6713

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