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NO. 36572-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Deborah Phifer, Personal Representative of the estate of Mr. Phifer,

Appellant,

v.

State of Washington Department of Labor and Industries,

Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. COUNTERSTATEMENT OF THE ISSUES ON APPEAL 2

1. Did the trial court appropriately dismiss Mr. Phifer's negligence claim because the Department did not owe him any duty – whether under common law or statute and whether ordinary or heightened – to avoid calling the police after he made concerning statements to a claims manager that she understood to be suicidal? 2

2. Did the trial court appropriately dismiss Mr. Phifer's negligence claim because he cannot establish the Department's call to the police proximately caused his alleged injury, when the Department had no control over the police and the police independently performed the welfare check and decided to place Mr. Phifer in custody? 2

III. COUNTERSTATEMENT OF THE CASE 2

A. Mr. Phifer Is Injured at Work and Files an Industrial Injury Claim with the Department 2

B. Mr. Phifer's Concerning Phone Call with Ms. Alvarado, the Department's Claim Manager 3

C. The Yakima Police Perform a Welfare Check on Mr. Phifer 5

D. The Department Allows Mr. Phifer's Industrial Injury Claim 6

E. Procedural History 7

IV. ARGUMENT 9

A. Standard of Review 10

B. The Trial Court Properly Concluded the Department Did Not Owe Mr. Phifer a Common Law or Statutory Duty.....10

1. The common law did not impose an actionable duty on the Department with respect to reporting concerns about Mr. Phifer's safety to the police. 11

a. There is no cause of action for negligent claims administration or negligent investigation.....12

b. The Department did not have a special relationship with Mr. Phifer or with the Yakima Police Department.....19

2. No statute creates an individualized, actionable duty with respect to reporting concerns about Mr. Phifer's safety to the police.....23

a. The public duty doctrine bars any negligence claim by Mr. Phifer premised on RCW Title 51.....23

b. Neither the Department's internal memoranda regarding injured workers' threats of suicide nor RCW 43.70.445 created an actionable duty.....28

C. Mr. Phifer Has Not and Cannot Establish Proximate Cause.....30

V. CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Binschus v. State,
186 Wn.2d 573, 380 P.3d 468 (2016)..... 21

Buchalski v. Universal Marine Corp.,
393 F. Supp. 246 (1975) 34

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)..... 10

Cena v. State,
121 Wn. App. 352, 88 P.3d 432 (2004)..... 13, 14, 27, 28

Cummins v. Lewis County,
156 Wn.2d 844, 133 P.3d 458 (2006)..... 27

Deeter v. Safeway Stores Inc.,
50 Wn. App. 67, 747 P.2d 1103 (1987)..... 13

Deheer v. Seattle Post-Intelligencer,
60 Wn.2d 122, 372 P.2d 193 (1962)..... 12

Dewar v. Smith,
185 Wn. App. 544, 342 P.3d 328 (2015)..... 30

Fabrique v. Choice Hotels Int'l, Inc.,
144 Wn. App. 675, 183 P.3d 1118 (2008)..... 31

Folsom v. Burger King,
135 Wn.2d 658, 958 P.2d 301 (1998)..... 11

Gregoire v. City of Oak Harbor,
170 Wn.2d 628, 244 P.3d 924 (2010)..... 21

Guile v. Ballard Comty. Hosp.,
70 Wn. App. 18, 851 P.2d 689 (1993),
review denied, 122 Wn.2d 1010, 863 P.2d 72 (1993) 10

Halverson v. Dahl,
89 Wn.2d 673, 574 P.2d 1190 (1978) 26, 30

Hartley v. State,
103 Wn.2d 768, 698 P.2d 77 (1985) 30, 31

HBH v. State,
192 Wn.2d 154, 429 P.3d 484 (2018) 20

Hendrickson v. Moses Lake Sch. Dist.,
192 Wn.2d 269, 428 P.3d 1197 (2018) 20, 22

Higgins v. Intex Recreation Corp.,
123 Wn. App. 821, 99 P.3d 421 (2004) 11, 17

Hungerford v. State Dept. of Corrections,
135 Wn. App 240, 139 P.3d 1131 (2006) 28, 29

Hutchins v. 1001 Fourth Ave. Assoc.,
116 Wn.2d 217, 802 P.2d 1360 (1991) 19, 20, 21, 22, 23

Janaszak v. State,
173 Wn. App. 703, 297 P.3d 723 (2013) 13, 15

Joyce v. Department of Corrections,
155 Wn.2d 306, 119 P.3d 825 (2005) 28

Lambert v. Morehouse,
68 Wn. App. 500, 843 P.2d 1116 (1993) 15

M.M.S. v. Dep't. of Soc. and Health Servs.,
1 Wn. App. 320, 404 P.3d 1163 (2017) 11

M.W. v. Dep't of Soc. & Health Servs.,
149 Wn.2d 589, 70 P.3d 954 (2003) 15

Mancini v. City of Tacoma,
No. 77531-6-I, 2019 WL 2092698 (Wash. Ct. App. May 13, 2019) 14, 15

Marincovich v. Tarabochia,
114 Wn.2d 271, 787 P.2d 562 (1990) 10

McCord v. Tielsch,
14 Wn. App. 564, 544 P.2d 56 (1975) 16, 17

McLeod v. Grant Co. Sch. Dist., No. 128,
42 Wn.2d 316, 255 P.2d 360 (1953) 20

Michaels v. CH2M Hill, Inc.,
171 Wn.2d 587, 257 P.3d 531 (2011) 30

Miller v. Linkins,
109 Wn. App. 140, 34 P.3d 835 (2001) 30

Moretnesen v. Moravec,
1 Wn. App. 608, 406 P.3d 1178 (2017) 9

Mossman v. Rowley,
154 Wn. App. 735, 229 P.3d 812 (2009) 31

Munich v. Skagit Emergency Commc'n Ctr.,
175 Wn.2d 871, 288 P.3d 328 (2012) 24, 26, 27

N.L. Bethel School District,
186 Wn.2d 444, 378 P.3d 162 (2016) 31

Niece v. Elmview Grp. Home,
131 Wn.2d 39, 929 P.2d 420 (1997) 19

Osborn v. Mason County,
157 Wn.2d 18, 134 P.3d 197 (2006) 24

Petersen v. State,
100 Wn.2d 421, 671 P.2d 230, (1983) 9, 21

Raider v. Greyhound Lines, Inc.,
94 Wn. App. 816, 975 P.2d 518 (1999) 11, 17

Rasmussen v. Bendotti,
107 Wn. App. 947, 29 P.3d 56 (2001) 11

Reynolds v. Hicks,
134 Wn.2d. 491, 951 P.2d 761 (1998) 10

Rose v. Nevitt,
56 Wn.2d 882, 355 P.2d 776 (1960) 11, 16, 17

Schooley v. Pinch's Deli Market, Inc.,
134 Wn.2d 468, 951 P.2d 747 (1998) 9, 11, 31, 32

Taylor v. Stevens Cty.,
111 Wn.2d 159, 759 P.2d 447 (1988) 24

Transamerica Title Ins. Co. v. Johnson,
103 Wn.2d 409, 693 P.2d 697 (1985) 11

Tyner v. Dep't of Soc. & Health Servs.,
141 Wn.2d 68, 1 P.3d 1148 (2000) 15, 31

Washburn v. City of Fed. Way,
178 Wn. 2d 732, 310 P.3d 1275, 1291 (2013) 31, 32

Wolf v. Scott Wetzel Services, Inc.,
113 Wn.2d 665, 782 P.2d 203 (1989) 14

Statutes

42 U.S.C. § 1983 7

Laws 2016, ch. 90 30

RCW 43.70.445 ..... 23, 29, 30

RCW 48.01.050 25

RCW 48.010.070 25

RCW 48.30.015 ..... 24, 25

RCW 51.04.010 ..... 14, 26, 27

RCW 51.04.030 ..... 24, 26, 27

RCW Title 48 ..... 23, 25, 26

RCW Title 51 ..... 23, 25, 28

Other Authorities

16 Wash. Prac., Tort Law and Practice
(4th ed. 2018) 31

Prosser on Torts (3rd ed. 1964) 11

Restatement (Second) of Torts 19, 20

WPI 15.01 31

WPI Chapter 320 25

Rules

CR 56(c) 9, 10

I. INTRODUCTION

The trial court properly dismissed the negligence claim brought by the Estate of Fred Phifer (Mr. Phifer)[1] against the Department of Labor and Industries, because Mr. Phifer cannot establish a genuine issue of material fact as to two essential elements of his claim: duty and proximate cause. The Department's only allegedly negligent conduct in this case relates to calling the Yakima Police Department after Mr. Phifer made concerning statements on the phone to a claims manager that she understood to be suicidal. The Department of Labor and Industries did not owe Mr. Phifer a common law or statutory duty to avoid calling the police or avoid causing him the only harm he alleges he suffered – the aggravation of his pre-existing post-traumatic stress disorder (PTSD). In addition, the Department's sole act of calling the police did not proximately cause the alleged aggravation of Mr. Phifer's PTSD, when the Department had no control over the police and the police independently performed the welfare check and decided to place Mr. Phifer in custody. Summary judgment in favor of the Department should be affirmed.

[1] Mr. Phifer passed away in October 2016. Deborah Phifer, as the personal representative of Mr. Phifer's estate, is now the party in interest. CP at 78-79, 160-61. For ease of reference and intending no disrespect, the Department will refer to the appellant herein as Mr. Phifer.

II. COUNTERSTATEMENT OF THE ISSUES ON APPEAL

1. **Did the trial court appropriately dismiss Mr. Phifer's negligence claim because the Department did not owe him any duty – whether under common law or statute and whether ordinary or heightened – to avoid calling the police after he made concerning statements to a claims manager that she understood to be suicidal?**

2. **Did the trial court appropriately dismiss Mr. Phifer's negligence claim because he cannot establish the Department's call to the police proximately caused his alleged injury, when the Department had no control over the police and the police independently performed the welfare check and decided to place Mr. Phifer in custody?**

III. COUNTERSTATEMENT OF THE CASE

A. Mr. Phifer Is Injured at Work and Files an Industrial Injury Claim with the Department

Fred Phifer began working as a metal grinder for Magic Metals in Yakima, Washington in March 2008. CP at 66. The job involved grinding, sanding, and stacking metal boxes, which Mr. Phifer claimed hurt his back and hands. CP at 64, 71. To treat these problems, Mr. Phifer began seeing Dr. Larry LeFors in May 2008. CP at 63-64. Dr. LeFors' chart notes discuss Mr. Phifer's physical complaints related to his back and hands, as well as Mr. Phifer's mental health concerns. CP at 455-57 Mr. Phifer talked to Dr. LeFors about being stressed, tense, and having suicidal thoughts. *Id*.

On May 18, 2008, Mr. Phifer interacted with the Yakima Police Department for the first time. CP 232-35. At that time, a police officer cited him for "knowingly threaten [*sic*] harm to person or property." *Id*.

About a month later, on approximately June 18, 2008, Magic Metals terminated Mr. Phifer. CP at 65. Two weeks later, Mr. Phifer filed an industrial injury claim with the State of Washington Department of Labor and Industries (the Department). CP at 71, 479. The claim form states Mr. Phifer suffered gradual and specific injuries to his back and hands while working at Magic Metals, and lists an injury date of June 18, 2008. CP at 71. The Department assigned the claim to claims manager Annabea Alvarado, who was a Workers' Compensation Adjudicator 3. CP at 238, 479.

After the termination of his employment, Mr. Phifer continued to see Dr. LeFors to address issues related to his physical and mental health. On July 15, 2008, Dr. LeFors noted the need for a psychiatric evaluation of Mr. Phifer and referred him to Dr. Williams, a psychiatrist, for treatment of depression and "not wanting to go on." CP 461, 464.

B. Mr. Phifer's Concerning Phone Call with Ms. Alvarado, the Department's Claim Manager

Twenty days later, on Monday August 4, 2008, Ms. Alvarado spoke with Mr. Phifer by phone about time loss benefits related to his industrial

injury claim. CP at 482-83. At that time, the Department had not yet accepted Mr. Phifer's time loss claim. CP at 12. Ms. Alvarado contemporaneously typed what she believed Mr. Phifer told her during the call, while Mr. Phifer was on the phone, and then saved the typewritten note to the Department's file on August 4, 2008. CP at 146, 482-83. There is no way to change or amend the typewritten note once saved into the system. CP at 139-40, 146, 175.

Ms. Alvarado's note reflects that she believed Mr. Phifer reported that he was not happy with the way things were going, he was having very bad thoughts, he felt like a loser, he felt like he had hit a brick wall, he felt like ending it all, that Magic Metals had caused his mental health problems, and that he was going to lose his house. CP at 238, 479-83. She also testified believing that he had a knife. CP 238. Ms. Alvarado was concerned for Mr. Phifer's safety because she had no way of knowing if he would act on what she understood to be threats of suicide. CP at 238. Mr. Phifer, on the other hand, claims he was never suicidal and did not make suicidal statements, but he does admit telling Ms. Alvarado he was sharpening knives. CP at 13-15, 62.

During the call, Ms. Alvarado asked Mr. Phifer if he wanted her to contact mental health or the authorities to pay him a visit. CP at 390, 483. He declined, and indicated he wanted to speak with Dr. Williams. *Id.* When

an injured worker threatens to commit suicide, however, Department policy directs employees to contact law enforcement. CP at 130, 137, 485-88. Employees have a copy of the policy with them at their desks, and Ms. Alvarado testified she received training on what to do if injured workers threaten to harm themselves. CP at 138, 146. Pursuant to the policy, and after speaking with her supervisors, Ms. Alvarado contacted the Yakima Police Department to report Mr. Phifer's perceived suicide threat and her concern for his safety. CP. At 146, 238, 479-80. That was the last involvement by the Department or a Department employee on August 4, 2008.

C. The Yakima Police Perform a Welfare Check on Mr. Phifer

After receiving Ms. Alvarado's call, the Yakima Police Department dispatch sent officers to Mr. Phifer's home for a welfare check and mental health assistance. CP at 468. Dispatch informed the responding officers that "Bea" (Ms. Alvarado) with the Department of Labor and Industries "was concerned about statements made by a client identified as Phifer, Freddy J. ... ." *Id*. Dispatch also relayed to the officers that Mr. Phifer had a concealed weapons permit, which meant officers acted under the assumption Mr. Phifer was armed. CP at 441, 468.

Three officers arrived at Mr. Phifer's home and met him at the front door. *Id*. Mr. Phifer admitted to the officers he told Ms. Alvarado "that [he]

had some sharp knives." *Id*. He also told the officers he lost his job and was probably going to lose his house, and after Mr. Phifer referenced going to "heaven," the officers decided to place him in handcuffs for everyone's safety. *Id*. Officers told Mr. Phifer he was going to be taken to the station for a mental health evaluation and Mr. Phifer asked if it could be done at his residence. *Id*. An officer then contacted Michael Cape of Central Washington Comprehensive Mental Health; "[w]ith the statements Phifer made and the medical advise [*sic*] of Cape, it was determined Phifer should be taken into custody for a mental health evaluation. Cape stated he would meet [Phifer and the officers] at the station as soon as he finished at the hospital." *Id*. Mr. Cape eventually determined Mr. Phifer was depressed but he did not believe Mr. Phifer would harm himself. *Id*. Mr. Phifer was released shortly thereafter. *Id*.

D. The Department Allows Mr. Phifer's Industrial Injury Claim

The Department issued a Notice of Decision allowing Mr. Phifer's workers' compensation claim. CP at 69-70. The claim was allowed as an occupational disease for cervical, thoracic, and lumbar sprain; bilateral carpal tunnel syndrome; depression; and post-traumatic stress disorder. *Id*. In particular, the diagnoses of depression and post-traumatic stress disorder were "allowed as an aggravation." *Id*.

E. Procedural History

In September 2011, Fred and Deborah Phifer filed a complaint for damages against the Department and the City of Yakima. CP at 3-6. The complaint brought causes of action against both defendants, including negligence; outrage; negligent training, supervision, and hiring; loss of consortium, and violation of 42 U.S.C. § 1983. CP at 3-6. Mr. Phifer's only alleged injury was an aggravation of his post-traumatic stress disorder (PTSD). CP at 150. Mr. Phifer claims he previously had suffered PTSD from an incident in the 1970s with Toppenish police officers. CP at 19. It is undisputed that, as of August 4, 2008, neither Ms. Alvarado nor Dr. LeFors knew Mr. Phifer had pre-existing PTSD from that incident with police. CP at 226, 238-39.

In May 2012, the City of Yakima filed a motion for partial summary judgment solely on the issue of 42 U.S.C. § 1983. CP at 7-9. The Department joined the May 2012 partial summary judgment, and the court granted that motion dismissing the 42 U.S.C. § 1983 claims. CP at 7-9.

On July 18, 2012, the Department filed a motion for summary judgment contesting Mr. Phifer's claims for negligence, outrage, and negligent training, supervision and hiring, as well as Mrs. Phifer's loss of consortium claim. CP 47-49. In response to the motion for summary judgment, the parties entered a stipulated order dismissing Mrs. Phifer's

loss of consortium claim and Mr. Phifer's outrage claim. CP at 16-17.[2] The trial court ultimately denied the Department's motion for summary judgment regarding the only two remaining claims - negligence and the negligent training, supervision, and hiring. CP at 47-49. Meanwhile, the City of Yakima had also filed a motion for summary judgment, which the court granted, dismissing it from the case. CP at 43-45.

On July 10, 2013, the Department filed another motion for summary judgment arguing Mr. Phifer's negligence claim was barred by the exclusive remedy provision of the Industrial Insurance Act, and the negligent training, supervision and hiring claim lacked sufficient evidentiary support. CP 50-51. The court granted the Department's motion as to the negligent training, supervision and hiring claim, but denied the motion as to the negligence claim. *Id*.

Finally, on April 2, 2018, the Department filed a motion for summary judgment on the sole remaining negligence claim, which is the focus of the current appeal. CP at 52-54. The court's oral ruling granted the motion as to the issue of ordinary negligence, and deferred as to whether an internal Department memorandum created a separate duty. CP at 329. To clarify the court's oral ruling and present the order on summary judgment,

[2] At this point, Mrs. Phifer was no longer a party to the case, as the City of Yakima and Mrs. Phifer had also entered a stipulated order dismissing her loss of consortium claim against the City. CP at 10-11.

the Department filed a motion for presentment and clarification. *Id*. The court ultimately granted the Department's motion for summary judgment, dismissing the sole remaining negligence claim in its entirety. CP at 443-45. Mr. Phifer appeals that order. CP at 446-47.

IV. ARGUMENT

Summary judgment on Mr. Phifer's negligence claim should be affirmed because, as a matter of law, the Department did not owe Mr. Phifer any actionable duty and the Department's conduct was not a proximate cause of his claimed injury. In this case, as in any claim of negligence, Mr. Phifer must establish the existence of a duty, breach of that duty, a resulting injury, and proximate cause between the resulting injury and the breach, including both legal cause and cause in fact. *See Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 747 (1998) (citing *Petersen v. State*, 100 Wn.2d 421, 435, 671 P.2d 230 (1983). To survive summary judgment, he must prove there is at least a genuine issue of material fact with respect to each element of negligence. *See* CR 56(c); *Moretnesen v. Moravec*, 1 Wn. App. 608, 406 P.3d 1178 (2017). Because Mr. Phifer failed to do so on the elements of duty and proximate cause, dismissal of his negligence claim was appropriate. The Department will address each of those two elements, in turn, below.

A. Standard of Review

When reviewing an order of summary judgment, an appellate court must engage in the same inquiry as the trial court. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact which would preclude summary judgment as a matter of law. CR 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A material fact is a fact which will affect the outcome of the litigation. *Id*. A defendant may show that there are no material facts at issue, or that the plaintiff cannot meet the burden of proof to establish the required elements of a claim. *Guile v. Ballard Comty. Hosp*., 70 Wn. App. 18, 21, 851 P.2d 689 (1993), *review denied*, 122 Wn.2d 1010, 863 P.2d 72 (1993); *Celotex Corp*., 477 U.S. at 325. No genuine issue of material fact exists if the court, after considering the evidence in a light most favorable to the non-moving party, concludes that reasonable persons could reach only one conclusion. *Reynolds v. Hicks*, 134 Wn.2d. 491, 495, 951 P.2d 761 (1998).

B. The Trial Court Properly Concluded the Department Did Not Owe Mr. Phifer a Common Law or Statutory Duty

"Since a negligence action will not lie if a defendant owed a plaintiff no duty of care, the primary question is whether a duty of care existed."

Folsom v. Burger King, 135 Wn.2d 658, 671, 958 P.2d 301 (1998). Whether or not a duty exists is a question of law. *Id.* The existence of a duty can arise either from common law principles or from a statute. *M.M.S. v. Dep't. of Soc. and Health Servs.*, 1 Wn. App. 320, 326, 404 P.3d 1163 (2017). Here, the Department did not owe Mr. Phifer either such duty.

1. The common law did not impose an actionable duty on the Department with respect to reporting concerns about Mr. Phifer's safety to the police.

Duty is often referred to as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 413, 693 P.2d 697 (1985) (quoting Prosser on Torts, § 53 (3rd ed. 1964)). The existence of a duty at common law hinges on the foreseeability of the risk created. *Higgins v. Intex Recreation Corp*., 123 Wn. App. 821, 837, 99 P.3d 421 (2004) (quoting *Rasmussen v. Bendotti*, 107 Wn. App. 947, 956, 29 P.3d 56 (2001)). "To be foreseeable, the harm must lie within the general field of danger covered by the specific duty owed by the Defendant." *Raider v. Greyhound Lines, Inc*., 94 Wn. App. 816, 819, 975 P.2d 518 (1999) (citing *Schooley*, 134 Wn.2d at 478). If the conduct of an actor does not involve an unreasonable risk of harm to the person injured, there is no duty to the person and no actionable negligence. *Rose v. Nevitt*, 56 Wn.2d 882, 885, 355 P.2d 776 (1960).

Mr. Phifer argues the Department owed him a duty to listen and ask appropriate questions to determine the best way to handle his call—making what is essentially a veiled claim of negligent claims administration or negligent investigation, and also that the Department had a special relationship with him giving rise to a heightened duty of care. Amended Opening Brief (Op. Br.) at pp. 12-13, 17-19. Mr. Phifer is wrong in both respects.

a. There is no cause of action for negligent claims administration or negligent investigation.

Mr. Phifer argues, without citing any authority, that the Department owed him a duty to "respond to [his] request for benefits in good faith, to listen and ask follow up questions to determine the best way to handle his call." Amended Op. Br., p. 12-13. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after a diligent search, has found none." *Deheer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Indeed, the Department is aware of no precedent that supports Mr. Phifer's argument, and it runs contrary to the fundamental principles underlying negligence and duty of care.

Mr. Phifer alleges that the Department acted negligently during its claims administration process in the manner in which Ms. Alvarado

collected information from him on the phone and then acted on that information. *See* Amended Op. Br. at pp. 12-16. Washington law, however, does not recognize claims for negligent claims administration, nor does Washington law recognize claims for negligent investigation in the context at issue in this case. *See Cena v. State*, 121 Wn. App. 352, 356-57, 88 P.3d 432 (2004) (no claim for negligent claims administration under the Industrial Insurance Act); *Janaszak v. State*, 173 Wn. App. 703, 725, 297 P.3d 723 (2013) ("In general, Washington common law does not recognize a claim for negligent investigation because of the potential chilling effect such claims would have on investigations.").

First, Washington courts have consistently rejected attempted claims for negligent claims administration under the exclusive remedies provision of the Industrial Insurance Act (IIA), which "is sweeping, comprehensive and of the broadest, most encompassing nature." *Cena*, 121 Wn. App. at 356. A person receiving benefits under the IIA has no separate remedies for his or her injuries covered by the IIA. *Id*. For example, claims based on wrongful delay in the payment of benefits that fall short of outrage do not pass the separate injury test because a claim which arises from a bona fide dispute over compensation is inextricably interwoven with the compensation claim. *Id.* at 357 (citing *Deeter v. Safeway Stores Inc.*, 50 Wn. App. 67, 84, 747 P.2d 1103 (1987) (Grosse, J., concurring)). Indeed, "[t]he

exclusive remedy provisions in RCW 51.04.010 withdraw from private controversy 'all phases of the premises' and consider the administration of a claim as involving one of those phases." *Cena*, 121 Wn. App. at 356-57 (citing *Wolf v. Scott Wetzel Services, Inc*., 113 Wn.2d 665, 675, 782 P.2d 203 (1989)). "Only if the claimed injury is too tenuous in its relationship to the underlying workplace injury can a separate action lie." *Cena*, 121Wn. App. at 357 (citing same).

Here, the exclusive remedy for Mr. Phifer's claimed injury – the aggravation of his PTSD - is found in the IIA. Mr. Phifer dismissed his claim of outrage against the Department. CP at 16-17. And his negligence claim arises from conduct by the Department inextricably interwoven with the administration phase of the underlying compensation claim. Moreover, Mr. Phifer was specifically allowed benefits for the aggravation of his PTSD as part of his IIA claim. CP 69-70. For these reasons, Mr. Phifer's attempt to allege a claim for negligent claims administration should be rejected. *See Cena*, 121 Wn. App. at 356-57.

Second, as Division I of the Court of Appeals recently recognized, where the duty alleged to have been breached "was to 'investigate better,' ..., a negligence claim has become a negligent investigation claim." *See Mancini v. City of Tacoma*, No. 77531-6-I, 2019 WL 2092698, at *5 n. 9 (Wash. Ct. App. May 13, 2019) (unpublished). As noted above, Washington

common law generally does not recognize a claim for negligent investigation. *Janaszak*, 173 Wn. App. at 725.[3] When such non-cognizable claims have been brought against law enforcement, they have been recognized as encompassing, at minimum, assertions of negligence occurring during the authorized evidence gathering aspects of police work. *Mancini*, No. 77531-6-I, 2019 WL 2092698, at *5.

Mr. Phifer seeks to hold the Department liable for Ms. Alvarado's conduct in allegedly failing to listen to him and ask follow up questions to determine the best way to handle his call. Amended Op. Br. at 12-13. That is an allegation that Ms. Alvarado should have "investigated better" in gathering information during the call about time loss benefits. And it is exactly that type of claim for negligent investigation that is not actionable under the law. *See Janaszak*, 173 Wn. App. at 725; *Mancini*, No. 77531-6-I, 2019 WL 2092698, at *5. Mr. Phifer's claim for negligent investigation should be rejected.

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[3] There are two limited exceptions to the general rule that the law does not recognize a claim for negligent investigation. Those are for (1) implied causes of action arising from negligent investigations of suspected child abuse or neglect that result in harmful placement decisions, *see Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000); *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 602, 70 P.3d 954 (2003); and (2) when an employment relationship is not at will, and if an employer is contractually obligated to provide reasons for dismissal to an employee, the employer may be held liable for failing to conduct a reasonable investigation prior to terminating the employee, *see Lambert v. Morehouse*, 68 Wn. App. 500, 505-06, 843 P.2d 1116 (1993). Neither exception applies in this case.

In addition, Washington precedent provides that there is no liability for the simply calling the police and providing them with information. In *McCord v. Tielsch*, 14 Wn. App. 564, 566, 544 P.2d 56 (1975) (footnote omitted), the court held:

> "We think [*Parker v. Murphy*, 47 Wash. 558, 92 P. 371 (1907)] and the other Washington cases evidence a rule that liability will not be imposed when the defendant does nothing more than detail his version of the facts to a policeman and ask for his assistance, leaving it to the officer to determine what is the appropriate response, at least where his representation of the facts does not prevent the intelligent exercise of the officer's discretion."

McCord recognizes that public policy does not support imposing liability for such calls to the police. *Id.* at 567. To hold to the contrary would have a chilling effect on an individual's willingness to report crimes or other public safety concerns. *Id.* In other words, merely calling the police and providing them with information does not create an unreasonable risk of harm recognized by the law – a requirement needed to support the existence of a duty. *See Rose*, 56 Wn.2d at 885.

In this case, Ms. Alvarado called the police to report her concern for Mr. Phifer's safety. According to the police report, Ms. Alvarado told police dispatch that she was concerned about statements made by Mr. Phifer on the phone, and that Mr. Phifer had stated he was going to end his life. CP at 468. Ms. Alvarado intended her report to lessen the risk of harm to

Mr. Phifer.[4] She merely detailed her version of the facts, and left it up to officer discretion to determine the appropriate response. The law imposes no liability, and no duty, in such circumstances. *See McCord*, 14 Wn. App. at 566.

Further, even assuming, for argument's sake, that calling the police created a risk of some level of harm, aggravation of Mr. Phifer's PTSD is not a reasonably foreseeable consequence of that risk and thus there was no duty to avoid it. *See Rose*, 56 Wn.2d at 885; *Higgins*, 123 Wn. App. at 837; *Raider*, 94 Wn. App. at 819. Mr. Phifer has not submitted a single fact tending to show the aggravation of his PTSD was a reasonably foreseeable consequence of calling the police. All the evidence points toward the contrary.

Mr. Phifer allegedly had an encounter with Toppenish police officers in the early 1970s that led to PTSD. CP at 19. Dr. LeFors, who had been treating Mr. Phifer since 1989, did not even know about the prior PTSD until after the incident in this case. CP at 226. Nor did Ms. Alvarado. CP 238-39. Even Mr. Phifer testified that he did not know one way or another if Ms. Alvarado had knowledge about his interactions with the police in the 1970s. CP at 67. In addition, Mr. Phifer had interacted with the

[4] The alternative Ms. Alvarado was facing – not calling the police – had a significantly higher risk with potentially even greater consequences.

Yakima Police Department on May 18, 2008, less than four months before the incident in this case. CP 232-35. A police officer cited him at that time for "knowingly threaten [*sic*] harm to person or property." CP at 232-35. There is no evidence suggesting that prior interaction with the police caused an aggravation of his PTSD, nor does Mr. Phifer allege so. Based on these facts, no reasonable juror could conclude that aggravation of Mr. Phifer's PTSD was a reasonably foreseeable consequence of Ms. Alvarado's call to the police.

Mr. Phifer, however, claims Ms. Alvarado should have simply listened longer and asked more questions to really vet if Mr. Phifer was actually suicidal. This argument confounds breach with duty. It presupposes Ms. Alvarado was bound to follow a specific standard of care, and the fact she allegedly did not (according to Mr. Phifer) was a breach of some duty. *See* Amended Op. Br., p. 13-15. The issue decided by the trial court, which is the issue on this appeal, is whether a duty is owed, and not whether a breach occurred.

Moreover, the Department and its employees cannot be expected to perform functions better suited for law enforcement and mental health professionals. Mr. Phifer wants Department employees to ask more questions, and psychoanalyze someone over the phone, to determine if they are actually suicidal – that is a difficult job even for trained medical or other

professionals. It is not reasonable to place that burden on the Department, when mental health counselors and police officers are specifically trained to handle these types of situations.

b. The Department did not have a special relationship with Mr. Phifer or with the Yakima Police Department.

The only alleged injury in this case is the aggravation of Mr. Phfer's PTSD, which, according to Mr. Phifer, occurred when Yakima Police Officers handcuffed him and took him to the police station for a mental health evaluation. CP at 221-22; Amended Op. Br., p. 8, 15. In other words, the injury was caused by the acts of a third party – the Yakima police. *Id*.

In Washington, there is no duty to prevent injury caused by a third party unless "a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct." *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 50, 929 P.2d 420 (1997); *Hutchins v. 1001 Fourth Ave. Assoc*., 116 Wn.2d 217, 227, 802 P.2d 1360 (1991). According to the Restatement (Second) of Torts § 315, a duty only arises where: (a) a special relationship exists between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct, or (b) a special relationship exists between the defendant and the other which gives the other a right to protection. *See Niece*, 131 Wn.2d at 43. Neither type of special relationship exists in this case.

Washington Courts have consistently found that special relationships are protective or custodial in nature. *Hutchins*, 116 Wn.2d at 227-28; *see also HBH v. State*, 192 Wn.2d 154, 429 P.3d 484 (2018). For example, courts recognize a special relationship between a student and school district. *See McLeod v. Grant Co. Sch. Dist., No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953); *see also Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269, 428 P.3d 1197 (2018). The relationship gives rise to a duty because "[s]chool districts have a custodial relationship with their students – '[i]t is not a voluntary relationship.'" *Hendrickson*, 192 Wn.2d at 276 (quoting *McLeod*, 42 Wn.2d at 319). Several other examples of recognized special relationships are enumerated in Restatement (Second) of Torts § 314A – a common carrier and its passengers; an innkeeper to its guests; or a possessor of land that holds it open to the public. The common thread among all recognized special relationships is that they are protective in nature, and they "historically involve an affirmative duty to render aid." *Hutchins*, 116 Wn.2d at 228.

The other category of cases, generally speaking, involve situations where a defendant may have a duty to control the actions of a third party (as opposed to situations where the injured party has been placed in the care of the defendant). *Hutchins*, 116 Wn.2d at 229. For example, cases involving a psychiatrist and patient may give rise to a psychiatrist's duty to take

reasonable precautions to protect one who may foreseeably be endangered by the patient's criminal conduct. *Petersen*, 100 Wn.2d at 428. Other special relationships where courts have found a duty to control the actions of a third party include employer and employee, tavern keeper and intoxicated guest, physician and assistants, hospital and unqualified physician, jail and inmate, and parents and children. *Hutchins*, 116 Wn.2d at 229; *see also Binschus v. State*, 186 Wn.2d 573, 578, 380 P.3d 468 (2016).

None of the special relationship characteristics exist in this case. Mr. Phifer was not under the care or control of the Department, and, in fact, he actually had opposing interests from the Department at the time this incident occurred. CP at 12. The Department was still investigating Mr. Phifer's underlying industrial injury claim and had not made any final decisions. CP at 12. Nor was Mr. Phifer physically located on the Department premises. Ms. Alvarado was having a remote telephone conversation with Mr. Phifer, who was physically located in his own home and engaged in conduct of his own choosing - sharpening knives, per his own report. CP at 13-15, 62. The Department did not have complete control over Mr. Phifer, and his attempts to analogize his situation to that of a jailer and inmate should be rejected. *See* Amended Op. Br. at p. 19 (citing *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010)). Because Mr. Phifer was not under the Department's custody or protection,

it did not have a special relationship with him. *See Hutchins*, 116 Wn.2d at 227-28.

Additionally, the Department did not have a special relationship with the Yakima police, such that it had a duty to control their actions. Such a duty would run contrary to law. Police officers are specifically trained to provide public safety and investigate crimes, and the Department is neither statutorily authorized nor equipped to direct their day-to-day operations. The Department had no authority and no ability to direct the police to conduct a welfare check, let alone tell them how to conduct it. Again, Ms. Alvarado simply made a call to police reporting a concern for Mr. Phifer's safety and the police officers did the rest.

Finally, Mr. Phifer also references a "heightened duty" based on a special relationship under the *Hutchins* line of cases. Amended Op. Br., p. 17. A special relationship does not impose a different or heightened duty, it merely defines whether a duty is owed. *See Hendrickson*, 192 Wn.2d at 276-77 ("[E]ven when the parties have a special relationship, the standard of care remains one of ordinary, reasonable care.") In this case, there is no special relationship and thus no duty of care, whether ordinary or heightened.

2. No statute creates an individualized, actionable duty with respect to reporting concerns about Mr. Phifer's safety to the police.

Although it is not entirely clear, Mr. Phifer may also be arguing the Department had an actionable statutory duty based on (1) an insured/insurer relationship, *see* Amended Op. Br., p. 17-20 (discussing RCW Titles 48 and 51); (2) a Department internal memorandum regarding injured workers threatening suicide, *see id.* at p. 16-17; and (3) the provisions of RCW 43.70.445, *see id.* at p. 17, 20. As described in detail below, none of these supports the imposition of a statutory duty.

a. The public duty doctrine bars any negligence claim by Mr. Phifer premised on RCW Title 51.

Mr. Phifer insinuates throughout his brief that the Industrial Insurance Act (RCW Title 51) creates a special relationship and a heightened duty of care. *See* Amended Op. Br., p. 17-20. The special relationship argument presented in Mr. Phifer's brief, however, comes from *Hutchins*, discussed above, and relates to a common law duty for injuries caused by the intentional acts of third parties. *See id.* at p. 19 (citing *Hutchins*, 116 Wn.2d at 227-28). To the extent, however, that Mr. Phifer seeks to rely on RCW Title 51 as creating an actionable duty of care, the public duty doctrine bars any such claim and its exceptions are inapplicable.

The public duty doctrine applies to duties mandated by statute or ordinance, as opposed to common law duties. *Munich v. Skagit Emergency*

Commc'n Ctr., 175 Wn.2d 871, 888-89, 288 P.3d 328 (2012) (Chambers, J. concurrence). "When the defendant in a negligence action is a governmental entity, the public duty doctrine provides that a plaintiff must show the duty breached was owed to him or her in particular, and was not the breach of an obligation owed to the public in general, i.e. a duty owed to all is duty owed to none." *Id*. at 878. The doctrine is simply a tool used to narrow focus when determining "whether a defendant owed a duty to a nebulous public or a particular individual." *Id*. (quoting *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006)). "The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability." *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 170–71, 759 P.2d 447 (1988).

There are four exceptions to the public duty doctrine – (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship. *Munich*, 175 Wn.2d at 879. If any exception applies, the governmental entity owes a duty to the plaintiff. *Id*.

Mr. Phifer appears to rely on RCW 51.04.030 and RCW 48.30.015 in attempts to establish a statutory duty. *See* Amended Op. Br., pp. 17-19. He argues that, pursuant to RCW 48.30.015, an insurer has a "duty to promptly, fairly, and in good faith investigate its insured's claims and provide the benefits that the insured is entitled to." at Amended Op. Br.,18.

The first problem with Mr. Phifer's position is that industrial insurance is *not governed* by RCW 48.30.015 – nor any other provision under RCW Title 48. Industrial insurance in the State of Washington is governed by RCW Title 51. The two types of insurance Mr. Phifer has conflated are fundamentally different, which is why his analogy to bad faith law is unavailing. Further, Mr. Phifer does not allege a bad faith claim, which is its own independent cause of action. *See* WPI Chapter 320 (Insurance Bad Faith Actions).

RCW 48.01.050 defines an "insurer" for purposes of that title. It explains, "'Insurer' as used in this code includes every person engaged in the business of making contracts of insurance…" RCW 48.01.050. "'Person' means any individual, company, insurer, association, organization, reciprocal or interinsurance exchange, partnership, business trust, or corporation." RCW 48.010.070. Nowhere in that definition does it say the Department of Labor and Industries is a "person" subject to the provisions of RCW Title 48, which is a fundamentally distinct statutory scheme that applies when a person contracts for insurance. In other words, where there is a contract between two private parties – the insurer and insured, a violation of that contract is actionable under bad faith law under superior court jurisdiction.

Industrial insurance, on the other hand, is a no fault system specifically "withdrawn from private controversy." RCW 51.04.010. There is no contract, there is no private cause of action, and there is no insurer/insured relationship falling under RCW Title 48. The Department is not engaged in a for profit "business" of insurance.

Next, Mr. Phifer quotes RCW 51.04.030, a statute establishing rules on medical aid, maximum fees, and records for physicians working on industrial injury claims. *See* Amended Op. Br., p. 19. That statute sets forth obligations the Department owes to the public in general, and not anyone in particular. *See Munich*, 175 Wn.2d at 878. Further, neither the legislative intent exception nor the special relationship exception applies in this case.

The legislative intent exception provides that liability to an individual can exist if a statute evidences "a clear intent to identify and protect a particular and circumscribed class of persons." *Halverson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978). Here, the legislature expressly disavowed any liability on the part of the Department for claims falling short of outrage outside of the workers compensation scheme:

> "The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided

> in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided."

RCW 51.04.010; *see also Cena*, 121 Wn. App. at 356-57 (claims falling short of outrage do not pass the separate injury test). Any argument that RCW 51.04.030 somehow creates an individualized, actionable tort duty, and not a duty owed to the general public, is contrary to the express direction of the legislature.

Nor does the special relationship exception to the public duty doctrine apply. A special relationship can give rise to an actionable duty, if three elements are met: (1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the general public, (2) an express assurance given by the public official, and (3) justifiable reliance on the assurance by the plaintiff. *Munich*, 175 Wn.2d at 879. Case law typically focuses on express assurances given by 911 operators in emergencies. *Id*. To satisfy the second element, there must be evidence of an unequivocally given assurance. *See Cummins v. Lewis County*, 156 Wn.2d 844, 855, 133 P.3d 458 (2006). "A government duty cannot arise from implied assurances." *Id*.

No express assurances were given in this case. While speaking with Mr. Phifer on the phone, Ms. Alvarado asked him if he would like her to

"contact mental health or authorities to pay him a visit to discuss his bad thoughts" and Mr. Phifer stated no. CP. at 482-83. There is no evidence, not even in Mr. Phifer's own declarations and testimony (CP at 12-15), that show Ms. Alvarado gave Mr. Phifer any type of assurance, whether implied or express. Thus, the special relationship exception does not recognize a duty in this case under RCW Title 51.

b. Neither the Department's internal memoranda regarding injured workers' threats of suicide nor RCW 43.70.445 created an actionable duty.

Internal agency rules do not create an independent legal duty. *Hungerford v. State Dept. of Corrections*, 135 Wn. App 240, 258, 139 P.3d 1131 (2006). The Washington Supreme Court explained, "[u]nlike administrative rules and other formally promulgated agency regulations, internal policies and directives generally do not create law. …[B]ecause the Department's policy directives are not promulgated pursuant to legislative delegation, *they do not have the force of law*." *Joyce v. Department of Corrections*, 155 Wn.2d 306, 323 119 P.3d 825 (2005) (emphasis added).

In the *Hungerford*, plaintiff argued that a Department of Corrections internal rule requiring community corrections officers to report all probation violations to the court created a general duty to report such violations. *Id*. The court disagreed, reasoning the internal rule may be evidence of the standard of care and what was reasonable, but it does not

create an independent legal duty upon which plaintiff could base liability. *Id*. The *Hungerford* court ultimately granted defendant's motion for summary judgment based on the lack of a duty owed even though the Department of Corrections had an internal rule requiring community corrections officers to report all probation violations. *Id*.

Despite such cases, Mr. Phifer argues the Department should be liable for Ms. Alvarado's "fail[ure] to follow the Department's internal memo." Amended Op. Br., p. 16. This is the exact argument rejected by the Court in *Hungerford*. The Department memorandum outlines procedure to follow when an injured worker threatens suicide during the claim process. CP at 485. Generally, the memo instructs the Department employees to contact county law enforcement unless it is outside normal work hours, when they are instructed to contact 911. *Id*. This internal memorandum does not have the force of law, and the Department surely does not have a legal duty to avoid calling the police unless an injured worker literally says, "he/she is threatening to commit suicide." *See* Amended Op. Br., p. 16. Policy, public safety, and precedent do not support Mr. Phifer's position.

Mr. Phifer also makes an argument in passing, that the policy of instructing employees to call the police in the first place is somehow negligent. *See* Amended Op. Br., p. 17, 21. He cites to RCW 43.70.445, a statute establishing a suicide-safer homes task force. The first problem with

Mr. Phifer's argument it that RCW 43.70.445 was enacted in June 2016 – nearly eight years after the incident underlying this case. *See* Laws 2016, ch. 90, § 2. And Mr. Phifer has presented no argument or evidence that it should be applied retroactively. Moreover, the statute was not intended by the legislature to protect any circumscribed class of persons, and it is barred by the public duty doctrine. *See Halverson*, 89 Wn.2d at 676.

For all the foregoing reasons, the trial court correctly granted the Department summary judgment because Mr. Phifer failed to establish the Department owed him any of the duties he alleges.

C. Mr. Phifer Has Not and Cannot Establish Proximate Cause

Mr. Phifer's negligence claim also fails on the element of proximate cause. To prove proximate cause, a plaintiff must prove the "but for consequence of the act, and legal causation, whether liability should attach as a matter of law." *Miller v. Linkins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001) (citing *Hartley v. State*, 103 Wn.2d 768, 777-79, 698 P.2d 77 (1985)). Cause in fact proves actual cause, that "but for" the defendant's negligence, the harm would not have occurred. *Dewar v. Smith*, 185 Wn. App. 544, 563, 342 P.3d 328 (2015) (citing *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 609-10, 257 P.3d 531 (2011)). Legal causation is determined by "mixed considerations of logic, common sense, justice,

policy, and precedent." *Hartley*, 103 Wn.2d at 779; *see also Tyner*, 141 Wn.2d at 82.

In particular, legal causation 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." *Schooley*, 134 Wn.2d at 478-79. To do this, the plaintiff must show the injury occurred "in a direct sequence, unbroken by any new, independent cause." *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 683, 183 P.3d 1118 (2008); *see also* WPI 15.01 (Proximate Cause - Definition). Unforeseeable, intervening acts break the chain of causation between a defendant's negligence and a plaintiff's injury. *Washburn v. City of Fed. Way*, 178 Wn. 2d 732, 761, 310 P.3d 1275, 1291 (2013). Legal causation also requires an increased risk of the injury occurring and not the mere chance that the injury might occur. *See Mossman v. Rowley*, 154 Wn. App. 735, 741-42, 229 P.3d 812 (2009) (trial court properly dismissed claim against speeding driver where lower speed would not have prevented the collision). Legal cause is a question of law. 16 Wash. Prac., Tort Law and Practice § 5:13 (4th ed. 2018); *N.L. Bethel School District*, 186 Wn.2d 444, 169-70, 378 P.3d 162 (2016).

Both types of causation are absent in this case. Logic, common sense, justice, policy and precedent all lead to but one conclusion - the connection between the aggravation of Mr. Phifer's PTSD and

Ms. Alvarado's call to the police to report her concerns for his safety is too remote and insubstantial to impose liability on the Department. *See Schooley*, 134 Wn.2d at 478-79. It defies common sense to claim that calling the police in the circumstances here increased the risk of injury to Mr. Phifer, when the whole point of calling the police was to prevent injury in the first place. Public policy also favors the Department erring on the side of caution by relaying concerns to the police when someone may be threatening harm to themselves or others.

In addition, Mr. Phifer admits the Yakima police caused his PTSD when they took him in handcuffs to the police station and placed him in a holding cell for approximately forty-five minutes. *See* Amended Op. Br., p. 8, 15. This was an unforeseen, independent intervening act that breaks the causal chain. *See Washburn*, 178 Wn. 2d at 761. Ms. Alvarado could not have reasonably foreseen what the officers were going to do, let alone foreseen that they would handcuff and hold Mr. Phifer, thereby aggravating his unknown PTSD. There are limitless possibilities of how a scenario can play out when police are called about a perceived suicide threat, none of which are any more foreseeable than the next. For example, if Mr. Phifer had not made concerning statements to the officers – statements referencing "going to heaven" – then it is possible the police would not have detained him and thereby aggravated his PTSD. A Department claims manager has

absolutely no control over what the police officers do when conducting a welfare check. For that reason, the chain of causation was broken when the police officers made an independent decision to place Mr. Phifer in custody, which was the only reason his PTSD was aggravated.

Ignoring those facts, Mr. Phifer argues that, if Ms. Alvarado would have only called Dr. Lefors on August 4, 2008, he could have somehow intervened in the police activity and prevented the aggravation of PTSD. Amended Op. Br., p. 15-16. This argument relies on several levels of speculation and depends on facts that do not exist. First, Dr. LeFors did not know Mr. Phifer had pre-exisitng PTSD, so speculating that he could have prevented the aggravation is not a reasonable conclusion. Second, Dr. LeFors is a family practitioner, who had already referred Mr. Phifer for a psychiatric evaluation twenty days prior to this incident. CP at 463-64. Dr. LeFors was not equipped to conduct a mental health evaluation. Third, no one knows if Dr. LeFors was even working August 4, 2008, let alone that he would answer a phone call and be able to respond to Mr. Phifer's situation. There is absolutely no evidence to that effect. Finally, even if Dr. LeFors did respond, there is no evidence the police officers would have done anything different. The police officer who responded to the scene testified it was not common for mental health counselors to respond to homes. CP at 438.

Finally, Mr. Phifer's citation to *Buchalski v. Universal Marine Corp.*, 393 F. Supp. 246 (1975), is inapposite to the issue of proximate cause. *See* Amended Op. Br., p. 22. In *Buchalski*, the sole issue before the court was a "determination of the proper measure of damages due to plaintiff." *Id*. at 248. Liability and causation were already established, and the court was faced with the common "eggshell plaintiff" scenario when analyzing plaintiff's damages. The concept that "a tortfeasor takes the victim as he finds him" is inapplicable to the issue of whether proximate cause exists and is, instead, just a recitation of the eggshell plaintiff rule, which only applies to damages. *See Bulchalski*, 393 F. Supp. at 248.

For all these reasons, Mr. Phifer cannot establish the element of proximate cause, and the trial court correctly granted summary judgment in favor of the Department.

V. CONCLUSION

No legal authority in the State of Washington supports the imposition of an actionable tort duty on the Department for calling the police to report concerns for a person's safety based on information learned during the administration process of a workers' compensation claim. There are no cognizable causes of action for negligent claims administration or negligent investigation, and it is not reasonably foreseeable that Ms. Alvarado's call to the police would have resulted in the aggravation of

Mr. Phifer's PTSD. In addition, there is no special relationship at issue in this case, whether it is a special relationship under the common law, or a special relationship under the exception to the public duty doctrine. And the statutes listed by Plaintiff do not meet the requirement for establishing the existence of an individualized, actionable duty under the legislative intent exception to the public duty doctrine. Further, internal Department policy also cannot support imposing a duty in this case. And finally, Mr. Phifer cannot establish that Ms. Alvarado's call to the police was a proximate cause of his injury. For the reasons set forth herein, the Department respectfully requests that the Court affirm the trial court's ruling granting it summary judgment on Mr. Phifer's negligence claim.

RESPECTFULLY SUBMITTED this 13th day of June, 2019.

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PROOF OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13th day of June, 2019, at Spokane, Washington.

s/Derek T. Taylor
DEREK T. TAYLOR

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