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FRED BINSCHUS, individually and as Personal Representative of the Estate of JULIE ANN BINSCHUS; TONYA FENTON; TRISHA WOODS; TAMMY MORRIS; JOANN GILLUM, as Personal Representative of the Estate of GREGORY N. GILLUM; CARLA J. LANGE, individually and as Personal Representative of the Estate of LEROY B. LANG; NICHOLAS LEE LANGE, Individually and as Personal Representative of the Estate of CHESTER M. ROSE; STACY ROSE, Individually; RICHARD TRESTON and CAROL TRESTON, and the marital community thereof; BEN MERCADO; and PAMELA RADCLIFFE, individually and as Personal Representative of the Estate of DAVID RADCLIFFE, and TROY GIDDINGS, individually,

Respondents,

v.

SKAGIT COUNTY,
a political subdivision of the State of Washington,

Petitioner,

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS; OKANOGAN COUNTY, a political subdivision of the State of Washington; and SKAGIT EMERGENCY COMMUNICATIONS CENTER d/b/a "Skagit 911," an interlocal government agency,

Defendants.

ANSWER OF PETITIONER SKAGIT COUNTY TO WSAJ FOUNDATION'S AMICUS CURIAE BRIEF

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Under the mistaken view that issues of duty and legal causation are nothing more than fact-driven questions of foreseeability for the jury, rather than policy-driven questions of law for the court, WSAJ proposes a dramatic and unwise expansion of "take charge" liability that would impose upon jailors a duty to the entire world, with no temporal limits, to prevent criminal conduct by former inmates. Neither precedent nor policy supports WSAJ's proposition that Skagit County's "take charge" duty could extend to protect the public at large from a former inmate's crimes committed after the period of confinement and control.

A. Foreseeability is only one of the considerations for this Court in deciding as a matter of "logic, common sense, justice, policy, and precedent" whether Skagit County had a "take charge" duty to the public at large to prevent Zamora's murderous rampage.

This Court decides whether a defendant owes a tort duty of care to the plaintiff as "a question of law [that] depends on mixed considerations of 'logic, common sense, justice, policy, and precedent.'" *Snyder v. Med. Serv. Corp. of E. Washington,* 145 Wn.2d 233, 243, 35 P.3d 1158 (2001), quoting *Hartley v. State,* 103 Wn.2d 768, 779, 698 P.2d 77 (1985). The foreseeability of harm is a consideration in making that decision, as this Court recognized in *McKown v. Simon Prop. Grp., Inc.,* 182 Wn.2d 752, 762, ¶ 10, 344

P.3d 661 (2015) ("foreseeability as a question of whether a duty is owed is ultimately for the court to decide.").

WSAJ, not petitioner Skagit County, "mixes the issue" in claiming that the jury decides any issue of "foreseeability" as a question of fact. (WSAJ Br. 14 n.8, citing *McKown*). If the *existence* of a duty from the defendant to the plaintiff (as opposed to its breach) were nothing more than a question of foreseeability, duty would always be a question of fact, rather than one of law. But only "once 'a duty is found to exist *from the defendant to the plaintiff* [do] concepts of foreseeability serve to define the scope of the duty owed.'" *McKown,* 182 Wn.2d at 763, ¶ 12, quoting *Schooley v. Pinch's Deli Mkt., Inc.,* 134 Wn.2d 468, 475, 951 P.2d 749 (1998) (emphasis added).

Whether addressed as an issue of duty or legal causation, public policy, not just foreseeability, dictates whether a duty exists "from the defendant to the plaintiff." *McKown,* 182 Wn.2d at 763, ¶ 12. As Justice Cardozo held in *Palsgraf v. Long Island R. Co.,* 248 N.Y. 339, 162 N.E. 99, 100 (1928), "[t]he plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another." The determination of Skagit County's duty with respect to inmates under its control,

therefore, must be made in light of the County's obligations to the public at large to whom WSAJ asserts the duty is owed.

WSAJ ignores the policies underlying "take charge" liability in arguing that the County, in its capacity as jailor, owes a duty to the public to prevent a former inmate from committing crimes after his release from custody "so long as the tortious act or omission occurs during the special relationship" and a jury decides the resulting harm was "foreseeable." (WSAJ Br. 6, 14) In order to impose liability based on the defendant's control of an inmate, the relevant harm that befalls the plaintiff must relate in some manner to the defendant's control over the inmate, as a matter of "logic, common sense, justice, policy," and this Court's precedent. *Snyder*, 145 Wn.2d at 243. "Take charge" liability to the public is premised on the defendant's ability to *control* the inmate's *conduct*, not cure his mental illness.

It is logical that a hospital for contagious diseases may be liable if it negligently releases a scarlet fever patient who infects the public, because avoiding further communication of the disease is the very purpose of the hospital's control over an infected patient. *See Restatement (Second) Torts*, § 319, Illustration 1 (1965). (WSAJ Br. 9) Similarly, because one of the purposes of

incarceration is "the social advantage and protection of society," *Hosea v. City of Seattle,* 64 Wn.2d 678, 682, 393 P.2d 967 (1964), it makes sense that a jailor may be liable for the criminal acts of an inmate who escapes or is allowed to leave the defendant's jail before completion of a sentence – just as it is logical that the State may be liable during the period of its actual supervision for the criminal acts committed by a parolee as a result of its negligent supervision. *See Taggart v. State,* 118 Wn.2d 195, 219, 822 P.2d 243 (1992) (discussed at Skagit Supp. Br. 9).

But just as there is no duty to control a parolee's criminal misconduct after the State's actual control has terminated, a county jail can have no duty to prevent crimes committed after an inmate's release from custody, when it no longer has any physical or legal control over the inmate. *See Smith v. Dep't. of Corrections,* 189 Wn. App. 839, 849, ¶ 19, 359 P.3d 867 (2015); *Husted v. State,* 187 Wn. App. 579, 590, ¶ 24, 348 P.3d 776, *rev. denied,* 184 Wn.2d 1011 (2015); *Couch v. Dep't of Corrections,* 113 Wn. App. 556, 571, 54 P.3d 197 (2002), *rev. denied,* 149 Wn.2d 1012 (2003) (all discussed at Skagit Supp. Br. 10). The purpose of incarceration in a county jail is not to prevent the commission of *future* crimes that may occur *after* the "take charge" relationship ends. As a consequence,

the "foreseeability" that a jail inmate may reoffend if his mental illness or other pathologies remain untreated is not a reason that the jail should be forever a guarantor to the public of the former inmate's conduct.

The purpose of incarceration in a county jail is not, and should not be, treatment of an inmate's mental illness. (*See* Arg. § C, *infra* at 10-11; ACLU Br. 6-10) That is the difference between the duty of a psychiatrist addressed in *Petersen v. State,* 100 Wn.2d 421, 671 P.2d 230 (1983), and the duty of a jailor at issue here. It may be reasonable, as a matter of logic, common sense, justice, and policy (as well as precedent), to hold a psychiatrist to a duty to use reasonable care to protect those who might be foreseeably endangered by a patient who poses a risk of harm, because the purpose of psychiatric treatment is to alleviate those very risks. *Petersen,* 100 Wn.2d at 427-28. But the purpose of detaining an inmate in a county jail is not the treatment of his mental illness. *See Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 651, ¶ 43, 244 P.3d 924 (2010) (Madsen, C.J., concurring/dissenting). That is why a jailor cannot be liable in tort to a victim of an inmate's post-release criminal conduct on the grounds that the inmate might have

been "cured" by mental health treatment during his incarceration. *Melville v. State*, 115 Wn.2d 34, 35, 793 P.2d 952 (1990).

WSAJ ignores the purpose of the duty of care imposed on psychiatrists by *Petersen,* attempting to distinguish *Melville* on the grounds that the claim there was based on "certain former statutes" and policy directives governing the Department of Corrections, while here the claim is "based on the common-law duty to provide medical treatment to jail inmates." (WSAJ Br. 11, 12) WSAJ's reliance on *Shea v. City of Spokane,* 17 Wn. App. 236, 562 P.2d 264 (1977), *aff'd,* 90 Wn.2d 43, 578 P.2d 42 (1978) (WSAJ Br. 10) for that proposition conflates a jailor's duty to inmates in its custody and control with the duty of a psychiatrist to the public.

In *Shea,* the issue was whether the City of Spokane could be liable *to the inmate* for the negligence of its jail physician in failing to diagnose and treat the inmate's spinal injury, caused by a fall while in custody. In rejecting the argument that the jail physician was an "independent contractor" whose negligence could not be ascribed to the City, the appellate court recognized a jailor's duty to provide medical care is to *the prisoner,* and inextricably "intertwined" with its "nondelegable" "duty to keep the prisoner in health." *Shea,* 17 Wn. App. at 242. *See Gregoire,* 170 Wn.2d at 635,

¶ 12; *Kusah v. McCorkle*, 100 Wash. 318, 323, 170 P. 1023 (1918) (both discussed at Skagit Supp. Br. 12).

It is quite a leap for WSAJ to argue that *Shea* definitively imposed on county jails a duty *to the public* that *Petersen* ascribed to a mental patient's psychiatrist five years after Division Three decided *Shea*. *Shea's* recognition that a jail has a duty to inmates to provide non-negligent medical care does not support WSAJ's facile attempt to equate *Petersen's* analysis of a State psychiatrist's duty to the public at large to Skagit County's duties in operating its jail.

B. Jails are not mental health treatment facilities, and their standard of care is not that of a psychiatrist.

WSAJ's reliance on *Petersen* and *Shea* to extend Skagit County's "take charge" liability for the criminal conduct of former inmates fails for another reason – the County's duty of care *owed to the inmate* is not that of the duty owed by a psychiatrist to a patient. A County jail must provide medical care commensurate with the protections of the federal and state constitutions, not with the standard of care applicable to psychiatrists. *See Gregoire,* 170 Wn.2d at 635, ¶ 12; RCW 70.48.130(1). As the ACLU points out, the Eighth Amendment requires jails to avoid the "unnecessary and wanton infliction of pain" but also prohibits forcing medical care

upon inmates against their wishes. (ACLU Br. 5-6, citing *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L.Ed. 2d 251 (1976) and *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990))

Petitioners' expert Dr. Hegyvary, upon whom the Court of Appeals relied in reversing the trial court's summary judgment (Op. ¶¶ 66-69), framed his opinion in terms of a breach of the standard of care of the "average ordinary psychiatrist." (CP 2543) Without acknowledging the distinction between the duty to provide an inmate constitutionally-required medical services and a psychiatrist's duty to prevent harm to persons threatened by the conduct of a patient under his control, WSAJ relies on RCW 70.48.130(1) and RCW 70.48.071 to argue that a county jailor has a duty to the public to provide mental health treatment to inmates to prevent the commission of future offenses after an inmate's release from custody. (WSAJ Br. 11-12)[1] But as this Court recognized in

[1] WSAJ's reliance on a statutory underpinning for the claimed common law duty to provide mental health treatment also falters first because plaintiffs expressly stated that their "claims are not based on failure to perform any statutory duty . . ." (CP 3442), and second because it wholly ignores the legislative immunity afforded the County and its employees for "the decision to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment" by RCW 71.05.120(1). (*See* Skagit Supp. Br. 14-16)

Melville, "the inmate himself . . . could not have insisted upon the mental health treatment which plaintiff contends DOC had to provide to him. If those persons who would directly benefit from the services, *i.e.*, the inmates, do not have a right to demand particular treatment, it logically follows that members of the public cannot claim a duty to them." 115 Wn.2d at 38-39.

The Legislature has not imposed upon county jails the duties of a psychiatrist or of a state mental hospital to provide mental health treatment. "[J]ail staff are not required to be mental health experts." *Gregoire,* 170 Wn.2d at 651, ¶ 43 (Madsen, C.J.). WSAJ's assertion that the County has a common law duty to provide mental health treatment to its inmates commensurate with the standard of care expected of a reasonable psychiatrist is without merit.

C. WSAJ ignores the legal and social consequences of imposing upon counties a duty to protect the public by treating mentally ill inmates.

WSAJ fails to acknowledge the pernicious social and legal consequences of imposing on county jails a duty in tort to warehouse and medicate (voluntarily or involuntarily) the mentally ill. As the ACLU argues, imposing on counties a tort duty to "treat" or "cure" mentally ill inmates would encourage the continued

misuse of jails to "warehouse" the mentally ill, and to forcibly medicate and prolong the detention of inmates. (ACLU Br. 10-14)

Plaintiffs' claim here is that Skagit County, despite Zamora's professed, consistent resistance, should have used its custodial control over him to inject Zamora with a long-acting psychotropic drug that could have prevented his murderous rampage a month after his release from custody: "Even if he did not want treatment, Zamora could have received it involuntarily." (Resp. Supp. Br. 33, citing CP 2543-44) Encouraging county jails to medicate inmates in order to reduce the county's potential civil liability in tort to the public at large would certainly threaten the rights of those who suffer, or are perceived to suffer, from mental illness, as cogently addressed in the ACLU's amicus brief. And it would also threaten counties with a new, independent, basis for tort liability (to both inmates and the public at large) based on claimed affirmative misfeasance creating a new or increased danger if the treatment "failed," or if administration of psychotropic drugs caused adverse side effects. *See Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013); *Restatement (Second) of Torts* § 302B (1965).

WSAJ correctly recognizes (as did the Court of Appeals) that the negligence alleged here is nonfeasance – a failure "to provide medical treatment" (WSAJ Br. 9, 10, 11, 12), rather than "affirmative acts" that "dramatically increased the risk of harm" to the public. (Op. ¶¶ 57-63) Although neither presented nor preserved in this case,[2] claims for breach of a Section 302B duty by both inmates and members of the public *would* become viable were the Court here to adopt a duty to the public to treat (and cure) mentally ill inmates serving time in a county jail. By imposing an affirmative duty to "treat" inmates, the Court would subject jailors to potential liability for exacerbating the inmate's condition by both the inmate and the public at large. The County, or any jailor, would be doubly damned if it did – or if it did not – medicate inmates. Neither "logic, common sense, justice, policy, [nor] precedent" support such a result, or the significant financial and social consequences it would have.

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[2] Respondents in their supplemental brief argue their claim that Skagit County failed to treat Zamora's mental condition as one for "improper" treatment, despite having failed to cross-petition the Court of Appeals' affirmance of summary judgment of dismissal of their Section 302B claim on the basis that the negligence asserted was Skagit County's nonfeasance, not malfeasance. (*See* Skagit Supp. Br. 16-17 & n.17) WSAJ correctly recognizes that the claim here was for Skagit County's failure to act, and properly does not challenge the Court of Appeals' decision that it was not cognizable under Section 302B.

D. The financial and social consequences of imposing tort liability on jailors for failure to treat or cure a mentally ill inmate argue against imposition of a duty of care to the general public here.

WSAJ claims that "financial resources or strategies" have no "bearing on the analysis of duty," citing *Bodin v. City of Stanwood*, 130 Wn.2d 726, 927 P.2d 240 (1996). (WSAJ Br. 17) But this Court has long recognized that financial and social consequences are among the "mixed considerations of logic, common sense, justice, policy, and precedent" relevant to imposing a legal duty in tort upon a defendant. *Snyder*, 145 Wn.2d at 243. *See, e.g., Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 57, 929 P.2d 420 (1997) (rejecting imposition of nondelegable duty for harm to residents by an employee's assault because it would "mak[e] group homes the insurers of their employees' conduct . . . [and] would likely be extremely burdensome").

The issue in *Bodin* was whether *the jury* should have been allowed to consider evidence of the municipal defendant's efforts to obtain funding to pay for the cost of sewage lagoon dikes, in support of an argument to the jury that the City had not been negligent in failing to raise the dikes. 130 Wn.2d at 746 (Johnson, J.: "This case lost proper focus when *the jury* was allowed to consider monetary matters") (emphasis added). Skagit County does not suggest that

the jury consider the financial consequences of imposing a duty to medicate (or "cure") Zamora before his murderous rampage. To the contrary, whether Skagit County owed a "take charge" duty to the public at large to prevent Zamora's future crimes is a question of law. *McKown,* 182 Wn.2d at 762, ¶ 10.

The issue here, unlike the evidentiary issue in *Bodin,* is one of public policy. This Court should not leave to a jury to decide whether it is "foreseeable" that a jail inmate may reoffend, but must itself decide the questions of duty and legal causation in light of the financial and social consequences of making jails guarantors of an inmate's conduct after his release from custody.

E. Conclusion.

Unless and until the Legislature decides that the mission of county jails is to provide inmates with comprehensive mental health services, this Court should not make jails guarantors of the mental well-being and conduct of former inmates after they have been released. This Court should reverse the Court of Appeals and reinstate the trial court's dismissal of all claims against Skagit County.

Dated this 18th day of December, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 18, 2015, I arranged for service of the Answer of Petitioner Skagit County to WSAJ Foundation's Amicus Curiae Brief, to the Court and to the parties to this action as follows:

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Subject: RE: Binschus, et al. v. Skagit County, et al. Case No. 91644-6

Attached for filing in searchable PDF format is the Answer of Petitioner Skagit County to WSAJ Foundation's Amicus Curiae Brief in *Binschus, et al. v. Skagit County, et al.*, Supreme Court Cause No. 91644-6.

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