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No. 101824-0

SUPREME COURT
OF THE STATE OF WASHINGTON

RICKEY FIEVEZ, individually, KYLE FIEVEZ, individually, and TYLER FIEVEZ individually,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS,

Respondent.

AMICUS CURIAE MEMORANDUM OF JULIE A. KAYS IN SUPPORT OF REVIEW

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I. INTRODUCTION

When the Department of Corrections ("DOC") negligently fails to discover that a highly violent offender under its supervision possesses an illegal arsenal of firearms, DOC allows a ticking bomb to roam the streets. It becomes a matter of when, not if, the danger explodes and an innocent person gets hurt or even dies. Yet the lower court's opinion absolves DOC of liability in such cases—as a matter of both fact and law—and erodes this state's tort system for compensating crime victims. This Court should grant review and hold that the causal chain does not break merely because a jury must draw a series of reasonable inferences that span more than two years. Unless an unforeseeable intervening act occurs, cause in fact remains.

The lower court's opinion advances the trend of courts rejecting reasonable inferences as mere "speculation" and "speculative theory" on summary judgment. Op. at 20-21 & n. 16. This decision also serves as an example of a court weighing the evidence, relying on facts outside the record, and even

rejecting as unpersuasive an expert's declaration. While an unpublished case ordinarily does not garner attention, this trend has persisted for too long in Washington's lower courts, and it is time for a course correction. This Court should review this case to reaffirm the causation principles in *Joyce v. State, Dep't of Corrections*, 155 Wn.2d 306, 119 P.3d 82 (2005), and *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), and to adopt the Division Three's analysis in *Behla v. R.J. Jung, LLC*, 11 Wn. App. 2d 329, 453 P.3d 729 (2019), *review denied*, 195 Wn.2d 1012 (2020), which discusses the role that "speculation" plays under CR 56.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Former Senior Deputy Prosecuting Attorney Julie A. Kays has an extensive civil practice in representing crime victims. She often represents clients with government liability claims against DOC, as in this case, and other state and local agencies. Having tried a combined 125 civil and criminal cases to a jury during her career, Kays has gained a strong appreciation for the role of juries

in resolving questions of fact. Experience has taught her that juries are smart. Juries properly render verdicts for the party who shows the facts and reasonable inferences support their theories of the case. And juries capably reject claims and defenses based on pure speculation.

Kays took a particular interest in this case because Kays routinely represents crime victims in their causes of action against the Department of Corrections for failure to "take charge" of an offender and the lower court's opinion in this case is inconsistent with longstanding case law on the issue of causation in DOC cases. Kays has a strong interest in the Supreme Court reviewing the lower court's analytical approach to a question of fact surrounding causation, or else the courthouse doors will shutter for many crime victims who have meritorious claims.

III. STATEMENT OF THE CASE

Kays defers to the Statement of the Case set out in the lower court's opinion and in the petition for review.

IV. ARGUMENT

The lower court's opinion creates mischief because it rejects both as a matter of fact and law that DOC may be liable for failing to control a criminal defender who later injures or kills someone. RAP 13.4(b)(1) supports review. *Joyce* and *Taggart* say nothing about whether the passage of time breaks the factual chain of causation. Rather, this Court said only that "[t]here must be a direct, unbroken sequence of events that link the actions of the defendant and the injury to the plaintiff." *Joyce*, 155 Wn.2d at 322 (citing *Taggart*, 118 Wn.2d at 226). The causal chain breaks only with an intervening act. *Id.* at 321-22. And that intervening act must be unforeseeable. *E.g.*, *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 761, 310 P.3d 1275 (2013).

Yet the lower court's opinion rejects the possibility that DOC's negligence in controlling an offender on community custody can be factually linked to an injury occurring two years later. Op. at 20-21. That was error. The offender here was a ticking bomb, and it was only a matter of time before he went

off. If he were incarcerated, he would not have committed the deadly shooting in this case, a reasonable jury might find.

The lower court gets around the logical causal chain with a lengthy footnote asserting that it was "speculative" that the offender would have been charged, convicted, and incarcerated. Op. at 20-21 & n.16. But, as a former criminal prosecutor, Kays submits the lower court incorrectly disregarded the expert declaration of Judge Gary Tabor, who formed an opinion based on this case's facts and his experiences as a criminal prosecutor and a superior court judge who presided over criminal cases. CP 861-68. In so doing, the lower court deepened its breach with this Court's precedents. *See, e.g.*, *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 301, 449 P.3d 640 (2019) ("Generally speaking, expert opinion on an ultimate question of fact is sufficient to establish a triable issue and defeat summary judgment." (citations omitted)). The court also contradicted its own recent opinion in *Haley v. Amazon.com Servs., LLC*, __ Wn. App. 2d __, 522 P.3d 80, 82, 87 (2022), which reaffirmed that summary

judgment is not a tool for weighing a party's evidence.

Criminal prosecutions are fairly predictable when the evidence is overwhelming, as was the unlawful possession of a firearm charge would have been against the offender here. And so an expert well versed in criminal prosecutions (as Judge Tabor was especially, given his experiences as both a prosecutor and a judge who presided over trials, guilty pleas, and sentencings) can predict on a more-probable-than-not basis how a criminal prosecution would have unfolded. CP 861-62, 864. Judge Tabor reviewed hundreds of pages documenting Day's criminal history, the prior criminal proceedings against him, and his conduct while in DOC community custody. CP 864. He relied on his combined 39 years' experience as a prosecutor himself and then a Thurston County Superior Court judge:

> By virtue of my knowledge, training, education, and experience, I am very familiar with judicial and prosecutorial practices and procedures. Relevant here, I have considerable judicial and prosecutorial experience with the assessment of evidence and information relating to potential criminal charges; the decision-making process underlying the filing of

> criminal charges; offender score calculation; sentencing recommendations, assessment, and decision-making; plea negotiations; assessing and evaluating the likelihood of conviction; judicial and prosecutorial considerations with regard to repeat felony offenders; judicial and prosecutorial considerations for offenders that violate the conditions of their community supervision; jury pools in the South Sound and surrounding regions; and with regard to sentencing, minimum/maximum sentencing ranges, as well as good time awards and other judicial and prosecutorial assessments relating to sentencing recommendations and decision-making.

CP 861-63. Judge Tabor's expert opinion created a triable issue on whether the offender would have been in prison based on the standard sentencing range of 51-60 months. CP 864-65.

Whereas the lower court disregarded the summary judgment standard's requirement that it credit the facts, opinions, and reasonable inferences offered by the nonmoving party, the lower court weighed its own speculation and assumptions. The lower court *assumed* that a prosecutor might not have brought a charge of unlawful possession of a firearm despite Day's history of violent, firearm offenses, his mental instability, and his "high

violent" risk assessment. Op. at 21 n.16. And the lower court *assumed* that any such prosecution might not have resolved with Day's incarceration before the deadly shooting in this case. *Id.* But that was all pure speculation, and the lower court never explained what in the record might have supported its assumptions. *Id.* The only reasoned opinion based on the record was Judge Tabor's—a county prosecutor was more likely than not to prosecute an unlawful possession of a firearm charge against a highly violent repeat offender like Day, and he would not have been in the streets. CP 864-66. This Court should grant review to reaffirm the proximate causation standard in negligent supervision cases.

The lower court's holding on legal causation also conflicts with this Court's observation in *Taggart* that "[t]he question of legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter." *Taggart*, 118 Wn.2d at 226 (citations omitted). In *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999), this Court rejected the

City's legal causation defense as an argument that "essentially asks for reversal of *Taggart*." *Id.* at 284. The lower court cited no precedent for invoking legal causation to dismiss a claim brought under *Taggart*. Op. at 21-22. And for good reason the lower court cited no such precedent: Since *Taggart*, this Court has repeatedly turned back government's efforts to use the doctrine of legal causation to evade a cause of action. *See, e.g.*, *Joyce*, 155 Wn.2d at 321-22 (rejecting legal causation argument); *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013) (same); *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 437-38, 378 P.3d 162 (2016) (same); *Wuthrich v. King Cnty.*, 185 Wn.2d 19, 28-29, 366 P.3d 926 (2016) (same); *Meyers v. Ferndale Sch. Dist.*, 197 Wn.2d 281, 291-96, 481 P.3d 1084 (2021) (same). These cases show appellate courts should be reluctant to use legal causation to subvert the policy conclusions that supported the duty of care in the first instance. But the lower court disregarded this teaching. Accordingly, this Court should grant review and reject this backdoor subversion of the "take charge" duty of

supervision recognized in *Taggart*.

RAP 13.4(b)(2) also supports this Court granting review and holding that Division Three's approach in *Behla* is the correct one on appeal from a summary judgment order. "Speculation is a specious word," Division Three realized. *Behla*, 11 Wn. App. 2d at 337. A jury's inquiry into causation necessarily involves *some* speculation, because it is a counter-factual exercise, asking, *If the defendant had not been negligent, what would have happened?* And reasonable people will interpret the facts and reasonable inferences differently: "reasonable persons may disagree as to whether causation is speculative in discrete circumstances." *Id.* at 338. With these observations, Division Three then articulated two summary judgment tests for causation:

> First, if the plaintiff can rationally rule out other potential causes, the jury should decide if plaintiff's proffered cause constitutes the true cause of harm or rests in speculation. Second, if the plaintiff can show that his offered cause *could have* caused his injury, *the jury* should decide whether the plaintiff's proffered cause is based on speculation or if

> defendant's list of possible causes relies on speculation.

Id. at 343. The lower court's analysis flatly contradicts the second test from *Behla*. Even though the plaintiff here produced evidence that DOC's negligence *could have* caused the shooting, *the court* decided that the plaintiff's proffered cause was based on speculation. Op. at 20-21 & n.16. This Court should review this case and adopt the test from *Behla*. As Division Three explained, "the jury should often be the decider of speculation." *Behla*, 11 Wn. App. 2d at 347.

RAP 13.4(b)(4) also supports review. For decades, Washington's common law courts have held that crime victims should receive compensation when DOC's negligent supervision of offenders in the agency's custody results in injury. The Legislature has never abrogated this cause of action, suggesting a legislative endorsement of the policies of deterrence and compensation that underlie it. *See, e.g.*, *Jewels v. City of Bellingham*, 183 Wn.2d 388, 397, 353 P.3d 204 (2015). But DOC

(as well as counties and cities) has tried to chip away at its liability indirectly, persuading the lower courts to dismiss cases based on other elements of the tort—breach, cause in fact, and legal causation. This Court, however, has steadfastly refused such entreaties, finding that juries should resolve factual questions. *See, e.g.*, *Joyce*, 156 Wn.2d at 314 (granting petition for review); *Taggart*, 118 Wn.2d at 199 (noting that two consolidated cases were accepted on direct review); *Hertog*, 138 Wn.2d at 282-84 (rejecting the City's arguments on proximate causation). This Court should grant review and do so again.

V. CONCLUSION

This Court should grant review to reaffirm that proximate causation is a question of fact for juries to decide—even when a judge harbors doubt what that factual determination should be. This Court also should reaffirm that lower courts should refrain from using legal causation as a tool to chip away at DOC's "take charge" duty of care.

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Respectfully submitted,

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