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.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals correctly affirmed summary judgment for the Department of Corrections (DOC) in this negligence case. *See Fievez v. Dep't of Corr.*, No. 70365-0-I, 175 Wn. App. 1061 (2023) (unpublished) (slip op.). The case arises from former supervisee Timothy Day's shooting of Plaintiff Rickey Fievez. As the Court of Appeals determined, Plaintiffs failed as a matter of law to show proximate cause. Instead, they relied only on inadmissible speculation and conjecture to argue that Day would have been incarcerated on the day of the shooting had Community Corrections Officer (CCO) Natalie Carrigan reviewed Day's criminal and prior supervision history records more than two years earlier.

Importantly, Plaintiffs do not seek review of the Court of Appeals' determination that this was the only allegation on which Plaintiffs showed an issue of material fact on breach. To the contrary, Plaintiffs contend that the Court's analysis on breach was correct. *See* Pet. at 5-6. Plaintiffs nonetheless spend

the vast majority of their petition arguing that other alleged failures by DOC proximately caused the shooting, as well as debating the merits of evidentiary rulings. But these arguments are irrelevant to the issue on which they seek review: the Court's determination that the sole surviving allegation of breach could not support a proximate cause finding as a matter of law.

The Court of Appeals' unanimous unpublished opinion on the narrow issue of proximate cause as it relates to a single allegation of conduct by CCO Carrigan follows this Court's established precedent. In addition, the proximate cause analysis flows from the unique set of facts and the specific evidentiary record presented in this matter. Further, as an unpublished opinion, the opinion lacks any precedential value and does not raise an issue of substantial public interest. Review is not warranted. *See* RAP 13.4(b)(1), (4).

II. COUNTERSTATEMENT OF ISSUES

Whether the trial court properly granted DOC summary judgment based on proximate cause because:

(1) on cause-in-fact, Plaintiffs failed to proffer any admissible, non-speculative evidence to establish that Day would have been incarcerated on the day he shot Fievez, but for CCO Carrigan's failure to review Day's criminal and prior supervision history at the start of his supervision more than two years earlier; and

(2) on legal causation, CCO Carrigan's failure at the start of Day's supervision was too disconnected and attenuated to the shooting that imposing liability on DOC would be contrary to public policy and common sense.

III. COUNTERSTATEMENT OF THE CASE

A. A Criminal Court Sentenced Day to Prison Followed by Community Custody Supervision

Pursuant to a 2015 conviction for felony harassment–domestic violence of his ex-wife that did not involve firearms, Day was sentenced under a Special Drug Offender Sentencing Alternative (DOSA). CP 83-93. His DOSA sentence included 19 months in prison followed by 19 months of community custody supervised by DOC. CP 87. Ultimately, Day was

incarcerated from January 9, 2015 to March 1, 2016, and was on community supervision until September 30, 2017. CP 78, 99.

B. DOC Supervised Day between March 2016 and October 2017

Day was supervised in Thurston County for the first month of his supervision. CP 423-46. After Day's ex-wife told DOC crime victim liaison Sherina James that she did not want Day released to Thurston County for safety reasons, DOC arranged for Day to live and work in Grays Harbor County. CP 312, 425, 1024. Day would share a rental house next door to his employer's automotive shop; the other tenants were the Stinsons. CP 1024.

Accordingly, in late March 2016, Day's supervision transferred from Thurston County to CCO Carrigan in Grays Harbor County. CP 422. When Day came onto her caseload, CCO Carrigan did not look into Day's prior criminal and supervision history; however, she did know his history included domestic violence and drugs and testified that the transfer request would have told her the pertinent information she needed to know

about Day for supervising him. CP 439-41. Another CCO, Ted Creviston, testified that it was his practice to review records from prior community custody supervision, such as the "chronos" and "field discipline." CP 499. In addition, Carrigan's supervisor testified that she expected CCOs to know the criminal history of the people they are supervising, including the offender's current judgment and sentence and their criminal conviction record in DOC's database. CP 530-31.

Using a static risk assessment tool, DOC scored Day as a "high violent" risk to reoffend. CP 922. Pursuant to DOC policy, this meant Day's CCO was to have three face-to-face contacts with Day per month (all of which occurred), with at least one of the contacts in the office and one of the contacts out of the office, plus one collateral contact per month. CP 200-22; 393-426.

In addition, due to Day's DOSA status, DOC policy required Day to have one face-to-face contact per week with a CCO for the first three months of supervision. CP 206, 214, 222.

While supervised in Thurston County in March 2016, Day complied with this requirement. CP 423-26. CCO Carrigan was initially unaware of this requirement, however, and so did not direct Day to report weekly in April and May 2016. CP 224.

Before Day moved in with the Stinsons, CCOs Carrigan and Creviston walked through the home to ensure its appropriateness. CP 423, 426. Carrigan told Ms. Stinson that Day could not have alcohol, drugs, or firearms, and Ms. Stinson assured Carrigan that none were in the home. CP 423. Other than occasionally seeing Ms. Stinson while conducting home visits with Day, Carrigan did not have further contact with Ms. Stinson. CP 479. Instead, Carrigan relied on Day's employer and landlord for ongoing information about Day. CP 116, 127, 1023-24.

Day maintained his employment throughout his supervision and his employer always reported that Day was doing well. CP 106, 119, 121, 124-25, 394, 1024. Day's employer never saw any evidence that Day possessed firearms or that he was using drugs or alcohol, nor did the employer ever receive any

information from the Stinsons relating any concerns regarding Day's compliance with the conditions of his supervision. CP 1024.

Throughout Day's supervision, the victim liaison, James, maintained contact with Day's ex-wife regarding any requests by Day to be in Thurston County. CP 418, 420. In May 2016, Day's ex-wife relayed a concern that Day may have had access to his deceased father's unrecovered firearms. CP 418. However, Day's ex-wife had not seen Day with a firearm since before 2015. CP 327-28, 339-40, 342-43.

In December 2016 and June 2017, Carrigan counseled Day for two minor supervision violations, neither of which involved firearms. CP 401, 409. DOC knew of no further violations. CP 1030-1031. In addition, DOC did not have the authority to extend Day's incarceration beyond September 30, 2017, when Day's criminal sentence ended, regardless of the nature of any violation. CP 924, 1030.

In late August 2017, Day mentioned to CCO Carrigan that he could no longer afford rent and was considering living out of

his truck. CP 1030. Afterwards, Day never told Carrigan that he carried out this plan, and Carrigan assumed that Day maintained his residence with the Stinsons. CP 1030.

Day last reported to CCO Carrigan on September 20, 2017. CP 1030. His supervision ended ten days later. CP 1030. The court officially closed the matter on October 2, 2017. CP 78.

C. Discovery in This Litigation Revealed that Day *May* Have Violated Other Conditions of His Supervision

During this litigation, the Stinsons claimed that they saw Day intoxicated more than once at their residence. CP 569-72. They also claimed that, around May 2016, Day came home with a long firearm soft case. CP 151-52, 164-65. Day allegedly admitted it contained a gun. CP 887. The Stinsons reminded Day he was not supposed to have firearms and asked him to take it out of the house. CP 154-55, 171-72. Day agreed. CP 152, 155, 170, 887. The Stinsons never saw any actual firearms, ammunition, or other firearm cases or containers—or anything else related to firearms—in or out of the house or in Day's truck. CP 155-56, 171-73.

In addition, Day's fiancé at the end of his supervision, Annaliese Richmond, testified that Day moved into her home about one month before his supervision ended. CP 178, 1030. She testified she had six firearms in her home when Day moved in, and Day brought two weapons with him. CP 177, 184-86. Richmond did not know Day was being supervised or prohibited from gun ownership. CP 184, 192, 196.

Over eight months after his supervision ended, on June 17, 2018, Day stole a revolver from Richmond, shot off the locks on the glass ammunition case in a Walmart store, and attempted to carjack and ultimately shot Rickey Fievez. *Fievez,* slip op. at 2. Another bystander fatally shot Day. *Id.*

D. Procedural History

Rickey Fievez, along with his sons, sued DOC and brought negligent supervision claims. CP 1-12. DOC moved for summary judgment. CP 23-47. Following a hearing, the trial court struck certain evidence submitted by Plaintiffs and granted DOC's motion. CP 1016-19. The trial court determined that

(1) DOC did not owe Plaintiffs any duty because supervision had ended, and (2) Plaintiffs had not shown proximate cause. CP 31-32.

The Court of Appeals affirmed in a unanimous unpublished opinion. *Fievez*, slip op at 1. The Court determined that Plaintiffs had raised a material question of fact as to duty and had "raised a material question of fact on the element of breach based *only* on Carrigan's failure to review Day's criminal history and records from previous community custody supervision." *Id.* at 13, 19 (emphasis added). The Court then analyzed proximate cause, referencing seminal appellate court precedent. *Id.* at 19-22 (discussing *Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 239-40, 95 P.3d 764 (2004); *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005); *Taggart v. State*, 118 Wn.2d 195, 226, 822 P.2d 243 (1992)). It made special note of Plaintiffs' "speculative theory" of cause in fact. *Id.* at 20-21 & n.16. It concluded:

> While Fievez demonstrated that DOC breached the duty of slight care when Carrigan failed to review Day's criminal history and prior supervision records before undertaking his supervision in March 2016, *he is unable to demonstrate a causal connection between that breach early in Day's supervision and the tragic events that occurred eight months after DOC closed out Day's file.* Fievez's claim is likewise undercut by "considerations of policy and common sense as to how far the defendant's responsibility for the consequences of its actions should extend." Taggart, 118 Wn.2d at 226. *The injury-causing act is so disconnected from the only breach by DOC for which Fievez was able to demonstrate a genuine issue of material fact that imposing liability on DOC would be contrary to policy and common sense.*

Id. at 21-22 (footnotes omitted; emphases added).

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals' Decision on Proximate Cause Comports, Not Conflicts, with This Court's Precedent

While proximate cause is generally a factual question for the jury, Washington courts have also long recognized that it may be decided as a matter of law where reasonable minds cannot differ. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *Estate of Bordon*, 122 Wn. App.

at 235. Plaintiffs seek to upend this uncontroversial principle and ask this Court to carve out a category of cases – those involving a "take charge" duty – in which proximate cause can never be the basis for granting summary judgment. *See* Pet. at 6-7. This Court should reject such a categorical approach to causation and, instead, should continue with the case-by-case analysis that has guided causation decisions of this Court for decades.

Proximate cause includes cause in fact and legal cause. *Taggart*, 118 Wn.2d at 225-26 (citing *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985)). As the Court of Appeals and the trial court concluded, both are missing under the facts in this case.

1. Because only speculation supports finding cause in fact in this case, summary judgment for DOC was appropriate

"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." *Taggart*, 118 Wn.2d at 226 (citing *Hartley*, 103 Wn.2d at 778).

In cases involving DOC's allegedly grossly negligent supervision of an offender, cause in fact requires non-speculative evidence that the offender would have been incarcerated on the date in question but for the alleged gross negligence. *Hungerford v. State Dep't of Corr.*, 135 Wn. App. 240, 245, 253-54, 139 P.3d 1131 (2006) (affirming summary judgment when only speculation supported finding the offender would have been in custody on the day of the murder); *Estate of Bordon*, 122 Wn. App. at 241, 243-44 (reversing jury's verdict when gaps in chain of causation required speculation to find offender would have been incarcerated on the day of the accident). This causal requirement – that there must be evidence the offender would have been incarcerated – is undisputed by the parties. *See*, *e.g.*, Pet. at 11, 17.

Here, Plaintiffs cannot show that Day would have been incarcerated and unable to shoot Fievez on June 17, 2018, but for the only potentially viable theory of gross negligence Plaintiffs asserted against DOC. Plaintiffs continue to argue that "DOC's

breaches of its 'take charge' duty" caused the shooting. *See* Pet. at 15 (emphasis added). Yet, they do not seek review of the Court of Appeals' determination that a question of fact only existed on *one* alleged breach: CCO Carrigan's failure to review Day's prior criminal and supervision history in March 2016. *See Fievez*, slip op. at 16, 19.

Plaintiffs do not even attempt to demonstrate how the shooting flowed in a direct, unbroken sequence from *that* alleged breach. And in any event, any argument that but for Carrigan's failure to review those records Day would have been incarcerated on the day of the shooting rests entirely on speculation, which is insufficient. *See Taggart*, 118 Wn.2d at 227 ("when the connection between a defendant's conduct and the plaintiff's injury is too speculative and indirect, the cause in fact requirement is not met"); *Hungerford*, 135 Wn. App. at 254 ("[S]peculation and argumentative assertions are not sufficient to create a genuine issue of material fact.").

a. Plaintiffs' reliance on *N.L.*, *Meyers*, *Petersen*, and *Volk* is misplaced as they are not "take charge" duty cases

Plaintiffs mistakenly assert that this Court has "refused to address causation as a matter of law" in "case after case" involving a "take charge" duty. *See* Pet. at 7. In support of this proposition, Plaintiffs cite five opinions of this Court, but only one involves a comparable "take charge" duty. *See* Pet. at 7-11 (discussing *Joyce*, *N.L.*, *Meyers*, *Petersen*, and *Volk*).

The "take charge" duty at issue here, as in other cases involving DOC's supervision of offenders, is defined by the *Restatement (Second) of Torts* § 319 (1965). *See Taggart*, 118 Wn.2d at 219. That duty provides: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under *a duty to exercise reasonable care to control* the third person to prevent him from doing such harm." *Id.* (quoting *Restatement* § 319; emphasis added). With the exception of *Joyce*, none of the cases

Plaintiffs reference involve this § 319 duty of control. *See* Pet. at 7-11.

More precisely, *N.L. v. Bethel School District* involved the special relationship duty of school districts to protect students. 186 Wn.2d 422, 430-31, 378 P.3d 162 (2016) (discussing *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005); *McLeod v. Grant County School District No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953)). The foundation for this duty of protection, as embraced in *McLeod*, was the *Restatement (First) of Torts* § 320, which applied to one who "takes custody of another under circumstances such as to deprive the other of his normal power of self-protection." 42 Wn.2d at 320-21. Similarly, *Meyers v. Ferndale School District* involved the special relationship duty described in the *Restatement (Second) of Torts* § 314A (1965), by which school districts have a duty to protect students from foreseeable harm caused by third parties. 197 Wn.2d 281, 288, 481 P.3d 1084 (2021).

In addition, *Petersen v. State* involved the special relationship duty under the *Restatement (Second) of Torts* § 315 (1965), by which a psychiatrist incurred a duty to take reasonable precautions to protect anyone who might foreseeably be endangered by his patient's drug-related mental health problems. 100 Wn.2d 421, 426-29, 671 P.2d 230 (1983). Indeed, this Court in *Volk v. DeMeerleer*, 187 Wn.2d 241, 259, 386 P.3d 254 (2016), recognized: "One need only examine our prior decisions considering the § 319 take charge relationship to see that *Petersen* was not a take charge case." *Volk* also involved the § 315 special relationship duty of protection, extending it to an outpatient setting. 187 Wn.2d at 262-63.

Accordingly, none of the analyses of causation in those four cases are controlling here such that the Court of Appeals' decision on causation would be in conflict. *See* RAP 13.4(b)(1).

b. Plaintiffs' reliance on *Joyce* is misplaced because causation there rested on specific, non-speculative evidence

As noted above, only *Joyce*, cited by Plaintiffs, involved a comparable § 319 duty. *See* 155 Wn.2d at 315. But the analysis of causation in *Joyce* is factually distinguishable from this case. As such, there is no conflict between the Court of Appeals' decision here and *Joyce*. *See* RAP 13.4(b)(1).

Joyce involved non-speculative evidence that, at the time of the accident that killed the plaintiff's wife, (1) DOC still had control over the offender who remained on active supervision, (2) DOC had actual knowledge of the offender's continued supervision violations, (3) just days before the accident, DOC issued notices of violation recommending 20 days' jail time, (4) the court had, in fact, imposed jail time of 39 days on the offender for prior supervision violations, and (5) plaintiffs' expert opined that, had DOC obtained a bench warrant on the newly reported violations, the offender would have been in jail at the time of the accident. *Joyce*, 155 Wn.2d at 309, 311-14, 322. This evidence, if credited by a jury, created a question of material fact on proximate cause by connecting, in a direct, unbroken

sequence, the fatal accident to DOC's alleged breach of failing to more diligently pursue the offender's numerous supervision violations. *Id.* at 322.

Plaintiffs here submitted no such non-speculative admissible evidence to connect the shooting in 2018 to CCO Carrigan's failure in 2016 to review Day's prior history. Rather, Plaintiffs' entire argument as to proximate cause rests wholly on speculation and conjecture that, had CCO Carrigan supervised Day "intensely," she would have learned of additional violations of the conditions of his supervision. Pet. at 13. But failure to supervise Day "intensely" is not the alleged breach at issue. Failure to review his criminal and supervision history at the start of his supervision is.

c. Only rank speculation could support a finding that Day would have been incarcerated on the day of the shooting but for Carrigan's failure to review his prior history

Plaintiffs submitted no evidence from CCO Carrigan that if she had reviewed Day's criminal and supervision history, it

would have changed her supervision, beyond (1) "possibly" increasing her index of suspicion that Day might try to possess firearms and (2) "probably" leading her to ask more questions of Ms. Stinson about access to firearms during the initial collateral contact that occurred before Day moved into the Stinsons' rental home. CP 487-88. That is not enough to link the alleged breach to the shooting.

Moreover, even assuming that Carrigan otherwise would have changed how she supervised Day, there is no non-speculative evidence that Carrigan would have discovered any violation or that, if discovered, the violation would have resulted in Day's incarceration more than eight months after his supervision came to an end.

First, Plaintiffs presented no non-speculative evidence that Day was harassing his ex-wife with hang-up calls while being supervised by DOC. *Cf.* Pet. at 14. Indeed, Day's ex-wife gave permission for Day to be in Thurston County, supported lifting

the no contact order, and agreed to allow Day to attend church *with* her. CP 317, 413, 416, 430.

Second, Plaintiffs presented no non-speculative evidence that Day would have been incarcerated on the day of the shooting due to any failure to report becoming houseless or moving in with Richmond. *Cf.* Pet. at 17-19. A failure to report could not have resulted in more than 30 days of incarceration, and more likely would have only resulted in a stipulated agreement between Day and Carrigan with no incarceration. CP 923. Likewise, Day's failure to advise DOC of a change of address to Richmond's home, if discovered, would likely have resulted in a stipulated agreement requiring two further reporting days the following week. CP 923. Even if jail was a possible sanction, DOC did not have the authority to extend incarceration beyond September 30, 2017, when Day's criminal sentence ended. CP 924, 1030.

Third, Plaintiffs presented no non-speculative evidence that Day would have been incarcerated due to any firearms

violations or offenses. *Cf.* Pet. at 12-19. Although Day's ex-wife relayed concerns to DOC in May 2016 that Day may have access to his deceased father's firearms, CP 418, she admitted these concerns were not based on new information and that she had not seen Day with firearms since before he went to prison in January 2015. CP 327-28, 339-40, 342-43. Moreover, even if CCO Carrigan had this information, it would not have constituted specific and articulable facts supporting reasonable cause to search Day's residence. *See* RCW 9.94A.631(1) (requiring DOC to have "reasonable cause" to search an offender's residence for evidence of a specific violation); *State v. Jardinez*, 184 Wn. App. 518, 524, 338 P.3d 292 (2014) (describing "reasonable cause" in RCW 9.94A.631(1) as requiring "reasonable suspicion" based on "specific and articulable facts and rational inferences"); *State v. Maddox,* 152 Wn.2d 499, 506, 98 P.3d 1199 (2004) (circumstances in support of reasonable cause must support "commonsense determination

that there is continuing and contemporaneous possession of the property intended to be seized").

Further, even if the Stinsons had timely relayed their observation of Day with a firearm case, or if CCO Carrigan had somehow discovered that Day had moved in with Richmond where she had a number of firearms, a series of other improper, speculative assumptions are needed to establish causation. As the Court of Appeals aptly described, Plaintiff's argument depends on speculation that Day would have been incarcerated again on "what are ultimately fictional criminal charges":

> While Fievez is entitled to all favorable inferences based on the facts presented, this aspect of his argument rests entirely on speculation. Given Day's satisfactory completion of the other terms of the DOSA sentence, it is a leap to suggest that access to firearms . . . would have resulted in immediate revocation of the remainder of Day's DOSA sentence. . . . Even if Day had been revoked for noncompliance when he was living with Richmond without DOC approval, revocation alone could only have resulted in the imposition of the remainder of his sentence which, at that point in time, was only 40 more days.
>
> The other possibilities regarding incarceration based on a new criminal charge rest on presumptions

> that fly in the face of the discretion held by each elected prosecutor, and their deputies by extension, as to the filing of charges and the presumption of release under CrR 3.2. These theories require a conclusion that Day would have either been denied pretrial release or unable to post bail, or, stretching credulity even further, that he would have not only proceeded to trial, but been convicted and sentenced so that he would have been serving time on the date of Fievez's shooting. Inferences in favor of the nonmoving party do not include such unrestrained chains of speculation.

Fievez, slip op. at 20-21 n.16 (internal citations omitted).

These layers of speculation are missing from *Joyce*. The specific facts in *Joyce* left little room for improper speculation: to the contrary, there was evidence that the offender would have been incarcerated on the day of the accident had DOC obtained a bench warrant on specific violations. *See Joyce*, 155 Wn.2d at 309, 311-14, 322; *see also Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990) ("'The opinion of an expert must be based on facts. An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury.'"

(Quoting *Theonnes v. Hazen*, 37 Wn. App. 644, 648, 681 P.2d 1284 (1984)).

Here, neither the declaration of Dan Hall nor of Judge Gary Tabor, Plaintiffs' experts, contains admissible, non-speculative testimony based on specific facts to establish that Day would have been incarcerated on June 17, 2018, had CCO Carrigan reviewed his prior history and supervision records. *See* CP 802-10 (Hall declaration); CP 861-68 (Tabor declaration). Notably, Judge Tabor's testimony does not even attempt to link Carrigan's failure to review Day's history to the shooting. *See* CP 861-68. Instead, Judge Tabor embraces the legal fiction – not fact – that DOC would have discovered Day in possession of a firearm while on supervision and postulates a series of inadmissible speculative assumptions about what a prosecutor, a court, and even Day would have done following that discovery. *See id.* Similarly, Hall's testimony improperly assumed that Carrigan would have more closely monitored Day and prioritized collateral contacts with his roommates, and, as a result, would have discovered firearms in his

residence. CP 810. As the Court of Appeals determined, Hall presented no direct, unbroken sequence of events linking Carrigan's failure to review the relevant records before beginning supervision to Day's shooting of Fievez more than two years after this identified breach, over eight months after supervision ended. *Fievez*, slip op. at 20.

In summary, without non-speculative admissible evidence that Day would have been incarcerated on June 17, 2018, factual proximate cause was properly decided as a matter of law. *E.g. Smith v. Dep't of Corr.*, 189 Wn. App. 839, 852, 359 P.3d 867 (2015) (finding proximate cause lacking as matter of law when plaintiff's argument was "pure speculation"), *review denied* 185 Wn.2d 1004, 366 P.3d 1244 (2016).

2. Because imposing liability on DOC under these facts would be contrary to public policy and common sense, legal causation is lacking

Even assuming cause in fact could be established, the Court of Appeals correctly concluded that legal causation is lacking here. *Fievez,* slip op. at 21-22. Legal causation, which is

a more fluid concept, is grounded "in policy determinations as to how far the consequences of a defendant's acts should extend." *Tyner v. Dep't of Social & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000) (internal quotation marks and citation omitted). The focus is "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." *Id.* (same). The inquiry thus depends upon "mixed considerations of logic, common sense, justice, policy, and precedent" and "permits the courts to limit liability, for policy reasons, even though duty and foreseeability concepts would indicate liability." *Id.* (same).

DOC's conduct in supervising Day is not a legal cause of Plaintiffs' injuries when recognizing legal causation here would expand DOC's responsibility for supervision indefinitely, contrary to common sense, logic, and public policy. The shooting occurred more than two years after Carrigan's failure to review certain records about Day, at a time when DOC no longer had

any ability to control Day. The connection between the shooting and the alleged breach is too insubstantial and too remote to impose liability on DOC. *See Hartley v. State*, 103 Wn.2d 768, 784, 698 P.2d 77 (1985) (concluding that "the failure of the government to revoke Johnson's license [was] too remote and insubstantial to impose liability for Johnson's drunk driving").

The Court of Appeals' decision on causation comports with the precedent of this Court. Review is not warranted under RAP 13.4(b)(1).

B. The Court of Appeals' Unpublished Opinion, Which is Based on Unique Facts Unlikely to Recur, Does Not Raise an Issue of Substantial Public Interest

In seeking review by this Court, Plaintiffs argue that "treatment of causation in take charge duty cases is a significant public policy issue for this Court." Pet. at 19 (capitalization altered). Plaintiffs' attempted invocation of RAP 13.4(b)(4) should be rejected.

First, RAP 13.4(b)(4) does not concern "public policy" issues. It concerns issues of "substantial public interest."

RAP 13.4(b)(4). Second, a decision that has the potential to affect multiple lower court proceedings may warrant review as an issue of substantial public interest in order to avoid unnecessary litigation and confusion. *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). The underlying opinion here does not have this potential. Instead, the Court of Appeals correctly applied settled law on proximate cause to the unique facts of this case. Its decision neither affects other proceedings nor sows the seeds of general confusion and unnecessary litigation. Moreover, the decision is unpublished and therefore not precedential or binding on any court under GR 14.1(a). Review is not warranted under RAP 13.4(b)(4).

V. CONCLUSION

For the foregoing reasons, DOC respectfully requests that this Court deny review.

This document contains 4,927 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 5th day of June 2023.

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I certify under penalty of perjury in accordance with the laws of the state of Washington that the preceding ANSWER TO PETITION FOR REVIEW was electronically filed via the Washington State Appellate Courts' Portal on the date below and that parties will be notified of such filing via the same.

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