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.

STATE'S ANSWER TO AMICUS CURIAE MEMORANDUM

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I. INTRODUCTION

Adhering to well-settled law on proximate cause, the Court of Appeals correctly determined that Plaintiffs' negligence case against the Department of Corrections (DOC) must fail. *See Fievez v. Dep't of Corr.,* No. 70365-0-I, 175 Wn. App. 1061 (July 29, 2023) (unpublished) (slip op.). Amicus Julie A. Kays disregards the court's reliance on that authority and instead mischaracterizes the court's opinion as one weighing evidence and relying on evidence outside the record. It does neither. In addition, similar to Plaintiffs, amicus also argues that DOC's failure to discover Day's unlawful possession of firearms caused the shooting. But the Court of Appeals rejected such a generalized alleged breach as a matter of law, and its analysis of breach is *not* the subject of the petition for review. Further, amicus also inappropriately invites to this Court to accept review under RAP 13.4(b)(2), which was not raised by Plaintiffs and which lacks merit in any event. This Court should reject the arguments of amicus and deny review.

II. ARGUMENT

A. The Court of Appeals' Decision Comports with This Court's Precedent on Causation

As DOC notes in its answer to the petition, Washington courts have long recognized that proximate cause 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 v. Dep't of Corr.*, 122 Wn. App. 227, 235, 95 P.3d 764 (2004). Amicus, like Plaintiffs, ignores this jurisprudence and argues, as an absolute, that "proximate causation is a question of fact for juries to decide." Amicus Memo. at 12. No such absolute and categorical rule exists and this Court should not now create one.

Amicus initially contends this Court should accept review 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)." Amicus Memo at 2. That is unnecessary, because the Court of

Appeals' opinion expressly relied on the causation principles articulated in those cases:

> To demonstrate cause in fact, "[t]here must be a direct, unbroken sequence of events that link the actions of the defendant and the injury to the plaintiff." Joyce v. Dep't of Corr., 155 Wn.2d 306, 322, 119 P.3d 825 (2005). Legal causation, in contrast, "rests on 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.

Fievez, slip op. at 19.

Amicus also contends a conflict exists between the Court of Appeals' opinion and *Joyce* and *Taggart*. *See* Amicus Memo at 4, 8. Amicus is wrong.

Contrary to amicus' argument, the Court of Appeals' opinion did not reject, based solely on the passage of time, the possibility that DOC's negligence could be factually linked to an injury occurring two years later. *See* Amicus Memo at 4. Rather, consistent with *Joyce*, the Court reviewed the evidence in the record and determined that Plaintiffs failed to demonstrate a "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." *Id.* at 20 (footnote omitted). That *Joyce* reached a different result on causation based on different facts is not enough to demonstrate a conflict.

Amicus also mischaracterizes *Joyce*'s discussion of intervening cause, which does not stand for a broad proposition that only an unforeseeable, intervening act will break a causal chain. Rather, *Joyce*'s holding is a narrow one: "[i]n the absence of an actual intervening act by a court, the court does not act as an intervening cause." 155 Wn.2d at 321-22. But here we do not have a causal chain allegedly being broken by an intervening act by a court. We have, instead, "layers of speculation" premised on "matters of prosecutorial discretion, discretionary rulings of the trial court, and Day's strategic choices as to the defense against what are ultimately fictional criminal charges." *Fievez*, slip op. at 20 n.16. Further, the Court

of Appeals specifically noted that it was not reaching the issue of superseding, intervening causes. *Id.* at 22 n.17.

Moreover, amicus's argument suggests that temporal correlation is enough to establish causation. That is, amicus assumes a causal chain necessarily exists between CCO Carrigan's alleged negligence (in not reviewing Day's criminal and prior supervision history) and the shooting that temporally followed years later. *See* Amicus Memo at 4-5. Amicus's assumption that a succession of events alone can establish causation is an example of the logical fallacy of *post hoc, ergo propter hoc* – i.e., after this, therefore because of this. "Post hoc ergo prop[t]er hoc is neither good logic nor good law." *Volentine & Littleton v. United States*, 169 F. Supp. 263, 265 (Ct. Cl. 1959). Plaintiffs must do more than rely on a logical fallacy to meet their burden of proof. This is especially true in light of the totality of the record in this case and the "unrestrained chains of speculation" on which Plaintiffs rely. *See Fievez,* slip op. at 21 n.16.

Further, amicus mistakenly relies on a nascent discussion in *Taggart* as to the interplay between questions of duty and legal causation that has been further developed and clarified by this Court. *See* Amicus Memo at 8 (quoting *Taggart* for the proposition that legal causation can be answered by addressing the question of duty). Six years after *Taggart*, this Court explained:

> [A] court should *not* conclude that the existence of a duty automatically satisfies the requirement of legal causation. This would nullify the legal causation element and along with it decades of tort law. *Legal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise.*

Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 479, 951 P.2d 749 (1998) (emphases added); *see also Meyers v. Ferndale Sch. Dist.*, 197 Wn.2d 281, 291, 481 P.3d 1084 (2021) ("While the issues of duty and legal cause often involve similar considerations, they are separate inquiries."). Thus, the Court of

Appeals' decision comports with this Court's precedent recognizing legal causation and duty to be separate inquiries.

Amicus also wrongly contends that Judge Tabor's expert opinion created a triable issue on whether Day would have been in prison at the time of the shooting, and that the Court of Appeals erred in disregarding that opinion. *See* Amicus Memo at 5-8. The problem is that nowhere in Judge Tabor's declaration does he connect the shooting to the only alleged breach to survive summary judgment: Carrigan's failure to review certain records. *See* CP 861-66.[1] Rather, his opinions rest on assumptions that information regarding Day's possession of a firearm during 2016-2017 would have been discovered and provided to a prosecuting attorney. *See* CP 866; *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

[1] Again, the Petition for Review does not seek review of the Court of Appeals' determination that Carrigan's failure to review these records was the only alleged breach on which Plaintiffs established a genuine issue of material fact. *See* Petition at 5-6.

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))).

Given that, the Court of Appeals appropriately focused its analysis on the other expert declaration submitted by Plaintiffs: that of Dan Hall. But the Court correctly found—relying directly on the standard set forth in *Joyce*, 155 Wn.2d at 322—that Hall's declaration "present[ed] 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 (footnote omitted). Because the underlying decision comports with and relies upon this Court's precedent, review is not warranted under RAP 13.4(b)(1).

B. The Petition for Review Does Not Rely on RAP 13.4(b)(2) and, in Any Event, There is No Conflict between Opinions of the Court of Appeals

This Court "do[es] not consider issues raised first and only by amicus." *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993). Accordingly, this Court should decline amicus's invitation to accept review under RAP 13.4(b)(2) to adopt the reasoning in *Behla v. R.J. Jung, LLC*, 11 Wn. App. 2d 329, 453 P.3d 729 (2019), *review denied*, 195 Wn.2d 1012, 460 P.3d 180 (2020), because Plaintiffs have not raised that ground for review in their petition. *Compare* Amicus Memo at 2, 10-11, *with* Petition.

Even if this Court entertains amicus' argument, however, it lacks merit. There is no conflict between the opinion here and Division III's decision in *Behla.*

In *Behla*, the Court of Appeals recognized that, "when addressing purported 'speculative' claims, the trial court should give the benefit of the doubt as to causation to the plaintiff and dismiss a claim only to the extent the court can decide that all

reasonable people would conclude causation to be speculative." 11 Wn. App. 2d at 338. This is in keeping with this Court's rule in *Hertog*, discussed above, that proximate cause may be decided as a matter of law where reasonable minds cannot differ. *See Hertog, ex rel. S.A.H.*, 138 Wn.2d 265 at 275.

Further, contrary to amicus's implication (Amicus Memo at 10-11), the court in *Behla* did not announce a universally applicable two-test rule for causation. Rather, the court made a limited holding that rejected application of a particular rule of causation "under the circumstances of [the plaintiff's] fall." 11 Wn. App. 2d at 343. Those factual circumstances involved a plaintiff who lost awareness from a fall on a thin layer of snow and gravel on top of a concrete slab, and who found a coiled cable near him when he regained consciousness. *Id.* at 332-33, 343. The legal rule the court chose not to apply in the context of these circumstances would have required dismissal when "two or more conjectural theories" exist, "under one or more of which a defendant would be liable and under one or more of

which a plaintiff would not be entitled to recover." *Id.* at 343 (discussing rule from *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947)). In its place, the court relied on two other rules:

> 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.

Applying both rules, the court determined a jury should decide causation because a reasonable juror could conclude that the coiled cable more likely than not caused the fall when (1) the plaintiff presented evidence reducing the likelihood of other potential causes (i.e., the snow, the gravel, the concrete slab, some other nonexistent foreign object, his own health and physical condition), and (2) the plaintiff testified that, upon regaining consciousness, he saw the cable in a coiled position

and concluded that it likely caused his fall. *Id.* at 343-44. But *Behla* acknowledged that in other circumstances, summary judgment on causation is proper when "the causal connection is 'so speculative and indirect' that reasonable minds could not differ." *Id*. at 347 (quoting *Mehlert v. Baseball of Seattle, Inc.*, 1 Wn. App.2d 115, 119, 404 P.3d 97 (2017)).

Behla's analysis is inapposite because, unlike in that case, this case does not involve such a direct link between a potential cause and the claimed injury. And further, the potential cause in *Behla* did not rest on the discretionary decisions of other actors. Rather, in this case, summary judgment on causation was appropriate "because 'the facts are undisputed, the inferences are plain and inescapable, and reasonable minds could not differ.'" *Fievez*, slip op. at 20-21 (quoting *Estate of Bordon*, 122 Wn. App. at 239); *see also Behla*, 11 Wn. App.2d at 347 (acknowledging that summary judgment is appropriate where "reasonable minds could not

differ"). Review is therefore not warranted under RAP 13.4(b)(2).

C. Amicus Does Not Identify an Issue of Substantial Public Interest

Finally, the underlying, unpublished causation analysis raises no issue of substantial public interest requiring review by this Court. The opinion does not abrogate, erode, or otherwise "chip away" at the recognized cause of action that may be brought against DOC for the negligent supervision of offenders. *Cf.* Amicus Memo at 11-12. Rather, the Court of Appeals diligently applied the legal principles attendant to the elements of that cause of action to the specific record before it. *See Fievez*, slip op. at 9-22 (discussing duty, breach, and causation).

Under those principles, courts refuse to dismiss claims against DOC for harms caused by its supervisees if the plaintiff produces admissible, non-speculative evidence to establish the relevant negligence elements. *See*, *e.g.*, *Joyce*, 155 Wn.2d at 322-23. In this case, the Court of Appeals relied on well-settled law in determining that the record did not show a genuine issue

of fact on causation with regard to whether Day would have been incarcerated on the day of the shooting had Carrigan reviewed certain of his records more than two years earlier. *See id.* at 20-22. Therefore, the Court appropriately affirmed summary judgment for DOC, and review is not warranted under RAP 13.4(b)(4).

III. CONCLUSION

For the foregoing reasons and those in DOC's Answer, the Petition should be denied.

This document contains 2,303 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 15th day of June 2023.

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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 15th day of June 2023, at Tumwater, Washington.

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