67518-4

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NO. 67518-4-I

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

SABRINA RASMUSSEN

Plaintiff/Appellant,

vs.

STATE OF WASHINGTON,

Defendant/Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT NO. 10-2-30307-3 KNT

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

On May 31, 2000, eleven year old Sabrina Rasmussen had her first sexual experience. While she was walking to school, someone approached and threatened to stab Sabrina, forced her into a truck and took her to a remote area near the Fort Lewis base in Pierce County. CP 207. The kidnapper bound Ms. Rasmussen's eyes, mouth and hands, ripped her clothes off, and raped her vaginally, anally, and orally. CP 207 at ¶ 2. Following the rape, Sabrina was left blindfolded, with her hands still bound with duct tape near Fort Lewis before she was picked up by a soldier close to the highway and taken to Mary Bridge Hospital. CP 208 at ¶ 4.

Sabrina's injuries were so severe that she required stitches running from her vagina to her anus to repair the damage. CP 208 at ¶ 4. She currently still has intermittent severe pelvic pain. The rapes left Sabrina suffering terror and flashbacks that lasted years, prevented her from finishing school, and continue to limit her employment opportunities even now because she has difficulty commuting or working alone. CP 207-210.

The man that raped Sabrina Rasmussen was Terapon Adhahn. In 1990, he was convicted of first-degree incest for the violent rape of his half-sister. CP 241-246. In 1992, while under supervision for the 1990 crime, he was convicted of intimidation with a weapon for chasing another

man outside a bar with a gun. CP 258-268, CP 353-355. After raping Sabrina, in 2004 and 2005, Adhahn repeatedly raped a 12 year old girl whom he had "purchased" from her mother for $2,000. CP 458-465, CP 466-484. Adhahn is also a leading suspect in the 2005 kidnapping and murder of Adre'anna Jackson, who was around 11 at the time of the rape. CP 430-435. Finally, in 2007, Mr. Adhahn was apprehended after kidnapping, raping, and murdering 12 year old Zina Linnik. CP 278-281.

Adhahn was a noncitizen under Department of Corrections ("DOC") community supervision program for seven years between 1990 and 1997 after being convicted of first-degree incest for the violent rape of his half-sister. CP 241-246. The case had originally been charged as second-degree rape, but was pled down to first-degree incest after the victim's family pressured her not to cooperate. CP 485-488, CP 489-491. A pre-sentencing psychological evaluation diagnosed Adhahn with Paraphilia, Pedophilia (Prepubescent Female), Sadism and Rape, Dysthymia, Alcoholism, and a Personality Disorder with Borderline Paranoid Features, characterized him as devious and manipulative, and concluded that long-term monitoring of Adhahn's behavior was necessary to "ensure the safety of the community." CP 247-257. The report also noted that Adhahn had first molested his half-sister when he was twelve and she was 3, indicating longstanding sexual pathology. CP 247-257.

The evaluator specifically recommended intensive weekly individual and group psychotherapy monitored by polygraph and penile plethysmograph for "many years," sobriety because "under the influence of alcohol, he would be at extreme risk for further assaultive behavior," and "ongoing and active probation supervision...to ensure there is no relapse in his alcoholism and control of his anger and sexual impulses," with "immediate court review of his probation" for any substance abuse violation. CP 247-257.

Although Adhahn's Community Corrections Officers ("CCOs") should have been aware of this information and should have realized that Adhahn was a dangerous offender requiring close supervision for the safety of the community, they subjected him to a remarkably lax course of supervision. CP 213, CP 215. For example:

> —Adhahn's sentence required him to successfully complete alcohol treatment. Adhahn's alcohol treatment provider required him to attend Alcoholics Anonymous ("AA") regularly and obtain a sponsor. CP 241-246, CP 442-443. Adhahn never attended AA or found a sponsor, and, on polygraphs available to CCOs, stated that he was "drinking up to a six pack a night" on weekends. CP 241-246, CP 442-443, CP 345-352. Adhahn's CCO's did not report him to the supervising court for violating his judgment and sentence by failing to successfully complete alcohol treatment. In fact, nothing in the supervision records indicates that the CCOs pursued this matter with Adhahn at all. CP 214-219 at ¶ 10.

—As a condition of his felony conviction, Adhahn was prohibited from possessing firearms, and had been notified of that fact by the DOC, CP 448. On August 17, 1992, Adhahn's CCOs received a report from the Washington State Patrol that Adhahn had been arrested on June 21, 1992 "for weapon." CP 451. Nothing was done. The offender chronological reports, which are by policy a complete record of the CCO's actions regarding the offender, reflect no action. CP 221 at ¶ 14. Under regular DOC practice, the CCOs should have obtained and reviewed the arrest report. CP 214-219 at ¶ 10. There is no indication that they did. *Id.* Had they done so, they would have learned that on June 21, 1992, outside a bar, Adhahn chased another man while aiming a gun at him, and that the victim injured himself running from Adhahn and feared for his life, CP 258-268. Based on this information, the CCOs should have detained Adhahn and reported to the court that Adhahn had violated both the firearms condition and likely the alcohol treatment condition of his sentence. CP 214-219 at ¶ 10. In 1997, when the supervising court specifically ordered the State to inform the court of any new convictions, Adhahn's CCOs again failed to notify the court of the 1992 crime. CP 258-268 (police reports from brandishing incident, indicating that Adhahn's victims feared for their lives); CP 269-270 (order directing the State to search for new convictions and report them to the Court); CP 271-275 (verbatim report of proceedings showing no discussion of 1992 conviction).

—Adhahn was not a U.S. citizen. Although it is standard practice for CCOs supervising noncitizens to establish and maintain contact with immigration authorities, Adhahn's CCO failed to do so. CP 214, CP 216 at ¶¶ 9, 10(c).

—Although it is a CCO's duty to verify and compel sex offender registration, Adhahn's CCOs failed to ensure that he re-registered when he moved, and failed to pursue him for failure to register. CP 217. This was so even after Pierce County included Adhahn on a list of absconded sex offenders sent to DOC. CP 450.

—Although Adhahn's sentencing conditions specified that he should get five years of ***inpatient*** sex offender treatment, he got neither individual nor inpatient treatment—only weekly sessions of group therapy. CP 241-246, CP 214 at ¶ 10(a).

The court below committed an error of law when it granted the State's motion for summary judgment. There are genuine issues of material fact with respect to both duty and proximate cause; it was error to dismiss the case.

II. ASSIGNMENTS OF ERROR

1. The trial court committed an error of law by granting the State's motion for summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Does the State have a duty to properly supervise dangerous offenders in accordance with the Supreme Court's holding in *Joyce v. State*? (Assignment of Error No. 1).

B. Does the State have a duty to protect third parties and particularly children from the foreseeable risk of harm when releasing sex predators back into the community consistent with the Supreme Court holding in *Peterson v. State*? (Assignment of Error No. 1).

C. Did the plaintiff produce sufficient evidence pursuant to CR 56 to demonstrate that the damages suffered were proximately caused by the State's breach of its duty to supervise and control a dangerous sex offender? (Assignment of error No. 1)

D. Does public policy support the legal duties expressed by Washington courts in *Joyce* and *Peterson* when it comes to protecting children from dangerous sex offenders? (Assignment of error No. 1)

IV. STATEMENT OF CASE

A. Adhahn violently rapes his half-sister in 1990.

Terapon Adhahn first entered the United States from Thailand in 1976. He was a legal resident of the U.S., but not a citizen. CP 282-284.

Adhahn first became known to authorities after raping his 15 year-old half-sister in March, 1990. CP 285-318. Adhahn was drunk. The victim fought back physically. During the rape, Adhahn held his young relative down, choked her, ripped her clothes off, punched her, threatened her with a knife, forced her thighs apart, smeared Vaseline on her vagina and anus, inserted his fingers into her anus, and vaginally raped her, repeatedly. CP 285-318. Adhahn was initially arrested for second degree rape, but was allowed to plead guilty to first degree incest in exchange for agreeing to five years of community supervision and sex offender treatment. CP 319-327. The prosecution fell apart largely because the victim's mother (who was also Adhahn's mother) pressured her not to cooperate with the prosecution. CP 485-488. Even in the plea documents, Adhahn minimized his crime, attributing his acts to alcohol. CP 628-331. In other accounts of the crime, he claims his half-sister had laid down with him and he does not remember what happened next. CP 285-318.

The plea agreement in Adhahn's 1990 conviction was driven primarily by a desire to see Adhahn subjected to lengthy supervision and

intensive therapy for his sexual deviance and other problems, rather than the relatively short sentence available on the incest charge. CP 513-521. A psychosexual evaluation and treatment plan completed by Dr. Michael Comte before Adhahn's sentencing on the 1990 rape concluded:

> In summary, Mr. Adhahn's violent sexual assault on his half-sister provides ample evidence of his violent proclivities and assaultive potential, especially under the influence of alcohol. He is an angry and poorly controlled man with a plethora of psychological, emotional and behavioral problems. Long-term intensive psychotherapy and monitoring of his behavior will be necessary to ensure the safety of the community.

CP 247-257. The evaluation also found that Adhahn admitted to molesting his half-sister when she was three and he was twelve. CP 247-257. Adhahn was diagnosed with Paraphilia, Pedophilia (Prepubescent Female), Sadism and Rape, Dysthymia, Alcoholism, and a Personality Disorder with Borderline and Paranoid Features. CP 247-257. The evaluator specifically recommended intensive weekly individual and group psychotherapy monitored by polygraph and penile plethysmograph for "many years," sobriety because "under the influence of alcohol, he would be at extreme risk for further assaultive behavior," and "ongoing and active probation supervision...to ensure there is no relapse in his alcoholism and control of his anger and sexual impulses," with

"immediate court review of his probation" for any substance abuse violation. CP 247-257.

Adhahn was sentenced on September 4, 1990. The sentencing judge ordered 60 months of community supervision during which time Adhahn needed to complete inpatient sex offender treatment. There were several other sentencing conditions: "Remain within the state of Washington unless receives military orders reporting him from state. No contact with victim unless victim, her therapist (if any) and defendant therapist agree. Also receive and successfully complete alcohol counseling program." Adhahn was also required to "consume no drugs or alcohol or have contact with minor children." CP 241-246.

B. Adhahn's seven years of lax state supervision.

For the next seven years, DOC's supervision was characterized by negligence and a willingness to overlook the same behaviors that the psychosexual evaluation had identified as red flags. CP 211-234. Although Adhahn had been identified as a danger to the community, he was required to check in only once a month, and often did not even see his Community Corrections Officer ("CCO"), but filled out a form instead. The CCO rarely visited Adhahn's home or workplace, and had no idea of Adhahn's activities or associates in the community. CP 332-344; CP 212

and 219 at ¶¶ 7, 10(i). Although the conditions of Adhahn's supervision specifically forbade him to have contact with the victim, in 1996 he did—without repercussions. CP 332-344. Although the conditions of Adhahn's supervision specifically forbade him to leave the state, he was allowed to go to Texas for a wedding in 1994 and visit Thailand for a month in 1995—despite the fact that he was a child rapist and Thailand is a known haven for pedophiles. CP 218 at ¶ 10(h); CP 332-344.

After completing alcohol treatment in 1991, Adhahn was not monitored for alcohol use at all, despite a March, 1992 polygraph indicating that he was still drinking and "had continued to drink about a six pack a night on weekends." CP 345-352. Although Adhahn's discharge from alcohol treatment in 1991 noted that Adhahn needed to continue attending Alcoholics Anonymous meetings and "work closely with an AA sponsor," he never did, and his CCOs never required it or notified the court that Adhahn was not following through on the final conditions of his treatment. CP 332-344. Although Dr. Comte's evaluation clearly stated that Adhahn was a danger to the community when drinking and Adhahn's conditions of release required that he not drink, the DOC failed to monitor his alcohol use, failed to refer him to treatment when necessary, and failed to report Adhahn's violations to the sentencing judge. CP 211-234, CP 332-344.

Most glaringly, although the pre-sentencing psychosexual evaluation recommended that probation supervision be especially vigilant for relapses in alcoholism and anger control, the DOC failed to follow up on Adhahn's 1992 conviction for brandishing a weapon outside a bar (RCW 9.41.270). CP 258-268, CP 353-355. In the June 21, 1992 incident, Adhahn pointed a handgun at a man's chest, at point-blank range, outside a bar, then chased another man across the parking lot before being arrested. Both men feared for their lives. Adhahn was convicted after a one-day public trial in Tacoma Municipal Court on September 9, 1992, and was sentenced to five days in jail. CP 258-268, CP 353-355.

The Washington State Patrol notified Adhahn's CCO of the June 21st weapons arrest on August 17, 1992, but faced with this clear evidence of alcohol use, violence, possession of firearm, and impulse control problems from their sex offender, who "under the influence of alcohol...would be at extreme risk for further assaultive behavior," and who needed "ongoing and active probation supervision...to ensure there is no relapse in his alcoholism and control of his anger and sexual impulses," the DOC did nothing. CP 247-257, CP 332-344, CP 211-234.

The DOC failed to report the incident to the judge supervising Adhahn's sentence, and also failed to report Adhahn's later conviction to federal immigration authorities, who would have deported Adhahn for a

second crime. CP 214 and CP 216 at ¶¶ 9, 10(c); CP 504-505 at ¶¶ 24-26; CP 513-521. Had the arrest been reported to the court, it is more likely than not that Pierce County prosecutors would have become aware of the incident and become aware of Adhahn's history and the fact that he was failing his SSOSA and treatment plan, and as a result, would have sought and obtained convictions for felon in possession of a firearm and failure to register as a sex offender. CP 513-521. And in fact, in 2007 after Adhahn became a suspect in the Linnik murder, Immigrations and Customs Enforcement detained him and prepared deportation proceedings on the basis that Adhahn had been convicted of two crimes of moral turpitude—the 1990 incest conviction and the 1992 intimidation with a weapon conviction—at that time the only convictions Adhahn had. CP 444-447.

The DOC also failed to refer the conviction to Pierce County prosecutors for pursuit of a charge of felon in possession. This is significant not just because it would have been a second felony, an additional crime of moral turpitude, and an aggravated felony, but also because INS generally learns of and pursues noncitizen felons when they are in jail. CP 216 at ¶ 10(c). Any jail time Adahn served, either for a new felony or for revocation of his SSOSA, would have been an additional opportunity for deportation. CP 216 at ¶ 10(c). In fact, doing

so was standard procedure when supervising a non-citizen. CP 214 and CP 216 at ¶¶ 9, 10(c).

The DOC also failed to follow up on Adhahn's apparent solicitation of a prostitute in 1994. CP 256-358. Adhahn's counselor said of this incident:

> This may be cause for concern as it is the second issue within the past two years that involved TA in highly questionable situations. As you will recall, approximately one year ago, he had gone to a local night club, which was off limits to him. He became involved that evening with an individual who had a weapon on him. The latest incident similarly involves an individual of questionable character, but whom he says he knows vaguely. He will be submitting to a polygraph examination in January. This issue will be addressed more thoroughly then.

CP 356-358. The January 1995 polygraph report produced by the State shows that the issue was not addressed at Adhahn's next polygraph. CP 356-358. There is no indication that the "questionable situation," whatever it was, was ever dealt with. CP 332-344.

C. Adhahn completes once-a-week sex offender treatment and is deemed a success.

The DOC also failed to ensure that Adhahn's treatment complied with his sentence and with Dr. Comte's recommendations. The Sentencing Order clearly states Adhahn was to receive *inpatient* sex offender treatment. CP 241-246. Dr. Comte recommended *intensive individual counseling.* CP 247-257. Adhahn received neither. After his

sentencing, Adhahn failed to start treatment for sexual deviancy until ordered by the court. CP 362-367. When he finally did start weekly outpatient group therapy, Adhahn showed up, but did not participate, and did not take responsibility for his crimes. The mental health professional overseeing his counseling, Dr. Daniel DeWaelsche, noted: "It is my impression from Terapon's discussions that he does not understand the full significance of the need for him to attend therapy." CP 366-367. In a 1992 polygraph, Adhahn admitted to prior significant sexual deviancies, which had in the past included homosexual activity, peeping, and bestiality. CP 345-352. Adhahn would miss therapy sessions on a bi-weekly basis. These absences were reported to his CCO, but never dealt with. In one report, Dr. DeWaelsche stated: "Terapon has admitted that he has still not fully completed the assignments on methods to assist him in decreasing his sexually deviant arousal...." CP 376-378.

In short, Adhahn's treatment for sexual deviancy was as lax and pro forma as the rest of his supervision. The sentencing order required inpatient treatment, which never happened. CP 241-246. Dr. Comte's pre-sentencing treatment plan recommended that Adhahn receive intensive individual *and* group treatment monitored by polygraph and penile plethysmograph. CP 247-257. The DOC never ensured that Adhahn received inpatient therapy or any significant individual therapy, and his

group treatment was far less than "intensive." Adhahn's treatment failed to address the role of alcohol in his crime. Adhahn received only a few polygraphs. Therapeutic "assignments," particularly those regarding Adhahn's deviant arousal patterns, were allowed to languish for years with DOC's full knowledge. Adhahn's therapy was evaluated by plethysmograph exactly twice in five years, and the second plethysmograph happened only after Adhahn's sentencing judge ordered it. CP 269-270. Yet by the end of his treatment a few months later, Adhahn was deemed a success: "Terapon has demonstrated that he is using the skills and techniques, gleaned in sex-offender treatment, on a day-to-day basis to avoid recidivism," DeWaelsche wrote in 1997. "It has been a pleasure working with Terapon." CP 379-381.

D. DOC fails to report relevant information to immigration or the sentencing judge.

Before releasing Adhahn from supervision, the sentencing judge tried to ensure that Adhahn had not violated important conditions of his supervision. In a 1996 order issued prior to Adhahn's release, Judge Strombom ordered the State to "check for any criminal charges against the defendant since 11/90." CP 269-270. Even then, when the DOC was specifically ordered to look for new convictions, the DOC failed to report the 1992 weapons conviction to Judge Strombom or to immigration

authorities. CP 272-275. As a consequence, Adhahn's treatment and supervision were terminated on July 8, 1997. CP 216 at ¶ 10(c).

E. Adhahn is classified as a "low risk" offender despite his violent rape of a child and his psychological problems.

Despite the fact that Adhahn's rape of his sister was violent, involved the threatened use of a weapon, and indicated some experience at sexual assault, despite the fact that Adhahn's psychosexual evaluation indicated a high level of psychopathology and characteristics indicating a high risk of recidivism, and despite Dr. Comte's conclusion that Adhahn presented significant risk to the community and was likely to reoffend without close supervision, Adhahn was eventually classified as a Level 1 sex offender—the least dangerous level, requiring little supervision and rated least likely to reoffend. CP 383. The State then claims it did not classify Adhahn, but statutory language from 1997 indicates that the DOC was, at that time, responsible for forwarding classifications to local law enforcement. CP 368-375. In an extensive review of public records produced by the defendants before this action was filed, plaintiff/appellant has been unable to locate any documentation of the classification decision.

F. Adhahn fails to register and continues to rape children.

Adhahn was required to register as a sex offender—his 1990 incest conviction was a class B felony requiring him to maintain registration for

a minimum of fifteen years. CP 241-246. CP 449. His 1992 weapons conviction extended the registration period, requiring him to maintain his registration until September 2007. Adhahn did not register, and in fact he had not registered since October 1990. CP 382-385. Although he had moved over ten times while under active DOC supervision for a sex offense, DOC apparently never noticed that their sex offender had not been registering. CP 217; CP 451-457. Had DOC reported Adhahn for failure to register, that would have been an additional crime resulting in revocation of his community release and jail time—thereby increasing the likelihood of deportation.

After his release from DOC supervision, Adhahn also started raping children again—if he had ever stopped. In 2007, after Zina Linnik was killed, police matched Adhahn's DNA to semen taken from Sabrina Rasmussen in 2000. CP 412-420. Sabrina was bound, gagged, and blindfolded with duct tape, and repeatedly raped over a period of hours. Sabrina was left in a secluded area on the Fort Lewis Air Force base with her hands bound and her eyes covered. Eventually she made her way to a highway and was picked up by military personnel. She had suffered vaginal injuries requiring surgery. Less than three years after "successful" completion of community supervision and treatment, Adhahn, who began serially raping his sister when he was twelve, who should not have been in

the United States at all, was assaulting other Washington children. CP 258-268.

Sabrina Rasmussen filed a negligence action in King County Superior Court against the State of Washington, by and through the Department of Corrections. The State of Washington moved for summary judgment on all claims. After a hearing before the Honorable Regina Cahan, the Superior Court granted the State's motion for Summary Judgment, dismissing Appellant's claims in their entirety with prejudice on August 1, 2011. The reasons for dismissal are not included in the order. CP 557-558.

Ms. Rasmussen timely appealed the Order granting the State of Washington, Department of Corrections' Motion for Summary Judgment on August 3, 2011. CP 559-566.

IV. ARGUMENT

The trial court committed an error of law by dismissing this action. The claims against the State involve traditional analysis of basic negligence principles, including duty, breach, proximate cause, and damages. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). In a negligence claim against the State, the State is liable to the same degree as any private person. RCW 4.92.090. Ms. Rasmussen has demonstrated, at a minimum, that genuine issues of material fact exist with respect to the

State's duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by Adhahn's dangerous propensities, and that this duty encompasses harms happening after Adhahn's negligent release from supervision.

Because the summary judgment order does not delineate the basis for dismissal, and because appellate review of summary judgment is *de novo* in any event, this Brief will address each of the arguments asserted by the State in support of its motion for summary judgment. This Brief will first examine the issue of whether the State had a duty to properly supervise Terapon Adhahn. This Brief will then examine whether the State had a duty to properly release Adhahn back into the community by providing the sentencing judge with all necessary information. This Brief will then examine the issues related to legal cause and cause in fact. Finally this Brief will address the broad public policy implications associated with this case and the protection of children.

A. The Trial Court erred by dismissing the plaintiff's claims on summary judgment based on the contention that the State had no duty to Sabrina Rasmussen and other children.

On a summary judgment dismissal at the early pleading stage, appellate courts view the case from "the position of the trial court." *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). This inquiry requires review of the trial court evidence contained in the

pleadings, affidavits, admissions, and other properly presented material. *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 42, 515 P.2d 154 (1973) (citing *Leland v. Frogge*, 71 Wn.2d 197, 200, 427 P.2d 724 (1967)). A trial court's decision to grant summary judgment is reviewed *de novo*. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). The reviewing court must consider all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is only appropriate "if there is no genuine issue as to any material fact" and the moving party shows that she is "entitled to judgment as a matter of law." CR 56(c).

Under this standard, this Court should reverse the Trial Court's order, and remand this case for trial.

1. Historical structure of public liability in Washington.

The Washington State Legislature waived the State's sovereign immunity in 1961. RCW 4.92.090, the statute waiving sovereign immunity, reads in its entirety as follows:

> The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortuous conduct to the same extent as if it were a private person or corporation.

RCW 4.92.090. In 1967, the Washington Legislature waived sovereign immunity for counties and municipalities via RCW 4.96.010. *Id.* Since the Legislature unequivocally waived sovereign immunity, Washington courts have clarified that when a public entity is sued for negligence based on its governmental acts, the plaintiff must ultimately demonstrate that the duty breached was owed to the plaintiff particularly, not just to the public in general. *See e.g., Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). This principle, known as the "public duty doctrine," is not a State immunity. It is simply an application of fundamental tort principles. As the Washington Supreme Court most recently clarified in *Osborn v. Mason County*:

> Because a public entity is liable in tort "to the same extent as if it were a private person or corporation," former RCW 4.92.090 (1963) (state) *and* former 4.96.010 (1967) (municipality), the public duty doctrine does not—cannot—provide immunity from liability. Rather, it is a "'focusing tool'" we use to determine whether a public entity owed a duty to a "'nebulous public'" or a particular individual. The public duty doctrine simply reminds us that a public entity—like any other defendant—is liable for negligence only if it has a statutory or common law duty of care. And its "exceptions" indicate when a statutory or common law duty exists. "The question whether an exception to the public duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff." *Taggart*, 118 Wn.2d at 218, 822 P.2d 243; *see also Bishop v. Miche*, 137 Wn.2d 518, 530, 973 P.2d 465 (1999) ("Exceptions to the doctrine generally embody traditional negligence principles and may be used as focusing tools to determine whether a duty is owed."). In other words, the public duty doctrine helps us distinguish proper legal duties from here hortatory "duties."

157 Wn.2d 18, 27-28, 134 P.3d 197 (2006) (some citations omitted). The public duty doctrine only applies when the governmental entity is sued for acts or omission in performing characteristically governmental acts. *Borden v. City of Olympia*, 113 Wn. App. 359, 371, 53 P.3d 1020 (2002). When a government entity or agent is performing a proprietary function, the doctrine does not apply, and liability is found precisely as it would be for any other defendant. *Id.* A government performs a proprietary function "when it engages in a business-like venture as contrasted with a governmental function." *Hoffer v. State*, 110 Wn.2d 415, 522, 755 P.2d 781 (1988) (citing BLACK'S LAW DICTIONARY 1097 (5th ed. 1979)); *Moore*, 85 Wn. App. at 715-16, 934 P.2d 707; *see also Russell*, 39 Wn.2d at 553, 236 P.2d 1061.

Accordingly, there is a cause of action against public entities for negligence, and a duty will run to the plaintiff, either when the public entity was engaged in a proprietary function, or when the public entity has engaged in a governmental function and the plaintiff can demonstrate that a particularized duty runs to the plaintiff. Washington courts have repeatedly held that fundamental principles of tort liability, drawn from the Restatement of Torts, determine when a particularized duty is owed.

Washington courts have thus far held that a plaintiff may establish a particularized duty by proving:

> Legislative intent: Plaintiff must demonstrate that there is a clear legislative intent to protect a circumscribed class of citizens, and the plaintiff falls within that class. *See e.g., Holvorson v. Dahl,* 89 Wn.2d 673, 574 P.2d 1120 (1978); Rest. (Second) Torts § 286.
>
> A special relationship: Plaintiff must demonstrate that their was privity between the government official and the plaintiff, that the government official offered express assurances, and that the plaintiff justifiably relied on those assurances. *See e.g., Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988); Rest. § 315.
>
> Failure to enforce: Plaintiff must establish that government officials responsible for enforcing a statute had actual knowledge of its violation, failed to take corrective action, had a statutory duty to take corrective action, and the plaintiff is within the class of foreseeable victims the statute intended to protect. *See e.g., Campbell v. City of Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975); *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987).
>
> Voluntary rescue: Plaintiff must demonstrate that the government official has voluntarily undertaken a rescue effort, but failed to exercise due care in doing so. *See e.g., Brown v. MacPherson's Inc.*, 86 Wn.2d 293, 545 P.2d 13 (1975); Rest. § 323.
>
> *Parens Patriae*: An individual under state control and protection is owed a duty of reasonable care. *Babcock v. State*, 116 Wn.2d 596, 641, 809 P.2d 143 (1991); Rest. §§ 315, 320.
>
> A take-charge duty: Plaintiff must demonstrate that the government official was charged with the supervision or restraint of a dangerous individual, and that the injury to the plaintiff was one reasonably foreseeable from those

> tendencies. *See e.g.*, *Joyce v. State*, 155 Wn.2d 306, 119 P.3d 825 (2005); Rest. § 319.

Because many of the most important cases involving public entity liability do establish a particularized duty, by proving legislative intent, public entities frequently argue as if that is the only way a plaintiff may establish a duty owed by a state entity. But, as the cases cited above demonstrate, that is not so.

Several additional key principles are apparent from the multiple ways that Washington courts have allowed plaintiffs to establish duties owed by public entities. First, there is no special state immunity—general tort principles from the Restatement, rooted in fundamental principles of reasonableness and foreseeability, apply to public entities. Where the harm is foreseeable, liability will be found. Second, although it is frequently stated that duty is determined as a matter of law, the analysis of whether a duty will arise is highly fact-dependent. The presence of a duty may turn on facts such as the specific representations made, whether reliance was reasonable, whether a defendant had actual knowledge of a statutory violation, whether a rescue was voluntarily undertaken, or what was known about the dangerousness of an individual under state control. As a result, the existence of a particularized duty is frequently a matter of

fact for the jury, and is often not suitable for determination on summary judgment.

2. The State took a known manipulative rapist, and negligently released him back into the community.

When Terapon Adhahn became eligible for release from supervision, little, if any, of his supervision history was provided to the Court. CP 272-275, CP 513-521. Instead, the State repeatedly refused to provide the Court with all relevant information. CP 272-275, CP 211-234. The State failed to inform the Court that the Court's specific judgment and sentence had not been complied with. CP 242-246, CP 272-275. The State failed to advise the Court that Adhahn had been convicted, while on supervision, of a crime involving both alcohol and a firearm. CP 259-268, CP 354-355, CP 358, CP 492, CP 272-275, CP 269-270. The State failed to inform the Court that Adhahn continued to drink copious amounts of alcohol, and had failed to comply with his alcohol treatment requirements. CP 272-275, CP 346-347, CP 211-234. The State failed to inform the Court that Adhahn continued to possess pornography in violation of his treatment guidelines. CP 272-275, CP 347. The State failed to inform the Court that Adhahn had been observed in the company of a known prostitute in violation of his conditions of release. CP 272-275, CP 358. The State failed to advise the Court that Adhahn had continuously violated

the law regarding his requirement to register as a sex offender. CP 272-275, CP 333-344, CP 408-411. Even when the sentencing judge specifically asked the State to advise as to whether Adhahn had been convicted of any crimes during the course of his supervision, the State failed to do so. CP 270, CP 272-275.

It was therefore not surprising that the sentencing judge actually congratulated Mr. Adhahn, terminated supervision and released him into the community, where he would savagely rape, kidnap and murder 11 to 12 year old prepubescent female children over a period of many years. CP 272-275.

Generally, one does not owe a duty to prevent third parties from causing physical injury to another. Washington common law, however, provides that a party may have a duty to take reasonable measures to guard against foreseeable dangerous propensities of another, and when it fails to do so, that party may be held responsible for those failures. *Petersen v. State,* 100 Wn.2d 421, 438, 671 P.2d 230, 242 (1983)

In *Petersen*, the plaintiff had been injured when her car was struck by another automobile driven by a recently released Western State Hospital psychiatric patient. The Court held a "special relation" exists between a state psychiatrist and her patients, such that when the psychiatrist determines, or pursuant to professional standards should

determine, that a patient presents a reasonable foreseeable risk of serious harm to others, the psychiatrist has "a duty to take reasonable precautions to protect anyone who might foreseeably be endangered." *Id.* 100 Wn.2d at 428, 671 P.2d 230. The scope of this duty is not limited to "readily identifiable victims," but includes anyone foreseeably endangered by the patient's condition. *Id.* at 429.

The *Taggart* court expanded that holding and concluded "parole officers have a duty to protect others from reasonably foreseeable dangers engendered by parolees' dangerous propensities." *Taggart v. State*, 118 Wn.2d at 224, 822 P.2d 243 (1992). Similarly relying on this interpretation of the Restatement (Second) of Torts § 319, the court in *Joyce v. Dep't of Corrections*, 155 Wn.2d 306, 316, 119 P.3d 825 (2005), who found "no reason to categorically distinguish community corrections officers from others who actively supervise offenders," explained:

> In each, the government has assumed the duty of supervising an offender's conduct. In each, the government has the ability to take steps to ensure, as a condition of release, that the offender complies with the conditions of release. In each, the government has the duty of reasonable care in executing its duties.

Id. at 317. All three cases rely on Restatement (Second) of Torts § 319, and establish a broad tort duty to take reasonable precautions to guard against the known dangers posed by individuals under DOC supervision.

These cases hold that two separate duties exist: first, during the course of supervision there exists a take charge duty to protect the public from a dangerous offender; and, second, there exists a duty "to take reasonable precautions to protect anyone who might foreseeably be endangered" when a dangerous third party is being released from control into the community. *Peterson,* 100 Wn.2d at 428.

3. The State had a duty to both properly supervise Adhahn and not to release him into the community when it could prevent that release under *Joyce* and *Peterson*; the court below erred by deciding the State did not owe a duty to Sabrina Rasmussen.

Where the State is vested with the authority to supervise an offender and it is aware of the person's dangerous tendencies, it may be liable for any injuries caused by those propensities. Although a nexus "may be relevant" between the crime for which the offender is convicted and the subsequent act which causes harm, it is no requiem. *Joyce*, 155 Wn.2d at 315. A take-charge relationship was created between the State and Terapon Adhahn as a result of the State's knowledge of his dangerous propensities for violently raping prepubescent females.

In *Joyce v. Department of Corrections*, the Court recognized the "bedrock principle that the State has a duty to use reasonable care once it takes charge of an offender" to protect against reasonably foreseeable dangers posed by the dangerous propensities of parolees. *Id.* 155 Wn.2d

306, 315, 119 P.3d 825 (2005). The State's "authority to supervise *arises* from the conditions of release contained in a judgment and sentence for a crime." *Id.* (emphasis in original).

The significant failure in supervising the offender in *Joyce* is nearly identical to the DOC's significant failures in the supervision of Terapon Adhahn. In *Joyce*, the CCO had knowledge of the offender's "abusive relationship with his girlfriend." *Id.* The CCO documented that the offender also "seldom reported as required, did not perform community service," and "did not receive any domestic violence counseling." *Joyce*, 155 Wn.2d at 311. Although the CCO specifically documented the offender's non-compliance, the CCO "did not take any of the steps authorized by statute to call [the offender's] non-compliance to the court's attention." *Id.* His conditions of community supervision required him to "maintain law-abiding behavior, not to associate with other offenders, not to move without first obtaining permission from his" CCO. *Id.* at 312.

Here, Terapon Adhahn's conditions required him to successfully complete both alcohol treatment and inpatient sexual deviancy treatment. He was to be monitored through frequent polygraph and plethysmograph examinations. Mr. Adhahn was not permitted to leave the country unless under military orders. CP 241-246. Instead, like the offender in *Joyce*,

Adhahn consistently violated the terms and conditions of his release. He did not always report as required, delayed getting treatment, consistently unlawfully possessed a firearm, was convicted for causing reasonable fear in others outside a bar, maintained and watched pornography, and had contact with his victim—all in violation of his Judgment and Sentence. He continued drinking and did not comply with the AA requirements. He was legally required to register as a sex offender but routinely failed to do so.

Nonetheless, faced with these blatant violations, Adhahn's CCOs continually subjected him to a remarkably lax course of supervision. Like the CCOs in *Joyce,* Adhahn's CCOs permitted the supervising court to believe that Adhahn was in compliance.

In *Petersen*, the plaintiff had been injured when her car was struck by another automobile driven by a recently released Western State Hospital psychiatric patient. The Court held a "special relation" exists between a state psychiatrist and her patients, such that when the psychiatrist determines, or pursuant to professional standards should determine, that a patient presents a reasonable foreseeable risk of serious harm to others, the psychiatrist has "a duty to take reasonable precautions to protect anyone who might foreseeably be endangered." 100 Wn.2d at 428, 671 P.2d 230.

Like the psychiatrist in *Peterson*, the CCOs knew or should have known that Adhahn's failures to successfully comply with the various treatment modalities posed a significant and escalating risk to the public. In his SSOSA evaluation, it had been recommended that Adhahn have individual sexual deviancy counseling together with group therapy. The sentencing court ordered Adhahn to have "inpatient" deviancy treatment. He received neither.

Similarly, both the initial evaluation and the Judgment and Sentence and conditions of release required Adhahn to complete alcohol treatment, obtain an AA sponsor and attend AA meetings regularly. He did not obtain an AA sponsor and did not attend AA. Rather he began again almost immediately to consume enormous amounts of alcohol.

His failure to obtain the ordered treatments was not without consequence. Adhahn was subsequently convicted of chasing a citizen down the street while waiving a firearm that he possessed outside of a bar. Thus, the lax supervision, and the failure to require Adhahn to obtain the recommended and ordered treatment, meant that the State knew or should have known that Adhahn constituted a significant continuing risk to the public. The State had the ability to prevent his release into the community by accurately informing the sentencing court of Mr. Adhahn's dangerous and untreated propensities. The State failed to do so, and the sentencing

court, in the absence of accurate information, released Adhahn back into the community.

Both *Joyce* and *Peterson* impose separate tort duties that applied to the State in this case. It was therefore error for the trial court to dismiss the plaintiff's negligence claims in accordance with the State's theory that it owed no duty.

4. The State had a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by Adhahn's dangerous propensities, and that duty encompasses harms happening after Adhahn's release, but proximately caused by the State's negligence during Adhahn's period in community custody.

The trial court erred in determining that the State's liability terminates when the supervision does. CP 131. For these propositions, the State and the trial court relied on dicta from *Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 139 P.3d 1131 (Div. II, 2006).

It is not the law in Washington that a take-charge duty terminates when the take-charge relationship does. Under *Petersen v. State*, where a party having a duty to take reasonable measures to guard against the foreseeable dangerous propensities of another fails to do so, he may be held responsible for those failures, even after the take-charge relationship has terminated. *Petersen*, 100 Wn.2d 421 (psychiatrist held responsible after patient's release). The *Petersen* holding is not possible if the State's

theory of liability is accurate. The *Petersen* court did not ask whether the take-charge relationship was in effect at the time plaintiff suffered harm—it simply concerned itself with the control that the psychiatrist could have exercised, but did not.

The *Hungerford* dicta conflicts with *Petersen's* binding precedent, and would also defy basic tort principles by prematurely terminating liability for foreseeable harms based on a technicality. It would also create a perverse incentive for the State to negligently terminate supervision. A simple hypothetical demonstrates the circular nature of the State's argument.

Assume that a probation officer negligently fails to inform a court that a parolee has been convicted of a serious crime that violates the parolee's conditions of release. Also, assume that as a consequence the court closes or terminates supervision and then that the parolee goes out and murders a twelve year old girl. The State contends that it owes no duty to the little girl because it no longer had any take-charge relationship after supervision was terminated.

In other words, the State proposes that change in the relationship giving rise to the tort should serve as a method of retroactively destroying any duty it may have owed, and thereby immunizing the State from liability. Where supervision was negligently terminated, the State's

bright-line rule would provide that its very negligent act terminates its duty and therefore its liability for the negligent act. Basic tort principles, public policy, and logic do not support the State's position.

The exact same erroneous argument was unsuccessfully asserted by the defendant in *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 77 Ohio St.3d 284, 312, 673 N.E.2d 1311, 1332 (1997). There, the court dealt with the argument as follows:

> This argument commingles two distinct issues, that of duty and proximate cause. The control portion of the argument goes to the issue of duty. In this regard, the argument may be reduced to a proposition that there can be no duty unless the patient was under the care of the authority for this position. Moreover, such a proposition runs counter to negligence principles. Viewing the facts most favorably to plaintiffs-appellants, Civ.R. 56(c), the gravamen of Dr. Brown's alleged negligence in this case is the very act of withdrawing medication and relinquishing care of Matt. It is clearly unsound to absolve a negligent defendant because of the very act which made his conduct negligent.

Estates of Morgan, 77 Ohio St.3d at 312.

In *Littleton v. Good Samaritan Hosp. & Health Center*, 39 Ohio St.3d 86, 92 ,529 N.E.2d 449, 455 (1988), the Court indicated that the existence of a duty depends, instead, on the foreseeability of the injury. In that case, a psychiatrist was held liable for releasing a patient from voluntary commitment suffering from post-partum depression. After her release, the mother killed her infant daughter. *Id.* at 92. Again, the Court

refused to adopt the illogical concept that the psychiatrist's duty was terminated upon the technical termination of the take charge relationship.

In this case, the State clearly had a take charge duty to supervise Adhahn during his seven years of community custody. *Joyce*, 155 Wn.2d at 322. The State clearly breached its duty to supervise Adhahn in a non-negligent manner. CP 211-234. The State similarly had a duty to take reasonable steps available to prevent the release of a dangerous predator back into society when it had the power to do so. The State failed to fully and adequately inform the sentencing court of the various violations resulting in the premature termination of Adhahn's supervision. In fact, Mr. Adhahn's SSOSA should have been revoked and he should have been sent to prison.

The State construes its duty as limited to preventing Adhahn from committing new crimes while under supervision; however, that is contrary to case law. Binding Washington case law states the duty is one to "take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities" of the offender. *Taggart*, 118 Wn.2d at 217, 822 P.2d 243. It is plain from *Petersen* that breaches of this duty during the period of active control may give rise to claims for injuries taking place after termination of control.

The *Joyce* court examined the State's duty under the Restatement (Second) of Torts § 319, when one of its supervised offenders stole a motor vehicle late one night and rammed a driver killing her. *Id.* at 314. *Joyce* is dispositive as to the duty owed in cases where CCOs had the authority to report an offender's repeated violations of the conditions of parole to the court and had the authority to investigate any mental infirmaries. *Joyce*, 155 Wn.2d at n.3 (where "the State has a special relationship with an offender by virtue of its actual obligation and authority to supervise, then a duty to prevent foreseeable injury to others follows."). The question properly analyzed is not whether the State had a duty (under *Joyce*, and *Peterson* it did), but whether the State's various acts of negligence caused or were a substantial factor in the kidnapping and rape of Sabrina Rasmussen.

5. Enforcing Adhahn's sex offender registration requirements was one of the reasonable measures available to the State as part of its duty to take reasonable precautions under the take-charge duty doctrine.

As the declaration of William Stough (CP 211-234) makes clear, enforcing sex offender registration requirements was one of the reasonable measures that Adhahn's CCOs could and should have used to guard against foreseeable dangers. CP 217 at ¶ 10(e). Thus, the so-called

"registration claim" is not a separate claim requiring a separate statutory source of legal duty, but merely one omission among many others breaching the State's take-charge and release duties. On the declarations submitted, failure to enforce sex-offender registration requirements also gives rise to cause in fact because had Adhahn's CCOs pursued a conviction for failure to register, that would have been a deportable conviction and Adhahn would more likely than not have been removed. CP 217 at ¶ 10(e); CP 504-505 at ¶¶ 24-26.

6. Proper classification was one of the measures available to the State as part of its duty to take reasonable precautions under the take-charge duty.

Like sex offender registration, proper classification of Adhahn as a high-risk sex offender was simply another tool reasonably available to the DOC in fulfilling its take-charge duty to guard against the foreseeable danger Adhahn posed. The State maintains that DOC did not classify Adhahn. Based on the historical version of RCW 4.24.550—during the period of time before the establishment of formal classification procedures via the amendments to RCW 4.24.550 in 1997—the Department of Corrections had the ability to classify sex offenders and share that classification with law enforcement officials. CP 368-375 (1997 bill amending RCW 4.24.550, indicating in §§ (4) that the DOC made risk level classifications). Classification was a tool reasonably available to

DOC in controlling and guarding against Adhahn. Given that law enforcement agencies use classification level as a shortcut to prioritize enforcement of sex offender registration laws, Adhahn's classification as a Level I offender had an important effect on how he was later treated. CP 440-441 (news article indicating that Adhahn was not an enforcement priority for Pierce County because as a Level I, he was thought to be less dangerous).

Moreover, this Court has held that classification of offenders that results in greater freedom or less supervision can be a basis for liability. *Estate of Jones v. State*, 107 Wn. App. 510, 521-23, 15 P.3d 180 (Div. I, 2000). Finally, the statutory immunity created by the 1997 version of RCW 4.24.550 would not have been in effect when the DOC made or failed to make any classification decision, as Adhahn's DOC supervision was terminated before the immunity went into effect.

This issue then serves to both create a duty and to bolster the substantial evidence of negligent conduct by the State in this case. Both the State and the trial court seemed to classify this only as a separate tort, and seemed to conclude there was no duty to properly classify Adhahn. Under the above authority this conclusion was error. Moreover, the evidence further demonstrates that the Stated acted negligently both in its supervision of Adhahn, and its release of him back into society.

In summary, it is clear that the State had a legal duty to properly supervise Adhahn and to take reasonable steps to insure that a dangerous predator was not released back into society. It is undisputed that the State breached these duties. It was error for the trial court to dismiss Sabrina's claims based on the State's theory that it had no duty. The plaintiff also proved that the State's negligence caused her harm.

B. The trial court erred when it dismissed on summary judgment the plaintiff's claims based on cause in fact and legal cause.

It is unclear precisely why the trial court dismissed the plaintiff's claims on summary judgment. The State argued both prongs of causation, legal cause and cause in fact. This Brief will first examine the cause in fact issue. This Brief will then analyze why it was error to dismiss the plaintiff's claims based upon legal cause as argued by the State.

1. The plaintiff produced sufficient evidence to raise an issue of material fact as to cause in fact; the trial court erred by deciding the issue as a matter of law.

The Trial Court ignored the Supreme Court's most recent decision on proximate cause in negligence cases, *Joyce v. State*, 155 Wn.2d 306, 322-23, 119 P.3d 825 (2005). The State relied primarily on the Division II *Hungerford* case to argue that the plaintiff cannot show cause in fact. *Joyce*, however, is dispositive.

"Proximate causation includes both cause in fact and legal causation." *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 256, 978 P.2d 505 (1999). "To establish cause in fact, a claimant must establish that the harm suffered would not have occurred but for an act of omission of the defendant. There 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. In most cases, cause in fact is a question for the jury. *Id.*

In order to defeat summary judgment on cause in fact, the plaintiff must come forward with evidence from which a reasonable jury could conclude that, but for the State's negligence, Terapon Adhahn would have been unable to harm Sabrina Rasmussen. Washington courts have held that cause in fact can be established by expert testimony, as in *Joyce*, where the plaintiff relied on the testimony of William Stough, a corrections expert. *Joyce*, 155 Wn.2d at 322. Mr. Stough's testimony was held sufficient to establish that but for the State's failure to obtain a bench warrant, the offender in *Joyce* would have been unable to harm the plaintiff because he would have been in jail. *Id.* at 322-23.

Cause in fact in a take-charge case can thus be established by expert testimony that the State's negligence caused the injury. *Bordon*, 122 Wn. App. at 243-44 (citing *Joyce*, *supra*). Cause in fact can also be established by "expert testimony about how judges rule in particular

proceedings, factual evidence that the very nature of the negligence led to an offender's release, testimony of the sentencing judge, or expert testimony that the State's negligence directly caused the injury." *Id.* In this list, *Bordon* summarized evidence that Washington courts previously held sufficient. The list is neither exhaustive nor exclusive.

Here, the plaintiff submitted facts and expert opinion from which a reasonable jury could conclude that, but for the State's negligence, Adhahn would have been unable to harm Sabrina Rasmussen because he would have been deported prior to Sabrina's abduction and rape.

The facts establish that Adhahn's original incest conviction was for a violent sexual assault on a minor, and was considered a crime of moral turpitude by immigration authorities. CPS 504-505 at ¶¶ 24-26. The facts also establish that Adhahn was convicted of a weapons charge in 1992, and that the State failed to pursue him for failure to register. William Stough's declaration (CP 211-234) establishes that Adhahn's CCOs breached the standard of care when they failed to establish and maintain contact with immigration authorities and report Adhahn's violations, original crime, and new crimes to immigration. CP 211-234 at ¶¶ 8-11. John Sampson's declaration (CP 504-505) establishes that if Adhahn's original violent rape of his minor half-sister and his later weapons conviction had been reported to immigration authorities, it is more likely

than not that Adhahn would have been deported, and that deportation is also the likely result if Adhhan had been convicted for failure to register as a sex offender. CP 504-505 ¶¶ 24-26.

This conclusion is proven by the fact that in July 2007, when Adhahn's only two convictions were the incest conviction and the intimidation conviction, Immigrations and Customs Enforcement held him and instituted removal proceedings based on those convictions alone. CP 444-447. It is further demonstrated by the fact that Adhahn did not fight deportation at that time, and has stated under oath that he would not have contested deportation proceedings if they were brought earlier. CP 444-447, CP 466-484. In other words, unlike Joyce where the expert testified to what was likely to have happened, in this case the plaintiff proved what actually did happen when Adhahn's crimes were brought to the attention of immigration authorities.

A reasonable jury could conclude that when Adhahn served a prison sentence for his 1990 incest conviction, he would be reported to immigration authorities as required by RCW 10.70.140. There is a legal presumption that public officers properly perform the duties of their office. *Smith v. Hollenbeck*, 48 Wn.2d 461, 465, 294 P.2d 921 (1956); *State ex rel. Longview Fire Fighters Union, Local 828, I.A.F.F. v. City of Longview*, 65 Wn.2d 568, 572, 399 P.2d 1, 3 (1965). Had Adhahn been

reported to Immigration & Naturalization Services ("INS") for his original incest conviction or weapon brandishing in 1992, he would have more likely than not faced deportation. CP 504-505. Cause in fact is an issue for the jury.

In *Joyce*, the State made almost an identical argument as the argument in this case. The State contended that whether the offender would have been in custody at the time of the crime was too speculative. The Court disagreed and stated:

> It is undisputed that Stewart committed numerous violations of his supervision that were not reported to the court or diligently pursued by community corrections officials. A court had previously sentenced Stewart to jail time for reported violations. Joyce's expert, William Stough, testified that if the Department had obtained a bench warrant for Stewart prior to the accident, he "would have been in jail, either awaiting a hearing or doing time on the violations" without bail on August 8, 1997. While we recognize that a reasonable jury could have decided against the plaintiffs on this issue, especially if properly instructed, the trial court did not err in denying the Department's motion to dismiss as a matter of law.

Joyce v. Dept. of Corrections, 155 Wn.2d 306, 322-323, 119 P.3d 825 (2005) (citations to record omitted).

Similarly, in this case, it is undisputed that Adhahn "committed numerous violations of his supervision that were not reported to the court or diligently pursued by community corrections officials." Almost identically, William Stough testified, along with Mr. Sampson, that had

these violations been reported, Mr. Adhahn would have been deported. Just as in *Joyce*, it should be up to a jury to believe or disbelieve this testimony. Instead, the trial court substituted its own determination for that of the jury. In doing so, the trial court committed reversible error.

The trial court was required to apply the summary judgment standard. In doing so, the court was required to accept as true the evidence submitted by the plaintiff, including the declarations of Sampson and Stough, and the evidence as to what immigration authorities actually did when informed of Adhahn's crimes. While the jury could, at trial, choose to disregard this evidence, the trial court was not free to do so on summary judgment.

2. As a matter of policy, legal cause should be found.

Legal cause should also be found here as a matter of policy, justice, and common sense. In determining legal cause, courts consider logic, common sense, justice, policy, and precedent as well as foreseeability. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998). State policy in a particular area, including legislative enactments and legislative intent, is a critical consideration. *Id.* *Taggart*, 118 Wn.2d at 227-28. Where the duty is clear and liability is otherwise limited, Washington courts will readily find legal causation even for harms not caused directly by the defendant.

For instance, in *Schooley v. Pinch's Deli Market, Inc.*, the Washington Supreme Court found there was legal cause where a minor suffered injuries after drinking alcohol that a convenience store sold to another minor. *Id.* The Court held that because Washington's policy regarding minors and alcohol was clear and because the vendor controlled the point of sale and the duty (in this case, checking I.D.) was not onerous, legal causation should be found regardless of the intervening illegal acts of both the plaintiff and the minor who furnished her the alcohol. *Id.* at 481. Similarly, in *Taggart* legal cause was found where a parolee with a history of non-sexual assault crimes raped his girlfriend's son, largely because on the facts of the case, the State defendants knew the parolee was violating the terms of his parole, had received actual reports that he was beating his girlfriend, and had received information indicating that police in Montana were standing by to arrest him. *Taggart*, 118 Wn.2d at 228. Thus, the danger was reasonably apparent and the burden was not great. *Id.*

Here, policy, logic, and common sense argue for a finding of legal causation. The Washington Legislature has repeatedly recognized, as a matter of policy, that sex offenders at a high risk of recidivism. In RCW 26.44.030(5), the Legislature specifically chose to impose non-discretionary duties on law enforcement to report suspected child sex crimes to local prosecutors. Furthermore, Legislative findings for RCW

26.44.030, Laws of 1985 ch. 259, provides that children must be protected from child abuse, "[g]overnmental authorities must give the prevention, treatment, and punishment of child abuse the highest priority," "all instances of child abuse must be reported to the proper authorities," and "child abusers must be held accountable to the people of the state for their actions." The policy interest here is unmistakable: child sex offenders must be stopped, and the Legislature has seen fit to create special duties to ensure they are stopped. As a matter of logic and common sense, legal cause should be found.

As importantly, the State made an identical argument in *Joyce* and that argument was rejected. There is no reason why this Court should decide this matter differently.

C. Requiring the State to carefully and fully supervise dangerous pedophiles is an important public policy and supports imposing significant duties on the State.

Imposing a duty of care in this case, and in similar cases, furthers the public policy of protecting children from sexual predators, like Terapon Adahn.

In *Tyner v. DSHS*, 141 Wn.2d 68, 1 P.3d 1148 (2000), the court implied a tort remedy in favor of parents from the statutory framework of RCW 26.44.050 in the context of negligent investigations for child abuse. The *Tyner* court highlighted how "the existence of some tort liability will

encourage [the State] to avoid negligent conduct and leave open the possibility that those injured by [the State]'s negligence can recover." *Id.* at 80-81. "Accountability through tort liability," the Court explained, "may be the only way of assuring a certain standard of performance from governmental entities." *Id.*

The State also argued that it would "frustrate the purpose of the statute by forcing CPS caseworkers to compromise the interests of the children." *Id.* The court dismissed that argument as "unwarranted," because "all that is required is that the State act reasonably, not that it act in a flawless manner." *Id.*

It is unnecessary to imply a cause of action in Sabrina Rasmussen's case because the State already has a duty to properly supervise offenders, and to protect foreseeable victims from the dangerous propensities of third parties under *Peterson v. State.*

The State is continuously seeking to restrict and temporally limit its duties to protect children. However, the public policy of protecting children from predators is well established in the state of Washington. There are a great number of statutes which recognize the importance of protecting children (e.g., RCW 26.44.050) as well as the registration of sex offenders (RCW 9A.44.130).

The Legislature has repeatedly recognized that sex offenders have a high rate of recidivism—the 1990 Community Protection Act alone refers to the risk of recidivism no less than three times. *See* Laws of 1990, ch.3, § 117 ("[S]ex offenders pose a high risk of engaging in sex offenses . . . after being released from incarceration or commitment . . . ."); § 401 ("[Se]x offenders often pose a high risk of reoffense . . . ."); § 1001 ("[S]ex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high."). The sex offender registration statutes implicitly link the danger of recidivism to the need for registration and verification in order to help "local law enforcement agencies" protect "their communities." *Id.* § 401. When sex offenders do not register, agencies' "efforts to protect their communities . . . are impaired by the lack of information available . . . about convicted sex offenders who live within the law enforcement agency's jurisdiction." *Id.* Law enforcement agencies that can apprehend sex offenders quickly not only protect the public in general, but also specifically protect sex offenders' potential victims.

As in cases involving Child Protective Services as stated by the Supreme Court in *Tyner*, imposing significant duties to act carefully in both the supervision and release of dangerous offenders supports the very strong public policy of protecting children.

In this case, the State contends that it had no duty to properly supervise Terapon Adhahn and further had no duty to insure that Adhahn had complied with all of the terms and conditions of his Judgment and Sentence before he was released into the public. The trial court agreed, and in so doing creates an incentive for the State to negligently release dangerous predators into the community, thereby abolishing the possibility of liability. Logic and public policy suggest a different result.

V. CONCLUSION

When an offender is under community supervision, the State has a duty to "take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities" of the offender. *Taggart v. State*, 118 Wn.2d at 217; *Joyce*, 155 Wn.2d 310 (negligent supervision claim).

Also, when the State has the ability to control a dangerous third party, the State has "a duty to take reasonable precautions to protect anyone who might foreseeably be endangered" and not negligently release that third party into the community. *Peterson,* 100 Wn.2d at 428, 671 P.2d 230 (negligent release claim).

Both of these duties are recognized by this State's Supreme Court. The trial court ignored these holdings and instead dismissed the plaintiff's

claims, despite the undisputed evidence that the State violated the above duties in supervising and releasing Adhahn into the community.

The plaintiff has brought forth evidence from which a jury could conclude that the State's breach of its duty was the cause in fact of Sabrina's damages. In other words, but for the State's failure to adequately supervise and then inform the Court of the numerous violations, Adhahn would have been deported or he would have been being held on removal proceedings at the time of Sabrina's abduction and rape.

While it unclear under what theory the trial court granted summary judgment, it is clear that summary judgment should not have been granted. There are substantial issues of material fact to be resolved by a jury—and not the trial court. The trial court therefore erred when it granted the defendant's motion for summary judgment. The summary judgment should be reversed on appeal and this matter should be remanded to the superior court for trial.

RESPECTFULLY submitted this 16th day of December, 2011.

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APPENDIX A

Honorable Regina Cahan, Dept. 10

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

SABRINA RASMUSSEN, Plaintiff, v. STATE OF WASHINGTON, by and through its various state agencies and subdivisions, including DEPARTMENT OF CORRECTIONS and CHILD PROTECTIVE SERVICES, and PIERCE COUNTY, a municipal corporation, and CITY OF TACOMA, Defendants.	NO. 10-2-30307-3 KNT ORDER GRANTING DEFENDANT STATE OF WASHINGTON, DEPARTMENT OF CORRECTION'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER coming on for hearing on the motion of defendant, State of Washington, Department of Corrections for summary judgment, said defendant appearing by Robert M. McKenna, Attorney General, and Eric A. Mentzer, Assistant Attorney General, and plaintiff appearing by her attorney, Tyler K. Firkins, and the court having heard argument, considered the records and files herein, including:

1. Defendant DOC's Motion and Memorandum in Support of Motion for Summary Judgment;
2. Declaration of Anmarie Aylward, with Exhibits 1-5;
3. Declaration of Eric A. Mentzer, with Exhibits 1-3;
4. Plaintiffs' Opposition to the State's Motion for Summary Judgment;

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5. Declaration of Tyler K. Firkins, with Exhibits A-QQ;

6. Declaration of Sabrina Rasmussen;

7. Declaration of John N. Sampson, with Exhibit A;

8. Declaration of William Stough, with Exhibits A-B;

9. Declaration of Barbara Corey, with Exhibit A;

10. Defendant DOC's Reply to Plaintiffs' Opposition to Motion for Summary Judgment;

11. Declaration of Eric A. Mentzer, with Exhibit 1;

12. Declaration of Manuel Rios, with Exhibits 1-2;

NOW THEREFORE

IT IS HEREBY ORDERED That defendant State of Washington, Department of Corrections' Motion for Summary Judgment is hereby GRANTED, and Plaintiff's claims are DISMISSED in their entirety * with prejudice.

DATED this 1 day of ~~July,~~ August 2011.

JUDGE REGINA CAHAN

* At oral argument, Plaintiff represented that there were no claims alleged against Child Protective Services.

Presented by:

ROBERT M. MCKENNA
Attorney General

ERIC A. MENTZER, WSBA #21243
Assistant Attorney General
Attorneys for State Defendants

Approved as to form;

VAN SICLEN, STOCKS & FIRKINS

TYLER FIRKINS, WSBA # 20964
Attorneys for Plaintiff

Certificate of Transmittal

I hereby certify that the foregoing Appellant's Opening Brief was sent out to be filed with the Court of Appeals and a true and correct copy was sent to the following counsel by email (per agreement) and by Priority Mail:

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DATED this 16th day of December, 2011 at Auburn, Washington.

Diana Butler

Diana Butler, Legal Assistant