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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 REPLY BRIEF

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STATE OF WASHINGTON
2012 APR -4 PM 4:46

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I. INTRODUCTION

Terapon Adhahn was able to kidnap and rape Sabrina Rasmussen on May 31, 2000 only because of seriously negligent lapses in his supervision by the State of Washington. For nearly a decade the State ignored his repeated violations, declined to enforce court-ordered conditions, and failed to report new crimes even when specifically ordered to do so by a court. As a result, Terapon Adhahn remained free in the community. He should have been him deported or in jail.

Adhahn's original conviction resulting from the violent rape of his half-sister in 1990 brought with it a host of court-ordered conditions, including treatment, required sex offender registration, and a prohibition on future crimes. His subsequent conviction in 1992 after chasing a man while brandishing a gun elicited almost no supervisory action. Over the next ten years, Adhahn violated almost every one of the ordered conditions, yet time and again the State refused to enforce any consequences for his behavior. The State's utter neglect of its duty is both factually and legally responsible for the harm that befell Sabrina Rasmussen.

The trial court erred when dismissing this case on summary judgment, and the State continues to argue that this improper application of law should guide the court here. In doing so, the State relies heavily on

Hungerford v. Department of Corrections, a Division II Court of Appeals decision that, if interpreted as the State suggests, is contrary to this state's Supreme Court holdings in *Peterson v. State*, *Taggert v. State*, and *Joyce v. State*. Instead, this is a case properly understood as an example of the basic negligence principles of duty, breach, and proximate cause of harm. There are genuine issues of material fact in respect to the State's duty and the breach of that duty proximately causing injury to Sabrina Rasmussen.

II. REPLY STATEMENT OF CASE

The State claims that the assigned Community Corrections Officer's supervising Adhahn "closely monitored him." State's Response at 4. This assertion is wrong. In fact, the supervision provided to Adhahn is more properly characterized as reckless. A timeline of errors demonstrates the serious negligence present in this case.

Timeline of Errors

August 1990: The sexual deviancy evaluator found that "under the influence of alcohol, he would be at extreme risk for further assaultive behavior." CP 247-257.

September 1990: The Judgment required inpatient treatment, which Adhahn never received.

March 1992: A subsequent polygraph revealed that Adhahn had relapsed and nothing was done. CP 345-352; CP 241-246. This is so even

though he was required to attend AA on a continuing basis, a requirement he and his CCOs ignored. CP 332-344.

August 1992: The DOC failed to report Adhahn's conviction to the supervising judge or 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.

September 1992: Pre-sentencing psychosexual evaluation recommended that probation supervision be especially vigilant for relapses in alcoholism and anger control, yet the DOC failed to take virtually any action after Adhahn's 1992 conviction for brandishing a weapon outside a bar (RCW 9.41.270). CP 258-268, CP 353-355

August 1993: A compiled record shows that CCOs only rarely visited Adhahn's home or workplace between 1990 and August 1993, and never after that. CCOs had no idea of Adhahn's activities or associates in the community. CP 332-344; CP 212 and 219 at ¶¶ 7, 10(i).

January 1994: The DOC failed to follow up on Adhahn's apparent solicitation of a prostitute. CP 256-358.

October 1994: Adhahn's judgment did not permit him to leave the State, yet his CCOs allowed him to leave the State to attend his brother's wedding in Texas.

June 1995: Adhahn's CCO again permitted him to leave the State, this time to Thailand, a known haven for pedophiles.

February 1996: Although the conditions of Adhahn's supervision specifically forbade him to have contact with the victim, he did—without repercussions. CP 332-344.

July 1997: The DOC failed to report the 1992 weapons incident to the judge even after she specifically asked for conviction information on the day she terminated supervision.

1990 - 2000: Adhahn was required to register as a sex offender. Adhahn did not register, and in fact he had not registered since October 1990. CP 382-385. DOC apparently never noticed that their sex offender had not been registering, i.e., committing a new criminal violation CP 217; CP 451-457.

Each of these events demonstrates the lack of care shown by the State, and each event was an opportunity for the State to exert effective control over a known violent offender. The State instead did nothing. As a result Terapon Adhahn continued to victimize children, including Sabrina Rasmussen, until his eventual arrest more than a decade later for killing a child.

III. ARGUMENT

The State's argument in this case begins with a false premise, and fails entirely to address the plaintiff's main points. Rather the State relies on cases that misstate and conflate the public duty doctrine into a form of quasi-immunity. The State's erroneous analysis was adopted by the trial court, which committed error by dismissing the plaintiff's claims entirely.

The State further suggests that at summary judgment, the trial court can properly ignore facts asserted by the plaintiff and decide how a jury should resolve factual disputes. Such a theory is contrary to the law.

Basic Tort Principles Control

Before analyzing some of the State's tautological errors, a brief review of basic tort principles is necessary. In 1967, the Washington State Legislature waived sovereign immunity in RCW 4.92.090, which in pertinent part reads:

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

RCWA 4.92.090.

After the Legislature unequivocally waived sovereign immunity, Washington courts created the public duty doctrine. Courts held that plaintiffs must 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). The Washington

Supreme Court in *Osborn v. Mason County* explained this judicially created theory further:

> 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."

Osborn v. Mason County, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006) (some citations omitted).

Thus, there is a cause of action against public entities for negligence whenever the plaintiff can demonstrate that a duty runs to the foreseeable class of plaintiffs that could be harmed. Washington courts have repeatedly held that fundamental tort principles, drawn from the Restatement of Torts, determine when a particularized duty is owed. More recently, the focus has increasingly been on duty and foreseeability, rather than on the public-duty doctrine exceptions.

For example, this Court in *Robb v. Seattle*, following *Osborn*, held that a plaintiff did not need to demonstrate that a recognized exception to the public duty doctrine was applicable, but only that a duty ran under traditional tort principles. *Robb v. Seattle*, 159 Wn. App. 133, 145, 133 P.3d 242 (2010).

The *Robb* court held that Restatement (Second) of Torts § 302(B) comment e created a duty in Robb's case. In so holding, this Court rejected Seattle's argument that for a duty to be found, the plaintiffs must demonstrate a public duty doctrine exception: "Seattle maintains that the public duty doctrine bars Robb's negligence action because none of the four exceptions to the doctrine are present. Seattle cites no authority to support this categorical statement. If a private actor can owe a duty under section 302B, as a consequence of the abolition of sovereign immunity the same must be true of a governmental actor." *Id.* at 12.

The State here, as it has in countless other cases, argues that its negligence should be parsed out, temporally limited and divided into separate sub-categories of negligence, such as negligent supervision. The plaintiffs are not bound to the facts of other cases. The plaintiffs have asserted a broad negligence claim against the State of Washington. The existence of a duty is a question of law. The existence of a prior identical case is not a requirement for deciding whether a duty exists in a particularized case. The State is no different than any individual when it comes to determining the existence of a duty—it enjoys no immunity or special consideration.

In *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (1987) the Colorado Supreme Court noted that when determining whether the law imposes a duty on a particular defendant, many factors are to be considered. These factors

may include, for example, "the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the [defendant's] conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the [defendant]." *Id,* citing, *Iverson v. Solsbery,* 641 P.2d 314, 316 (Colo.App.1982). Other considerations may also be relevant, depending on the circumstances of each particular case. *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* §§ 31, 53 (5th ed. 1984). No one factor is controlling, and the question of whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards—whether reasonable persons would recognize a duty and agree that it exists. *See* W. Keeton, § 53, at 359. *Taco Bell, Inc. v. Lannon,* 744 P.2d at 46; see also, Prosser, Palsgraf Revisited (1953) 52 Mich.L.Rev. 1, 15. Thus, the existence of a duty is a particularized assessment in each case, not a formulaic recital of past cases. *Osborn v. Mason County*, 157 Wn.2d at 27-28.

In this case, applying these basic tort principles clearly demonstrates that the State had a duty to Sabrina Rasmussen.

(1) The risk involved.[1]

Here the known risk involved is prematurely releasing an unrepentant, relapsed sex offender back into the community, and the risk that the sex offender might rape a prepubescent female as he had in the past.

(2) The foreseeability of injury as weighed against the social utility of the [defendant's] conduct

Here it was easily foreseeable and likely that releasing Terapon Adhahn after failing to require him to undergo the sex offender treatment required under the judgment and recommended by the evaluator, would increase the risk of future sex offenses. The injury was made more foreseeable when the DOC failed to report Adhahn's alcohol abuse relapse and the Department's further failure to require continuing treatment and participation in AA as required. 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.

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[1] *Taco Bell, Inc. v. Lannon*, 744 P.2d at 46.

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. Thus the original evaluator indicated that the failure to provide proper treatment for both Adhahn's alcoholism and his pedophilia would pose an "extreme risk."

The social utility of failing to properly supervise a dangerous sex offender offers no social benefit whatsoever, particularly where the burden is nearly insignificant in terms of making recommendations to the supervising superior court judge. As an example, when the sentencing Judge entered a judgment requiring inpatient sex offender treatment, the DOC merely needed to make sure that the defendant knew and understood this requirement, and undertook it. It failed to do so, permitting Adhahn to undertake only group therapy. Similarly, there was no utility to failing to advise the Court that Adhahn had relapsed with respect to his alcoholism. Stated another way, failing to supervise a dangerous sex offender or taking no action whatsoever when confronted with the knowledge of a violation

serves no societal purpose and actually undermines the intended utility of offender supervision.

(3) The magnitude of the burden of guarding against injury or harm

Here the burden analysis might be different in each case depending on the allegations made. As an example, requiring CCOs to perform in home visits in accordance with DOC policy is a significantly higher burden, than are the failures in this case. Here the burden of guarding against known risks was slight. The CCOs merely needed to inform the Court of violations that were brought to the attention of the CCOs in the course of their supervision of Adhahn. When Adhahn was convicted of a weapons charge while under supervision after a public trial, and the DOC learned of the violation, the only burden on the CCO would have involved paperwork. The CCO could have advised INS and the Court of the violation. Had INS or the Court done nothing, then the causal chain would have been broken. Informing the Court and INS involved a very slight burden.

Similarly, informing the Court of Adhahn's relapse and subsequent alcohol abuse merely required providing the Court with a violation notice. The information had been received by the DOC in the course of its routine supervision of Adhahn. Instead, the DOC failed to inform the Court that

Adhahn had relapsed and further that Adhahn had not complied with his conditions of release including continuing AA participation.

Most of the burdens involved in this case are similar in nature to those described above. Even for the obligations that involve a slightly higher burden, such as performing home visits, the burden imposed is simply to comply with the Department's own policies. Presumably the DOC believed that its policies were reasonable and not unduly burdensome or it would not have established them.

(4) The consequences of placing the burden upon the [defendant].

The consequences of requiring the DOC to inform courts and other related agencies of known supervision violations serves an important societal goal—effective offender supervision. The legislature has made the judgment that offenders released into the community should be supervised for a period of time. This legislative judgment is intended to serve the important societal goal of increasing public safety.

The consequence of placing the burden of non-negligently supervising an offender increases the likelihood of community safety. There are really no countervailing public policies. As an example, in *Tyner v. DSHS*, 141 Wn.2d 68, 1 P.3d 447 (1988), the State argued that imposing liability for negligently investigating allegations of child abuse might cause CPS workers to be more cautious in separating families thereby leaving children in abusive

relationships. No similar argument can be made here where a dangerous sex offender is being supervised. Permitting the DOC to ignore known violations of the conditions of supervision works against the societal goals, and would undermine effective supervision goals.

(5) Whether reasonable persons would recognize a duty and agree that it exists.

Reasonable persons, and indeed, our Supreme Court, recognize and agree that the State has a duty to not release dangerous offenders back into the community without first taking the action it can to prevent such release. *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983); *Taggert v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992); *Joyce v. Dep't of Corrections*, 155 Wn.2d 306, 119 P.3d 825 (2005).

All of the factors set forth above that are used to determine whether a private individual has a duty, should apply equally to the State of Washington in this and every other case. The legislature specifically enacted a law that unambiguously states that the State should be treated like private individuals or corporations. No plaintiff has to prove an exception to the public duty doctrine when suing a private individual. Neither should Sabrina Rasmussen.

Despite these clear tort principles, the State nonetheless relies on the holding in *Hungerford v. Dep't of Corrections*, 135 Wn.App 240, 258, 139 P.3d 1131 (2006), for the proposition that the public duty doctrine bars

liability in this case. See State's Response at 8. Despite the plaintiff's analysis of *Peterson*, the State ignores the case entirely, instead insisting that *Peterson* stands for a different proposition.

***Peterson v. State* is Controlling in This Case**

The State of Washington's flawed argument can be summarized by a single assertion it makes:

> However, *Taggart* exposes plaintiff's misplaced reliance on *Peterson* and the Restatement of Torts because both were considered in *Taggart.*

State's Response at 15. This is a strange proposition in light of the fact that the *Taggert* holding, on which the State relies, itself relies on and approves the holding in *Peterson*. *Peterson* stands for the common-law rule that a party may have a duty to take reasonable measures to guard against foreseeable dangerous propensities of another, *even after a take-charge relationship has terminated*, and when it fails to do so, it may be held responsible for those failures. *Petersen,* 100 Wash.2d at 438.

In *Peterson*, a recently released Western State Hospital psychiatric patient drove her car into the plaintiff's car, injuring the plaintiff. The court held that liability existed even though the patient had been released from supervision, finding 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" and not negligently terminate supervision of that individual. *Id.* at 428.

Similarly here, the State negligently released Adhahn from supervision and he subsequently injured Sabrina Rasmussen. The State had a take-charge duty over Adhahn for seven years. It breached that duty when it repeatedly failed to monitor him or report his multitude of violations to immigration authorities or the court. The State argues that its duty only extended to crimes committed during the period when Adhahn was under direct supervision, but this is contrary to the court's holding in *Peterson*. Breaches of duty while the offender is under control can give rise to liability injuries caused by the offender after control is terminated. *Id.*

The State appears to argue that *Hungerford* somehow overrules *Peterson*, despite recent reliance on *Petersen* by the Supreme Court. *See State v. Schaler*, 169 Wn.2d 274, 236 P.3d 858 (2010). There is no support for this assertion. *Peterson* is binding precedent.

The State argues that its duty to insure that Terapon Adhahn complied with his conditions and its duty to prevent a known dangerous individual from being released into the community are irrelevant because

it had no duty to the children of this state to protect them from a known sex offender after Adhahn was released from supervision in 1997. In essence, the State argues that its own negligent acts, by failing to properly monitor Adhahn before negligently terminating supervision and by failing to provide known information that would have seen him in jail or deported, preclude liability. The very act of negligence immunizes the State. This argument is contrary to logic and would create a perverse incentive for the premature release of dangerous offenders. More recent decisions have not adopted such an absurd theory, and neither should this court.

The State Fails to Address the Applicability of *Joyce v. Department of Corrections*

The State also ignores subsequent case law that reinforces the policy of *Peterson*, notably a directly on-point Washington case: *Joyce v. Dep't of Corrections*, 155 Wn.2d 306, 139 P.3d 825 (2005). 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." *Id.* 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.* The offender's 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.

Building on the holdings of *Peterson* and *Taggert*, the *Joyce* court found "no reason to categorically distinguish community corrections officers from others who actively supervise offenders" *Id.* at 317. It further 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.

The State's failures when supervising the offender in *Joyce* are almost identical to the State's failures here. Contrary to the conditions of Adhahn's judgment and sentence, he failed to complete either alcohol or inpatient sexual deviancy treatment. He unlawfully possessed a firearm, was convicted of intimidation, routinely failed to report or register, and continued drinking. His CCOs failed to administer frequent polygraph and plethysmograph examinations, allowed him to leave the country, and permitted the supervising court to believe that Adhahn was in compliance with these conditions.

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 then clearly breached its duty to supervise Adhahn in a non-negligent manner. Just as the *Joyce* court found the existence of a duty and remanded for trial, it was error to dismiss this case on summary judgment.

Most importantly, as in *Peterson*, the defendant had a duty to make sure that it undertook the steps it reasonably could to prevent a dangerous offender from being released into the community. This the State failed to do. Because the State, like the psychiatrist in *Peterson,* had the means to prevent the release, but failed to do so, then the State is liable.

Reckless Acts or Omissions Can Create a Duty

The State's breach of duty to monitor and control Terapon Adhahn is so extensive that a jury could conclude it to have been reckless conduct. Washington Courts have described reckless behavior as follows:

> The usual meaning assigned to "willful," "wanton," or "reckless," according to taste as to the word used, is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences....

State v. Brown, 40 Wn.App. 91, 697 P.2d 583 (1985), quoting W. Prosser & W. Keeton, *Torts* § 34, at 213 (5th ed. 1984). Here, the State

consciously refused to provide Adhahn's conviction data to the court when specifically ordered to do so.

Reckless omissions can create a duty even if one did not exist before. *See Bailey v. Town of Forks,* 108 Wash.2d 262, 268, 737 P.2d 1257 (1987). Here, the State recklessly assisted in the termination of Adhahn's supervision, and so gained an additional duty to protect those harmed because of its recklessness. Adhahn posed an extreme risk to prepubescent females. It was forseeable that released in the manner that he was he would rape again. When the State was given a simple request to provide information known to it, it instead chose to do nothing. Sabrina and other children were savagely raped and murdered.

Failure to Properly Supervise Adhahn Proximately Caused Injury to Sabrina Rasmussen

The State's breach of its take-charge duty to supervise Terapon Adhahn was both the cause in fact and the legal cause of injury to Sabrina Rasmussen.

(1) The State's negligence was the cause in fact of injury to Sabrina Rasmussen

Cause in fact requires that the plaintiff establish a direct, unbroken chain of events between the act or omissions of the defendant and the injury to the plaintiff. *Joyce,* 155 Wn.2d at 322-23. The undisputed facts of this case demonstrate that the State did not take what steps it could to

protect a foreseeable victim like Sabrina Rasmussen from the predations of Adhahn. Liability in this case stems from the State's complete failure to take action against Adhahn. No one did anything, and so the causal chain of omissions is unbroken.

Expert testimony that the State's negligence caused the plaintiff's injury has been held sufficient to establish cause in fact in a take-charge scenario. *Estate of Borden v. State, Dep't of Corrections*, 122 Wn. App. 227, 243-44, 95 P.3d 764 (2004), *review denied*, 69 P.3d 874 (2005). Here, the plaintiff has provided expert testimony that but for the State's negligent omissions, Adhahn would have been unable to harm Sabrina Rasmussen because he would have been deported. CP 211-234; CP 504-505. Whether or not the court believes the plaintiff's experts are more credible than the State's is irrelevant on summary judgment, and properly a question for the jury.

Additionally, the jury does not need to speculate as to what immigration authorities would have done had the State properly informed them of Adhahn's crimes. This case is different than most. Here immigration authorities once they learned of Adhahn's two convictions actually undertook to both arrest and deport him. It is not speculation; it is what actually happened. Immigrations and Customs Enforcement held Adhahn in 2007 and instituted removal proceedings based only on his

convictions for incest and intimidation. CP 444-447. Adhahn did not fight deportation, and has stated under oath that he would not have contested deportation proceedings even if brought earlier. CP 444-447, CP 466-484. Unlike the facts of *Joyce*, where an expert testified to what was likely to have happened, here the plaintiff has shown what actually took place when immigration authorities learned of Adhahn's crimes.

The State asks the court to speculate otherwise, citing to the declaration of Pierce County Corrections officer who himself only assumes that immigration authorities had been notified in 1992. CP 532-33. This assertion is unsupported, contrary to actual events, and asks the court to make a factual finding that the State acted in a non-negligent manner in spite of all other evidence. The State made a nearly identical argument in *Joyce*, but the court there disagreed and found that such questions were properly for the jury. *Joyce,* 155 Wn.2d at 322-23. Had the State done its duty here and informed immigration officials of Adhahn's two convictions, the facts show that more likely than not he would have been deported years before he was able to harm Sabrina Rasmussen.

(2) The State's negligence was the legal cause of injury to Sabrina Rasmussen

Logic and Policy dictate that this court should find legal causation. To determine whether legal cause exists, 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. The legislature of the State of Washington has repeatedly recognized, as a matter of policy, that sex offenders at a high risk of recidivism. 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." There are also a great number of statutes which recognize the importance of protecting children (e.g., RCW 26.44.050), and the registration of sex offenders (RCW 9A.44.130).

Notwithstanding the State's arguments that finding legal causation will "place no limit whatsoever" on the State's liability, finding causation

would simply impose liability where the state already has a duty to non-negligently supervise and monitor dangerous sex offenders. State's Response at 33. The State neglected to take even minimal steps to monitory Adhahn when it did not report his numerous violations as required by statute, and actively failed its duty when it did not provide conviction information even upon a direct request from a judge. The State never attempted to insure that Adhahn was registered as required by law. The State never followed up on information that Adhahn was committing new crimes. It makes little sense for the court to hold that requiring the State to do what it is already required to do is somehow against policy.

Furthermore, the fact that Adhahn kidnapped and raped Sabrina Rasmussen several years after he was negligently released is not dispositive. Proximity in time is only relevant to causation if it somehow breaks the causal chain. A man who negligently leaves a land mine in a park, assuming no intervening acts, will be equally liable if someone steps on it in one day or five years later. Similarly here, the question is "whether *the breach* occurred while the duty was in effect, not whether *the injury* occurred while the duty was in effect." *Couch v. Washington Dep't of Corrections*, 113 Wn.App 556, 573, 54 P.3d 197 (2002), *review denied* 154 Wn.2d 1003 (2003). The State breached its duty while it still had a take-charge duty over Adhahn, and as a result, Sabrina Rasmussen

suffered serious harm. Again, the state made the same argument in *Joyce* as it does here, and again the argument was rejected by that court. Just as the *Joyce* court found that logic and policy gave rise to legal causation, so too must the court here.

Plaintiff Has Never Asserted a Separate "Improper Classification" Claim

Finally, the State has again attempted to parse plaintiff's negligence claim out into another separate tort, thereby requiring its own full causal chain of negligence. State's Response at 36. To the contrary, however, the State's breach of duty here is merely a facet of the overall breach of its duty to adequately supervise Adhahn. The historical version of RCW 4.24.550 in effect during the period of Adhahn's supervision gave the Department of Corrections the ability to classify sex offenders and share that classification with law enforcement officials. CP 368-375. And contrary to the State's arguments here, this court has previously held that liability may stem from classification of offenders which results in greater freedom or less supervision. *Estate of Jones v. State*, 107 Wn.App. 510, 521-23, 15 P.3d 180 (Div. I, 2000). Further, law enforcement agencies commonly use the assigned classification level to prioritize enforcement of sex offender registry violations. CP 440-41. By classifying Adhahn as only a Level 1 sex offender, the State unnecessarily

limited its control over Adhahn while simultaneously assuring that he would not be considered a priority for law enforcement. *Id.*

Failure to enforce sex-offender registration requirements gives rise to cause in fact. Plaintiff has presented evidence that 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. A reasonable jury could find that this breach to be the proximate cause of Sabrina Rasmussen's injury.

IV. CONCLUSION

The plaintiff here has demonstrated evidence of material facts from which a reasonable jury could conclude that the State's breach of its duty was the cause of Sabrina Rasmussen's damages. The trial court ignored precedential case law and instead dismissed the plaintiff's claims, despite undisputed evidence that the State violated its duties in supervising and releasing Adhahn into the community. It was error to grant summary judgment for the State, and this matter should be remanded for trial.

RESPECTFULLY submitted this 4th day of April, 2012.

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Certificate of Transmittal

I hereby certify that the foregoing Appellant's Reply 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 US Mail:

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