NO. 91644-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

[No. 71752-9-I - Court of Appeals, Division I]

FRED BINSCHUS, individually and as Personal Representative of the Estate of JULIE ANN BINSCHUS; TONYA FENTON; TRISHA WOODS; TAMMY MORRIS; JOANN GILLUM, as Personal Representative of the Estate of GREGORY N. GILLUM; CARLA J. LANGE, individually and as Personal Representative of the Estate of LEROY B. LANG; NICHOLAS LEE LANGE, Individually and as Personal Representative of the Estate of CHESTER M. ROSE; STACY ROSE, Individually; RICHARD TRESTON and CAROL TRESTON, and the marital community thereof; BEN MERCADO; and PAMELA RADCLIFFE, individually and as Personal Representative of the Estate of DAVID RADCLIFFE, and TROY GIDDINGS, individually,

Respondents,

v.

SKAGIT COUNTY, a political subdivision of the State of Washington,

Petitioner,

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS; OKANOGAN COUNTY, a political subdivision of the State of Washington; and SKAGIT EMERGENCY COMMUNICATIONS CENTER d/b/a/ "Skagit 911," an interlocal government agency,

Defendants.

MEMORANDUM OF AMICUS WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Washington State Association of Municipal Attorneys ("WSAMA"), is the organization of municipal attorneys representing the cities and towns across the State. It has an interest in this case because if Division One's decision is allowed to stand, its expansion of tort liability will significantly affect municipalities that operate jails.

II. COURT OF APPEALS DECISION

WSAMA asks this Court to grant Skagit County's Petition for Discretionary Review of Division One's published decision (the "Opinion").

III. STATEMENT OF THE CASE

WSAMA adopts the facts set forth by Petitioner Skagit County, but notes that notwithstanding Zamora's mental health issues and the fact that Zamora had been arrested numerous times, *none* of his violations were violent. (Opinion 6.) Based on the facts recognized by the Court of Appeals, there was no reason for Skagit County to know Zamora would be likely to cause bodily harm to others if not controlled.[1] But even if Zamora had known dangerous propensities, that would still not support the Plaintiffs' claims. Likewise, Skagit County's special take-charge relationship with Zamora existed only during the time Zamora was in jail,

[1] *See also Kok v. Tacoma School District* , 179 Wn. App. 10, 317 P.3d 481 (2013), in which Division Two ruled as a matter of law that the actions of a paranoid schizophrenic student who shot and killed a classmate at school were not foreseeable, and thus, the school district was not responsible for the student's death.

and would not extend to the Plaintiffs' claims.

IV. ARGUMENT WHY THIS COURT SHOULD TAKE REVIEW.

A. This Case Raises Issues of Substantial Public Interest.

As Skagit County argues in its Petition, the Opinion conflicts with three of this Court's decisions and two Court of Appeals decisions justifying discretionary review per RAP 13.4(b)(1) and (2).[2] Additionally, this case involves issues of substantial public interest, conceivably affecting every county, city and town in this state, that should be determined by the Supreme Court.

Every public agency across the state that is responsible for arresting, detaining and, ultimately, releasing, individuals will regularly contend with inmates who have mental health issues. Because the Court of Appeals' decision effectively conflates the fact of mental illness with a presumption of dangerousness, the consequences of its decision would be to saddle the taxpaying public with an immense potential financial burden, chasing a myriad of "what if's," trying to avoid possible liability for a mentally ill inmate's future acts.[3] This case also poses challenging and

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[2] *Hungerford v. Dep't of Corrections*, 135 Wn. App. 240, 139 P.3d 1131 (2006), *review denied*, 160 Wn.2d 1013 (2007); *Sheikh v. Choe*, 156 Wn.29 441, 128 P.3d 574 (2006), *Couch v. Dep't of Corrections*, 113 Wn. App. 556, 54 P.3d 197 (2002), *review denied*, 149 Wn.2d 1012 (2003); *Taggart v. State*, 118 Wn.2d 195, 219, 822 P.2d 243 (1992); *Melville v. State*, 115 Wn.2d 34, 39, 793 P.2d 952, 955 (1990).

[3] See Fay Anne Freedman, *The Psychiatrist's Dilemma: Protect the Public or Safeguard Individual Liberty?*, 11 U. Puget Sound L. Rev. 255, 277-79 (1988). The fact that Zamora was in jail and had mental health issues is by no means unusual. For instance, more than 40% of the inmate population at the South Correctional Entity (SCORE), the jail facilities

potentially unfair consequences for anyone with mental illness who might find him or herself in jail, and then subjected to evaluation and unwarranted forced treatment that is prescribed not for the inmate's benefit but in order to reduce the potential for jail liability. Thus, discretionary review also is appropriate under RAP 13.4(b)(4).

B. As a Matter of Law, Any "Take-Charge" Duty Does Not Extend to Predicting and Controlling an Inmate's Behavior After Release.

The special take-charge relationship created under the Restatement (Second) of Torts §§ 315(a) and 319 does not impose a duty upon a jail to provide mental health treatment to an inmate, even an inmate with a history of violent behavior, in order to prevent harm to the general public in anticipation of his eventual release from custody. The §§ 315(a) and 319 duty to control the actions of a third party in order to prevent harm to others has never been interpreted by Washington courts to apply to jails, where the inmate was completely segregated from society and within a fully controlled environment. By finding that a question of fact existed as to whether a county [or city] jail had a duty to provide an inmate with a mental health evaluation and treatment, the Court of Appeals expanded the

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of which the City of Auburn is a partner, have been prescribed psychiatric medicine. The U.S. Department of Justice, Bureau of Justice Statistics Special Report *Mental Health Problems of Prisons and Jail Inmates*, September 2006, NCJ 213600, places the percentage of inmates with mental problems at between 44 and 61%. SCORE costs for psychiatric medicine and mental health services amount to over $690,000 per year, and that does not include jailer time in contending with mentally ill inmates. These costs will rise notably if SCORE must insulate itself from increased liability exposure for future acts after inmates have been released from custody. These increases would affect all such jails.

scope of the §§ 315(a) - 319 duty to control dramatically, placing a nearly limitless liability exposure on local jails.

Neither the Legislature nor the constitution imposes upon municipalities the obligation to provide long-term mental health care for individuals who may be arrested, prosecuted and housed in jail facilities. The Court of Appeals' decision imposes that unfunded mandate on prosecuting jurisdictions, setting up the impossible dilemma of requiring jurisdictions to predict and modify the behavior of offenders potentially long after their release from custody.

Jails are not designed or administered to provide for the long term treatment of the mentally ill. They are responsible for housing inmates, to facilitate the law enforcement functions of enforcing laws. Their "control" duties should thus be limited to taking reasonable care to control an inmate to prevent him from causing injury to himself or other inmates within the confines of the facility. A jail is only able to protect others outside of the facility by preventing the inmate from escaping or departing the jail earlier than his or her release date. While providing for the inmate's health, safety and welfare is a duty a jail owes to an inmate, for the inmate's benefit, providing an inmate mental health treatment is not a response to a jail's duty to control an inmate from causing harm to others.

This Court knows that "the problems of prisons in America are

complex and intractable, and ... not readily susceptible of resolution by decree." *Bresolin v. Morris*, 88 Wn.2d 167, 170, 558 P.2d 1350 (1977). If the manner in which jails are operated needs to be changed, this should come from the other branches of government. *Bell v. Wolfish,* 441 U.S. 520, 548, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) ("the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial").

The public's interest in law enforcement is to provide general safety to the public, to punish offenders, and to deter others from offending. If the public agencies responsible for law enforcement are to become predictors and guarantors of the behaviors of detainees after their release from jail or prison custody, the Legislature should impose that obligation, with the allocation of adequate resources to transform local jails into facilities for long term mental health treatment.

1. As a Matter of Law, the Only Duty Imposed on a Jail by the "Take-Charge" Duty Under the Restatement (Second) of Torts is the Duty to Physically Control its Inmates to Prevent Harm to Others by Escape or Improper Early Release From Custody.

As a general rule, there is no duty to prevent a third party from intentionally harming another. *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997). However, Washington courts recognize § 315 of the Restatement (Second) of Torts as creating an exception to the general rule:

> There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless: (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection.

Restatement (Second) of Torts § 319, is a subset of special relations contemplated by § 315, commonly referred to as the "take charge" relationship:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to *control* the third person to prevent him from doing such harm.

(emphasis added). Under § 319, then, a defendant with a "take-charge" duty may be required to "control" a third party.

Merriam-Webster[4] defines control as follows:

- to direct the behavior of (a person or animal)
- to cause (a person or animal) to do what you want
- to have power over (something)
- to direct the actions or function of (something)
- to cause (something) to act or function in a certain way

See also RCW 70.48.020(17) and (20) defining "Physical Control," and "Restraints."[5] Applying § 319 to jails, assuming (pejoratively) that a

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[4] *Merriam-Webster.com.* Merriam-Webster, n.d. Web. 11 June 2015. <http://www.merriam-webster.com/dictionary/prevent>.

[5] Chapter 70.48 RCW, (The City and County Jails Act), which governs the jail's authority and power to act, defines "Restraints" as anything "used to control the movement of a person's body or limbs and includes: (a) Physical restraint; or (b) Mechanical device

diagnosis of mental illness should per se give rise to a presumption that the inmate should be considered a threat to the safety of others, and then applying the basic definition of "control," a jail could still only be subject to liability for injuries caused to the general public by the inmate if jail staff negligently failed to restrain the inmate, either by releasing the inmate prematurely or allowing him to escape – that is, by failing to physically "control" the inmate.

This emphasis on physical control is further supported by the comments and illustrations following the language of § 319, which essentially says that (1) when a patient suffering from scarlet fever is permitted to leave a contagious disease hospital, and (2) when a "homicidal maniac" escapes from an insane asylum.[6] In both instances, the

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including but not limited to: Metal handcuffs, plastic ties, ankle restraints, leather cuffs, other hospital-type restraints, tasers, or batons." RCW 70.48.020(17).

"Physical restraint" is defined as the "use of any bodily force or physical intervention to control an offender or limit an offender's freedom of movement in a way that does not involve a mechanical restraint. Physical restraint does not include momentary periods of minimal physical restriction by direct person-to-person contact, without the aid of mechanical restraint, accomplished with limited force and designed to (a) Prevent an offender from completing an act that would result in potential bodily harm to self or others or damage property; (b) Remove a disruptive offender who is unwilling to leave the area voluntarily; or (c) Guide an offender from one location to another. RCW 70.48.020(20).

[6] Comment a to § 319 provides that the "rule stated in this Section applies to two situations. The first situation is one in which the actor has charge of one or more class of persons to whom the tendency to act injuriously is normal. The second situation is one in which the actor has charge of a third person who does not belong to such a class but who has a peculiar tendency so to act of which the actor from personal experience or otherwise knows or should know."

The first scenario is illustrated as follows: A operates a private hospital for contagious diseases. Through the negligence of the medical staff, B, who is suffering from scarlet fever, is permitted to leave the hospital with the assurance that he is entirely recovered, although his disease is still in an infectious stage. Through the negligence of a guard employ by A, C, a delirious small pox patient, is permitted to escape. B and C

hospital or asylum could be found liable for injuries to others based on their failure to physically *control* a patient who they knew could cause harm to others if not restrained. In neither instance, however, would the hospital or asylum be found liable for failing to cure or treat the patient.

2. As a Matter of Law, the Jail's Duty to Control an Inmate is Limited by Statutory Authority and Power to Act to the Time When the Inmate Is In Custody.

As to § 319, this Court has recognized that a special relationship giving rise to a duty to control a party with known dangerous propensities may exist where there is a "'definite, established and continuing relationship between the defendant and the third party.'" *Taggart v. State,* 118 Wn.2d 195, 219, 822 P.2d 243 (1992) (quoting *Honcoop v. State,* 111 Wn.2d 182, 193, 759 P.2d 1188 (1988)). Such a duty exists, however, only where the actor has the legal authority to control the third party's conduct. *Funkhouser v. Wilson,* 89 Wn. App. 664, 654, 950 P.2d 501 (1998). For example, in *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), a state-employed psychiatrist had a duty to control the conduct of a recently released state hospital psychiatric patient where the psychiatrist had treated the patient while institutionalized, knew of the patient's dangerous

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communicate the scarlet fever and smallpox to D and E respectively. A is subject to liability to D and E.

The second scenario: A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac is permitted to escape. B attacks and causes harm to C. A is subject to liability to C.

propensities, and had authority to seek an additional civil commitment under Chapter 71.05 RCW. In *Taggart, supra,* parole officers were found to have a duty to control parolees where the officers had the obligation and authority to guide and supervise the parolees pursuant to RCW 72.04A.080.

Here, Plaintiffs argue that the jail had a duty to provide Zamora with mental health treatment in order to reduce possible danger to society upon his eventual release. But they fail to point to any statutory authority that would give a jail the power to force an inmate to get mental health treatment.[7] If there is no authority for the duty, the duty cannot exist.

3. If the Scope of a Jail's Duty to Control is a Question of Fact, Then Plaintiffs Have Failed To Show That Mental Health Treatment is Reasonable Care in the Exercise of the Duty to Control.

Even if a duty exists, the law will only recognize the duty as it is defined by a particular standard of conduct. *Stangland v. Brock,* 109 Wn.2d 675, 747 P.2d 464 (1987). In order to establish an actionable claim for negligence, a plaintiff must establish that a defendant had a duty to conform to a particular standard of conduct. *Kaye v. Lowe's HIW, Inc.*, 155 Wn. App 320, 332, 242 P.3d 27 (2010). "If the standard itself is not proven, then a deviation from that standard is incapable of proof." *District*

[7] WSAMA acknowledges the Plaintiffs' reference to statute requiring jail to provide for health and welfare of inmate. However, that is a duty owed to inmate, not a duty owed to third parties. *See Melville v. State,* 115 Wn.2d 34, 39, 793 P.2d 952, 955 (1990).

of Columbia v. Carmichael, 577 A.2d. 312, 214 (D.C. 1990).

To determine if a jail's conduct fell below the required level of care required by its duty to control, the Plaintiffs must articulate the degree of care, skill, and diligence required of a Jail to control its inmates. A standard of care may be guided by internal directives or policies. *Joyce v. State, Dept. of Corrections*, 155 Wn.2d 306, 323-24, 119 P.3d (2005). In some cases, it may be defined by statute. *Samuelson v. Community College District. No. 2,* 75 Wn. App. 340, 349, 877 P.2d 734 (1994). It may be established by expert witness testimony. *Hojem v. Kelly,* 93 Wn.2d 143, 147 606 P.2d 275 (1980). Plaintiffs can point to none of those in this case, however. Instead, Plaintiffs argue, without evidence or support, that mental health treatment was the standard of care expected to be exercised by the Jail in performance of its duty to control Zamora. This is not only vague, it is speculative. As the Plaintiffs have failed to articulate a standard of conduct defining the extent of a jail's duty to control an inmate to prevent harming others, no fact finder could determine that a standard was breached.

V CONCLUSION

For all the reasons set forth above, and those provided by Skagit County, WSAMA respectfully requests that this Court grant the Petition for Discretionary Review and ultimately reverse the Court of Appeals decision.

RESPECTFULLY SUBMITTED this 2nd day of July, 2015.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FRED BINSCHUS, et al, Respondents, v. SKAGIT COUNTY, Petitioner. STATE OF WASHINGTON, et al, Defendants.	Cause No. 91644-6 CERTIFICATE OF SERVICE (Court of Appeals No. 71752-9-I)

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on July 2, 2015, I caused service of the Amicus Motion and memorandum of the Washington State Association of Municipal Attorneys on the attorneys of record herein via U.S. Mail, to the following addresses:

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Dated this 2 day of July 2015, at Auburn, Washington.

Megan Stockdale

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Dear Mr. Carpenter:

Attached hereto please find an electronic copy of a Motion for Leave to file Brief of Amicus Curiae and a proposed Memorandum of Amicus of the Washington State Association of Municipal Attorneys in the above-referenced case. I am also including an electronic copy of a cover letter. Also, in addition to mailing our pleadings to counsel of record, per the certificate of mailing (appended to the Memorandum), for their convenience, I am also cc'ing them with this e-mail.

Please let me know if you have any questions. Thank you.

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