No. 91644-6

SUPREME COURT
OF THE STATE OF WASHINGTON

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. LANGE; NICHOLAS LEE LANGE, individually; ANDREA ROSE, 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; PAMELA RADCLIFFE, individually and as Personal Representative of the Estate of DAVID RADCLIFFE; and TROY GIDDINGS, individually,

Respondents,

vs.

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

Defendants,

and

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

Petitioner.

ANSWER TO AMICI MEMORANDA

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TABLE OF CONTENTS

Page

Table of Authorities .....ii-iii

A. INTRODUCTION 1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT WHY REVIEW SHOULD BE DENIED.....5

(1) The Court of Appeals Correctly Determined that the County Owed the Violence Victims a Duty of Care.....5

(a) The Court of Appeals' Duty Decision is Entirely Consistent With This Court's Decision on "Take Charge" Duty 5

(b) This Court Should Not Be Affected by the Amici's Fiscal Pleas in Determining the County's "Take Charge" Duty to the Violence Victims 10

(2) The Court of Appeals Decision Correctly Analyzed the Causation Issues Here.....17

D. CONCLUSION.....19

Appendix

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Estate of Davis v. Dep't of Corrections, 127 Wn. App. 833, 113 P.3d 487 (2005) 13
Gallo v. Dep't of Labor & Indus., 155 Wn.2d 470, 120 P.3d 564 (2005) 7
Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 244 P.3d 924 (2010) 14, 16
Hertog ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 979 P.2d 400 (1999) 7, 16, 17
Hungerford v. State, 135 Wn. App. 240, 139 P.3d 1131 (2006) 6
Joyce v. State Dep't of Corrections, 155 Wn.2d 306, 119 P.3d 825 (2005) ..... *passim*
Kim v. Budget Rent-a Car Sys., Inc., 143 Wn.2d 190, 15 P.3d 1238 (2001) 18
Kusah v. McCorkle, 100 Wash. 318, 170 Pac. 1023 (1918) 14
McKown v. Simon Property Group, Inc., 182 Wn.2d 752, 344 P.3d 661 (2015) 18
McLeod v. Grant County Sch. Dist. No. 128, 42 Wn.2d 316, 255 P.2d 360 (1953) 8
Melville v. State, 115 Wn.2d 34, 793 P.2d 952 (1990) 15, 16
Petersen v. State, 100 Wn.2d 421, 671 P.2d 230 (1983) ..... *passim*
Poletti v. Overlake Hospital Med. Ctr., 175 Wn. App. 828, 303 P.3d 1079 (2013) 13
Shea v. City of Spokane, 90 Wn.2d 43, 578 P.2d 42 (1978) 14
Taggart v. State, 118 Wn.2d 195, 822 P.2d 243 (1992) 7, 8, 17
Volk v. Demeerleer, 184 Wn. App. 389, 337 P.3d 372, *review granted*, ___ Wn.2d ___ (July 8, 2015) 8

Federal Cases

Brown v. Plata, ___ U.S. ___, 131 S. Ct. 1910, 179 L. Ed.2d 969 (2011) 16
Trueblood v. Wash. State Dep't of Soc. & Health Servs., __ F. Supp.3d __ 2015 WL 1526548 (W.D. Wash. 2015) 12, 15

Statutes

RCW 70.48.130(1) 14
RCW 71.05 ..... 3, 8, 13
RCW 71.05.120(1) 13
RCW 71.05.120(2) 8
RCW 71.05.150(1) 3
42 U.S.C. § 1983 17

Rules and Regulations

RAP 13.4(b) 1, 2, 19

Other Authorities

Restatement (Second) of Torts § 315 ..... 5, 8, 15
Restatement (Second) of Torts § 319 ..... 1, 5, 7

A. INTRODUCTION

This Court has accepted the amici memoranda of the State of Washington ("State"), the Washington Association of Municipal Attorneys ("WSAMA"), and the Washington Cities Insurance Authority ("WCIA")[1] on its review decision under RAP 13.4(b).

Those memoranda on review in many instances seriously misrepresent the facts concerning the mental health history and violent conduct of Isaac Zamora, his incarcerations at the Skagit County Jail, during which his mental health deteriorated, unevaluated and untreated, and his consequent murderous rampage that resulted in six deaths and four people seriously wounded at his hands.

Moreover, these memoranda fundamentally misread the County's liability under § 319 of the *Restatement (Second) of Torts,* hoping to re-shape and truncate this Court's precedents on "take charge" liability, particularly *Petersen v. State,* 100 Wn.2d 421, 671 P.2d 230 (1983). The amici offer a duty analysis that would reward jailers for ignoring, ostrich-like, inmate mental health problems, problems that foreseeably result in explosive violence, as the violence victims' experts only confirmed in their testimony.

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[1] The amici are hardly disinterested. The State is a former defendant in this case that settled with the violence victims by entering into a series of stipulated judgments. WCIA provided defense counsel (the same counsel who prepared its amicus memorandum) to former defendant Skagit 911.

Similarly, the memoranda seek to ignore this Court's precedents on causation in the "take charge" liability context, particularly *Joyce v. State Dep't of Corrections,* 155 Wn.2d 306, 119 P.3d 825 (2005), a case only WSAMA cites.

The Court of Appeals decision correctly determined that Skagit County ("County") had a "take charge" duty as to Zamora and consequently owed a duty to the respondents, the estates of the people he killed, and the individuals he wounded in his violent killing spree ("violence victims"). Moreover, the Court of Appeals also correctly determined that causation was appropriately a question for a jury.

This Court should deny review. RAP 13.4(b).

B. STATEMENT OF THE CASE

The violence victims do not intend to repeat the Court of Appeals' correct recitation of the facts, op. at 3-12, or the extensive factual discussion in their answer to the County's petition for review. Answer at 2-9. They will, however, address a number of *blatant* factual misrepresentations in the motions for leave to submit the amici memoranda and the various amici memoranda that require noting and correction.

A critical factual misstatement found in the amici motions and memoranda is that Zamora had no history of violence. WSAMA asserts

that Zamora had no "violent criminal history" and WCIA claims he had "not shown any dangerous or violent propensities while in jail." WSAMA motion at 3; WSAMA memo at 1; WCIA motion at 3; WCIA memo at 1. This theme is belied by the facts here. Zamora was indeed a violent individual, a fact *known* to County authorities,[2] and he was violent while in the Skagit County Jail – he stabbed another inmate during his incarceration there. CP 2464. Moreover, he was written up for serious infractions while in the Jail. CP 2462, 2464, 2467, 2469-71. While at the Jail, he was obviously not "non-violent."

A second factual misstatement by WCIA is that Zamora allegedly would not take the Lamictal prescribed for him while he was in the Jail, WCIA memo at 2, implying that he would not have taken anti-psychotic medications had such medications actually been prescribed for him. Again, the actual record is to the contrary. While at Western State Hospital, after his rampage, Zamora *voluntarily* took anti-psychotic medications. CP 2545. Moreover, while he was at the Jail, it was Zamora who three times asked for mental health treatment, CP 2958, 3685, 3687, indicating a willingness to utilize such services and any prescribed treatment, and Zamora freely discussed Lamictal while at Okanogan

[2] As just one example, Zamora was involuntarily confined and treated under RCW 71.05 in 2003. This could only occur if he was a danger to himself or to others, or gravely disabled. RCW 71.05.150(1).

County Jail, CP 3700, hardly the conduct of one who willfully refused to be medicated.

Third, the amici also misrepresent the facts here by omitting reference to Zamora's incarceration in the Jail in August 2008 and his interactions with law enforcement in September. The factual recitations of each of two of the amici, WCIA memo at 8; State memo at 3, would have this Court believe that Zamora was released from incarceration on August 2, 2008 and that his rampage then occurred on September 2, a month later.[3] They ignore Zamora's *second* incarceration at the Jail in August 2008 and the call to Snohomish County law enforcement officers on September 1, the day before his rampage. On August 5, in that second incarceration, Zamora pounded the walls of his holding cell, hardly the conduct of a "non-violent" individual. CP 2465. Similarly, on September 1, he destroyed property in a bizarre fit that required intervention by *three deputies*. CP 2853.

Finally, left unsaid and *undisputed* by any of the amici, despite Zamora's own request and pleas of his mother, and notwithstanding requests from the County's own mental health contractors, at no point during his incarceration at the Jail did Zamora receive a mental health

[3] This misrepresentation is designed to further their contention that there was a "large gap" between Zamora's release from the Jail and his rampage. *E.g.*, WCIA memo at 7-8. This is plainly, however, an effort to adjust the factual narrative to the argument.

evaluation by appropriate mental health professionals, nor proper treatment of his mental health condition; his already problematic mental health condition *deteriorated during his confinement.* CP 2533, 2539.

When this Court considers the actual facts here, rather than those concocted or ignored by the amici, this Court, like the Court of Appeals, will conclude that the County owed the violence victims a duty of care and that factual questions on proximate cause abound, foreclosing dismissal of the violence victims' claims against the County on summary judgment.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

(1) The Court of Appeals Correctly Determined that the County Owed the Violence Victims a Duty of Care

(a) The Court of Appeals' Duty Decision is Entirely Consistent With This Court's Decision on "Take Charge" Duty

All three amici seek to read this Court's *Petersen* decision out of Washington law by distorting the Court of Appeals' analysis of the County's "take charge" duty to the violence victims under the *Restatement (Second) of Torts* §§ 315, 319. Review is not merited because the Court of Appeals correctly followed this Court's teachings in its "take charge" liability cases, as recounted in the violence victims' answer to the County's petition for review at 10-16.

WSAMA dramatically misstates the scope of the County's duty to take charge of Zamora. WCIA memo at 5-8.[4] It asserts that the County's "take charge" duty was confined to physical control to prevent Zamora from harming others by his escape or improper early release from confinement. *Id.* Similarly, the State *repeatedly* seeks to misshape the Court of Appeals decision, and the violence victims' argument, as one of imposing a duty to treat and rehabilitate violent offenders. *E.g.*, State memo at 2. That has *never* been the violence victims' position, nor did the Court of Appeals decision reflect such an analysis.[5] As in *Petersen*, the County's duty was to prevent the condition of the individual over which it had to control to deteriorate to such a degree that such individual foreseeably would cause harm to others, as Zamora did here.

In any event, the County itself never made the truncated duty arguments now advanced by WSAMA or the State at any time previously in the case and certainly *never* in its petition. This Court should not even

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[4] WSAMA and the State rely on a Court of Appeals decision, *Hungerford v. State*, 135 Wn. App. 240, 139 P.3d 1131 (2006), to argue that any "take charge" duty immediately ceases once the "take charge" period concludes, even if the negligence occurred, as here, during the "take charge" period. For the reasons set forth in the violence victims' answer to the petition for review, *Hungerford* is distinguishable as the negligence there occurred *after* the "take charge" period concluded. Answer at 14 n.18.

[5] Thus, the State's citation to case authority on a duty to rehabilitate or its emphasis on recidivism data is irrelevant to the issues at stake here. Again, the State seemingly lacked the courage of its new-found conviction as an amicus when it settled the violence victims' claims brought against it for its negligence in supervising Zamora and failing to address his manifest mental health problems.

consider such an argument raised for the first time in this Court only by an amici. *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 495 n.12, 120 P.3d 564 (2005).

Moreover, WSAMA's argument is not supported by *any* of this Court's "take charge" duty cases. In fact, none of those cases including *Petersen* (released WSH patient); *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992) (parolees); *Hertog ex rel. S.A.H. v. City of Seattle,* 138 Wn.2d 265, 275, 979 P.2d 400 (1999) (probationer); or *Joyce, supra,* (parolee), so narrowly construe the "take charge" conduct, limiting it only to preventing escapes and/or improper releases of an individual from custody. These cases generally involve improper supervision during the "take charge" period. If WSAMA's analysis were the law, and it is not, there would not have been a duty in *any* of those cases.[6]

Clearly, the County "took charge" of Zamora when he was confined in its Jail, as it *conceded* in the Court of Appeals. Op. at 15.

The aspect of the duty argument that the County does raise, as do the amici, is the extent to which a defendant may be liable for conduct of

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[6] The *Restatement (Second) of Torts* § 319 itself *nowhere* confines the "take charge" duty to situations involving an escape or improper release from control, as WSAMA seemingly *concedes*. WSAMA memo at 7 n.6. The comments to § 319 reveal that the "take charge" duty is not as truncated as advocated here by WSAMA. Indeed, comment a to § 319 makes this entirely clear: A, a private hospital for contagious diseases, releases B, who has scarlet fever, due to its staff's negligence in believing B is no longer infectious. B communicates the disease to D *after* the "take charge" period is over. A is liable to D. This case is no different.

the person over whom it took charge once the actual "take charge" control concludes. Pet. at 1; WCIA memo at 6-9; WSAMA memo at 3-5. But this Court has already answered that question in *Petersen*, a case the amici would essentially have this Court read out of Washington's "take charge" duty jurisprudence.[7] This issue is whether the wrongful conduct occurred during the period of take charge control. Here, it did. The County failed to evaluate or treat Zamora's *profound* mental health problems *while he was incarcerated in its Jail*; because those profound mental health problems were allowed to fester, unevaluated and untreated, he was a ticking time bomb upon his release waiting to go off, a fact only confirmed by his second incarceration at the Jail on August 5. Not unexpectedly, he then exploded.

It is important to recall that in *Petersen*, a patient with a long history of schizophrenia and abuse of the drug, PCP, or Angel Dust, who

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[7] In *Volk v. Demeerleer*, 184 Wn. App. 389, 337 P.3d 372, *review granted*, ___ Wn.2d ___ (July 8, 2015), Division III addressed the medical malpractice liability of psychotherapists in a case in which the plaintiff argued that the girlfriend and child of a mental health patient not involuntarily detained had a reduced chance of survival. The court's majority concluded that RCW 71.05.120(2) did not circumscribe the duty articulated by this Court in *Petersen*, narrowing it to specifically identifiable potential victims.

Volk supports the violence victims' position by reaffirming the scope of the duty in *Petersen*, particularly as it related to "take charge" liability. Unlike *Volk*, this is not an RCW 71.05 case. It is a "take charge" liability case under § 315 of the *Restatement*, exactly as it was in *Petersen*. The duty owed by the County was "to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of [Zamora]." *Taggart*, 118 Wn.2d at 217; *Joyce*, 155 Wn.2d at 310. The foreseeable harm is one falling within the "general field of danger." *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953).

had emasculated himself while high on the drug, was released from Western State Hospital after a series of involuntary hospitalizations. Five days *after* his release, the patient ran a red light operating a vehicle at 50-60 mph, high on drugs, colliding with the plaintiff's car, injuring her. The issue there was whether the State's psychiatrist was negligent in his treatment of the patient during the "take charge" period of control the State exerted over him during his confinement at Western State. The psychiatrist was negligent in authorizing the patient's release and failing to take precautions to protect others foreseeably affected by the patient's violent propensities. 100 Wn.2d at 428-29.

An additional aspect of *Petersen* involved the State's liability for the psychiatrist's negligence in failing to diagnose and treat the patient's schizophrenia *during* the "take charge" period, a condition whose symptoms were manifested subsequent to that period of control. The psychiatrist there believed that the patient was not schizophrenic, but suffering from schizophrenic-like symptoms from using PCP. *Id.* at 424. It was precisely for this reason that this Court found no error in the admission of evidence that the patient was schizophrenic and had raped a woman and killed her two parents after the automobile accident in which *Petersen* was injured. *Id.* at 438-42. Such evidence rebutted the

psychiatrist's contention that the patient had fully recovered from this schizophrenia at the time of his discharge from Western State.

The Court of Appeals appropriately understood this Court's "take charge" duty decisions when it stated:

> The counties contend that no duty can be imposed because any "take charge" relationship terminated once the counties released Zamora from custody. But this argument confuses the existence of a duty with the scope of duty, which is limited by the foreseeability of the danger to the victims. *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989) ("The concept of foreseeability limits the scope of the duty owed.").
>
> "Once the theoretical duty exists, the question remains whether the injury was reasonably foreseeable." *Joyce*, Wn.2d at 315 (citing *Taggart*, 118 Wn.2d at 217). The plaintiff's harm must be reasonably perceived within the general field of danger that should have been anticipated. *Christen*, 113 Wn.2d at 492. "'Foreseeability is normally an issue for the jury, but it will be decided as a matter of law where reasonable minds cannot differ.'" *Taggart*, 118 Wn.2d at 224 (quoting *Christen*, 113 Wn.2d at 492). Here, it was within the jury's providence to determine whether the injuries to the victims were reasonably foreseeable.

Op. at 18.

Review by this Court of the Court of Appeals' duty analysis, properly applying this Court's settled "take charge" duty precedents, is not merited.

(b) <u>This Court Should Not Be Affected by the Amici's Fiscal Pleas in Determining the County's "Take Charge" Duty to the Violence Victims</u>

All three amici are individual or collective governmental organizations, or organizations responsible for paying for governmental liability. They are entirely self-interested, having direct fiscal reasons for hoping that this Court will ignore its controlling precedents on "take charge" duty and causation. In discussing the actual "take charge" duty owed by the County to the violence victims, the amici hope to portray the Court of Appeals decision as one that "vastly" expands the present duty of jailers or creates a new duty all together that will increase costs to government.[8] Such arguments ring entirely hollow in light of existing law.

First, although some of the amici profess new-found concerns about forcing jail inmates to take anti-psychotic medications, *e.g.*, WCIA memo at 9-10, it is worth noting that these governmental amici have not evidenced such regard for the therapeutic or forensic needs of jail or correctional inmates in times past.

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[8] WCIA describes the Court of Appeals' decision as "a broad extension of tort liability to jailors for crimes committed by former jail inmates." WCIA motion at 2. The State asserts the Court of Appeals has created "new liability" "for failing to rehabilitate offenders and mental health patients to prevent harm to the public." State motion at 1. WSAMA then articulates what is actually at play for these self-interested amici when it references cities' alleged "limited financial resources available to them," WSAMA motion at 2, and the Court of Appeals' decision as saddling "the taxpaying public with an immense potential financial burden," created an alleged "unfunded mandate," WSAMA memo at 2, 4.

Recently, in *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, ___ F. Supp.3d ___, 2015 WL 1526548 (W.D. Wash. 2015), the federal district court was compelled by the routine and long-standing disregard of the rights of pretrial detainees in jail to address such detainees' right to pretrial competency services – the proper and timely evaluation of their mental illness.[9] The district court certified a class of such pre-trial detainees in local jails and ordered strict 7-day turnaround on pretrial competency evaluations after court orders for evaluations are signed, in order to avoid having such mentally ill persons languish in jail. It also ordered a 9-month limit on wait times for services, ordered the necessary staff and bed space to achieve the timelines in ordered, and ordered a long-term plan for competency services. *Id.* at *13.

The *Trueblood* decision fully evidences the fact that the amici's fiscal concerns about the need to provide mental health evaluations and treatment to jail inmates ring exceedingly hollow. Historically, when push comes to shove, jailers will readily avoid the rights of jail inmates to mental health services.

[9] As the court observed in its decision, the defendants "demonstrate a consistent pattern of intentionally disregarding court orders" resulting in contempt findings; the court determined that this was "a de facto policy of ignoring court orders which conflict with their internal policies." *Id.* at *14.

Moreover, for all their complaints that the Court of Appeals opinion somehow "vastly" expanded their mental health-related obligations to jail inmates, *that is simply untrue.*[10]

Unlike WSAMA or the State, neither of whom addressed the already-exiting duty owed by jailers to jail inmates to provide mental health services, WCIA correctly acknowledges that such a duty existed. WCIA memo at 4-5. Indeed, WSAMA goes so far as to misrepresent the law on the duty owed by jailors to jail inmates with respect to mental health services when it baldly claims: "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." WSAMA memo at 4.[11]

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[10] Moreover, left largely unaddressed by any of the amici is the fact that the Legislature has statutorily curtailed the scope of any liability for State and local government, treatment professionals, and law enforcement officers associated with decisions on mental health treatment of patients. RCW 71.05.120(1). *See, e.g., Poletti v. Overlake Hospital Med. Ctr.*, 175 Wn. App. 828, 303 P.3d 1079 (2013) (hospital decision to discharge voluntarily admitted mental patient without in-person evaluation by county designated mental health professional subject to gross negligence standard of statute); *Estate of Davis v. Dep't of Corrections*, 127 Wn. App. 833, 113 P.3d 487 (2005) (county immune from liability for incomplete unreasonable treatment of murderer who was not detained under RCW 71.05 and killed victims because treatment, though negligent, did not rise to level of bad faith and gross negligence). These cases make clear that a duty exists to victims of mental patients, although the duty is limited.

[11] WSAMA's statement even misses the actual judgment and sentence entered in Zamora's case. In addition to the duty to provide mental health care to Zamora discussed *infra*, the court sentenced Zamora to 12 months of community supervision. CP 3694. As a condition of such supervision by the County and the Department of Corrections, a "take charge" control over Zamora, Zamora was to receive both mental health evaluation *and treatment*, and was ordered to comply with any treatment recommendation. *Id.*

Contrary to WSAMA's assertion, for which it offers no authority and pointedly *ignores* this Court's decisions cited by WCIA, this Court has made clear that a jailer has a duty to provide mental health services to an inmate during the inmate's incarceration. *It is precisely for this reason that the duty articulated by the Court of Appeals should have no fiscal impact; the duty is required by already-existing law.* RCW 70.48.130(1) requires that all jail inmates receive appropriate and necessary medical care.

In *Shea v. City of Spokane*, 90 Wn.2d 43, 578 P.2d 42 (1978), this Court determined in a per curiam opinion that a municipal corporation could not delegate its duty to provide health care to a jail inmate, specifically approving the "analysis, rationale, and conclusion" of a Court of Appeals opinion that articulated the duty of municipalities as one of providing "competent and adequate" medical care to jail inmates, given the custodial relationship between them. *See also, Kusah v. McCorkle*, 100 Wash. 318, 323, 170 Pac. 1023 (1918) (sheriff's duty to jail inmate once inmate is in custody is to "keep him in health and safety."). In *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635-36, 244 P.3d 924 (2010), this Court made clear that this duty to provide health care to jail inmates included a duty to provide mental health services because the jailer-inmate custodial relationship is a special relationship under

Washington tort law. The City there *conceded* that an instruction stating that the City had a "duty to provide for the mental and physical health and safety needs of persons locked in the jail" was a correct statement of the law. *Id.* at 636.[12]

The centerpiece of the State's argument in support of review by this Court is that the Court of Appeals decision conflicted with this Court's decision in *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990). State motion at 3; State memo at 4-6. In making this argument, the State is deliberately obtuse to the facts and analysis in that case and is bent on attempting to re-frame the Court of Appeals duty analysis under § 315 of the *Restatement*, and the violence victims' arguments, as one of a "duty to treat and rehabilitate" all jail inmates, when *clearly* that has *never* been the violence victims' argument or the Court of Appeals' analysis.

First, the *Melville* court found that the State had no duty to provide mental health services to prison inmates based on general statutes describing the public safety purposes of the Department of Corrections. This aspect of the Court's opinion is now questionable authority in light of

[12] The only way the duty articulated by the Court of Appeals can have profound fiscal representations is if jailers are routinely violating jail inmates' rights to mental health services as those jailers have routinely violated pretrial detainees' rights to competency services as in *Trueblood*. In effect, amici ask this Court to truncate the duty owed by the County as a jailer to jail inmates to provide them mental health evaluation and treatment during their incarceration by rewarding the County with limitations on "take charge" liability when it deliberately discourages or fails to offer mental health evaluation or treatment to inmates.

Gregoire.[13] In the latter portion of the *Melville* court's decision, it stated that even if a duty existed, any mental health services were voluntary only and there was no evidence the inmate would have utilized the services. *Id.* at 40-41.[14] Here, the record is decidedly to the contrary where Zamora himself sought mental health services while in the Jail and readily accepted anti-psychotic medication when he was at Western State Hospital. *Melville* is thus entirely distinguishable.

In sum, despite all of the fears expressed by amici, the duty owed by the County here arises out of the well-worn contours of its already-existing special relationship to inmates to provide mental health services to those inmates during their incarceration.[15] Further, liability for

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[13] There is real irony in the State making this argument when it settled with the violence victims for its role in failing to prevent Zamora's rampage of violence, stipulating to a series of judgments against it in the face of the violence victims' allegations that it failed to monitor Zamora after his release and did not comply with court-ordered mental health treatment, and its specific allegation that the County was at fault for Zamora's violence. CP 24-40, 45-62, 3848-49.

[14] The argument by WCIA that inmates cannot be forced to take anti-psychotic medication, WCIA memo at 9-10, while interesting, is ultimately irrelevant to the *duty* issue presented by this case. It is a matter that goes to the question of breach, a question of fact for the jury. *Hertog*, Wn.2d at 275.

In any event, as noted by the violence victims *supra*, there was ample evidence that Zamora would *voluntarily* have accepted mental health treatment, *had the County ever properly evaluated his condition while in its Jail, something it never did.* Zamora himself sought mental health services while in the Jail, implying he would have complied with any treatment offered; he took Lamictal until its use was discontinued at the Okanogan County Jail; he voluntarily accepted mental health treatment at Western Hospital after his murderous rampage.

[15] In fact, the failure to provide such mental health services violates the Eighth Amendment, *Brown v. Plata*, ___ U.S. ___, 131 S. Ct. 1910, 1928, 179 L. Ed.2d 969

municipalities like the County is not automatic, as the amici imply; in order for claimants who are the victims of any inmate's violence to recover in tort, they must still demonstrate first that a county or other jailing authority breached the duty to provide requisite mental health services, that the victims were within the field of danger from the county's failure to provide such services, and that any harm occasioned to the victims proximately resulted from the breach.

(2) The Court of Appeals Decision Correctly Analyzed the Causation Issues Here

WSAMA does not address the issue of causation, but WCIA does so.[16] WCIA confines its argument to legal causation rather than "but for" proximate cause. WCIA memo at 2-4.[17] Because the duty and legal causation analyses are akin, this Court should deny review on the legal causation question for the same reasons it should deny review of the Court of Appeals' decision as to duty.

(2011), and could subject a County to liability under 42 U.S.C. § 1983 for deliberate indifference to those mental health service needs.

[16] Without ever mentioning the term "legal causation," the State also appears to make a legal causation argument that is essentially an outgrowth of its duty argument. State memo at 8-10. This Court should reject the State's "legal causation" argument for the same reasons its duty argument fails.

[17] It is highly likely that WCIA did not address "but for" causation, knowing it is ordinarily a *question of fact*, as this Court explained in other take charge liability cases like *Taggart*, 118 Wn.2d at 225-28; *Hertog*, 138 Wn.2d at 275, and *Joyce*, 155 Wn.2d at 322. WCIA does not document how the Court of Appeals' treatment of "but for" causation was erroneous. Op. at 23-26.

Moreover, as noted in the violence victims' answer to the County's petition at 19-20, the County only raised legal causation as an afterthought both in the Court of Appeals and in its petition to this Court and the trial court did not rest its opinion on legal causation. As noted *supra,* this Court should not grant review based on an issue largely addressed by amici rather than a party in the case.

The only legal arguments offered by WCIA that actually touch upon causation involve its discussion of this Court's decisions in *McKown v. Simon Property Group, Inc.,* 182 Wn.2d 752, 344 P.3d 661 (2015) and *Kim v. Budget Rent-a Car Sys., Inc.,* 143 Wn.2d 190, 15 P.3d 1238 (2001). WCIA memo at 6-8. As explained in the violence victims' answer to the County's petition for review, *McKown* is not a "take charge" liability case and addresses *duty,* not causation; the Court of Appeals' treatment of foreseeability in the duty context here is fully consistent with *McKown.* Answer at 19 n.25.

In *Kim,* this Court found no duty was owed by a rental car company to a person who was injured in an automobile accident by a person who took a rental vehicle in which the company negligently left the keys. The Court also found no legal causation given the fact that the thief had time to go home with the vehicle, go to sleep, and become intoxicated by alcohol and marijuana before becoming involved in the collision; his

actions were not foreseeable to the rental car company. By contrast, as the Court of Appeals noted, Zamora's actions, based on evidence adduced in this case, were foreseeable. The Court of Appeals legal causation was fully consistent with this Court's "take charge" decisions in *Petersen* and *Joyce*, rejecting the very same legal causation arguments amici now raise.

Just as this Court has *repeatedly* rejected legal causation arguments in "take charge" liability cases beginning with *Petersen*, this Court should deny review on this issue here.

D. CONCLUSION

Nothing offered in the various amici memoranda should dissuade this Court from concluding that the Court of Appeals correctly determined under this Court's well-established authorities that the County owed a duty to the victims of Isaac Zamora's violent rampage where it "took charge" of Zamora, it knew of his deteriorating mental health, and yet it neither evaluated nor treated his problems when he was incarcerated in its Jail or upon his release from the Jail as it had been ordered to do by the sentencing court. Similarly, the Court of Appeals correctly resolved the causation issues here.

This Court should deny review. RAP 13.4(b).

DATED this 24th day of August, 2015.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I emailed a copy for service a true and accurate copy of the Motion for Leave to File Over-Length Answer to Amici Memoranda and the Answer to Amici Memoranda in Supreme Court Cause No. 91644-6 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 12th, 2015, at Seattle, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick/Tribe

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Good Afternoon:

Attached please find the Motion for Leave to File Over-length Answer to Amici Memoranda and the Answer to Amici Memoranda in Supreme Court Cause No. 91644-6 for today's filing. Thank you.

Sincerely,

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