No. 33992-1-III

COURT OF APPEALS,
DIVISION III,
OF THE STATE OF WASHINGTON

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AHMET HOPOVAC,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS, and KIMBERLY ALLEN

Respondents.

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# APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

The extent of the duty owed by the Washington State Department of Corrections (hereinafter, "DOC") to a supervisee under Restatement (Second) of Torts § 314A is a matter of first impression in Washington. As explained in Appellant's Opening Brief and further clarified *infra*, the Restatement and Washington case law point to the existence of this duty, but the trial judge was hesitant to apply the plain language of the Restatement to measure the scope of the duty proportional to the limits on self-protection imposed by the DOC in its custodial supervision.

The Restatement (Second) of Torts § 314A provides:

§ 314 A. Special Relations Giving Rise to Duty to Aid or Protect

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) **One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.**

Restatement (Second) of Torts § 314A (Am. Law Inst. 1965) (emphasis added). Although incarcerated individuals are not specifically mentioned in the language of § 314A, Washington case law has established that jailors owe a duty of care and protection to individuals in physical custody under § 314A(4). *See, e.g. Shea v. City of Spokane*, 17 Wn.App. 236, 562 P.2d 264 (1977); *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010). Additionally, Washington courts have found § 314A "special relationship" duties in a variety of relationships not specified in the Restatement: school to student (finding students' loss of ability to protect selves creates duty in the school analogous to that of innkeepers' duty to guests), carrier to passenger, employer to employee, business to customer and hospital to patient. *See Caulfield v. Kitsap County*, 108 Wn.App. 242, 255-56, 29 P.3d 738 (2002) (collecting cases) (internal citations omitted).

The parties and the trial court below agree that no Washington case law to date addresses the scope of a DOC duty to individuals under community supervision, whose ability to protect themselves is diminished by the terms of their supervision but not to the extent of physical incarceration. Rep. of Proceedings of Summ. J. Hr'g. at 16. A review of the case law of our sister states of California, Oregon and Idaho likewise yields no guidance on the issue.

The court below, while acknowledging a need for higher court guidance, did seem to find a duty to ensure "normal opportunities for protection" as described in § 314A. *Id.* at 27-29. The court erred, however, in defining the scope of the duty by finding that individuals on community supervision are entitled only to those opportunities for protection afforded by the terms of their supervision:

> So the question then becomes are we talking about normal opportunities as it applies to the individual who has no restrictions on their liberty or are we talking about normal opportunities as it applies to somebody who has restriction on their liberty as a result of their criminal history.
>
> In this case, normal opportunities the court believes more appropriately would be normal opportunities as they pertain to somebody who has had some restrictions placed on them as a result of a prior criminal history.

*Id.* at 27-28. This finding is inconsistent with *Shea*: prisoners in complete physical custody have severe restrictions on their normal opportunities for protection as a result of criminal history and would not be protected under the trial court's logic, yet the *Shea* line of cases affords such prisoners a duty of protection on the part of their jailors which would not be available under the trial court's reasoning. This Court should clarify that those in community custody, who have had their ability to protect themselves limited by the terms of custody, are owed a duty of protection directly proportional to the limits imposed on them.

## II. Restatement (Second) of Torts § 314A, Washington case law and public policy support the existence of a duty of protection in proportion to the degree of limitation on an individual's ability to protect herself.

The language of § 314A imposes a duty on one who "takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection." Restatement (Second) of Torts § 314A(4) (Am. Law Inst. 1965). "Tak[ing] the custody of another" does not require complete physical custody of jail or prison to create a "special relationship." *Taggert v. State*, 118 Wn.2d 195, 223, 822 P.2d 243 (1992). Rather, Washington courts have focused on the deprivation of normal opportunities for protection as the source of the duty. For example, a jail has an absolute duty of care and protection for an inmate in physical custody, precisely because the inmate lacks the ability to care for himself. *Shea*, 17 Wn.App. at 242. Similarly, a convalescent center owes a duty of reasonable care to a patient whose physical condition has robbed her of all ability to care for herself. *Shepard v. Mielke*, 75 Wn.App. 201, 205, 877 P.2d 220 (1994). A nursing home likewise has a duty to a patient who is disabled and unable to protect herself. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 46, P.2d 420 (1997). In each of these cases, the Court noted that the individual's inability to protect or care for himself gave rise to a

duty to provide that care and protection that was otherwise unavailable to them.

Washington courts also recognize a duty for those with a special relationship to persons who retain some ability to protect themselves. *See, e.g., id.* (noting that the special relationship between a group home and a profoundly disabled person is more significant than that between an innkeeper and a guest, because the guest is merely in unfamiliar surroundings, not absolutely deprived of the ability to protect himself). *See also Kaltreider v. Lake Chelan Comm. Hosp.*, 153 Wn.App. 762, 769, 224 P.3d 808 (Shultheis, J., dissenting) (noting that *Niece* and *Shepard* identify a range of relative vulnerability in special relationships, and that the scope of the duty owed is in direct relation to the degree of impairment); *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 203-04, 943 P.2d 286 (1997) (noting that the duty arising from a special relationship does not make defendant completely responsible for plaintiff's safety in the case of a business-customer relationship); *Gregoire*, 170 Wn.2d at 645-46 (Madsen, J., dissenting) (explaining that different levels of duty correspond to different levels of incapacity).

Here, Mr. Hopovac's ability to protect himself was directly impaired by the conditions of his supervision: specifically, the conditions that he remain in Grant County and refrain from arming himself. Because

his supervision created a "special relationship" with the DOC, the reasoning and policy behind Washington case law suggests that the DOC had a duty to protect him to the degree that the terms of his supervision prevented him from protecting himself from foreseeable harm.[1]

## III. Contrary to DOC's assertion, Mr. Hopovac did have a special relationship with DOC at the time DOC breached its duty to protect him.

As explained *supra*, a § 314A special relationship exists between community supervisees and the DOC. *Taggert*, 118 Wn.2d at 223. Physical incarceration is not required for the relationship to arise. *Id.* DOC cites *Husted v. State* to support its claim that the special relationship was somehow broken by Mr. Hopovac's lack of compliance with terms of his supervision. Br. of Respondents at 9-10. However, as noted by the court below, *Husted* is not applicable to an analysis of a § 314A duty. Rep. of Proceedings of Summ. J. Hr'g. at 27. *See also Husted v. State*, 187 Wn.App. 579, 348 P.3d 776 (2015) (describing a DOC duty under § 315, not § 314A). Furthermore, Mr. Hopovac was in partial compliance with his supervision, as he appeared for a scheduled check-in with his supervisor, at which time the DOC refused to help or protect him after being warned of the danger to him. CP 137. DOC's breach of its duty to

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[1] Foreseeability is not at issue here: Mr. Hopovac explicitly informed DOC of his well-founded fear of being attacked by the gang.

Mr. Hopovac occurred, not on the date of the attack, but on May 3, 2011, when he appeared at the DOC supervision office as scheduled, requested help, and was refused. *Id.* He had not returned for supervision by the time of the attack directly in response to the DOC's refusal to help protect him. *Id.* He went into hiding in a futile attempt to avoid the attack. *Id.*

## IV. FACTS ARE IN DISPUTE

DOC asserts that Mr. Hopovac "does not contend that any disputed material facts prevent the Court from reaching a decision regarding the existence of a legal duty." Br. of Respondents at 7. This is correct. Mr. Hopovac would clarify that this does not mean that he accepts Respondents' version of the facts. To the contrary, the existence of duty is a legal determination for the Court, and the scope of that duty is a factual determination for a jury. As the DOC's extensive counterstatement of the facts in its brief shows, there is a wealth of disputed facts for fact-finder examination. *See generally* Br. of Respondents. However, the instant appeal involves the threshold issue of whether DOC has any duty to its supervisees under § 314A(4), not any dispute as to the facts brought forth by Mr. Hopovac.

## V. Contributory negligence is not a bar to recovery in Washington.

DOC makes a lengthy recitation of the facts suggesting that Mr. Hopovac brought about his injuries through his own actions. Br. of

Respondents at 12-13. Contributory negligence was removed long ago as a bar to negligence claims in Washington. *Godfrey v. State*, 84 Wn.2d 959, 962, 530 P.2d 630 (1975). Any fault of Mr. Hopovac's is properly a comparative negligence issue for a jury. RCW 4.22.005. It is irrelevant to this appeal regarding the threshold issue of duty.

## VI. Conclusion and Prayer for Relief.

The Restatement (Second) of Torts § 314A as interpreted by Washington courts indicates that the Department of Corrections owes a duty to protect its community supervisees from harm at the hands of third parties, proportional to the limitations imposed by the DOC on the supervisees' ability to protect themselves. Accordingly, Mr. Hopovac respectfully requests that this Court reverse the trial court, and remand this case to trial on the issue of whether the DOC breached its duty, causing Mr. Hopovac's damages.

Respectfully submitted this 17th day of August, 2016.

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