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No. 91644-6

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NO. ~~89256-3~~

SUPREME COURT
OF THE STATE OF WASHINGTON

FRED BINSCHUS, individually and as Personal
Representative of the Estate of JULIE ANN BINCHUS, et
al.,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF
CORRECTIONS,

Defendant,

And

SKAGIT EMERGENCY COMMUNICATIONS
CENTER, dba "Skagit 911," an interlocal government
agency, et al.,

Respondents.

BRIEF OF RESPONDENT OKANOGAN COUNTY

CHRISTOPHER J. KERLEY, #16489
Evans, Craven & Lackie, P.S.
818 W. Riverside Ave., Ste. 250
Spokane, WA 99201
(509) 455-5200
(509) 455-3632 facsimile
ckerley@ecl-law.com
Attorneys for Respondent Okanogan County

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I. INTRODUCTION

On May 29, 2008, Isaac Zamora (Zamora) arrived as a new inmate at the Okanogan County Jail. He was sent there from the Skagit County Jail pursuant to a housing contract between Skagit County and Okanogan County to serve out the remainder of a Skagit County sentence for second degree malicious mischief and possession of a controlled substance without a prescription.

Zamora's stay at the Okanogan County Jail was entirely uneventful. He was housed in a minimum security dormitory module or pod. He did not make any general or specific threats of violence. He did not engage in any assaultive, disruptive, or belligerent behavior. He did not display any conduct or make any statements suggesting that he had a mental health problem. He did not submit any "kites" asking to see a mental health professional. No fellow inmate, including those housed in the same pod as Zamora, complained of any threatening, unusual or aberrant behavior on the part of Zamora.

On Saturday, August 2, 2008, having served out his sentence, Zamora was released from the Okanogan County Jail and given a bus ticket to Everett, Washington.

Sixty-five days later, on September 2, 2008, after intervening contacts with multiple healthcare providers, the Washington State

Department of Corrections, a DSHS psychiatrist, Skagit County law enforcement and an additional stay in the Skagit County Jail, Zamora went on a random shooting spree, starting in his parents' neighborhood in rural Alger, Washington and eventually moving to southbound I-5. By the end of the rampage, Zamora had killed six people and wounded six others. The spree concluded with Zamora driving into the parking lot of the Skagit County Sheriff's Office in Mount Vernon, and turning himself in, announcing to Skagit County law enforcement that he was "doing God's will because God told him to kill evil." Zamora was ultimately diagnosed a paranoid schizophrenic and Appellants' psychiatric expert opined that, at the time of the shooting, Zamora was experiencing a psychotic episode.

Appellants alleged Okanogan County was negligent, and that its negligence proximately caused the rampage on September 2. On May 29, 2013, the trial court granted summary judgment in favor of Okanogan County, ruling that Okanogan County did not, under the circumstances, owe a duty to the Appellants and that Okanogan County's acts/omissions did not proximately cause Zamora's rampage. This appeal followed.

For the reasons set forth below, summary judgment in favor of Okanogan County should be affirmed.

II. STATEMENT OF CASE

A. Nature of Okanogan County Jail and Housing Contract with Skagit County

The Okanogan County Jail is a 183 bed facility located in Okanogan County, Washington. *CP 3648*. The Corrections Officers serving in the jail are all graduates of the Washington State Corrections Academy. *Id.*

The jail has a medical staff which at all material times, consisted of two Medical Officers and a jail Medical Provider. *CP 3648*. During the time period of May 1, 2008 to September 1, 2008, the corrections Medical Officers were Miranda Evans and Mitzy Green, and Kevin Mallory, PA-C was the Medical Provider. *Id.*

During the time period referenced above, Okanogan County, pursuant to RCW 70.48.090, had a contract with Skagit County for the housing of Skagit County Jail inmates. *CP 3648*. That contract was entered into on May 8, 2006. *Id.*, and its effective term was October 19, 2006 to December 1, 2009. *Id.* During that approximately three years, a total of 174 Skagit County jail inmates were housed in the Okanogan County jail for all or part of their sentence. *CP 3644-49. CP 3649.*

During the tenure of this contract, when a Skagit County inmate was sent to Okanogan, Skagit County would prepare a "Skagit County Jail

Transport Form" that was typically sent to Okanogan County in advance of the transport. *CP 3649*. This form identified the inmate, provided basic information about the Skagit County charges for which the inmate was serving time, indicated whether the inmate presented a risk of escape or violence, and stated the inmate's release date. *Id.*

When a contract inmate was sent from Skagit County to Okanogan County, medical records were sometimes sent with the inmate, along with a "Transfer of Medical Information" form. *CP 3649*. The contract between Okanogan County and Skagit County provided that when a Skagit inmate was sent to Okanogan County, all medical records were to be sent with that inmate. *CP 3649*. However, during the performance of the Skagit County-Okanogan County contract, Skagit County developed a practice where it would not necessarily send all records with an inmate, but only those dealing with current problems which Skagit County deemed pertinent to the inmate's management while in the Okanogan County Jail. *Id.*

B. Zamora's Stay at Okanogan County Jail

On May 29, 2008, Isaac Zamora arrived at the Okanogan County Jail in a transport van, along with four other inmates from Skagit County. *CP 3650*. The Skagit County Jail Transport form sent to Okanogan County in advance indicated that Zamora did not present a risk of violence or

escape, and Zamora's time-served, or "T/S" (release) date, was identified as August 2, 2008. *CP 3669*. The form identified the Skagit County charges for which Zamora was serving jail time were identified as malicious mischief in the second degree and possession of a controlled substance without a prescription. *Id.*¹

¹ Appellants make much of the Judgment and Sentence issued by the Skagit County Superior Court on May 15, 2008. They contend the Judgment and Sentence required Okanogan County to give Zamora a mental evaluation while he was in jail. That argument should be rejected for at least three reasons. First, the Judgment and Sentence was not sent to Okanogan County and there is no evidence Okanogan County was ever aware of this provision. Second, by the plain language of the document, submission to a mental evaluation and drug evaluation were conditions to be satisfied after Zamora's release from jail, along with other stated conditions like Zamora reporting to the DOC office in Mount Vernon not later than 72 hours after his release. Although unchecked in the form, the document also identified other frequently ordered conditions of community supervision or community custody, such as remaining in prescribed geographic boundaries specified by the community corrections officer, notifying the community corrections officer of any change in the defendant's address or employment, and not residing in a community protection zone. Obviously, these are all conditions of community supervision or community custody that can only be satisfied after the defendant is released.

Third, it would appear as though the Skagit County Superior Court lacked the authority to order either a mental health evaluation and treatment or a drug evaluation. *See* RCW 9.94A.500. A sentencing in court may only require an offender to "comply with any crime related prohibitions" as a condition of community custody. RCW 9.94B.050(5)(e). A "crime related prohibition" is "an order of a court prohibiting conduct that directly related to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030 (11); *State v. Julian*, 102 Wn.App. 296, 304 9 P.3d 851 (2000); *see also* Former RCW 9.94A.030 (13) (2006). An order requiring a mental health evaluation and treatment requires specific mental health findings and a presentence report. *See* RCW 9.94A.500; *State v. Lopez*, 142 Wn.App. 341, 174 P.3d 1216 (2007); *review denied*, 164 Wn.2d 1012 (2008) (court may not order mental health treatment as a condition of community custody where the court has not obtained or considered a presentence report or mental status evaluation and has not made findings that the defendant was a person whose mental illness contributed to his crimes); *State v. Brooks*, 142 Wn.App. 842, 176 P.3d 549 (2008); *State v. Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003). The court made no mental health findings.

Similarly, an order requiring a drug evaluation requires a chemical dependency screening report. *See* RCW 9.94A.500. The court did not order a screening report and specifically omitted from the J&S a finding that chemical dependency contributed to Zamora's crime. *CP 3494-3501*.

On arrival at the Okanogan County Jail, Zamora went through a booking process that included the booking Corrections Officer asking him a series of medical questions. *CP 3650*. The Correction Officer performing the intake completed a form during this process wherein she indicated Zamora was conscious and mentally alert, had no visible signs of injury or illness requiring care, that his behavior did not suggest a risk of suicide, or a risk of assault to staff or other prisoners, that the only medication Zamora was taking was Oxycodone, and that he was not seeing a mental health provider. *CP 3678-79*. Corrections Officers performing intake assessments are trained to watch for signs of mental illness or problems. *CP 3650*. None were noted. *Id.*, *CP 3678-79*.

Skagit County also sent certain medical records to Okanogan County contemporaneous with Zamora's transfer. *CP 3649*. The records were in a package, sent on the transport van, with a cover sheet captioned "Transfer of Medical Information." *CP 3671*. This form identified Zamora's current medical status as "right clavicle fracture." *Id.* The medical records in the package all related to this orthopedic issue and included a right clavicle x-ray report, a chart note reflecting a medical visit Zamora had in the Skagit County Jail regarding his right clavicle, and the medication log for May 2008. *CP 3671-76*. The medication log listed medications Zamora had been prescribed for his right clavicle pain:

Hydrocodone and Naproxen. *CP 3673*. It also listed "Lamictal", an anti-seizure medication that is sometimes prescribed off label as a mood stabilizer. According to the log, Zamora regularly refused that medication. *Id.*, *CP 3700*.

Based on the information provided by Skagit County and Zamora's behavior during the booking process, he was classified as a minimum custody inmate and housed in F module or "mod." *CP 3650*. F-mod is a dormitory style module Okanogan County uses for inmates without any special needs or risk factors. *Id.* This type of module has multiple bunk beds in an open, dormitory setting, and a private restroom. *Id.* A large viewing window allows corrections officers to observe inmates in F-Mod at all times. *Id.*

Corrections Officers check all mods on a fixed schedule, roughly every 60 minutes, and a record is made if anything unusual occurs. *CP 3650*. In addition, inmates are constantly being moved around the jail, including from one mod to another, to the infirmary, and to and from visiting areas. *CP 3651*. Corrections Officers observe inmate behavior when these moves take place. *Id.* There was no reference in the inspection records for F-Mod, between May 29, 2008 (the day of Isaac Zamora's arrival), and August 2, 2008 (the day of his release) to Zamora, at any time, displaying unusual or inappropriate behavior. *CP 3650*.

When an inmate arrives at the Okanogan County Jail, they are told they can request assistance or voice a concern by using the "Kite" system. *CP 3650*, and there is a supply of "kite" forms located in every mod. *Id.* While at the Okanogan County jail, Zamora did not submit any "kites" asking to see a mental health counselor or expressing any mental health issues or concerns. *CP 3650-51.*

Inmates sometimes submit kites to express a concern about the behavior of a fellow inmate, particularly if that inmate is located in the same mod or pod. *CP 3651.* There is no record that any Okanogan County Jail inmate used the kite system, or any other method, to make a complaint or identify a concern about Zamora's behavior. *CP 3651.*

The day after he arrived at the Okanogan County Jail, Zamora was seen by jail Medical Provider, Kevin Mallory, PAC, during a routine "med call." *CP 3700.* The visit was the result of Zamora having submitted two "kites" regarding his shoulder. *Id.* Mr. Mallory evaluated Zamora and, during this evaluation, discussed the Skagit County medication log with him in the presence of Medical Officer Miranda Evans. *Id.* Mr. Mallory noted that the medication log indicated Zamora regularly refused to take Lamictal while in the Skagit County Jail. *Id.* Mr. Mallory asked Zamora if he wanted to be continued on Lamictal, and Zamora replied in the negative. *Id.* Given that, and the absence of any behavior during this

medical encounter that indicated Zamora had a mental health issue, Mr. Mallory decided not to continue that medication. *Id.*

C. Zamora's Release From Okanogan County Jail

Zamora was released from the Okanogan County Jail on August 2, 2008, his "time served" ("T/S") date as identified by Skagit County. *CP 3651*. Because August 2, 2008, was a Saturday, and there was no "chain" transport van running to the westside of the state, Zamora, per Okanogan County policy and practice, was escorted to the bus station in Okanogan and given a ticket home. *CP 3651-52*.

D. Impact on Okanogan County Jail of Skagit Records Not Sent to Okanogan County

During the course of discovery, Okanogan County learned that Skagit County had not sent to Okanogan County records indicating that, early during his stay at the Skagit County Jail, Zamora had interacted with Skagit County Mental Health personnel.

Kevin Mallory, PA-C reviewed the Skagit County mental health records that were not sent to Okanogan County. *CP 3701*. If these records had been in Zamora's medical file when Mr. Mallory saw Zamora during the med call visit referenced above, or if Mr. Mallory had otherwise been made aware of these records or their contents, it would not have changed

the way in which Mr. Mallory treated Zamora at the Okanogan County Jail. *Id.*

Okanogan County reserved the right to refuse an inmate from Skagit County, and that had happened in the past. *CP 3652.* Okanogan County would not accept a Skagit County inmate with a serious psychiatric problem. *Id.* However, merely because a Skagit County inmate, at one time during his incarceration in the Skagit County jail saw a mental health professional for a mental health concern would not keep Okanogan County from accepting that inmate. *Id.* If the Skagit County mental health records had been sent with Zamora on May 29, 2008, Okanogan County would not have rejected Zamora and sent him back to Skagit County. *CP 3652-53.* Rather, Okanogan County would have monitored Zamora and based its decision on whether to continue housing him on his institutional behavior. *CP 3653.* As indicated above, during his stay at the Okanogan County jail, Zamora did not display any behavior or make any statements which presented a management problem or indicated Zamora presented a risk to himself or others in the institution, or that he had a significant mental problem. *Id.*

E. **Zamora's Interaction With Law Enforcement, Skagit County, Department of Corrections, Healthcare Providers and DSHS Psychologist Between August 2, 2008 and September 2, 2008.**

On August 5, 2008, three days after his release from the Okanogan County Jail, Zamora was arrested at his parents' home in Alger on an outstanding warrant (failure to appear in another criminal case), and jailed overnight in the Skagit County Jail. He was released on August 6, 2008 on his own recognizance. *CP 3505-06. CP 3549-3577.*

The day he was released from the Skagit County Jail, Zamora visited a local hospital emergency room complaining of nausea and vomiting. *CP 3511-12.* He was given an anti-nausea medication and released. *CP 3513.* The ER nurse did not note any symptoms of a mental health crisis. *CP 3516-17.*

On August 13, 2008, a 911 hang-up call originated from Zamora's parents' home. *CP 3549-3577.* A Skagit County Sheriff's Deputy responded to the residence and spoke with Zamora, and his mother, Denise. *Id.* Both denied making the call and no further action was taken. *Id.*

On August 18, 2008, a 911 caller reported that someone was riding a motorcycle on state land in Alger. *CP 3507-08.* A Skagit County Sheriff's Deputy responded and contacted Zamora near his parents'

residence. *Id.* The deputy told Zamora not to go on to state property. *Id.*; *CP 3549-3577.*

A short while later, Zamora was involved in a motorcycle accident on his parents' property and reportedly injured his shoulder. *CP 3509. CP 3549-3577.* He was taken by ambulance to the hospital for care. *CP 3519-20.* The ER doctor determined Zamora did not meet the detention criteria for a "psychoactive evaluation," and had no homicidal or suicidal ideations and "had adequate decisional capacity to decline care." *CP 3521-22.*

On September 1, 2008, Zamora and his father met with a psychologist, Dr. Silvero Arenas, who had been contracted by the State Department of Social and Health Services to assess Zamora for eligibility for state general public assistance. *CP 3538-40.* While Dr. Arenas was not able to conduct a full assessment because of a general lack of cooperation from Zamora, Dr. Arenas testified at his deposition that Zamora did not, in his opinion, present an imminent danger to himself or others. *CP 3541.*

The next day, September 2, 2008, Zamora embarked on the shooting rampage.

F. **Appellants' Causation Theory and Supporting Expert Testimony**

Appellants' overarching causation theory is that, on September 2, 2008, Zamora was schizophrenic and experiencing a psychotic episode and that this episode would have been prevented if Zamora had been on an anti-psychotic medication. The deposition of Appellants' expert Csaba Hegyvary, MD, a psychiatrist, included the following testimony:

- A basic psychiatric assessment would have entailed a good psychiatric interview, lasting from three to four hours, which would have included a good history from the patient. *CP 3610-11*. It would also have involved attempts to obtain collateral history from family members, parents, friends and relatives. *CP 3610*.
- If a patient refuses to allow collateral contacts, this cannot be done and "the actual diagnosis is delayed." *CP 3610*.
- The symptoms of schizophrenia come and go. One of the ways you can detect people who are malingering a psychosis is if the person says they hear things all the time. "But nobody [with actual schizophrenia] does. [The symptoms] come and go." *CP 3613-14*.
- Because schizophrenia is an episodic disorder, as a psychiatrist one "waits a couple of months before you make up your mind." *CP 3622*.

- Whether it would have been feasible to get a court order in Zamora's case would depend on how the case was presented to the court. Whether the court would have ordered it, "he has no way of knowing." *CP 3626*.

- Regarding whether there was a point in time prior to the September 2 murders where Zamora met the standard for involuntary commitment or treatment under the Washington State statute, in Dr. Hegyvary's opinion, by the middle of August Zamora was at the stage where, by the description of his behavior by his parents, he was profoundly disturbed. *CP 3626*. That was the moment when Dr. Hegyvary believes an experienced MHP would have decided that Zamora needed involuntary treatment. *Id.* Dr. Hegyvary's opinion about whether Zamora, in mid-August, was an imminent danger is derivative of the perceptions of Zamora's parents. *CP 3627*.

- Based on the history Dr. Hegyvary reviewed, there was nothing [in the records] to suggest that, prior to September 2, 2008, Isaac Zamora was a compliant patient for purposes of mental health treatment or drug treatment. *CP 3629*. He is not aware of any evidence that Zamora would have consistently taken medication [had it been prescribed]. *Id.*

- With respect to any serious treatment for Zamora's underlying behavior, prior to September 2, 2008, what the records show is non-compliance on the part of Zamora. *CP 3629*.

- Given Zamora's documented history of non-compliance with mental health treatment [before September 2, 2008] Dr. Hegyvary cannot say on a more probable than not basis that if Zamora had been asked to see a mental healthcare professional while in the Okanogan County Jail he would have (a) agreed to see the mental health professional and (b) would have revealed thoughts diagnostic of schizophrenia or psychosis. According to Dr. Hegyvary, "it's likely that he would not, but it could be said that we tried." *CP 3632*. Dr. Hegyvary cannot say, based on probability, what would have happened if the Okanogan County Jail authorities would have tried to have Zamora meet with a mental health professional. *CP 3633*.

III. ARGUMENT AND AUTHORITIES

A. Okanogan County Did Not Owe A Legal Duty To Appellants

1. The Public Duty Doctrine bars Appellants' claims against Okanogan County.

Under the public duty doctrine, a plaintiff alleging negligence against a government entity must show a duty was owed specifically to the plaintiff, not to the public in general. *J & B Dev. Co. v. King County*, 100

Wn.2d 299, 304, 669 P.2d 468 (1983). To establish a duty owed to them, a plaintiff must show one of the four exceptions to the public duty doctrine applies: (1) legislative intent; (2) a failure to enforce; (3) the rescue doctrine; or (4) special relationship between the government and the plaintiff. *Johnson v. State*, 164 Wn.App. 740, 748, 265 P.3d 199 (2011) citing *Cummins v. Lewis County*, 156 Wn.2d 844, 853 n.7, 133 P.3d 458 (2006).

The public duty doctrine has been described as a "focusing tool" to help the court determine when a duty should be recognized to individual members of the public (the plaintiffs) as opposed to the public as a whole. *Taylor v. Stevens County*, 111 Wn.2d 159, 166, 759 P.2d 447 (1988). Indeed, the common thread running among the four recognized exceptions to the public duty doctrine is either statutory language or conduct by a government actor reflecting an individualized relationship between the government entity or agent and the plaintiff.

Here, none of the four exceptions to the public duty doctrine applies. There is no statute that required Okanogan County to take a particular action, or refrain from a particular act, in favor of the Appellants. There is no statute Okanogan County failed to enforce, which failure brought about injury to the Appellants. No agent of Okanogan County set about to rescue or otherwise offer aid to any of the Appellants.

And, with regard to the special relationship exception, no agent of Okanogan County had direct contact with any of the Appellants, which contact involved express assurances of assistance.

Because none of the exceptions to the public duty doctrine are present here, and because the incarceration of offenders is a distinctly governmental exercise, the public duty doctrine bars Appellants' claims.

2. **Notwithstanding the Public Duty Doctrine, imposing a duty on Okanogan County would be contrary to considerations of public policy, logic, and common sense.**

To decide if the law imposes a duty of care, and to determine the duty's measure and scope, the court must weigh “considerations of ‘logic, common sense, justice, policy, and precedent.’” *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wash.2d 233, 243, 35 P.3d 1158 (2001) (internal quotation marks omitted) (quoting *Lords v. N. Auto. Corp.*, 75 Wash.App. 589, 596, 881 P.2d 256 (1994)). “The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a ‘plaintiff’s interests are entitled to legal protection against the defendant’s conduct.’” *Taylor v. Stevens County*, 111 Wash.2d 159, 168, 759 P.2d 447 (1988) (quoting W. Page Keeton, et al., *Prosser and Keeton on Torts* § 53, at 357 (5th ed.1984)). In considering whether to impose a duty on a government entity, a relevant public policy consideration is the burden

imposed on the government in light of budgeting and personnel constraints. *See e.g. Taylor v. Stevens County*, 111 Wn.2d 159, 169, 759 P.2d 447 (1988).

Here, it would be unreasonable to impose a duty on Okanogan County to protect third party strangers from the post-release criminally violent acts of Zamora where he successfully completed the entire term of his sentence without incident, and made no threats of violence or engaged in any violent or assaultive behavior while in custody. Imposing such a duty on Okanogan County to protect against any and all harm inflicted by Zamora after his release would subvert the public duty doctrine by creating an obligation to specific individuals instead of the public at large. This would be contrary to the public duty doctrine's maxim that "a duty to all is a duty to none." *See infra*.

Appellants argue Okanogan County had a duty to provide mental health care to Zamora and that this duty extended to them. Okanogan County does not dispute it owed Zamora a duty under state and federal law to provide him with reasonable and necessary medical and mental healthcare. *See infra* at page 28. But extending this duty to Appellants would be an unprecedented extension of the legal obligations of a correctional facility and would potentially give any person injured by the post-release violent behavior of an inmate a cause of action against the

prison or jail. In such a case, the inevitable argument would be that the post-release violent behavior could have been prevented if only the correctional facility had provided the inmate, during his incarceration, with counseling, medication, drug abuse treatment, anger management therapy, etc. Considerations of logic, common sense, justice and public policy cut against the imposition of such a boundless duty.²

3. **Okanogan County did not owe a duty to Appellants under Restatement (Second) of Torts §315**

In Washington, analysis of whether a defendant owes a duty to prevent the criminal conduct of a third person begins with the Restatement (Second) of Torts §315. Thereunder, a defendant has a duty to prevent the criminal conduct of a third person only if a "special relationship" exists between either the defendant and the plaintiff or the defendant and the third person – the criminal actor.

Significantly, under §315, the rule is one of no duty, unless a special relationship, as defined in subsequent Restatement sections, exists.

Comment b to §315 states:

² In addition to a mental health evaluation, the Skagit County Superior Court Judgment and Sentence required Zamora, as a condition of his community supervision, to undergo a "drug evaluation". If a jail were to have a legal duty to provide mental healthcare to an inmate for the benefit of persons injured by the inmate after his release, query whether a jail would have a legal duty to provide a drug evaluation and treatment to an inmate for the benefit of those who might be harmed as a result of the inmate's drug use/abuse after his release. Although such a duty seems absurd, that is the logical extension of the broad duty urged by Appellants.

In the absence of either one of the special relations described in this section, the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of the third person as to protect another from even the most serious harm...this is true even though the actor realizes that he has the ability to control the conduct of a third person, and could do so with only the most trivial efforts without any inconvenience to himself. (emphasis added).

Comment c to §315 goes on to state:

The relations between the actor and the third person which require the actor to control the third person's conduct are stated in §316-319.

§316 addresses the duty of a parent to control the conduct of a child. §317 addresses the duty of a master to control the conduct of a servant. §318 addresses the duty of a possessor of land or chattels to control the conduct of a licensee. And, finally, §319 discusses the duty of one having charge of a person with dangerous propensities (discussed infra).

Notably, the Restatement sections listing the special relationships contemplated by §315, all involve a relationship between the criminal actor and defendant, or with the plaintiff and defendant, that exists at the time of the criminal conduct, and some attendant ability or power on the part of the defendant to control the criminal actor. And, the emphasis in all

of the Restatement sections is on the actor's ability to control the criminal conduct of the third person.

The Washington Supreme Court's characterization of the §315 duty is consistent with this basic requirement –for a duty to exist, the "special relationship", and attendant power or right or ability to control the criminal or tortuous conduct of the that person must exist at the time of the criminal or tortuous conduct. In *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992) the Washington Supreme Court stated "...we note that a duty will be imposed under §315 only upon a showing of a 'definite, established and continuing relationship between the defendant and the third party.'" 118 Wn.2d at 219, citing *Honcoop v. State*, 119 Wn.2d 182, 193, 759 P.2d 1188 (1988). The *Taggart* court ultimately found a duty on the part of the Department of Corrections to supervise and control a parolee because, during the period of supervision, the "statute is sufficient to establish that parole officers have a 'definite, established and continuing relationship' with their parolees." *Taggart, supra* at 219.

Appellants argue that the duty owed by a state psychiatrist to persons injured by a patient, as recognized in *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), extends to correctional facilities like the Okanogan County Jail. This argument should be rejected.

In *Peterson*, Knox was involuntarily committed to Western State Hospital after he took a knife to himself and cut out his left testicle and hospital staff reported that Knox exhibited delusions and hallucinogenic tendencies. During his involuntary hospitalization, Knox reported to Dr. Miller, a psychiatrist and the clinical director of Western State Hospital, that he had taken the hallucinogenic drug angel dust just prior to the emasculation incident, Dr. Miller diagnosed Knox as having schizophrenia, paranoid type, with depressive features.

Two days after Knox was involuntarily committed, Dr. Miller and a psychiatric nurse filed a petition in Pierce County Superior Court requesting authority to detain Knox for an additional period of up to 14 days. At a hearing on the petition, Dr. Miller and the nurse testified that, in their opinion, Knox was gravely disabled as a result of his drug abuse and presented a likelihood of serious harm to himself. The superior court agreed and granted the petition for involuntary treatment.

Thereafter, Dr. Miller continued treatment and evaluation of Knox, including administration of an anti-psychotic medication.

Just before his release from the hospital, Knox was allowed to go home for Mother's Day but was required to return in the evening. That evening, Knox was apprehended by hospital security personnel while driving his car on the hospital grounds in a reckless fashion that involved

spinning his car in circles. Despite this behavior, Dr. Miller discharged Knox from the hospital the following morning.

Five days later, Knox drove through a red light at approximately 50 to 60 miles per hour and injured the plaintiff, Peterson. At the time, Knox appeared to witnesses to be greatly influenced by drugs.

On these facts, the Washington Supreme Court, relying on *Tarasoff v. Regence of University of California*, 17 Cal.3d 425, 551 P.2d 334, 131 Cal.Rptr. 14 (1976), held that Dr. Miller incurred a duty to take "reasonably precautions to protect anyone who might foreseeably be in endangered by Larry Knox's drug related mental problems." 100 Wn.2d at 428. Significantly, the *Peterson* court noted that, at the time of Knox's discharge from Western State, Dr. Miller knew of Knox's reluctance to take anti-psychotic medications and thought it was quite likely that Knox would revert to using Angel Dust again. Nevertheless, "Dr. Miller failed to petition the court for a 90 day commitment, as he could have done under RCW 71.05.280...". *Id.*

In *Taggart, supra*, the Supreme Court revisited *Peterson*. The Court noted the *Peterson* holding is truly narrow and "stands for the proposition that a 'special relationship' exists between a state psychiatrist and his or her patients, such that when the psychiatrist determines, or pursuant to professional standards should determine, that a patient presents

a reasonably foreseeable risk of serious harm to others, the psychiatrist has 'a duty to take reasonable precautions to protect anyone who might foreseeably be endangered.'" *Taggart*, 118 Wash.2d at 218-19.³

Five years later, the Washington Supreme Court, in *Nivens v. 7-11 Hoagies Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997), again commented on the limited scope of *Peterson*, describing it as "a case where we decided the special relationship between a psychotherapist and patient created a duty by the therapist to persons injured by the patient who was improperly released from a state hospital." *Nivens*, 133 Wn.2d at 201 (emphasis added).

The *Peterson* duty should not be extended to Okanogan County for several reasons. First and fundamentally, Okanogan County did not act as Zamora's psychiatrist. Second, there is no evidence that Okanogan County should have had, or actually had grounds to petition a court for the involuntary commitment or treatment of Zamora. Indeed, Dr. Hegyvary testified that grounds for involuntary commitment/treatment did not exist until mid-August, which was after Zamora's release from the Okanogan County Jail. Third, even if grounds existed for Okanogan County to have sought involuntary treatment, immunity is afforded to Okanogan County

³ Additionally, the Court noted that the public duty doctrine is still applicable and was not abrogated by *Peterson*; merely a narrow exception to the public duty doctrine was recognized. See *Taggart*, 118 Wash.2d at 218 n.4.

for its failure to do so. See RCW 71.05.120(1); *Estate of Davis v. Dept. of Corrections*, 127 Wn.App. 833, 113 P.3d 487 (2005).⁴

The logical extension of Appellants' argument with respect to *Peterson* is that the duty recognized there applies not only to psychiatrists and mental hospitals, but to any individual or entity that might arguably have a duty to seek mental healthcare on behalf of an individual in that entity's custody. This duty, if recognized, would arguably apply to schools, innkeepers, common carriers, and any other entity with "custody" of an individual who might benefit from mental healthcare. The court should decline to give *Peterson* such a broad interpretation.⁵

4. Okanogan County did not owe Appellants a "take charge" duty under Restatement §319

Washington courts have also looked to Restatement (Second) of Torts §319 as the source of a duty to prevent the criminal conduct of a third person, most notably in the context of the Department of Corrections'

⁴ It must be emphasized that Appellants did not assert in the Superior Court that Okanogan County had a duty to act under the involuntary treatment act (ITA). By not making this argument in the Superior Court, Appellants have waived this claim. RAP 9.12; RAP 2.5(a). In addition, Okanogan County, like Skagit County, argued in its Motion for Summary Judgment that it would be entitled to immunity for claims under the ITA pursuant to RCW 71.05.120(1), and this aspect of Okanogan County's motion was not opposed. Unless there is evidence of bad faith or gross negligence, immunity applies. *Id.* Neither was alleged.

⁵ It is worth noting that Justice Talmadge, in his concurring opinion in *Hertog v. State*, 138 Wn.2d 265, 979 P.2d 400 argued that the duty imposed in *Peterson v. State* was abrogated by RCW 71.05.120. That statute recognizes that mental health professionals have a "duty to warn or to take reasonable precautions to provide protection from violent behavior where the patient has communicated an actual threat of physical violence against a reasonably identifiable victim or victims." RCW 71.05.120(2).

supervision and control of a parolee during the period of supervision. *See e.g. Taggart, supra* and *Couch v. Washington Department of Corrections*, 113 Wn.App. 556, 564, 54 P.3d 197 (2002). Significantly, the Washington §319 cases all emphasize that the duty exists only to the extent of the defendant's right or ability to control the third person at the time of the criminal conduct. *See e.g. Couch, supra* (no duty under §319 because Department of Corrections' supervision and control existed only with respect to certain financial obligations on the part of the parolee in connection with a misdemeanor conviction and sentence. Thus, DOC had no duty to prevent murder committed by parolee).

Here, Zamora was not in the "charge" of Okanogan County at the time of his criminal conduct on September 2, 2013. Thus, Okanogan County had no duty to Appellants under §319.

On this point, *Hungerford v. State Department of Corrections*, 135 Wn.App. 240, 139 P.3d 1131 (2006) is instructive. There, a murder victim's estate brought a wrongful death action against the DOC following the decedent's murder by an offender who, at one time, had been on DOC supervision. The DOC's period of supervision ended on June 5, 1995. The murder took place on April 14, 1996. The plaintiff in *Hungerford* made the same argument Appellants are advancing here – that the "take charge" duty that existed while the offender was under community supervision

projected beyond the period of supervision to the time of the murder. In rejecting this argument, the court stated:

Under the public duty doctrine, when a government agency has a general duty to the public as whole, it does not have an actual duty to a particular individual (citation omitted). The duty to supervise offenders on probation is an exception to the public duty doctrine based on the "special relationship" between the government and the offender. DOC owes a duty of care to those who an offender might injury while DOC is supervising the offender *Taggart*, 118 Wn.2d at 220, 822 P.2d 243. We hold that once that special relationship ends, the exception to the public duty doctrine expires. Therefore, DOC did not owe a duty to Hungerford-Trap after DOC's take charge relationship with Davis ended. (emphasis added).

135 Wn.App. at 257-58.

Based on *Hungerford*, Appellants' contention that Okanogan County had a duty to them that extended beyond Zamora's period of incarceration in the Okanogan County Jail should be rejected. *See also Caldwell v. Idaho Youth Ranch, Inc.*, 132 Id. 120, 968 P.2d 215 (1998).

5. **Okanogan County's duty to provide Mr. Zamora "medically necessary" treatment including mental health treatment during his stay at the Okanogan County Jail care does not extend to the Appellants**

"Washington courts have long recognized a jailor's special relationship with inmates, particularly to ensure health, welfare, and

safety." *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010). As early as 1918, the Supreme Court of Washington recognized that a sheriff running a county jail "owes the direct duty to a prisoner in his custody to keep him in health and free from harm, and for any breach of such duty resulting in injury he is liable to the prisoner or, if he be dead, to those entitled to recover for his wrongful death." *Kusah v. McCorkle*, 100 Wn. 318, 325, 170 P. 1023 (1918).

The duty owed "is a positive duty arising out of the special relationship that results when a custodian has complete control over a prisoner deprived of liberty." *Gregoire, supra, quoting, Shea v. City of Spokane*, 17 Wn.App. 236, 242, 562 P.2d 264 (1977). The duty to provide for the health of an inmate is nondelegable. *Id., citing, Shea*, 17 Wash.App. at 242.

Here, Okanogan County's duty to provide "medically necessary" care to Zamora did not extend to Appellants. There is no reported case in Washington or the entire United States in which the duty to provide medically necessary care to an inmate during his period of incarceration has been held to extend to third persons after the inmate was released.

Appellants claim that Okanogan County's duty to Zamora to provide him with reasonable and necessary mental healthcare somehow ran to them is also contrary to the court's holding in *Sheikh v. Choe*, 156

Wn.2d 441, 128 P.3d 574 (2006). There, Scheikh was assaulted in a parking lot by Anderson and Pierre, two minors who resided in the home of Daniels as a result of placement arrangements by DSHS. Among other things, Sheikh asserted a claim against the state for negligent failure to provide Pierre and Anderson with treatment which Sheikh argued would have prevented the assault. Sheikh based this claim on DSHS's duty, established by administrative regulation, to provide mental health and substance abuse treatment to Anderson and Pierre. In rejecting Plaintiffs' argument that these statutes/regulations created a duty that ran to Sheikh, the court stated:

The basis for Aba Sheikh's claim fails to satisfy any of the three *Bennett* factors. First, these administrative rules are clearly intended to benefit the recipients of the listed services [the foster children]. Aba Sheikh points to nothing the in the WAC or authorizing legislation that would suggest the treatment provisions are intended to prevent tortious acts by dependent children from harming the community at large. Second, Aba Sheikh's only contention that the legislature intended to create a remedy is his renewed citation to the "community at large" references in RCW 74.15.010(5) (1) of DSHS's purposes is to license foster homes to ensure there are minimum standard in child care). Licensing foster homes had no relation to offering additional services (i.e. mental health and chemical dependency treatment) to dependent children. Finally, as discussed in detail above, the purpose of the child welfare statutes and

regulations is to benefit the dependent children, not to make DSHS a component of the criminal justice system. Because Aba Sheikh fails to succeed under any party of the *Bennett* test, we hold that the trial court was correct in granting summary judgment in the State's favor on the negligent failure to provide treatment claim.

156 Wn.2d at 458-59.

Apply the reasoning of *Sheikh* to the instant case, there is nothing in Washington's statutes or regulations obligating jails and other correctional facilities to provide reasonable and necessary medical and psychiatric care to inmates that would suggest these statutes/regulations are intended to prevent tortious acts by [released inmates] from harming the community at large.

6. **The contract between Skagit County and Okanogan County did not create a duty to Plaintiffs**

Appellants argue that the jail housing agreement between Skagit County and Okanogan County somehow created a duty to them. This argument should be rejected. The contract merely recites Okanogan County's duty to Isaac Zamora and all contract inmates independent of the contract – to provide reasonable and necessary medical and psychiatric care. There is no indication or suggestion in the contract that Skagit County and Okanogan County intended this duty to extend to third persons. *Key Development Inv., LLC v. Port of Tacoma*, 173 Wn.App. 1,

292 P.3d 833 (2013). Moreover, a contract between a government entity and a third person cannot abrogate the public duty doctrine where the doctrine would otherwise apply. *See Ravenscroft v. Washington Water Power*, 136 Wn.2d 911 (1998).

B. No Act Or Omission of Okanogan County Proximately Caused Zamora's Shooting Spree.

Even where a duty exists, proof of negligence requires the defendant's breach of duty be a proximate cause of the plaintiff's injuries. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). Proximate cause consists of two elements: 1) cause-in-fact; and 2) legal causation. *Tyner v. Dept. of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). Both are lacking here.

1. Legal causation

Legal causation is grounded in policy and focuses on whether the connection between the ultimate result and the defendant's act is too remote to establish liability. *Tyner*, 141 Wn.2d at 82. This determination depends on mixed considerations of logic, common sense, justice, policy, and precedent. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998).

Here, the public policy considerations that argue against the imposition of a duty on Okanogan County are discussed *supra* at pages 12 and 13.

2. Cause-in-fact

Cause in fact exists where the alleged harm arises from a direct and unbroken sequence of events. *Tae Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 203–04, 15 P.3d 1283 (2001). "Cause in fact refers to the 'but for' connection between an act and an injury. . ." *Anderson v. Weslo, Inc.*, 79 Wn.App. 829, 838, 906 P.2d 336 (1995). Where a later "independent and intervening act" is shown not reasonably anticipated, no cause in fact is shown because the causal chain has been broken. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 85, 18 P.3d 558 (2001); *see Tae Kim*, 143 Wn.2d at 203–04. Cause in fact is generally a jury question. *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985). Cause in fact becomes a question of law for the court, however, when undisputed facts and the inferences therefrom, are plain and incapable of reasonable doubt or difference of opinion. *Id.*

Proof of proximate cause must rise above speculation, conjecture, or mere possibility. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)(party opposing summary judgment may not rely on speculation); *Marshall v. Bally's Pacwest, Inc.*, 94

Wn.App. 372, 381, 972 P.2d 475 (1999)('A claim of liability resting only on a speculative theory will not survive summary judgment.');

Reese v. Stroh, 128 Wash.2d 300, 309, 907 P.2d 282 (1995)(evidence establishing proximate cause must rise above speculation, conjecture, or mere possibility); *Gardner v. Seymour*, 27 Wash.2d 802, 809, 180 P.2d 564 (1947); *Nejin v. Seattle*, 40 Wn.App. 414, 420-22, 698 P.2d 615 (1985) ("proximate cause must be proved by evidence, whether direct or circumstantial, not be speculation or conjecture or by inference piled upon inference").

[I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.

Gardner v. Seymour, 27 Wn.2d 802, 809, 180 P.2d 564 (1947) (citations omitted).

In *Estate of Bordon ex rel. Anderson v. Dept. of Corrections*, 122 Wn.App. 227, 95 P.3d 764 (2004), a DOC supervision case, the court held that the plaintiff did not establish cause-in-fact because the plaintiff presented no evidence the offender would have been in jail on the day of the incident giving rise to the case if the DOC had not been negligent, noting:

We hold that some evidence of a direct link between DOC's negligence and the harm to a third party is necessary to survive a CR 50 motion in negligent supervision cases. In previous cases, the nature of that evidence has varied. It has included expert testimony about how judges rule in particular proceedings, factual evidence that the very nature of the negligence led to an offender's release, testimony of the sentencing judge, or expert testimony that the State's negligence directly caused the injury. Causation evidence could also include statistical evidence about what judges do in similar cases. While we agree that expert testimony is not always required, *some* evidence establishing causation must be presented to survive a CR 50 motion. That evidence must allow a jury to determine causation without resorting to speculation.

Bordon, 122 Wn.App. at 243-44.

The court in *Walters v. Hampton*, 14 Wn.App. 548, 543 P.2d 648 (1975) came to a similar conclusion:

In our view, there are too many gaps in the chain of factual causation to warrant submission of that issue to the fact finder. It would require a high degree of speculation for the jury or the court to conclude that some sort of prosecutorial action by the police against Hampton in September 1970 would have prevented plaintiff's injuries at Hampton's hands in February 1972. Such a conclusion would require the assumption of a successful prosecution of Hampton. This in turn would require an assumption that Mrs. Hampton, herself intoxicated on several of the reported occasions, would cooperate with the police as the only potential prosecuting witness. Finally,

we would have to assume that Hampton would be incarcerated for the offense, or unable to procure another weapon in the event the one he possessed was confiscated. Factual causation requires a sufficiently close, actual connection between the complained-of conduct and the resulting injuries. See *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975); *Wells v. Vancouver*, 77 Wn.2d 800, 802, 467 P.2d 292 (1970); WPI 15.01, 6 Wash.Prac., at 105 (1967). Where inferences from the facts are remote or unreasonable, as here, factual causation is not established as a matter of law.

Walters, 14 Wn. App. at 555-56.

In the instant case, Appellants cannot establish cause-in-fact because there is no evidence, beyond speculation and conjecture, that the events of September 2, 2008, would not have happened if Okanogan County had attempted to provide Zamora with some form of mental healthcare. The available medical records evince that, at the time of Zamora's stay in the Skagit County jail, he was resistant to the suggestion that he suffered from a mental illness or had mental health issues, was generally uncooperative with mental health professionals, and regularly refused to take medication other than narcotic pain medicine. Thus, it is entirely speculative to say that, if a mental health professional had attempted to visit with Zamora while he was in the Okanogan County Jail, he would have agreed to the visit, participated in the evaluation in a way

that would have provided the mental healthcare professional with information sufficient to diagnose schizophrenia, agreed to take an anti-psychotic medication, and that Zamora's compliance in taking the medication would have continued after he was released from the Okanogan County Jail such that the medication might have prevented the events of September 2, 2008. Indeed, Dr. Hegyvary, at his deposition, testified that Zamora, if asked to undergo a mental evaluation at the Okanogan County Jail, "likely would not" have agreed to the evaluation and revealed thoughts diagnostic of schizophrenia and psychosis. *CP 3632-33.*

Moreover, it is entirely speculative to say that, while Zamora was in the Okanogan County Jail, grounds existed for Okanogan County or some other individual or entity, to have obtained a court order authorizing an involuntary psychiatric evaluation of Zamora and/or his involuntary treatment with an anti-psychotic. There is no evidence that Zamora, while in the Okanogan County Jail, made any statements or displayed any behavior indicating that he was a threat to himself or others, or that he was gravely disabled, or that he was having hallucinations and/or delusional thoughts. Dr. Hegyvary testified that in his opinion, it was not until mid-August that Zamora was displaying behaviors that would have allowed for involuntary commitment/treatment. *CP 3626-27.* Indeed, after he was

released from the Okanogan County Jail on August 2, 2008, Zamora had multiple contacts with healthcare providers, a DSHS psychiatrist, and Skagit County law enforcement. These individuals all testified that, at the time of their interaction with Zamora, he did not meet the criteria for statutory involuntary commitment or treatment.

In short, Appellants' causation theory against Okanogan County consists of one speculation piled on another, and, as the Washington courts have repeatedly stated, a proximate cause theory that is nothing more than speculation and conjecture cannot survive summary judgment.

IV. CONCLUSION

Based on the foregoing argument and authorities, Okanogan County respectfully requests that summary judgment in its favor be affirmed.

DATED: February 5, 2014

EVANS, CRAVEN & LACKIE, P.S.

By s/ Christopher J. Kerley
CHRISTOPHER J. KERLEY, #16489
Attorneys for Defendants Okanogan County
Evans, Craven & Lackie, P.S.
818 W. Riverside Ave., Ste. 250
Spokane, WA 99201
(509) 455-5200
(509) 455-3632 facsimile
ckerley@ecl-law.com

CERTIFICATE OF SERVICE

I certify that I caused to be e-mailed, pursuant to an agreement of the parties to accept service by e-mail, a copy of the foregoing **BRIEF OF RESPONDENT OKANOGAN COUNTY**, on the 5th day of February, 2014, to the following counsel of record:

Original e-mailed for filing to: Washington Supreme Court Clerks Office 'supreme@courts.wa.gov'	Phillip A. Talmadge Talmadge/Fitzpatrick phil@tal-fitzlaw.com
John R. Connelly, Jr. Nathan P. Roberts Connelly Law Offices 2301 North 30 th Street Tacoma, WA 98403 <i>Attorneys for Binchus Plaintiffs</i> jconnelly@connelly-law.com NRoberts@connelly-law.com PWells@connelly-law.com vshirer@connelly-law.com	Jaime Drozd Allen Jeffrey D. Dunbar Ogden Murphy Wallace, PLLC 1601 5 th Ave., Ste. 2100 Seattle, WA 98101 <i>Attorneys for Gillum Plaintiffs</i> jallen@omwlaw.com chenry@omwlaw.com jdunbar@omwlaw.com mwhipple@omwlaw.com
Dean R. Brett Brett Murphy Coats Knapp McCandlis & Brown, PLLC 1310 10 th Street, Ste. 104 PO Box 4196 Bellingham, WA 98227 <i>Attorneys for Lange, Rose, Treston, and Mercado Plaintiffs</i> dbrett@brettlaw.com amchugh@brettlaw.com itaylor@brettlaw.com	Gene R. Moses Law Offices of Gene Moses 2200 Rimland Drive, Ste. 115 Bellingham, WA 98226-6643 <i>Attorneys for Lange, Rose, Treston, and Mercado Plaintiffs</i> gene@genemoses.net kari@genemoses.net

<p>W. Mitchell Cogdill Cogdill Nichols Rein Wardelle Andrews 3 Thirty Two Square 3232 Rockefeller Ave. Everett, WA 98201 <i>Attorneys for Radcliffe Plaintiffs</i> wmc@cnrlaw.com sue@cnrlaw.com</p>	<p>Paul J. Triesch Joshua L. Choate Attorney General of Washington Torts Division 800 Fifth Avenue, Suite 2000 Seattle, WA 98104-3188 <i>Attys for State of WA, Dept of Corrections</i> TORseaEF@atg.wa.gov PaulT@atg.wa.gov joshuacl@atg.wa.gov DianaH@atg.wa.gov graceSl@atg.wa.gov geraldn@atg.wa.gov courtneya@atg.wa.gov tadr@atg.wa.gov</p>
<p>John E. Justice Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S. PO Box 11880 Olympia, WA 98508-1880 <i>Attorneys for Defendant Skagit County</i> jjustice@lldkb.com toni@lldkb.com</p>	<p>Mark R. Bucklin Keating, Bucklin & McCormack, Inc., P.S. 800 Fifth Avenue, Suite 4141 Seattle, WA 98104-3175 <i>Attorneys for Defendant Skagit Emergency Communications Center</i> mbucklin@kbmlawyers.com sossinger@kbmlawyers.com sragonesi@kbmlawyers.com jhadley@kbmlawyers.com</p>

Feb 5, 2014 /Spokane, WA
(Date/Place)

/s/Christopher J. Kerley

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Subject: Supreme Court No. 89256-3: E-Service Brief of Respondent Okanogan County
Attachments: Response Brief.pdf

Please see attached for filing Brief of Respondent Okanogan County.

Case Name: Binschus, et al. v. Skagit Emergency Communications Center, et al.
Case No.: Supreme Court No. 89256-3

Filer:
Christopher J. Kerley, WSBA 16489
Attorney for Respondent Okanogan County
Ph: 509.455.5200
ckerley@ecl-law.com

Thank you,

Frances Cera
Legal Assistant to Christopher J. Kerley
and James S. Craven
Evans, Craven & Lackie, P.S.
818 W. Riverside Avenue, Suite 250
Spokane, WA 99201-0910
(509) 455-5200
Fax: (509) 455-3632
fcera@ecl-law.com

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