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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,

Appellants,

vs.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS; SKAGIT EMERGENCY COMMUNICATIONS CENTER d/b/a "Skagit 911," an interlocal government agency,

Defendants,

and

SKAGIT COUNTY, a political subdivision of the State of Washington; and OKANOGAN COUNTY, a political subdivision of the State of Washington,

Respondents.

ORIGINAL

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A. INTRODUCTION

The briefs of Skagit and Okanogan Counties are remarkable for their studied indifference to the facts in this case and their misstatement of the law governing "take charge" duties of governments to third parties injured by the persons over whom those governments had control.

The glaring fact in this case is that Isaac Zamora had serious mental health problems, well known to the law enforcement community and jailers in Skagit County. Skagit County did not accurately convey Zamora's mental health history to Okanogan County, but there was enough information known to Okanogan County to have prompted its Jail personnel to act. Neither County performed anything resembling an adequate evaluation of Zamora's condition or treated it. Both Counties were content not to act on Zamora's warning signs. Because Zamora's mental condition was allowed to deteriorate *during* his incarceration at the Skagit and Okanogan County Jails, when both Counties had complete control over him, he later acted out upon his release with a killing rampage. Both Counties owed the appellants, the victims of that rampage ("violence victims") a duty of care.

Further, the Counties studiously avoid citing this Court's seminal decision on proximate cause in this setting and are oblivious to the principle that proximate cause is a question of fact. There was ample

expert testimony that the Counties' breach of their duty to the violence victims and that breach proximately resulted in the deaths and injuries Zamora inflicted.

This Court should reverse the trial court's order dismissing the violence victims' complaint against both Counties.

B. STATEMENT OF THE CASE[1]

A casual reader reading the Counties' briefs, without having the benefit of the actual record in this case, or the violence victims' opening brief, would be left with the impression that Zamora's mental illness was largely unknown to both Counties' law enforcement personnel and Jail staffs, and that Zamora was a benign figure who was not particularly dangerous.

Nothing could be farther from the truth. The record in this case belies the Counties' fundamental misrepresentation of Isaac Zamora's mental health history in their briefs.

It is nothing short of astonishing that the Counties' briefs are *silent* on three critical features of Zamora's mental health history.

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[1] Okanogan County does not discuss the standard of review for summary judgment at all. Skagit County notes that the standard of review is de novo. Skagit br. at 12-13. Intentionally missing from either brief is the critical legal tenet that this Court reviews the facts and reasonable inferences from the facts in a light most favorable to the violence victims as the non-moving parties on summary judgment. *Dowler v. Clover Park Sch. Dist. No.* 400, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). Thus, the Counties' factual recitation need not be accepted by this Court.

First, it is *undisputed* by either County that Zamora had a history of involuntary treatment for mental health issues.[2] He had hallucinations in 2003 and was detained; while detained for involuntary treatment at North Sound Evaluation and Treatment Center, his physicians administered Seroquel, an anti-psychotic medication used in the treatment of schizophrenia, to him. CP 2538. Zamora also had a lengthy history of paranoia and anger issues that predated his involuntary treatment. *Id.* Dr. Henry Levine, who evaluated Zamora's competency to stand trial, CP 1965-79, recounted facts from Zamora's 2003 involuntary treatment at length in his report. CP 1968-69. Dr. Levine stated that the day after he was released from North Sound, Zamora sought treatment at the Skagit Valley Hospital emergency room. He was detained at the Skagit Care Center where he was "extremely hostile, threatening, and demanded Percocel." CP 1968. He was returned to North Sound where he was placed in restraints and secluded from the rest of the population. CP 1968-69. He yelled "relentlessly," bit a technician, and was charged with criminal assault. CP 1969. Zamora's conduct could not be characterized as "non-violent."

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[2] To qualify for involuntary treatment under RCW 71.05, Zamora had to be a danger to himself or others, or gravely disabled due to a mental condition. RCW 71.05.150.

Thus, because Skagit County begins its factual recitation at 2008, Skagit br. at 1-2, *it intentionally omits* a true picture of Zamora's mental health history that predated his incarceration in the Skagit County Jail in 2008.

Second, equally misleading is the fact that neither County chooses to address Zamora's long and detailed interaction with law enforcement and Jail staffs in Skagit County. It is undisputed that Zamora has been arrested 21 times in Skagit County and incarcerated 11 times between 1999 and 2008. CP 2651-52, 2655. It is further undisputed that Skagit County law enforcement knew he had mental health problems,[3] as did the County's 911 staff. CP 3201. Indeed, in 2007, a probable cause affidavit was filed in Skagit County Superior Court regarding a Malicious Mischief charge against Zamora. Under the section relating to the defendant's prior record, the probable cause affidavit lists: "mental health issues." The form asked, "Do you have any reason to believe Defendant has underlying mental health issues?" The "yes" box is checked. At the bottom the form says: "The jail staff will deliver the original to the court at the time of the preliminary appearance and a copy will be placed in the inmate's file." CP 2634. Further, the Jail itself fully understood Zamora's mental

[3] Zamora was tagged with a 220 alert code on the County law enforcement computer indicating he was mentally unstable or crazy. CP 2844, 2864, 3105, 3202. This alert code was available to all Skagit County deputies. CP 2845.

instability. While at the Jail, it is undisputed that Zamora was housed in C-Pod, the Jails' section reserved for inmates who were dangerous or assaultive, or who have mental health problems. CP 2581, 2899.

Third, the Counties' briefs are silent on the numerous times Zamora's mother called the Jail to request mental health for her son. Br. of Appellants at 6. Denise Zamora made *five requests* for mental health treatment for Isaac during his 2008 incarceration at the Skagit County Jail, CP 2591-93, 2928, 2930, a fact left unaddressed in the Counties' briefs.[4]

The Counties' factual recitation of events that took place during Zamora's incarceration at their Jails omit fundamental facts. Skagit County baldly asserts that "[Zamora's] actions were not preceded by any threats of violence to himself or others." Skagit br. at 1. This assertion is simply *false*.

Skagit County's rosy perception of Zamora's condition is belied by numerous facts. Zamora had a history of aggressiveness, anger, volatility, and dangerousness at the Jail that earned him his residence in C-Pod. CP

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[4] Mrs. Zamora's plea to the Skagit County Prosecutor, for example, was prophetic:

> We are pleading for the court system on behalf of our son. He needs mental health evaluation [and] treatment. His condition is getting much worse -- unpredictable, unstable, rage, etc. Compass Mental Health said that he can be compelled by the court if he is in jail [and] may be a threat to himself or others. Please help.

CP 2928.

2408, 2410, 2412, 2414. Skagit County's claim is further belied by the interaction he had in April 2008 with contractor Stephanie Inslee; she reported Zamora's persecutorial thoughts and rageful thinking, his delusion that he was being poisoned, and his assertion that the Jail staff or others were "messing with his brain." CP 3685. Moreover, another contractor, Cindy Maxwell, reported that Zamora was "upset, easily angered [and had] rambling style speech." CP 3687. Zamora reported to Maxwell that he saw white flashes and black dots, CP 2958, and he believed that he saw monsters and demons from his window and that his bed was electrified. CP 2540.[5]

Again, contrary to Skagit County's rendition of a "pacific" Zamora, Skagit br. at 2,[6] Zamora allegedly cut another inmate in the

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[5] Skagit County's assertion in its brief that "there is no evidence that he [Zamora] ever reported these alleged [hallucinatory] thoughts to the Jail officers at either Skagit County or Okanogan County," Skagit br. at 5, is plainly false in light of the reports of Skagit County's own contractors referenced above.

Moreover, it was Zamora himself who sought out the mental health treatment that resulted in his interactions with Inslee and Maxwell, CP 2672, 2956, 2958, a fact that severely uncuts the Counties' contention that Zamora would have resisted treatment had it been provided.

[6] Skagit County complains that the violence victims did not cite to the record when stating in their opening brief at 27 that Zamora was given to violent outbursts and a pattern of aggressiveness. Skagit br. at 5. The County did not note that it was *the County's own contractor* who testified to his angry outbursts, br. of appellants at 6-7 and Zamora's violence was well documented in the violence victims' opening brief. *Id.* at 7 n.3. Contrary to Skagit County's claim, Skagit br. at 6, there is evidence that Zamora acted violently toward another Jail inmate. An inmate said Zamora cut him. CP 2464. Moreover, Zamora's post-arrest behavior is also revealing -- he was uncooperative, threatening, irrational, and provocative; in his criminal case for the deaths at issue in this case, the court was compelled to remove him due to disruptive behavior. CP 1974.

infirmary, CP 2464, and the County's Jail staff repeatedly wrote Zamora up for discipline for improper conduct. CP 2462, 2464, 2467, 2469-71. Skagit County itself acknowledges in its brief at 6 that Zamora pounded the walls of his holding cell when he was first booked. CP 3563 ("While waiting to get booked in, Zamora was pounding on the walls of the holding room."). This is hardly normal conduct.

Skagit County, like Okanogan County, wants to divert this Court's attention from the Judgment and Sentence and the fact someone, presumably a physician, prescribed Lamictal for Zamora. Skagit br. at 3-4; Okanogan br. at 5 n.1, 7, 8-9. Both Counties spend considerable time addressing when the mental health evaluation order in the Judgment and Sentence had to be carried out, and if it was legitimately a part of the Judgment and Sentence. Skagit br. at 27-28; Okanogan br. at 5 n.1. Similarly, both Counties downplay the significance of Zamora's Lamictal prescription. Skagit Br. at 3-4; Okanogan br. at 7, 8-9. But both Counties miss the significance of the Judgment and Sentence requirement of a mental health evaluation and the Lamictal. From these facts, *both Counties were put on notice that Zamora had mental health problems that required treatment while he was incarcerated.*

It is undisputed that Zamora was never seen by a physician while he was incarcerated in both Jails. It is further undisputed he never had a

full mental health evaluation and certainly received no mental health treatment while he was incarcerated in either facility.

Finally, as to Okanogan County specifically, Skagit County misleads this Court when it claims simultaneously that there is no legal requirement that it provide Okanogan County with necessary records about a transferred inmate and that the records were complete because "his current list of medications was included." Skagit br. at 4. Both statements are false.

Skagit County had a contractual duty to provide complete records on a transferred inmate. CP 3135. Moreover, as noted in the violence victims' opening brief at 7-10, the records Okanogan County received from Skagit County were woefully incomplete. Okanogan County itself noted that it was unaware of Zamora's interactions with Skagit County's mental health contractors. Okanogan br. at 9. Moreover, Okanogan County had no information regarding Zamora's mental health history with Skagit County law enforcement personnel or Jail Staff, or Zamora's fight with another inmate at the Skagit County Jail.

Instead, Okanogan County tries to put a brave face on its lack of information by referencing the testimony of Kevin Mallory, its physician assistant, rendered after Zamora's rampage, that accurate information would not have changed his view about Zamora. Okanogan br. at 9-10.

The key facts here, however, are that Mallory was not a physician nor was he specifically trained to treat mental health issues. CP 3699. Okanogan County had, or should have had, notice from the Judgment and Sentence and the Lamictal prescription that Zamora had mental health issues. Okanogan County did not seek Zamora's full records, or even an explanation of why he was prescribed Lamictal,[7] nor did it perform a full mental health evaluation of Zamora. CP 3700.

Finally, with regard to Zamora's post-incarceration behavior, both Counties play loose with the facts. Skagit County attempts to portray Zamora's post-release conduct as largely benign. Skagit br. at 7-9. Okanogan County's version of the facts similarly underplays Zamora's violent and bizarre behavior. Okanogan br. at 11-12. But taking the facts in a light most favorable to the violence victims, as this Court must, Zamora's conduct was far from benign; rather he continued to act in a bizarre, violent fashion.

Zamora's father and brother testified that Isaac was gathering a cache of weapons. CP 1701-02, 1765-66, 2399-2400.

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[7] Instead, Mallory simply discontinued the Lamictal prescription based on Zamora's direction. CP 3700. Mallory's post-hoc opinion about what he *might* have done had he received the full records of Zamora's mental health issues from Skagit County (and he did not address Zamora's *full* mental health history in his declaration) is unsupported speculation at best. CP 3701-02.

Both Counties underplay Zamora's actions on September 1, 2008 on the Griffeth property. That day, Griffeth called Skagit County to report an incident with Zamora; Griffeth sensed that "something wasn't right," and he wanted protection. CP 2852-53. He asked that officers be dispatched, hoping that Zamora would be arrested and would get "some help." CP 2853. *Three* officers came in response to Griffeth's call. CP 2854.

Griffeth observed Zamora walking up the road near his house in a very agitated manner. According to Griffeth, Zamora's fists were clenched and he did not look up when he passed. He was staring at the ground and was mad. He had a gait or a walk of a "gorilla," "stiff legged." CP 2852. This was not normal behavior.

When Griffeth got to his driveway, he saw that a sign had been ripped off the gate[8] and became concerned that his wife had just arrived home. *Id.* His wife was unharmed, but reported on a strange person who had come up to her and said "Who are you?" and when she answered, he said, "I know everyone around here ... no one's here. There's not supposed to be anyone here." *Id.*

When officers arrived at Griffeth's house, Griffeth described Zamora as "crazy" and that something had changed in him: "... I could

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[8] Zamora's destruction of property was hardly non-violent conduct.

sense it in him." CP 2853. He told the deputies to be careful, "this kid is ... he's over the edge." *Id.* He further noted: "... there was something just wrong. There was something that wasn't connecting and it was an aura of -- there was violence." *Id.*

Both Counties downplay the reports from Zamora's mother to Skagit authorities. Less than a month before the shootings and shortly after his release from jail, Skagit deputies were dispatched to remove Zamora from his parent's property because of her fears about his behavior. CP 2859. In a telephone conversation, Zamora's mother told deputies that her son had mental issues and was acting aggressive and "angry" towards family members, "intimidating" a younger brother in particular. CP 2858-59. She did not feel comfortable with Zamora in the home and that "Isaac is suffering from undiagnosed and untreated mental illness and ... has been a problem for some time." CP 2860.

While at the Zamora residence, Skagit Deputy Yonally learned of an outstanding warrant for Isaac Zamora and arrested him. CP 2859. He described Zamora's demeanor at that time as being such that he would not have been cooperative if Yonally had just been there by himself. *Id.* Yonally stated that with the presence of the second deputy, he felt Zamora moderated his response. *Id.* Deputy Yonally testified that "our goal at the time at the Sheriff's Office was to do everything possible to avoid any

type of physical arrest and ... normally in situations like that, the more uniforms that are there the less that would happen." *Id.*[9]

Most telling perhaps is the fact that while waiting to be processed at the Skagit County Jail, Zamora acted out, pounding the walls of the holding room. CP 2917. Again, this was not the conduct of a non-violent person.

Further, the incident on September 1 in which Dr. Silverio Arenas met with Zamora and his father in the parking lot of the Alger Bar & Grill is misrepresented by both Counties. Both fail to note the brevity of Dr. Arenas' contact with Zamora; he "evaluated" Zamora from meeting in his car in the Bar's parking lot. CP 3538. Both gloss over the fact that Zamora was extremely uncooperative. CP 2403, 2541, 3540. Both ignore the fact that Dr. Arenas concluded Zamora was psychotic with "paranoid tendencies." CP 2404. They instead emphasize Dr. Arenas' alleged conclusion that he was not acutely symptomatic at that time. CP 3541.

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[9] Common sense and common practice in the sheriff's department dictated having back-up when responding to a situation involving a code 220. CP 2847. This practice was followed in dealing with Zamora. October 23, 2003 -- four deputies sent to locate Zamora on a complaint; August 5, 2008 -- two deputies dispatched to remove Zamora from family property; September 1, 2008 -- three officers for Griffeth call; September 2, 2008 -- two deputies. CP 2661-62.

Thus, Skagit County's own response to Zamora incidents evidenced a strong belief on the part of Skagit County law enforcement that Isaac Zamora was not a non-violent offender.

Finally, perhaps most misleading of all, is the assertion in Skagit County's brief at 8-9 that Western State Hospital physicians opined *after* his rampage that Zamora never suffered from major mental illness except for a time-limited psychotic episode induced by drug use. CP 2100-02. This testimony from State physicians, when the State was a defendant in this litigation, is hardly likely to be impartial.

Further, to a significant degree, this testimony is belied by the doctors' assertion that Zamora had a "personality disorder" that required his placement in locked seclusion due to homicidal threats and his propensity for trying to escape. CP 2101. They also testified that Zamora was such a risk that Western State Hospital instituted "heightened security measures" to prevent Zamora from harming himself or others, or escaping. CP 2101. Those measures included restraints for Zamora and the posting of Hospital security staff and Lakewood police officers on Zamora's ward or outside the Hospital 24 hours per day. *Id.*

Further, this testimony is directly contradicted by Skagit County's treatment of Zamora during his 21 arrests and 11 incarcerations in its Jail, and the testimony of Dr. Levine, Dr. Hegyvary, and Dr. Arenas.[10]

C. ARGUMENT

(1) <u>The Counties Owed a Duty of Care to the Violence Victims</u>

[10] Again, on summary judgment, the evidence must be viewed in a light most favorable to the violence victims.

(a) Take Charge Liability

Both Counties argue that they owed no duty to the violence victims in this case, despite the long line of decisions from this Court establishing "take charge" liability on the part of correctional authorities. Skagit br. at 13-29; Okanogan br. at 17-31. Both Counties invite this Court to largely ignore its own precedents and focus on the nuances of various sections of the *Restatement (Second) of Torts* instead. Both Counties urge this Court to adopt a severely truncated duty on the part of local correctional authorities for the post-release conduct of inmates when it was the negligence of those local authorities during the inmate's incarceration that resulted in the victims' harm. This Court should reject the Counties' erroneous reading of this Court's decisions.

As articulated in the violence victims' opening brief at 22-32, this Court has made it unambiguous that a governmental defendant has a duty to third party victims of an individual over whom the government exercised control who commits violent acts against those victims. *See, e.g., Petersen v. State,* 100 Wn.2d 421, 671 P.2d 230 (1983) (patient released from Western State Hospital); *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, 979 P.2d 400 (1999); *Joyce v. State, Dep't of Corrections,* 155 Wn.2d 306, 119 P.3d 825 (2005). For Okanogan County to assert that

a duty here would be "unprecedented," Okanogan br. at 18, or for Skagit County to claim that its "take charge" duty is confined to preventing inmate escapes, Skagit br. at 23-29, represent an elevation of particular nuances of the *Restatement (Second) of Torts* and its comments over the plain rules adopted in the decisions of this Court.[11]

Once the Skagit County Jail undertook its special "take charge" relationship with Zamora, it had a duty to use reasonable care to protect against reasonably foreseeable dangers posed by Zamora. For instance, this Court stated in *Joyce*:

> But as we have recognized, once the State has taken charge of an offender, "the State has a duty to take reasonable precautions to protect against *the foreseeable dangers posed by the dangerous propensities of the parolees*." The existence of the duty comes from the special relationship between the offender and the State. Once this special relationship is created, the State has a duty to use reasonable care and may be liable for lapses of reasonable care when damages result.

155 Wn.2d at 310. (emphasis added). The Skagit County Jail, like the State in *Joyce*, owed a duty of reasonable care when it took charge of Zamora.

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[11] The Counties' reliance on cases like *Sheikh v. Choe*, 156 Wn.2d 441, 128 P.3d 574 (2006); *M.W. & A.W. v. Dep't of Soc. & Health Services*, 149 Wn.2d 589, 70 P.3d 954 (2003); *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990); and *Terrell C. v. Dep't of Soc. & Health Services*, 120 Wn. App. 20, 84 P.3d 899, *review denied*, 152 Wn.2d 1018 (2004) is misplaced. These cases pertain to whether a particular statute created a private right of action or the extent of any statutorily-based duty. This case is a common law duty case.

Taggart broadly defined the scope of the duty created by take charge relationships to include all persons who, like the violence victims, were reasonably endangered by a breach of that duty. "[T]he scope of this duty is not limited to readily identifiable victims, but includes anyone foreseeably endangered" by the offender's dangerous propensities, such as Zamora's victims. *Taggart*, 118 Wn.2d at 219. While on parole, Brock assaulted Taggart, a woman with whom he had not been previously acquainted. *Id.* at 200-01. To establish a "take charge" duty, this Court concluded that Taggart had only to show that she was "foreseeably endangered," not that she herself was "the foreseeable victim of Brock's criminal tendencies..." *Id.* at 224-25.

The principal arguments on duty advanced by both Counties are that the duty to provide medical treatment, including mental health, treatment to inmates does not extend to the violence victims and that they have no duty to anyone once the inmate's incarceration ends. The Counties are simply wrong on both arguments. Having no answer to this Court's "take charge" duty decisions, both Counties attempt to distinguish them on the basis of provisions in the *Restatement* or on the basis of distinguishable Court of Appeals decisions.

(b) <u>The Counties Had a Duty to Provide Mental Health Evaluation and Treatment to Zamora</u>

Both Counties effectively *concede* that they owed a duty to evaluate and treat Isaac Zamora's mental health problems while he was incarcerated in their Jails. Skagit County only does so in a footnote. Skagit br. at 25 n.8. Okanogan County waits until late in its brief to do so. Okanogan br. at 27-30. Of course, this Court has clearly established that such a duty is owed. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010).

But both Counties miss the point of the violence victims' argument on this point. Br. of Appellants at 27-30. Contrary to the Counties' contention, the violence victims are not asking to be third party beneficiaries of the duty the Counties' owed to their inmates. Rather, the violence victims reference this duty because it illustrates that the Counties' "parade of horribles" argument as to their "take charge" duty to the violence victims for Zamora's deteriorating mental condition during his incarceration is groundless. It runs parallel to the Counties' already existing, well-understood duty to its Jail inmates.

What is undeniable here is that Zamora's mental condition deteriorated during his incarceration in the Counties' Jails. Neither County fully evaluated Zamora's mental health condition. Neither County provided him effective treatment.

(c) The Counties' "Take Charge" Duty Is Not Limited to the Duration of the Period of Supervision

The Counties' also contend that they owed no duty for the consequences of Isaac Zamora's conduct once he was released, even though his mental condition deteriorated dramatically while he was subject to their supervision. Skagit br. at 14-19; Okanogan br. at 25-27. Ignoring this Court's *Petersen* decision, they rely on two Court of Appeals decisions.

What is inescapable from *Petersen* is that *the State no longer had any supervision of patient Larry Knox* when he plowed his vehicle into the plaintiff's car. He had been released from Western State Hospital. Nevertheless, the State could be liable for Knox's post-release conduct where its psychiatrist failed to take appropriate steps during Knox's in-patient treatment to deal with his problems.[12] *See also, Taggart*, 118 Wn.2d at 223.

Similarly, the Court of Appeals decisions in *Couch v. Dep't of Corrections*, 113 Wn. App. 556, 54 P.3d 197 (2002), *review denied*, 149 Wn.2d 1012 (2013) and *Hungerford v. State of Wash. Dep't of*

[12] Skagit County's attempt to distinguish *Petersen* because there the State knew at the time of his discharge that he presented a risk of harm to others, Skagit br. at 22, actually makes the violence victims' point here. Long before his release by either County, both Counties knew, *or should have known,* by proper evaluation of his deteriorating mental condition, that Zamora presented a risk of harm to others.

Corrections, 135 Wn. App. 240, 139 P.3d 1131 (2006) are distinguishable on their facts. Br. of Appellants at 26-27. *Hungerford* relied on *Couch*.

In *Hungerford,* the Department of Corrections ("DOC") supervised Cecil Davis following his release from prison. In March 1990, Davis was convicted of second degree assault with a deadly weapon and first degree criminal trespass for attacking a Tacoma couple. The trial court sentenced him to prison and subsequent community placement upon release, and ordered him to pay fines, costs, and restitution, also called legal financial obligations ("LFO"). He served his sentence and completed community supervision, but did not pay his LFOs. Then, in December 1992, Davis pleaded guilty to third degree theft; the trial court sentenced him to one year in jail but suspended this punishment so long as Davis successfully completed two years of probation and paid his LFOs.

In February 1995, DOC informed the trial court that Davis was behind on paying his 1992 LFOs. When he failed to attend a scheduled hearing, the trial court issued a bench warrant and police arrested Davis in early June. At a June 5, 1995 bench warrant hearing, instead of ordering jail time, the trial court found his "failure to pay was not willful," reduced the level of supervision by DOC from active status to only LFO monitoring, and ordered a review hearing of his LFO payments on December 8, 1995.

Davis did not appear for the December 8, 1995, review hearing and the trial court issued a bench warrant. On February 13, 1996, the trial court issued a second bench warrant for failure to pay LFOs arising from a 1990 felony. Davis murdered Hungerford-Trapp on April 14, 1996, before either warrant was served. DOC's failure to monitor Davis's LFO payments did not create a take charge duty on DOC's part there.

Couch arose from a murder that occurred on January 25, 1997 after DOC had a "take charge" relationship with the killer during three different time periods before the murder. *Couch*, 113 Wn. App. at 562.[13] The court held that the "main question in this case is whether the DOC owes a duty of care to prevent future crimes while supervising an offender only for the purpose of collecting money." *Id.* at 559. The court was not focused on whether the DOC had a duty only while it had an active take-charge relationship with the offender. It found that the time period before the murder was irrelevant because the court had terminated the DOC's active supervision of the offender. *Id.* at 570. If an entity with a take-charge relationship could be liable only for harms that occur during the relationship -- then the finding that the relationship had terminated by

[13] In analyzing whether the DOC had a take-charge relationship with the killer, the Court of Appeals considered three time periods: (1) from December 21, 1992 to June 5, 1995, when DOC had him on general misdemeanor probation; (2) from June 5, 1995 to April 26, 1996, when by court order the killer's supervision was reduced to "legal financial monitoring only"; and (3) from April 26, 1996 until the date of the murder when the supervision had been terminated by the court. *Id.* at 569-70.

April 26, 1996 would have ended the court's inquiry as to the two earlier time periods as well. Instead, however, the court analyzed the two periods separately. *Id.* It rejected the earliest time period not because there was no duty, but because it determined that this period, which concluded nineteen months before the murder, was not the proximate cause of the victim's harm. *Id.*

The court then stated that the second period was "material" and analyzed it in depth. *Id.* It held that no take charge duty applied, but not because the harm occurred later. *Id.* at 570-71. Rather, the court's holding was based on the fact that by then DOC was monitoring the killer only for LFOs and thus had no ability to monitor him for future criminal behavior. *Id.* at 571. The court concluded that DOC did not owe the victim a duty of care after June 5, 1995. *Id.*

Under the only logical interpretation of *Couch* and the other "take charge" cases, the proper inquiry is not whether the harm occurred during the "take charge" relationship, but rather whether the negligent act occurred during that time. For this reason, the *Couch* court categorized the time from June 1995 to April 1996 (nine months before the murder) as "material." And, for this reason, the court found it necessary to analyze whether a duty was owed during this time, even though it had already

concluded that any "take charge" relationship had definitely terminated after April 26.

This interpretation is also consistent with *Petersen*, in which Western State had released Knox five days *before* the accident in question occurred. Because the psychiatrist breached his duty while the subject was under his care, however, this Court held that the State could be liable for the harm that resulted after the relationship ended.

When both Counties assert that they had no take charge duty to the violence victims when Zamora went on his rampage, they miss the point. The question is not whether they had a "take charge" relationship with Zamora when he committed the shootings, but rather, whether they had a "take charge" relationship with Zamora at the time that the Jails breached their duty of care that ensued from that relationship. If the breach of duty leads to an injury after the special relationship is terminated, the Counties are nonetheless liable for the injury resulting from the breach.

Skagit County insists that for it to be liable it had to have a "continuing relationship" with Zamora. Skagit br. at 15. Both the context in which this language was first used and common sense require that the breach occur while the relationship is continuing, but that the injurious consequences are still actionable if they occur after the relationship has terminated.

The "continuing relationship" language was first used, not in *Taggart* as suggested by Skagit County, but in *Honcoop v. State*, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988).

> A review of the cases applying §315 discloses that a duty to a particular individual will be imposed only upon a showing of a definite, established and continuing relationship between the defendant and the third party. *E.g, Petersen v. State, supra; Tarasoff v. Regence of Univ. of Cal.*, 17 Cal.3d 425, 551 P.2d 334, 131 Cal. Rptr. 14, 83 ALR.3d 1166 (1976).

In both of the cited cases, *Petersen* and *Tarasoff*, a duty arose out of a § 315 special relationship. In both cases the breach of duty occurred during the course of the relationship, but the injury occurred after the relationship was terminated. In neither case did this impede the plaintiffs' tort claim.

Common sense dictates the same result here. If a duty arises in the context of a "take charge" relationship and the breach of that duty occurs while that relationship is intact, there is no reason to deny recovery if an injury occurs as a result of that breach after the relationship has ended. The duty is borne of the relationship but the consequences of breaching that duty are not dependent on the continuing existence of that relationship. Simply stated, as in *Petersen*, the liability-creating wrongful conduct on the Counties' part occurred during the period when they had charge over Isaac Zamora -- during his incarceration in their Jails.

(d) Liability for Increasing the Risk to the Violence Victims

Okanogan County does not address its liability under section 302B of the *Restatement (Second) of Torts*. Skagit County argues both that the violence victims did not argue the issue below, Skagit br. at 29-30, and that it did not owe a duty under the terms of that portion of the *Restatement*. Skagit br. at 30-37. Skagit County is wrong on both grounds.

First, the violence victims argued below that § 302B liability was present here. The violence victims specifically contended that the actions of both Counties affirmatively increased the risk presented by Isaac Zamora. CP 2520-22 (Okanogan County owed duty of care because actions increasing his risk to potential victims while he was in its Jail); CP 3341-43 (Skagit County owed duty out of Zamora's increased risk of harm created by its Jail's failure to evaluate and treat his mental health issues).

Second, Skagit County focuses inordinately on comments to Section 302B of the *Restatement*, rather than on the decisional law of this Court on its duty under § 302B. For example, the County cites comment e, Skagit br. at 31, and derives from it a requirement that liability does not occur unless the defendant expressly or impliedly agrees to protect the victims. Similarly, in citing comment f, Skagit br. at 37, the

County leaps to the conclusion that no liability exists under § 302B unless the person over whom the government takes charge is a known "homicidal maniac" or tries to escape. The County simply misses the teaching of this Court in *Robb v. City of Seattle,* 176 Wn.2d 427, 295 P.3d 212 (2013) and *Washburn v. Federal Way,* 178 Wn.2d 732, 310 P.3d 1275 (2013), and that of the Court of Appeals in *Parrilla v. King County,* 138 Wn. App. 427, 151 P.3d 879 (2007). Br. of Appellants at 32-37.

Contrary to Skagit County's protestations that it did not know Zamora had mental health problems or that its failure to fully evaluate or treat his mental health problems did not cause his condition to deteriorate, it was *fully* aware of the risk Zamora presented from:

- his long criminal history in Skagit County;
- his past involuntary treatment;
- the 220 alert code;
- his incarceration in the Jail's C-Pod;
- his delusionary actions while in the Jail;
- his violent conduct while in Jail;
- his mother's phone calls; and
- his Judgment and Sentence.

Moreover, his condition *deteriorated*, as both Dr. Levine and Dr. Hegyvary testified. CP 1972-73, 2540-41.

Skagit County's indifference to Zamora's condition was no different than the refusal of Federal Way's officers to read the contents of the anti-harassment order they were serving in *Washburn*. The County's

conduct affirmatively increased the risk Zamora presented, and a duty was stated under § 302B.

(e) The Public Duty Doctrine Is Inapplicable

Okanogan County, but not Skagit County, contends that the public duty doctrine barred the violence victims' claims here. Okanogan br. at 15-17. Okanogan County's half-hearted argument was not preserved for appellate review and is baseless.

First, the trial court found that the public duty doctrine applied only if no specific duty was owed by Skagit or Okanogan County under §§ 315, 319, or 302B of the *Restatement (Second) of Torts*. CP 218. To the extent that Okanogan County seeks to argue that the public duty doctrine bars the violence victims' claims independent of its contention that no duty was owed under those sections of the *Restatement*, its contention is barred because it has not filed a notice of cross-review.[14]

Second, the public duty doctrine does not apply here. The public duty doctrine is a "'focusing tool' ... to determine whether a public entity owed a duty to a 'nebulous public' or a particular individual." *Osborn v.*

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[14] In *State v. Xiong*, 137 Wn. App. 720, 723, 154 P.3d 318 (2007), *reversed on other grounds*, 164 Wn.2d 506, 191 P.3d 1278 (2008), a respondent sought to challenge the trial court's entry of certain findings of fact. The court rejected the argument because the respondent sought "affirmative relief" on appeal and failed to file a notice of cross-appeal. *See also, Robinson v. Khan*, 89 Wn. App. 418, 948 P.2d 1347 (1998) (defendants prevailed at trial, but sought to raise statute of limitations as further defense on appeal; court found argument barred as it was request for affirmative relief and no cross-appeal was filed).

Mason County, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) (quoting *Taylor v. Stevens County*, 111 Wn.2d 159, 166, 759 P.2d 447 (1998)) (internal quotations omitted). "The public duty doctrine simply reminds us that a public entity -- like any other defendant -- is liable for negligence only if it has a statutory or common law duty of care." *Id.* at 27-28. To this end, the public duty doctrine has two important limitations.

First, it applies *only* in cases in which the negligence claim is premised on the violation of a statutory duty. *Munich v. Skagit Emergency Communication Center*, 175 Wn.2d 871, 886, 288 P.3d 328 (2012) (Chambers, J., concurring) (citing *Harvey v. Snohomish County*, 157 Wn.2d 33, 134 P.3d 216 (2006)). As Justice Chambers explained, in a five-justice majority concurrence, this Court "has never held that a government did not have a common law duty solely because of the public duty doctrine." *Id.* at 886-87. The reason for this is simple: While tort law treats government entities the same as persons or corporations, the government has public duties, mandated by statutes, regulations, ordinances, etc., such as the duty to issue a permit or to maintain the peace, which private persons and corporations do not have. *Id.* at 887. The public duty doctrine simply interprets legislation to determine "whether a mandated government duty was owed to the public in general or to a particular class of individuals." *Id.* at 888 (citing *Halvorson v.*

Dahl, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978)). The violence victims do not claim a violation of a statutory duty here.

Second, the public duty doctrine applies only to omission cases, i.e. cases alleging that a public official failed to perform a required act. *See Coffel v. Clallam County*, 47 Wn. App. 397, 403-04, 735 P.2d 686 (1987). "The doctrine provides only that an individual has no cause of action against law enforcement officials for failure to act. Certainly if the officers do act, they have a duty to act with reasonable care." *Id.* at 403. Here, Skagit County and Okanogan County provided some mental health-related services to Zamora.

To the extent the violence victims assert a § 302B theory of recovery, the public duty doctrine is inapplicable. *See, e.g., Washburn*, 178 Wn.2d at 755, 761 ("As with any defendant, the true question is whether the entity owed a duty to the plaintiff, not whether an exception to the public duty doctrine applies to it[;]" Court finds liability under § 302B and rejects public duty doctrine application).

Moreover, the public duty doctrine is inapplicable in cases involving a special relationship. "Take charge" liability is precisely such a special relationship. *Taggart v. State*, 118 Wn.2d 195, 217-18, 822 P.2d 243 (1992) (citing *Petersen*).

The public duty doctrine does not bar the violence victims' claims here.

(2) Questions of Fact Abound in the Case As to Proximate Cause

Both Counties assert that the violence victims did not prove causation as a matter of law. Skagit br. at 37-46; Okanogan br. at 31-37. Both Counties argue "but for" causation and legal causation even though the trial court did not rest its decision on the latter theory. CP 210-11, 215.

(a) "But For" Causation

Neither County addresses the principal authorities and factual support provided by the violence victims on causation. Br. of Appellants at 37-44. In particular, both Counties deliberately ignore Dr. Hegyvary's opinion on causation. Both Counties also ignore this Court's seminal opinion in *Joyce*, a case involving "take charge" liability, even though it was cited *repeatedly* in the violence victims' opening brief. Instead, they rely on two Court of Appeals cases whose holdings were called into question by this Court's *Joyce* decision. Plainly, the Counties have no answer to Joyce.[15] Moreover, *Hertog* also supports *Joyce* on "but for" causation.

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[15] Having no answer to that decision means the Counties' effectively *concede* the points made by this Court's decision in *Joyce*. *Valley View Indus. Park v. City of*

In *Joyce*, Vernon Stewart, a person with a long history of criminal conduct and psychiatric problems, was under Department of Corrections supervision for his latest felony convictions. The Department's supervision was egregiously negligent; Stewart failed to obey the conditions of his community supervision. *Id.* at 310-14. While on supervision, Stewart stole a car in Seattle, drove it to Tacoma, ran a red light there, and smashed his stolen car into the car operated by Paula Joyce, killing her. *Id.* at 309.

This Court not only found the State owed Joyce a "take charge" duty, it made clear that "but for" causation is a *question of fact* for the jury that "may be determined as a matter of law only when reasonable minds cannot differ." *Id.* at 322. Thus, the Court rejected the State's motion to dismiss as a matter of law. *Id.*[16]

Similarly, in *Hertog,* another "take charge" liability case, this Court found "but for" causation is a question of fact. In that case, a 6-

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Redmond, 107 Wn.2d 621, 630, 733 P.2d 182 (1987) (failure to argue error constitutes a waiver of the error). The failure to cite or address contrary, controlling authority on an issue in a party's brief not only results in a waiver of the argument, it raises ethical issues. RPC 3.3(a)(3); comment [4] to RPC 3.3.

[16] *See also, Bell v. State*, 147 Wn.2d 166, 179, 52 P.3d 503 (2002) (jury question whether State's negligent supervision proximately caused a parolee sex offender to abduct and rape his victim); *Taggart v. State*, 118 Wn.2d 195, 227-28, 822 P.2d 243 (1992) (jury question whether failure of parole officials to respond to teletype from Montana authorities informing them that Montana police were standing by to arrest parolee was cause of injuries suffered by girl raped by parolee).

year-old girl was raped by a probationer, Barry Lee Krantz, on pretrial release. This Court affirmed the trial court's order denying the City's motion for summary judgment, finding issues of fact present as to whether the City's counselor breached his supervisory duty as to the probationer proximately caused the harm to the child. The Court rejected the City's contention that the counselor satisfied any duty by seeking to revoke Krantz's probation, which a court denied.

> The City argues that based on the knowledge that he had, Hoover could have done nothing to prevent the rape. The City premises this argument on the fact that the record thus far shows that Krantz used drugs and alcohol for two weeks prior to the rape, and that had Hoover known of that substance abuse, there was inadequate time for a petition for revocation of probation to be effected. It should be added that the information that Krantz consumed rugs and alcohol during that period is shown by a presentence report prepared after the rape which Hoover could not have known about.
>
> The Court of Appeals reasoned, however, that if Hoover had attempted to learn earlier whether monitoring by random urinalysis was being done and learned it was not, he could have sought revocation earlier. That court noted that treatment records of Dr. Von Cleve and Megan Kelley will clarify whether earlier violations occurred. *Hertog*, 88 Wn. App. at 57, 943 P.2d 1153. Thus, the court declined to hold that no issue of fact remains as to cause in fact. This conclusion is correct. As discussed below, we agree that the treatment records are discoverable. The records may show whether Krantz was in compliance with his probation conditions. Simply because Hoover sought revocation once does not mean that the duty to use reasonable care in supervision is forever satisfied. Further, the fact he did not actually know of probation violations does not answer the

> question whether he should have known of any such violations. Under Krantz's release agreement with Dr. Von Cleve, treatment and other information could be exchanged with Hoover, yet there is a material fact question as to whether Hoover sufficiently inquired about urinalysis or other testing.

138 Wn.2d at 283. The facts here are remarkably similar.

The principal authorities cited by both Counties on "but for" causation are *Estate of Bordon v. State, Dep't of Corrections*, 122 Wn. App. 227, 95 P.3d 764 (2004), *review denied*, 154 Wn. App. 1003 (2005) and *Walters*. Neither case helps the Counties. The *Bordon* court noted that proximate cause is generally a jury question. *Bordon*, 122 Wn. App. at 239.

In *Bordon*, the plaintiffs presented *no evidence* that had the State properly supervised the offender he would have been jailed. 122 Wn. App. at 241-44. The *Bordon* court ruled that while expert testimony was not always required, *some* evidence on causation was necessary. *Id.* at 243-44. Plainly, the violence victims here presented considerable evidence on causation.

In *Walters,* the factual predicate for take charge liability was simply too remote. In that case, Gordon Hampton had a history of domestic violence during which he made threats to his wife with a firearm when he was drunk. The last occurred in September 1970 when Port

Orchard officers took away his gun. He had no further contact with the police until February 3, 1972 when he shot plaintiff Robert Walters while visiting the Hamptons' home. The Court noted that the City had no notice that Hampton was violent outside of his marital disputes and had no interaction with him for 17 months. Any belief that City action in September 1970 would have prevented his conduct in February 1972 was too speculative to support "but for" causation:

> 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.

14 Wn. App. at 555.[17]

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[17] The *Walters* court also found that legal causation barred a claim because "the policy of the law (legal causation) should not countenance suits against a city for the basic discretionary action of its police chief relating to potential criminal prosecutions arising from marital conflicts." *Id.* at 556. There is no similar "legal policy" foreclosing liability for "take charge" situations given this Court's decisions in cases like *Petersen, Taggart, Hertog*, or *Joyce*.

The connection between the Counties' breach of duty and the harm to the violence victims is established because had they properly evaluated and treated Isaac Zamora's psychosis, he would not have engaged in his murderous rampage. There was ample testimony to establish that a proper evaluation would have led to effective voluntary, or involuntary, treatment of Zamora.

Dr. Hegyvary's direct and powerful testimony created a question of fact. He concluded that while in jail, Zamora did not receive a mental health assessment or treatment, and, if he had, he would not have gone on his September 2 rampage:

> As explained below, I am of the strong opinion that Isaac Zamora was not provided with a proper mental health evaluation or with any mental health treatment during his time at the Skagit and Okanogan County Jails. Furthermore, had either of these two counties provided Mr. Zamora with an adequate assessment and treatment, it is my opinion that Mr. Zamora would not have been in a psychotic state on September 2, 2008, and he would not have engaged in acts of violence on that day. Put another way, Mr. Zamora's psychosis-fueled rampage could have been easily prevented via the provision of basic psychiatric care and low-cost antipsychotic medications, both of which should have been provided to him by Skagit and Okanogan Counties.

CP 2537-38.

Zamora's psychiatric illness was long-standing, not a sudden aberration. CP 2538. Dr. Hegyvary stated: "My opinion, as confirmed by

other psychiatrists who have evaluated him, is that Zamora's actions on September 2, 2008 were the result of a severe, untreated and long-standing mental disease, specifically schizophrenia, paranoid type with associated hallucinations and delusions." CP 2542. A proper evaluation would have revealed Zamora's psychosis. CP 2543.

The Skagit County Jail had adequate information to alert personnel that Zamora needed a proper psychiatric evaluation. "Clinical interviews conducted after the shootings confirm that Zamora was, in fact, experiencing severe psychotic hallucinations and delusions during his time at both the Skagit County and Okanogan County Jails. For example, at Skagit County he saw monsters and demons out the window of his room and felt his bed was electrified." CP 2540.

Skagit County never provided Zamora with proper mental health evaluation or treatment. CP 2539.

Once Zamora's psychotic illness was identified, effective treatment would have been available, CP 2540-41, even when he did not want treatment. CP 2543-44. Dr. Hegyvary noted:

> Based on Mr. Zamora's behavior while incarcerated at Skagit and Okanogan Counties, it is unreasonable to assume that Mr. Zamora would have rejected antipsychotic medications if offered. Mr. Zamora may have had difficulty complying with an oral regime of antipsychotic medications requiring daily administration, but there are long-acting, injectable medications for use in these

> situations. Halloperidol Decanoate is one such antipsychotic commonly used in the treatment of schizophrenia and acute psychotic states. The medication is a long-acting injection given only once every four weeks.... The positive, therapeutic effects of the Haloperidol Decanoate lasts for longer than four weeks, thus, even if an injection was not given at the four week mark the medication would continue to work to subdue or eliminate psychosis for up to six weeks.... It is likely that either of these medications would have been effective in reducing or completely eliminating Mr. Zamora's psychosis, including his hallucinations and delusions.

CP 2544-45. Dr. Hegyvary stated: "Importantly, we know that Zamora's schizophrenia *was*, in fact, treatable with antipsychotic medications -- as evidence by his course upon admission to Western State Hospital after the shootings." CP 2545 (emphasis in original). Dr. Levine also testified in concluding that medication would render Zamora competent to stand trial. CP 1966, 1979.

Dr. Hegyvary concluded that if Zamora had been properly evaluated and treated, the events of September 2nd likely could have been avoided. *Id.* This testimony created a question of fact on "but for" causation.

(b) Legal Causation

Both Counties merely recite general principles of legal causation without appropriate analysis. Skagit br. at 44-46; Okanogan br. at 31-32.[18]

[18] The trial court here did not rest its decision on legal causation. CP 210-11, 215. Neither County preserved this issue for review as they did not file a cross-appeal to

Skagit County's recitation of facts is particularly truncated, and misleading. Skagit br. at 44. This recitation is but another example of Skagit County's ostrich-like "head in the sand" perception of Zamora. It ignores the long history of his mental health problems in interactions with Skagit County's authorities, and his hallucinations and violent episodes while in its Jail. Skagit County's ultimate plea to this Court is that it is entitled to ignore Zamora's array of mental health issues because its Jail "is not a mental hospital." *Id.* at 45. But it *is* a criminal justice facility that may not cause the mental illnesses of its inmates to be exacerbated by its indifference to those illnesses, making them ticking time bombs.

Legal causation "involves the question of whether liability should attach as a matter of law, even if the proof establishes cause in fact." *City of Seattle v. Blume*, 134 Wn.2d 243, 252, 947 P.2d 223 (1997). "Legal causation involves a determination whether liability should attach given cause in fact and is a question of law for the court based on policy considerations as to how far the consequences of the defendant's act should go." *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 51, 176 P.3d 497 (2008). The concept of legal causation involves considerations of "logic, common sense, justice, policy and precedent." *Hartley v. State*,

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secure additional relief on appeal. This Court should disregard their request for such relief. *See* n.14, *supra*. The Counties' effort to obtain summary judgment based on legal causation is a similar request for "affirmative relief."

103 Wn.2d 768, 779, 698 P.2d 77 (1985). "The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998).

The cases on legal causation illustrate the application of the principle. In *Hartley*, this Court found that legal causation principles applied where the plaintiffs argued that the State was liability for wrongful death and injuries caused by an intoxicated person because it had not revoked that person's driver's license. The Court stated that the failure to revoke was "too remote and insubstantial," a basis for liability. *Hartley*, 103 Wn.2d at 784. In *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 15 P.3d 1283 (2001), this Court held that legal causation could not be established where the defendant negligently left keys in its van and a third party stole it, but that third party went home, slept overnight, drank to intoxication, and the next day criminally caused the accident that injured the plaintiff. The remoteness in time between the negligence and the injury was "dispositive." *Id.* at 205. In *Colbert*, the Court found that legal causation limited the duty owed to family members to avoid negligent infliction of emotional distress to persons physically present at an accident

scene or who arrive shortly thereafter because they experienced the immediacy of the distressful situation. 163 Wn.2d at 51-53.

Cases involved a "take charge" duty are not susceptible to a legal causation argument -- the harm is not attenuated or remote. Indeed, this Court specifically rejected legal causation arguments in *Petersen*, 100 Wn.2d at 435-36, *Taggart*, *Hertog*, and *Joyce*.

In *Petersen*, this Court rejected a legal causation argument, noting too many facts and inferences from the facts in dispute. 100 Wn.2d at 435-36.

In *Taggart*, the victims of violent assaults by parolees filed suit against the State for liability arising out of its having taken charge of the parolees. Not surprisingly, the State alleged that legal causation foreclosed its liability to the violence victims in those cases. This Court *rejected* the State's legal causation argument predicated on its assertion that it lacked sufficient warning as to the parolees' violent conduct; it was speculative that any action by State officials would have prevented the violence, and the State lacked sufficient resources to properly monitor parolees. 118 Wn.2d at 225-28. The Court also distinguished *Walters*, the case on which the Counties rely as one where *factual causation* was not established. *Id.* at 227. Thus, the Counties cannot say *as a matter of law* that violence to victims like the violence victims here in a "take charge"

duty case is too remote or insubstantial. This Court emphasized that point in *Hertog* when it stated: "Where a special relationship exists based upon taking charge of the third party, the ability and duty to control the third party indicate that defendant's actions in failing to meet that duty are not too remote to impose liability. 138 Wn.2d at 284. That causal connection remains one to ordinarily be decided by a jury.

This Court's analysis in *Joyce* is particularly telling, again rejecting essentially the identical argument made by the Counties here:

> The State also argues that we should conclude, as a matter of law, that the State's negligence was not the cause of Joyce's death because, it contends, even if it had properly monitored Stewart and reported violations to the court, it is unknown what action, if any, the court could have taken. Therefore, argues the Department, any causal connection between breach of duty and Joyce's death is too speculative. This argument is predicated on a misunderstanding of our reasoning in *Bishop*, 137 Wn.2d 518, 973 P.2d 465 and *Bell v. State*, 147 Wn.2d 166, 178-79, 52 P.3d 503 (2002).
>
> It is true that *if* the Department had properly supervised the offender and reported his violations, and *if* a judge had nonetheless decided to leave Stewart at large in the community, the causal chain may have been broken as a matter of law. That is what we held in *Bishop*. Even though the judge in *Bishop* was aware that the supervised offender had violated conditions of probation, that he had a severe alcohol problem, and that he had willfully "[drive] after his license had been suspended, the judge did not revoke probation." *Bishop*, 137 Wn.2d at 532, 973 P.2d 465. "As a matter of law, the judge's decision not to revoke probation under these circumstances broke any causal connection between any negligence and the

> accident." *Bishop*, 137 Wn.2d at 532, 973 P.2d 465. If the Department had properly monitored Stewart and reported his violations to either of the two sentencing judges, and if the Department had unsuccessfully asked for judicial action, the causal chain would have been broken.

155 Wn.2d at 321. Likewise, in this case, both Counties simply raise concerns about whether Zamora would have accepted treatment, had he been properly evaluated and treated, or whether he qualified for involuntary treatment. The glaring problem, of course, is that both Counties neither evaluated nor treated Zamora and allowed his mental illness to become appreciably worse. Just as Vernon Stewart in *Joyce*, Larry Knox in *Petersen*, the *Taggart* parolees, and the probationer in *Hertog* were mental health time bombs waiting to go off, Isaac Zamora was a similar time bomb.

The harm occasioned to the violence victims by Zamora's rampage was the direct result of the Counties' permitting his psychosis to persist unevaluated and untreated during his incarceration in their Jails. For the reasons examined in detail in the previous subsection on "but for" causation, the basis for the Counties' liability to the violence victims was not unforeseeable, Zamora's rampage was neither too remote nor insubstantial.

Legal causation does not foreclose the Counties' liability here, as it has not in so many of this Court's "take charge" duty cases.

(3) Skagit County Was Not Immune as a Matter of Law under RCW 71.05.120(1)

Skagit County, but not Okanogan County, asks that this Court find it immune under RCW 71.05.120(1), Skagit br. at 46-48. This was again not a basis for the trial court's decision, CP 210, and should be rejected for the reasons set forth *supra* in n.14. RCW 71.05.120(1), however, is inapplicable here.

The statute applies only to "*the decision* of whether to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment. *PROVIDED, that such duties were performed in good faith and without gross negligence.*" RCW 71.05.120(1) (emphasis added). The violence victims do not seek to hold Skagit County liable for a "decision" whether to admit, release or treat Zamora. Rather, both Counties are liable for their breach of their "take charge" duty to the violence victims with respect to Zamora.

Skagit County's discussion of the pertinent case law is incomplete. It cites only *Estate of Davis v. State*, 127 Wn. App. 833, 113 P.3d 487 (2005) in support of its position. There, the basis for connecting the murder victim's harm to the State's breach of its take charge duty as to an offender on community supervision was the State's failure to secure the offender's involuntary treatment. The Court of Appeals concluded that

RCW 71.05.120 applied and the plaintiff failed to prove gross negligence as a matter of law.

But it is important to note that RCW 71.05.120(1) only applies to involuntary treatment-related issues and then does not afford the Counties an immunity from liability. Indeed, if the Counties acted in bad faith or with gross negligence, RCW 71.05.120(1) does not help them. This Court and the Court of Appeals have determined that gross negligence, in particular, presents *a question of fact.*

In *Petersen*, RCW 71.05.120 was presented to the jury by instruction. 100 Wn.2d at 441. The Court concluded that the trial court's instruction was proper. Moreover, the Court found that the evidence was sufficient to sustain liability for the State on a gross negligence standard even where the plaintiff did not provide expert testimony on the standard of care for a psychiatrist or its breach. *Id.* at 436-37. The State was liable where its psychiatrist at Western State Hospital failed to seek additional in-patient treatment for a patient the psychiatrist knew to be dangerous particularly if he rejected necessary drugs and took PCP.

In *Poletti v. Overlake Hospital Medical Center*, 175 Wn. App. 828, 303 P.3d 1079 (2013), the Court of Appeals held that the gross negligence standard of RCW 71.05.120(1) applied to the discharge of a voluntarily admitted patient without an adequate evaluation of that patient's condition.

That patient later died in a single-car crash. The court, however, found fact issues on gross negligence:

> The estate points to a number of mistakes the hospital allegedly made in caring for Poletti during the eighteen hours between her voluntary admission and discharge. For example, taken in the light most favorable to the estate, the record indicates the hospital did not monitor Poletti as it should have and as a result was unaware that she still was not getting much sleep. Also, there is evidence the charge nurse did not follow the attending physician's orders.
>
> The estate's primary wrongful death theory is that the hospital's act of discharging Poletti caused her death. We leave for the trial court to consider on remand whether any hospital employees' acts that preceded or followed the decision to discharge may have caused Poletti's death, and what jury instructions would be appropriate to allow the estate to develop such a theory.

Id. at 836-37. The Estate also asserted the hospital was liable as a matter of law because it failed to follow its own policy mandating a referral for a full evaluation for involuntary treatment by a county-designated mental health professional. Again, the court left this issue, as well as the Estate's contention that the hospital's errors were so abundant as to justify a finding of gross negligence as a matter of law, to the trier of fact. *Id.* at 838.

In this case, it is important to note that the violence victims' argument is not solely focused on Zamora's involuntary treatment. They argue that the Counties' breach of duty was present in not properly

evaluating or treating Zamora, voluntarily or involuntarily, during his incarceration. These are questions of fact where the Counties' steadfast failure to evaluate or treat Zamora was not only negligent, but grossly so. Further, Skagit County's deliberate truncation of the records it sent to Okanogan County raises issues of its good faith.

RCW 71.05.120(1) does not bar the violence victims' claims.

D. CONCLUSION

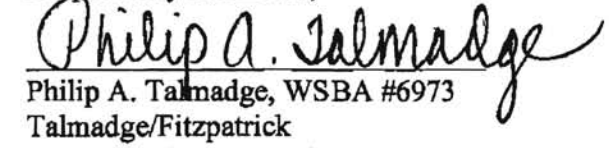
Because they distort the record of their knowledge of Isaac Zamora's mental health condition while incarcerated in their Jails, this Court should give scant credence to both Counties' arguments on duty and proximate cause.

Nothing in the Counties' briefs should dissuade this Court from concluding that the trial court erred in dismissing the violence victims' complaints against the Counties by finding no duty was owed or by ruling on proximate cause as a matter of law.

This Court should reverse the trial court's summary judgment and remand the case to the trial court for a trial on the merits of the violence victims' case against the Counties. Costs on appeal should be awarded to the violence victims.

DATED this 24th day of March, 2014.

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 Reply Brief, and the Reply Brief of Appellants in Supreme Court Cause No.89256-3 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: March 12th, 2014, at Tukwila, Washington.

Roya Kolahi, Legal Assistant
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Subject: Motion and Reply Brief of Appellants
Attachments: Motion and Reply Brief of Appellants.pdf

Good afternoon:

Attached please find the Motion for Leave to File Over-Length Reply Brief and Reply Brief of Appellants in Supreme Court, Cause No. 89256-3 for today's filing. Thank you.

Sincerely,

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