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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,

Respondents,

vs.

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

Defendants,

and

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

Petitioner.

VIOLENCE VICTIMS' ANSWER TO AMICI BRIEFS



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## A. INTRODUCTION

This Court has accepted the amici briefs of the State of Washington (“State”), the Washington Association of Municipal Attorneys (“WSAMA”), the Washington Cities Insurance Authority (“WCIA”), the American Civil Liberties Union (“ACLU”), and the Washington Association for Justice Foundation (“WSAJF”) in this matter.

Those briefs in many instances profoundly misrepresent the facts concerning the mental health history and violent conduct of Isaac Zamora, his incarcerations at the Skagit County Jail, during which his mental health deteriorated, unevaluated and untreated, despite a court order mandating such evaluation and treatment, and his consequent murderous rampage that resulted in six deaths and four people seriously wounded at his hands.<sup>1</sup>

Moreover, these memoranda fundamentally misread the County’s liability under §§ 315 and 319 of the *Restatement (Second) of Torts*, hoping to re-shape and truncate this Court’s precedents on “take charge” liability, particularly *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983). The amici offer a duty analysis that would reward jailers for

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<sup>1</sup> The State, WSAMA, and WCIA submitted amici memorandum in connection with RAP 13.4(b) review. They often *repeat* erroneous factual claims in their briefs that they made in those memoranda. The respondents pointed out those factual errors in detail. Answer to Amici Memos at 2-5. There is literally no excuse for such studied disregard of the facts in this case. See RPC 3.3 (candor with tribunal).

ignoring, ostrich-like, inmate mental health conditions, conditions that foreseeably result in explosive violence, as the violence victims' experts confirmed in their testimony.

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

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

## B. STATEMENT OF THE CASE

The Court of Appeals correctly recited the facts. Op. at 3-12. The amici indulge in *blatant* factual misrepresentations.<sup>2</sup>

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<sup>2</sup> WSAJF and the ACLU did not provide memoranda on review, as did the State, WSAMA, and WCIA. The factual recitation in the WSAJF brief is accurate. The ACLU brief is replete with the blatantly erroneous characterization of the facts. For example, the ACLU claims Zamora received "a mental health evaluation." ACLU br. at 2. That is misleading. Two mental health contractors saw Zamora while he was in the Jail and pleaded with the County for a proper evaluation. Victims' suppl. br. at 4 n.5. Those contractors did not say Zamora was not dangerous to himself or others, as the ACLU asserts. ACLU br. at 2. The ACLU again misleads when it says Zamora declined

The amici assert that Zamora had no history of violence. WSAMA repeats its assertion that Zamora had no "violent criminal history" or "no previous history of violence" in its motion for leave at 3, 4 and WCIA claims he had no "behavioral issues while he was in jail, and he did not present a risk to himself or others while in jail. WCIA br. at 1. That is flatly *untrue*. Zamora was indeed a violent individual, a fact *known* to County authorities,<sup>3</sup> and he was violent while in the Skagit County Jail -- he *stabbed* another inmate during his incarceration there. CP 2464. Moreover, he was written up for serious infractions while in the Jail. CP 2462, 2464, 2467, 2469-71. While at the Jail, he was obviously not "non-violent." Between his incarcerations at the Jail, Zamora stockpiled a cache of firearms, weapons he knew he could not legally possess. CP

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prescribed mental health medication, *id.*, when it *ignores the fact Zamora himself three times requested mental health treatment while in the Jail* and did not receive it. Victims' suppl. br. at 4 n.5. Moreover, he took Lamictal while in the Jail. CP 3673. When the ACLU asserts Zamora served his Jail time "with limited incident," ACLU br. at 3, it obviously makes light of the fact Zamora allegedly stabbed a fellow inmate, CP 2464, he was written up for serious infractions, CP 2462, 2464, 2467, 2469-71, and he had manifest psychotic episodes there.

The ACLU also blatantly misrepresents the violence victims' actual argument. The violence victims *nowhere* have contended that "the correctional system assume greater responsibility for long term mental health treatment." ACLU br. at 4. That is simply false. Nor have the violence victims advocated "forcible administration of psychotropic medication," *id.* at 5, or holding Zamora beyond his release date. *Id.* at 8. These assertions betray the ACLU's deliberate mischaracterization of the violence victims' central contention that the County had a duty to them in tort as prescribed in §§ 315, 319 and this Court's "take charge" cases to protect them from Zamora's violence.

<sup>3</sup> As just one example, Zamora was involuntarily confined and treated under RCW 71.05 in 2003. This could only occur if he was a danger to himself or to others, or was gravely disabled. RCW 71.05.150(1).

1700-01, 1765. Indeed, the State misclassified Zamora upon his Jail release as a "high risk nonviolent offender" when he was a *high risk violent offender*. CP 3356.<sup>4</sup>

The amici also claim that Zamora allegedly would not take the Lamictal prescribed for him while he was in the Jail, WCIA br. at 1, implying that he would not have taken anti-psychotic medications had such medications actually been prescribed for him. Again, the actual record is to the contrary. First, while he was at the Jail, it was Zamora who three times asked for mental health treatment, CP 2958, 3685, 3687, indicating a willingness to utilize such services and any prescribed treatment. Moreover, while in the Jail, he routinely took Lamictal, as the County's medication log indicated. CP 3673.<sup>5</sup> Moreover, while he was at Western State Hospital, after his rampage, Zamora *voluntarily* took anti-psychotic medications. CP 2545.

Third, the amici continue to omit reference to Zamora's incarceration in the Jail *in August 2008* and his interactions with law

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<sup>4</sup> In its brief at 6 n.4, the State tries to explain why it now seeks to provide this Court a position on "take charge" duty as *an amicus* when it settled with the violence victims as *a party*. Its effort to describe the situations as "different" is truly disingenuous. In its post-release supervision of Zamora, it "took charge" of him. It was liable to the violence victims because it misclassified Zamora as nonviolent and it failed to comply with the sentencing court's mandate that he undergo mental health evaluation and treatment. CP 3694. The County's duty to the violence victims is entirely comparable.

<sup>5</sup> Zamora also freely discussed Lamictal while at Okanogan County Jail, CP 3700, hardly the conduct of one who willfully refused to be medicated.

enforcement *in September*. The amici would have this Court believe that Zamora was released from incarceration on August 2, 2008 and that his rampage then occurred on September 2, a month later. They ignore Zamora's *second* incarceration at the Jail in August 2008 and the call to Snohomish County law enforcement officers on September 1, the day before his rampage.<sup>6</sup> On August 5, in that second incarceration, Zamora pounded the walls of his holding cell, hardly the conduct of a "non-violent" individual. CP 2465. Similarly, on September 1, he destroyed property in a bizarre fit that required intervention by *three deputies*. CP 2853.

Finally, left unsaid and *undisputed* by any of the amici, despite Zamora's own requests and pleas of his mother, and notwithstanding requests from the County's own mental health contractors, at no point during his incarceration at the Jail did Zamora receive a requested and court-ordered mental health evaluation by appropriate mental health professionals, nor proper treatment of his mental health condition, despite those requests, and the court order; his already problematic mental health condition *deteriorated during his confinement*. CP 2533, 2539.

This Court should consider the *actual facts* here, rather than those concocted or ignored by the amici; the County owed the violence victims a

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<sup>6</sup> Between August and September, Zamora's trend toward violence was manifested in his illegal gathering of firearms. CP 1700-01, 1765.

duty of care and that factual questions on proximate cause abound, foreclosing dismissal of the violence victims' claims against the County on summary judgment.

C. ARGUMENT

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

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

The amici seek to read this Court's *Petersen* decision out of Washington law by distorting the Court of Appeals' analysis of the County's "take charge" duty to the violence victims under the *Restatement (Second) of Torts* §§ 315, 319. The Court of Appeals correctly followed this Court's teachings in its "take charge" liability cases.

WSAMA dramatically misstates the scope of the County's duty to take charge of Zamora, asserting that the County's "take charge" duty was confined to physical control to prevent Zamora from harming others by his escape or improper early release from confinement. WSAMA br. at 3.<sup>7</sup> WCIA makes a similar argument that the County had no duty as to

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<sup>7</sup> In its motion for leave, but not its brief, WSAMA argues the duty extends only to identifiable victims. Motion at 3.

Zamora to anyone outside the Jail. WCIA br. at 3-7.<sup>8</sup> The State and the ACLU also *repeatedly* seek to misshape the Court of Appeals decision, and the violence victims' argument, as one of imposing a duty to treat and rehabilitate violent offenders or to impose psychotropic medication on inmates against their will or to extend their period of confinement beyond their sentences. State br. at 1-2, 17; ACLU br. at 6-7. That has *never* been the violence victims' position, nor did the Court of Appeals decision reflect such an analysis.<sup>9</sup> *The County itself* never made these truncated duty arguments at any time previously in the case. This Court should not even consider such an argument raised for the first time in this Court only by an amici or its supplemental brief. *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 495 n.12, 120 P.3d 564 (2005).

As in *Petersen*, the County's duty was to prevent the condition of the individual over which it had to control to deteriorate to such a degree that such individual foreseeably would cause harm to others, as Zamora did here.

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<sup>8</sup> WSAMA also *admits* that the County had a duty to control inmates with known dangerous propensities to prevent harm to others, WSAMA br. at 6, but claims that the County really could not control Zamora during his total confinement in its Jail, *id.* at 6-8, despite its unambiguous duty to provide Zamora mental health treatment. WSAMA also goes on at great length about the necessity of expert testimony on the standard for control, *id.* at 9-11, seemingly ignoring the pertinent expert testimony of Mr. Esten and Dr. Hegyvary provided by the violence victims to the trial court.

<sup>9</sup> Thus, the State's citation to case authority on a duty to rehabilitate or its emphasis on recidivism data is irrelevant to the issues at stake here.

Moreover, such arguments are not supported by *any* of this Court's "take charge" duty cases. In fact, none of those cases including *Petersen* (released WSH patient); *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992) (parolees); *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999) (probationer); or *Joyce, supra*, (parolee), so narrowly construe the "take charge" conduct, limiting it only to preventing escapes and/or improper releases of an individual from custody. None of those cases implied a duty to cure or rehabilitate the controlled patient or offender. These cases generally involve improper supervision during the "take charge" period. If government amici's analysis were the law, and it is not, there would not have been a duty in *any* of those cases.<sup>10</sup>

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

The aspect of the duty argument that the County does raise, as do the amici, is the extent to which a defendant may be liable for conduct of the person over whom it took charge once the actual "take charge" control concludes. But this Court has already answered that question in *Petersen*,

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<sup>10</sup> The *Restatement (Second) of Torts* § 319 itself *nowhere* confines the "take charge" duty to situations involving an escape or improper release from control, as WSAMA seemingly *concedes*. WSAMA br. at 3. The comments to § 319 reveal that the "take charge" duty is not as truncated as advocated here by WSAMA. Indeed, comment a to § 319 makes this entirely clear: A, a private hospital for contagious diseases, releases B, who has scarlet fever, due to its staff's negligence in believing B is no longer infectious. B communicates the disease to D *after* the "take charge" period is over. A is liable to D. This case is no different.

a case the amici would essentially have this Court read out of Washington's "take charge" duty jurisprudence.<sup>11</sup> This issue is whether the wrongful conduct occurred during the period of take charge control, as the violence victims noted in their supplemental brief at 15-21. Here, it did. The County failed to evaluate or treat Zamora's *profound* mental health distress *while he was incarcerated in its Jail*, even though ordered by the sentencing court to do so; because those profound mental health problems were allowed to fester, unevaluated and untreated, he was a ticking time bomb upon his release waiting to go off, a fact only confirmed by his second incarceration at the Jail on August 5. Not unexpectedly, he then exploded.

It is important to recall that in *Petersen*, a patient with a long history of schizophrenia and abuse of the drug, PCP, or Angel Dust, who had emasculated himself while high on the drug, was released from

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<sup>11</sup> In *Volk v. Demeerleer*, 184 Wn. App. 389, 337 P.3d 372 (2014), *review granted*, 183 Wn.2d 1007 (July 8, 2015), Division III addressed the medical malpractice liability of psychotherapists in a case in which the plaintiff argued that the girlfriend and child of a mental health patient not involuntarily detained had a reduced chance of survival. The court's majority concluded that RCW 71.05.120(2) did not circumscribe the duty articulated by this Court in *Petersen*, narrowing it to specifically identifiable potential victims.

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

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

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

The Court of Appeals appropriately understood this Court's "take charge" duty decisions when it stated the County's argument that no duty existed once the "take charge" period ended confuses the *existence of a duty with its scope*. Op. at 18. See also, WSAJF br. at 6-17.

The Court of Appeals correctly applied this Court's "take charge" duty precedents.

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

The governmental amici – WSAMA, WCIA, and State – are obviously self-interested, having direct fiscal reasons for hoping that this Court will ignore its controlling precedents on "take charge" duty and causation; they hope to portray the Court of Appeals decision as one that "vastly" expands the present duty of jailers or creates a new duty all together that will increase costs to government. Such arguments ring entirely hollow.

First, although WCIA and the ACLU profess concerns about forcing jail inmates to take anti-psychotic medications, it is worth noting that the government amici have not evidenced such regard for the therapeutic or forensic needs of jail or correctional inmates in times past.<sup>12</sup>

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<sup>12</sup> After misrepresenting the violence victims' actual arguments about the duty owed by the County as a jailer to the victims of a violent, severely mentally ill individual whose mental illness, left unevaluated and untreated, progressively worsens and causes

*See, e.g., Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, 101 F. Supp.3d 1010 (W.D. Wash. 2015) (the federal district court was compelled by the routine and long-standing disregard of the rights of pretrial detainees in jail to address such detainees' right to pretrial competency services – the proper and timely evaluation of their mental illness). As the court observed in its decision, the defendants “demonstrated a consistent pattern of intentionally disregarding court orders” resulting in contempt findings; the court determined that this was “a de facto policy of ignoring court orders which conflict with their internal policies.” *Id.* at 1024. The State appealed *Trueblood*. Martha Bellisle, *State Seeks Reversal of Ruling on Competency Evaluations*, *Seattle Times*, Dec. 7, 2015. When push comes to shove, jailers will readily avoid the rights of jail inmates to mental health services.

Moreover, for all their complaints that the Court of Appeals opinion somehow “vastly” expanded their mental health-related

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his violent psychotic outbreak, the ACLU contends that a “take charge” duty under §§ 315, 319 will encourage the warehousing of the mentally ill in jails. ACLU br. at 10-14. That argument is *fundamentally illogical*. If jailers like the County can ignore inmate mental health issues, as they will if not held accountable for the consequences of their failure to evaluate/treat that jail population, they will continue to warehouse that population rather than meet their duty to evaluate and treat their illness. That is the deterrent purpose and effect of tort law. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 419-20, 150 P.3d 545 (2007) (recognizing deterrent effect of tort law). The ACLU’s position on tort duty *will encourage the warehousing of mentally ill inmates in jail*.

obligations to jail inmates, *that is simply untrue*.<sup>13</sup> The amici generally fail to appreciate the implications of the already-existing duty owed by jailers to jail inmates to provide mental health services.<sup>14</sup>

A jailer has a duty to provide mental health services to an inmate during the inmate's incarceration.<sup>15</sup> *It is precisely for this reason that the*

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<sup>13</sup> Moreover, left largely unaddressed by any of the amici is the fact that the Legislature has statutorily curtailed the scope of liability for individual State and local government, treatment professionals, and law enforcement officers associated with decisions on involuntary treatment of mental health patients. RCW 71.05.120(1). *See, e.g., Poletti v. Overlake Hospital Med. Ctr.*, 175 Wn. App. 828, 303 P.3d 1079 (2013) (hospital decision to discharge voluntarily admitted mental patient without in-person evaluation by county designated mental health professional subject to gross negligence standard of statute); *Estate of Davis v. Dep't of Corrections*, 127 Wn. App. 833, 113 P.3d 487 (2005) (county immune from liability for incomplete unreasonable treatment of murderer who was not detained under RCW 71.05 and killed victims because treatment, though negligent, did not rise to level of bad faith and gross negligence). These cases make clear that a duty exists to victims of mental patients, although the duty is limited.

<sup>14</sup> Indeed, in Zamora's case, in addition to the duty to provide mental health care to Zamora discussed *infra*, the court sentenced Zamora to 12 months of community supervision. CP 3694. As a condition of such supervision by the County and the Department of Corrections, a "take charge" control over Zamora, Zamora was to receive both mental health evaluation *and treatment*, and was ordered to comply with any treatment recommendation. *Id.*

<sup>15</sup> By statute, all jail inmates receive appropriate and necessary medical care. RCW 70.48.130(1). Similarly, a common law duty exists. *Shea v. City of Spokane*, 90 Wn.2d 43, 578 P.2d 42 (1978), this Court determined in a per curiam opinion that a municipal corporation could not delegate its duty to provide health care to a jail inmate, specifically approving the "analysis, rationale, and conclusion" of a Court of Appeals opinion that articulated the duty of municipalities as one of providing "competent and adequate" medical care to jail inmates, given the custodial relationship between them. *See also, Kusah v. McCorkle*, 100 Wash. 318, 323, 170 Pac. 1023 (1918) (sheriff's duty to jail inmate once inmate is in custody is to "keep him in health and safety."); *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635-36, 244 P.3d 924 (2010) (duty to provide health care to jail inmates included a duty to provide mental health services because the jailer-inmate custodial relationship is a special relationship under Washington tort law; city there *conceded* that an instruction stating that the City had a "duty to provide for the mental and physical health and safety needs of persons locked in the jail" was a correct statement of the law.).

*duty articulated by the Court of Appeals should have no fiscal impact; the duty is required by already-existing law.*<sup>16</sup>

The centerpiece of the State's argument in support of review by this Court is that the Court of Appeals decision conflicted with this Court's decision in *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990). State br. at 4-5. In making this argument, the State is deliberately obtuse to the facts and analysis in that case and is bent on attempting to re-frame the Court of Appeals duty analysis under § 315 of the *Restatement*, and the violence victims' arguments, as one of a "duty to treat and rehabilitate" all jail inmates, when *clearly* that has *never* been the violence victims' argument or the Court of Appeals' analysis.

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

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<sup>16</sup> The only way the duty articulated by the Court of Appeals can have profound fiscal representations is if jailers are routinely violating jail inmates' rights to mental health services as those jailers have routinely violated pretrial detainees' rights to competency services as in *Trueblood*. In effect, amici ask this Court to truncate the duty owed by the County as a jailer to jail inmates to provide them mental health evaluation and treatment during their incarceration by rewarding the County with limitations on "take charge" liability when it deliberately discourages or fails to offer mental health evaluation or treatment to inmates.

*Gregoire*.<sup>17</sup> In the latter portion of the *Melville* court's decision, it stated that even if a duty existed, any mental health services were voluntary only and there was no evidence the inmate would have utilized the services. *Id.* at 40-41.<sup>18</sup> Here, the record is decidedly to the contrary where Zamora himself sought mental health services while in the Jail, took Lamictal voluntarily while he was in the Jail, and readily accepted anti-psychotic medication when he was at Western State Hospital. *Melville* is thus entirely distinguishable.

Finally, the efforts of the County and its governmental allies to raise the spectre of uncontrolled costs in connection with their duty in tort to the violence victims is simply *improper* under this Court's precedents. WSAJF br. at 17-19. But liability for municipalities like the County is not

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<sup>17</sup> There is real irony in the State making this argument when it settled with the violence victims for its role in failing to prevent Zamora's rampage of violence, stipulating to a series of judgments against it in the face of the violence victims' allegations that it failed to monitor Zamora after his release and did not comply with court-ordered mental health treatment, and its specific allegation that the County was at fault for Zamora's violence. CP 24-40, 45-62, 3848-49. Its protestation that its duty to the violence victims is somehow "different," State br. at 6 n.4, rings hollow.

<sup>18</sup> The argument by the amici that inmates cannot be forced to take anti-psychotic medication is ultimately irrelevant to the *duty* issue presented by this case. It is a matter that goes to the question of *breach*, a question of fact for the jury. *Hertog*, Wn.2d at 275. In any event, as noted by the violence victims *supra*, there was ample evidence that Zamora would *voluntarily* have accepted mental health treatment, *had the County ever properly evaluated his condition while in its Jail, something it never did*. Zamora himself sought mental health services while in the Jail, implying he would have complied with any treatment offered; he took Lamictal until its use was discontinued at the Okanogan County Jail; he voluntarily accepted mental health treatment at Western Hospital after his murderous rampage.

automatic in any event; in order for claimants who are the victims of any inmate's violence to recover in tort, they must still demonstrate first that a county or other jailing authority breached the duty to provide requisite mental health services, that the victims were within the field of danger from the County's failure to provide such services, and that any harm occasioned to the victims proximately resulted from the breach.

In sum, the duty owed by the County here arises out of the well-worn contours of its already-existing special relationship to jail inmates to provide mental health services to those inmates during their incarceration.<sup>19</sup>

(2) The Court of Appeals Decision Correctly Analyzed Causation

The Court of Appeals correctly analyzed the causation issue. Op. at 23-26. Now, among the various amici, only WCIA addresses causation, and then it only addresses legal, not "but for," causation.

The County in this case has always offered scant attention to causation, leaving that issue to its governmental amici allies. The County devoted exactly *one paragraph* in its petition and its supplemental brief to

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<sup>19</sup> In fact, the failure to provide such mental health services likely violates the Eighth Amendment, *Brown v. Plata*, 563 U.S. 493, 131 S. Ct. 1910, 1928, 179 L. Ed.2d 969 (2011), and could subject a County to liability under 42 U.S.C. § 1983 for deliberate indifference to those mental health service needs.

the issue. Pet. at 17; County suppl. br. at 19.<sup>20</sup> The County only cursorily addresses "but for" causation in its supplemental brief. But its argument is half-hearted and fails to articulate precisely how the Court of Appeals' analysis, resting as it does on this Court's "take charge" liability cases, is somehow erroneous. The County *nowhere* addresses "but for" causation as discussed in this Court's "take charge" duty cases. County suppl. br. at 18-19. This *glaring* omission to confront controlling authority is no surprise. This Court has repeatedly treated the issue as a *question of fact* in *Taggart*, 118 Wn.2d at 225-28; *Hertog*, 138 Wn.2d at 275; and *Joyce*, 155 Wn.2d at 322.

Among the amici, only WCIA addresses causation and it confines its argument to legal causation rather than "but for" proximate cause. WCIA br. at 2-11. Because the duty and legal causation analyses are akin, this Court should rule on the legal causation question just as it rules on duty.

WCIA's legal causation analysis focuses largely on the alleged "gap" between Zamora's release from the Jail and his rampage,<sup>21</sup> citing

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<sup>20</sup> As noted in the violence victims' answer to the County's petition at 19-20, the County only raised legal causation as an afterthought both in the Court of Appeals and in its petition to this Court and the trial court did not rest its opinion on legal causation. This Court should not address an issue effectively argued only by amici rather than a party in the case.

<sup>21</sup> As noted *supra*, this "gap" discussed by WCIA completely ignores the events of August-September 2008, including Zamora's further Jail incarceration.

this Court's decisions in *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 344 P.3d 661 (2015) and *Kim v. Budget Rent-a Car Sys., Inc.*, 143 Wn.2d 190, 15 P.3d 1238 (2001). WCIA br. at 7-9. But *McKown* is not a "take charge" liability case and addresses *duty*, not causation.<sup>22</sup>

In *Kim*, this Court found no duty was owed by a rental car company to a person who was injured in an automobile accident by a person who took a rental vehicle in which the company negligently left the keys. The Court also found no legal causation given the fact that the thief had time to go home with the vehicle, go to sleep, and become intoxicated by alcohol and marijuana before becoming involved in the collision; his actions were not foreseeable to the rental car company. By contrast, as the Court of Appeals noted, Zamora's actions, based on evidence adduced in this case, were foreseeable. The Court of Appeals legal causation was fully consistent with this Court's "take charge" decisions in *Petersen* and *Joyce*, rejecting the very same legal causation arguments amici now raise.

As this Court has *repeatedly* rejected legal causation arguments in "take charge" liability cases beginning with *Petersen*, it should do so again here.

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<sup>22</sup> In *McKown*, this Court indicated that foreseeability as a limit on the scope of any duty is a question of fact for the jury, 182 Wn.2d at 762-64, just as did the Court of Appeals here. Op. at 16-17.

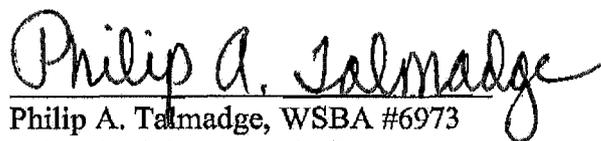
#### D. CONCLUSION

Nothing offered in the various amici briefs should dissuade this Court from concluding that the Court of Appeals correctly determined under this Court's well-established precedents that the County owed a duty to the victims of Isaac Zamora's violent rampage where it "took charge" of Zamora, it knew of his deteriorating mental health from his past history, his repeated requests for mental health treatment while in the Jail, and his mother's similar requests, and yet it neither evaluated nor treated his problems when he was incarcerated in its Jail or upon his release from the Jail as it had been ordered to do by the sentencing court. Zamora's condition could have been successfully evaluated and treated, as his Western State Hospital treatment records document.

The amici arguments on duty, offered with cynical claims of regard for the civil rights of jail inmates, simply avoid the County's duty to provide mental health treatment to Zamora and to protect the violence victims from his untreated rage; the amicus' disparaging mischaracterization of the County's duty as a mere duty to medicate threatens only to re-victimize the violence victims. The Court of Appeals got it right on duty and legal causation. This Court should affirm the Court of Appeals decision, awarding costs on appeal to the violence victims.

DATED this ~~18th~~ day of December, 2015.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed a copy for service a true and accurate copy of the Violence Victims' Answer to Amici Briefs in Supreme Court Cause No. 91644-6 to the following:

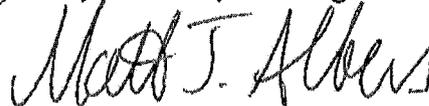
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 18, 2015, at Seattle, Washington.




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Matt J. Albers, Paralegal  
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Good afternoon,

Attached please find the following documents for filing with the Court:

Document to be filed: Violence Victims' Answer to Amici Briefs

Case Name: Fred Binschus, et al. v. Skagit County and State of Washington, Dept. of Corrections, et al.

Case Cause Number: 91644-6

Attorney Name and WSBA#: Philip A. Talmadge, WSBA #6973 of Talmadge/Fitzpatrick/Tribe

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If you have any questions, please feel free to contact me. Thank you!

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