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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Petitioner,

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

Defendants.

SUPPLEMENTAL BRIEF OF PETITIONER SKAGIT COUNTY

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. SUPPLEMENTAL STATEMENT OF ISSUE 1

III. SUPPLEMENTAL STATEMENT OF THE CASE 2

A. Zamora fully served his jail sentence in Skagit and Okanagan County jails and was released from custody – and from Skagit County's control – on August 2, 2008. 3

B. Zamora was under Department of Corrections, not County, supervision following his release. 6

C. Skagit County deputies documented three non-violent incidents involving Zamora, none resulting in criminal charges or further incarceration, before his September 2 rampage. 7

IV. SUPPLEMENTAL ARGUMENT 8

A. The County's duty to control Zamora's behavior terminated upon his release from County custody. 8

B. The County's "take charge" relationship with Zamora while in custody did not impose upon the County a duty to cure his mental illness or prevent Zamora from reoffending. 11

C. Respondents have no claim that Skagit County's affirmative actions increased the risk of harm to them. 16

D. Skagit County's failure to medicate Zamora was neither a legal nor factual cause of his criminal rampage a month after his unconditional release from custody. 18

V. CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Bd. of Sedgwick County Comm'rs,
289 Kan. 577, 214 P.3d 1173 (2009) 11

Bishop v. Miche,
137 Wn.2d 518, 973 P.2d 465 (1999) 9

Couch v. Dep't of Corr.,
113 Wn. App. 556, 54 P.3d 197 (2002), *rev. denied*,
149 Wn.2d 1012 (2003) 10

Donaldson v. City of Seattle,
65 Wn. App. 661, 831 P.2d 1098 (1992), *rev. dismissed*, 120 Wn.2d 1031 (1993) 2

Gregoire v. City of Oak Harbor,
170 Wn.2d 628, 244 P.3d 924 (2010) 12

Hertog v. City of Seattle,
138 Wn.2d 265, 979 P.2d 400 (1999) 9, 16

Honcoop v. State,
111 Wn.2d 182, 759 P.2d 1188 (1988) 9

Hubbard v. Spokane County,
146 Wn.2d 699, 50 P.3d 602 (2002), *overruled on other grounds by Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268, 358 P.3d 1139 (2015) 15

Hungerford v. Dep't. of Corr.,
135 Wn. App. 240, 139 P.3d 1131 (2006), *rev. denied*, 160 Wn.2d 1013 (2007) 19

Husted v. State,
187 Wn. App. 579, 348 P.3d 776 (2015), *rev. denied* November 3, 2015 10

Kim v. Budget Rent A Car Systems, Inc.,
143 Wn.2d 190, 15 P.3d 1283 (2001) 19

Kusah v. McCorkle,
100 Wash. 318, 170 P. 1023 (1918) 12

Lewis River Golf, Inc. v. O.M. Scott & Sons,
120 Wn.2d 712, 845 P.2d 987 (1993) 15, 17

Litchfield v. Nelson,
122 Idaho 416, 835 P.2d 651 (1992) 11

M.W. v. DSHS,
149 Wn.2d 589, 70 P.3d 954 (2003) 2

Melville v. State,
115 Wn.2d 34, 793 P.2d 952 (1990) 11-12

Osborn v. Mason County,
157 Wn.2d 18, 134 P.3d 197 (2006) 9

Parrilla v. King County,
138 Wn. App. 427, 157 P.3d 879 (2007) 17

Petersen v. State,
100 Wn.2d 421, 671 P.2d 230 (1983) 13-14, 16

Robb v. City of Seattle,
176 Wn.2d 427, 295 P.3d 212 (2013) 17

Ruf v. Honolulu Police Dep't.,
89 Haw. 315, 972 P.2d 1081 (1999) 11

Sheikh v. Choe,
156 Wn.2d 441, 128 P.3d 574 (2006) 10

Smith v. Dep't. of Corr.,
__ Wn. App. __, __ P.3d __, 2015 WL 5042152
(Aug. 26, 2015) 10

State v. Bobic,
140 Wn.2d 250, 996 P.2d 610 (2000) 17

State v. Jones,
118 Wn. App. 199, 76 P.3d 258 (2003) 3

Taggart v. State,
118 Wn.2d 195, 822 P.2d 243 (1992) 9

Washburn v. City of Federal Way,
178 Wn.2d 732, 310 P.3d 1275 (2013) 18

Statutes

Laws 1987, ch. 212, § 301 ..... 14, 16

RCW 9.92.151 5

RCW 9.94A.505 3

RCW 9.94B.080 3

RCW 70.48.071 12-13

RCW 70.48.130 12

RCW ch. 71.05 ..... 13, 15

RCW 71.05.120 14-16

RCW 71.24.025 3

Rules and Regulations

RAP 2.5 17

RAP 13.4 ..... 15, 17

RAP 13.7 ..... 15, 17

Other Authorities

Restatement (Second) of Torts § 302B (1965) 16-17

Restatement (Second) of Torts § 319 (1965) 11, 18

Restatement (Third) of Torts: Phys. & Emot. Harm §
29 (2010) 19

Restatement (Third) of Torts: Phys. & Emot. Harm §
41 (2012) 10-11, 14

I. INTRODUCTION

Respondents seek to hold petitioner Skagit County liable not because the County controlled or supervised Isaac Zamora when he committed his murderous rampage in September 2008, but because they claim Skagit County failed to medicate Zamora while he was in custody from April until August 2008. Skagit County's "control" over offenders serving criminal sentences in the County jail does not impose upon the County a tort duty to the public at large to prevent future criminal conduct following an offender's unsupervised release from County custody after completion of his sentence. This Court should reverse the Court of Appeals and affirm the trial court's order of dismissal.

II. SUPPLEMENTAL STATEMENT OF ISSUE

The Court's website Summary of Issues fairly characterizes the issue raised by this appeal:

Whether in a negligence action against a county stemming from the death or injury of several persons at the hands of a former jail inmate a month after his release, may the County be liable under its "take charge" duty to control the inmate on the basis of its alleged failure to adequately diagnose and treat the inmate for his mental condition while he was incarcerated?

III. SUPPLEMENTAL STATEMENT OF THE CASE

Obscuring the facts relevant to their "take charge" theory of liability for failing to treat Zamora while he served his six month sentence, respondents repeatedly cite Zamora's "interactions with law enforcement" *after* his August 2, 2008, release as somehow indicative of a breach of duty while Zamora was in Skagit County's custody. (Amici Answer 4; Petition Answer 6-8) But respondents have abandoned their claim against Skagit County for its Sheriff's failure to arrest or investigate Zamora following his release (CP 2047-53, 3328),[1] and Zamora was under Department of Corrections, not County supervision, when he committed his September 2008 crimes.[2]

Respondents concede that the County had no ongoing legal obligation or physical ability to control or to supervise Zamora following his release from County custody. The material facts concerning Zamora's incarceration in the Skagit County jail, his

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[1] Respondents' "failure to arrest" claim had no legal support whatsoever. *See M.W. v. DSHS*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003) ("Our courts have not recognized a general tort claim for negligent investigation."); *Donaldson v. City of Seattle*, 65 Wn. App. 661, 676, 831 P.2d 1098 (1992) (recognizing there is "no general duty to arrest"), *rev. dismissed*, 120 Wn.2d 1031 (1993).

[2] The State paid respondents over $10 million in settlement of their claims that the Department of Corrections was negligent in its supervision of Zamora once he was released from jail at the conclusion of the custodial portion of his sentence. (CP 24-62)

transfer to Okanagan County, and his release from custody a month before his murderous rampage, are undisputed.

A. Zamora fully served his jail sentence in Skagit and Okanagan County jails and was released from custody – and from Skagit County's control – on August 2, 2008.

Isaac Zamora was arrested on outstanding misdemeanor warrants at his parents' home after making a 911-hang up call on April 4, 2008. (CP 3553) On May 15, he was sentenced to six months in the Skagit County jail for felony possession of cocaine and a misdemeanor malicious mischief charge. (CP 3491, 3502) Zamora's sentence included a post-confinement term of 12 months of community supervision by the Department of Corrections. The district court also ordered Zamora to obtain a "mental health eval [uation]/treatment," based on an agreed recommendation of the prosecution and Zamora's defense counsel. (CP 1328-29, 3498-99)[3]

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[3] *See* former RCW 9.94A.505(9) ("The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense.") recodified at RCW 9.94B.080 (effective August 1, 2009). This provision of Zamora's sentence was likely unenforceable because it was unsupported by any findings or a presentence report. *See State v. Jones*, 118 Wn. App. 199, 209-10, 76 P.3d 258 (2003). However, it is not material to the *County's* duty of care following Zamora's release, as the Department of Corrections was responsible for his post-incarceration supervision. (CP 1328-29, 3449)

Zamora was in custody in the Skagit County Jail from April 4 to May 29, 2008. A mental health counselor evaluated Zamora on April 11, four days after his mother requested that Zamora, then age 27, receive mental health services. (CP 3681, 2412, 3685) The counselor recommended Lamictal, a mood stabilizer, and a medical assistant prescribed it to Zamora three days later, on April 14. (CP 2412, 3685) On April 23, the jail's medical assistant noted that the medication log contradicted Zamora's assertion that he had been taking the Lamictal as prescribed, and recorded Zamora's assertion that he "doesn't want any type of 'mental' medications." (CP 2414, 3687)[4] The log itself confirms that Zamora refused to take the Lamictal prescribed for him. (CP 3700, 3712)

During his time in the Skagit County jail, Zamora was disruptive, but with the exception of one altercation with another inmate, not violent.[5] Skagit County transferred Zamora to the custody of the Okanagan County to serve the rest of his sentence on May 29, 2008. He was classified as a non-violent offender at a low

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[4] Respondents provide no contrary evidence. Their statement that Zamora "indicat[ed] a willingness to utilize . . . any prescribed treatment . . ." (Amici Answer 3) is without any evidentiary support whatsoever.

[5] Zamora claimed another inmate had assaulted him. The jail notes reflect no injuries to either inmate. (CP 2462-64)

risk of escape. (CP 1336, 1339) As Skagit County had sent Zamora's most recent medical records (CP 3649), Okanagan County's medical assistant knew Zamora had been prescribed Lamictal while in the Skagit County jail. Zamora told the Okanagan County assistant he was not taking Lamictal and did not want it. (CP 3700)

Zamora exhibited no signs of mental illness or aggressive behavior while he was in jail in Okanagan County. (CP 3700-01) It is undisputed that Zamora completed the remainder of his sentence at the Okanagan County Jail without incident.[6] He was released on August 2, 2008, with two months of earned release credit for good behavior. *See* RCW 9.92.151(1). (CP 1338)

Three days after his release, on August 5, 2008, Skagit County deputies responded to a 911 call from Zamora's mother that her son "was being disruptive." (CP 1590, 2568) The deputy arrested Zamora on an outstanding misdemeanor warrant for failure to appear. He was taken to a jail holding cell where he pounded on the walls, but "was changed [sic] down without incident." (CP 3563)

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[6] Respondents characterize as "baseless" (Petition Answer 6) the assertion that Zamora's two month detention in Okanagan County concluded without incident, but once again fail to cite any contrary evidence.

Respondents point to this incident as indicative of Zamora's propensity for violence.[7] But they claim no duty on the part of the County to provide treatment to Zamora during the 24 hours he was in County custody on August 5-6, 2008, and the court ordered Zamora released on his own recognizance the next day. (CP 3564)

B. Zamora was under Department of Corrections, not County, supervision following his release.

On August 11, 2008, Zamora reported to the Department of Corrections community corrections office when his community corrections officer was not on duty. He returned the next day, August 12. (CP 1608-09) Zamora was compliant and cooperative, agreeing to obtain the court-ordered mental health evaluation as soon as he was approved for benefits from DSHS. (CP 1609, 1629) On August 20 and 27, Zamora reported again to his community corrections officer, who rated Zamora "high [risk] non-violent

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[7] Respondents' hyperbole concerning Zamora's "known dangerousness" has no support in the record. Skagit County law enforcement and jail personnel knew Zamora as an individual with mental health issues, not as a "violent individual." (Amici Answer 3) (*See* CP 3201: "he had a history of other calls and he was flagged . . . for a mental"; CP 3551: "we are aware that ISAAC ZAMORA does have some mental problems"; CP 3720: Skagit County Jail Sgt. Moore reporting on April 9, 2008 that Zamora was "[i]n and out since 1999 – *no incidents of aggressive behavior*." (emphasis added)) With the exception of a 2003 third degree assault arrest, Zamora's criminal and arrest history consisted of nonviolent misdemeanors, drug offenses, and property crimes. (CP 2651-52)

offender," meaning he was at high risk of committing a non-violent drug or property offense. (CP 870, 1610-11)

C. Skagit County deputies documented three non-violent incidents involving Zamora, none resulting in criminal charges or further incarceration, before his September 2 rampage.

On August 13, 2008, Skagit County sheriff deputies responded to another 911 hang-up call from Zamora's parents' residence. Zamora denied making the call. The responding officer reported "there was no problem at the residence," and Zamora left on his motorcycle. (CP 3558) Five days later, on August 18, a Skagit County officer responding to a neighbor's trespass call advised Zamora not to return. (CP 3559) Two hours later, Zamora crashed his motorcycle and was taken by ambulance to Skagit County Hospital, where he was treated for a broken collar bone. (CP 3560) The emergency room physician documented Zamora's abusive attitude toward staff and his narcotic-seeking behavior, but did not deem Zamora a threat to himself or others and did not express any other concerns about his mental health. (CP 1488)

On September 1, 2008, the next door neighbor called 911 to report that Zamora had confronted his wife. The neighbor did not wish to press trespass charges, but expressed concern about Zamora's mental health. (CP 3561-62) Later that evening,

Zamora's father drove him to a meeting with a DSHS psychologist, arranged by his mother, to assess Zamora's eligibility for state assistance. (CP 1291-92, 1306-08, 3538-40) Zamora's father told the psychologist that he and his wife did not feel endangered by Zamora. (CP 1296-97, 1300, 1309) The psychologist characterized Zamora as "oppositional" and "uncooperative," but not "acutely . . . symptomatic." (CP 1312, 2404-06)

The next day, Zamora killed six people, including a Skagit County sheriff's deputy, and injured five others, in a murderous rampage that lasted two hours. (CP 2768-70) After pleading guilty to four counts of aggravated murder, Zamora is serving a life sentence without the possibility of parole. (CP 3453-82)

IV. SUPPLEMENTAL ARGUMENT

A. The County's duty to control Zamora's behavior terminated upon his release from County custody.

Because the government's "take charge" duty of care ceases upon termination of its custody or control over an inmate, the County is not liable in tort for Zamora's crimes committed after completion of his sentence. Respondents' contention that the County is liable for Zamora's criminal actions after his release because "the County 'took charge' of Zamora when he was confined in its Jail" (Amici Answer 7) is unsupported by precedent or policy.

Respondents dismiss as mere "coincidence" the fact that Zamora committed his crimes when no longer under the supervision or control of Skagit County. (Petition Answer 13) But the premise of this Court's imposition of "take charge" tort liability for an offender's criminal acts is the existence of a "definite, established and continuing relationship between the defendant and the third party." *Taggart v. State,* 118 Wn.2d 195, 219, 822 P.2d 243 (1992) (Department of Corrections' duty to supervise offenders under community supervision), quoting *Honcoop v. State,* 111 Wn.2d 182, 193, 759 P.2d 1188 (1988); *Hertog v. City of Seattle,* 138 Wn.2d 265, 279, 979 P.2d 400 (1999) (city probation counselor's duty to "monitor[] the probationer to ensure that conditions of probation are being followed, and . . . to report violations to the court."); *Bishop v. Miche,* 137 Wn.2d 518, 973 P.2d 465 (1999) (county probation officer's duty to control probationer under officer's supervision). "[A] public entity has a 'take charge' duty to control parolees, mental patients, and others . . . *to the extent it has authority to control them.*" *Osborn v. Mason County,* 157 Wn.2d 18, 24-25, ¶ 10, 134 P.3d 197 (2006) (citations omitted) (emphasis added) (County "did not 'take charge' of [sex offender] because it had no authority to control him.").

In the absence of a continuing "take charge" relationship, there can be no duty to prevent a crime. *Sheikh v. Choe,* 156 Wn.2d 441, 453, ¶ 19, 128 P.3d 574 (2006). Thus, where an offender absconds from supervision and a warrant is issued for his or her arrest, the requisite continuing relationship no longer exists and the duties associated with the take charge relationship are terminated unless and until the person is apprehended. *Smith v. Dep't. of Corr.,* ___ Wn. App. ___, ¶ 19, ___ P.3d ___, 2015 WL 5042152 (Aug. 26, 2015); *Husted v. State,* 187 Wn. App. 579, 590, ¶¶ 23-24, 348 P.3d 776 (2015), *rev. denied* November 3, 2015. *See also, Couch v. Dep't of Corr.,* 113 Wn. App. 556, 571, ¶¶ 3-4, 54 P.3d 197 (2002) ("[I]f DOC lacked the ability to monitor Davis for future criminal behavior . . . , it was not participating in a 'take-charge' relationship of the kind that *Taggart* and its progeny require."), *rev. denied,* 149 Wn.2d 1012 (2003).

Neither this nor any other court has extended "take charge" custodial duty to impose liability for acts committed after the release of an inmate when the state, city, or county has no further control or supervision of the offender. To the contrary, "[t]he duty of care is limited to the period of actual custody." *Restatement*

(Third) of Torts: Phys. & Emot. Harm § 41 cmt. f (2012).[8] This Court should hold that the "take charge" liability of Skagit County does not extend to crimes committed after termination of the County's custodial control over an offender.

B. The County's "take charge" relationship with Zamora while in custody did not impose upon the County a duty to cure his mental illness or prevent Zamora from reoffending.

Respondents' attempt to impose a duty to prevent Zamora's post-custodial crimes while he was in the Skagit County jail is similarly without precedent. The County, in its capacity as jailor, has no obligation to provide treatment to prevent an inmate from re-offending upon release. *Melville v. State,* 115 Wn.2d 34, 793 P.2d 952 (1990) (State could not be liable in tort following a released inmate's murder of his ex-wife and their daughter three months after his release from custody based on its failure to provide mental health counselling while the inmate was incarcerated). As

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[8] *See Adams v. Bd. of Sedgwick County Comm'rs*, 289 Kan. 577, 214 P.3d 1173, 1185 (2009) ("When a defendant does not have the ability to control the behavior that causes the harm, this court has not found the special relationship that must exist before a duty arises under §§ 315 and 319 of the Restatement."); *Ruf v. Honolulu Police Dep't.*, 89 Haw. 315, 972 P.2d 1081, 1093 (1999) (noting no decisions under *Restatement (Second) of Torts* § 319 impose liability for acts of "a tortfeasor who had caused injury after being released from police custody."); *Litchfield v. Nelson*, 122 Idaho 416, 835 P.2d 651, 657 (1992) ("[O]nce the Bonner County Jail complied with the court-ordered release, its special relationship with Dawson, and its consequent duty to control him, had terminated.").

this Court recognized in *Melville,* the statutory obligation to provide for the medical needs of inmates in state, county or city custody and "general statements" of legislative policies to provide treatment to prisoners, to rehabilitate them, and to "ensure the public safety" "do not require the kind of specific actions from which a duty in tort should arise." 115 Wn.2d at 38.[9]

Contrary to respondents' contention (Amici Answer 14-16), subsequent cases have not overruled or limited *Melville's* holding that a jailor has no duty to provide mental health care sufficient to prevent the commission of future crimes. Respondents cite *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, ¶ 12, 244 P.3d 924 (2010) for this proposition, ignoring that the custodial relationship between a jail inmate and a jailor has long given rise to a duty protect the health of the inmate, as well as other prisoners, because inmates in custody are not capable of protecting themselves. *See Kusah v. McCorkle*, 100 Wash. 318, 323, 170 P. 1023 (1918). But just as the Department of Corrections had no duty to the public to cure an inmate's mental illness in *Melville*, the

[9] *See* RCW 70.48.130(1) (legislature's intent "that all jail inmates receive appropriate and cost effective emergency and necessary medical care"); RCW 70.48.071 (city and county jails must adopt minimum standards "necessary to meet federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff . . . and to provide for the public's health, safety, and welfare.").

County's obligation "to meet federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff . . . and to provide for the public's health, safety, and welfare," RCW 70.48.071, does not impose any duty to prevent a mentally ill inmate from re-offending after release from custody.

Respondents' contention that *Petersen v. State,* 100 Wn.2d 421, 428, 671 P.2d 230 (1983) "controls here" (Petition Answer 13) is particularly misplaced. There, a state psychiatrist had authority, but failed, to petition the court for an additional 90-day commitment under RCW ch. 71.05, releasing a schizophrenic patient, the day after he was caught recklessly driving on hospital grounds, knowing that the patient was likely to "revert to using angel dust." *Petersen,* 100 Wn.2d at 428. Under *Petersen,* a psychiatrist in a state hospital has a duty to use reasonable care, commensurate with a similarly situated professional, to protect those who might be foreseeably endangered by a patient who poses a risk of harm.

Respondents argue that *Petersen* stands for the proposition that one in a take charge relationship must "address the person's risk to others, even if that risk is manifested after the 'take charge' period ends." (Petition Answer 14) But the professional duty of a psychotherapist to diagnose mental illness and predict her patient's

future dangerousness is not co-extensive with the duties of a jailor, who lacks the training or the resources to provide the level of psychiatric care necessary to control the behavior of mentally ill inmates beyond their term of confinement. *See Restatement (Third) of Torts: Phys. & Emot. Harm*, § 41 cmt. g (2012).

Respondents' reliance on *Petersen* also ignores the broad statutory immunity given to state and county officials concerning decisions to involuntarily commit, detain or to medicate a mentally ill offender. RCW 71.05.120 was amended following *Petersen* to include state and local governments within its immunity provisions. Laws 1987, ch. 212, § 301(1). That statutory immunity substantially limits "take charge" liability for the offender's post-release crimes, immunizing the County from liability if its "duties were performed in good faith and without gross negligence":

> No officer of a public or private agency, . . . nor any public official performing functions necessary to the administration of this chapter, . . . nor any county designated mental health professional, nor the state, a unit of local government, or an evaluation and treatment facility shall be civilly or criminally liable for performing duties pursuant to this chapter with regard 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).

Respondents have failed to address this statute at all, arguing instead that their theory of liability "d[oes] not rest . . . on the ITA." (Petition Answer 14)[10] Respondents' disclaimer of the ITA proves too much. By conceding that the County had no obligation to "administer antipsychotic medications, or detain [Zamora] for evaluation and treatment," RCW 71.05.120(1), respondents are left to argue that the County may be liable for failing to convince Zamora to voluntarily take psychiatric drugs notwithstanding his adamant refusal to take the drugs the County had in fact prescribed for him. (Arg. § D, *infra*)

Respondents also ignore that when the Legislature amended RCW ch. 71.05 post-*Petersen,* it specifically rejected their theory of

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[10] Respondents purport to "reserve the opportunity to address the fact that the County could have sought Zamora's involuntary treatment during or at the conclusion of his incarceration." (Petition Answer 14, n.17) Before the Court of Appeals, respondents expressly disavowed any claim against the County for violating RCW ch. 71.05. (Reply Br. 42: "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."). The Court of Appeals expressly relied on the concession in not addressing any claim under the ITA. (Op. ¶ 69 n.37) Moreover, respondents may not under RAP 13.4(d) or RAP 13.7(b) "reserve" an argument in a 4-line footnote in an Answer to Petition for Review that does not seek cross-review. *See Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 725, 845 P.2d 987 (1993) ("incomplete briefing" does not preserve issue for review); *Hubbard v. Spokane County*, 146 Wn.2d 699, 705 n.7, 50 P.3d 602 (2002) (court "need not consider" assertions "raised only in a footnote."), *overruled on other grounds by Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268, 358 P.3d 1139 (2015).

unlimited liability to the public at large, repudiating *Petersen's* duty to "take reasonable precautions to protect *anyone* who might foreseeably be endangered." 100 Wn.2d at 428 (emphasis added). *See Hertog*, 138 Wn.2d at 293 n.1 (Talmadge, J., concurring) ("the Legislature statutorily abrogated our holding in *Petersen*"). The Legislature instead narrowed the "duty to warn or to take reasonable precautions to provide protection from violent behavior *where the patient has communicated an actual threat of physical violence against a reasonably identified victim or victims.*" RCW 71.05.120(2) (emphasis added). *See* Laws 1987, Ch. 212, § 301. With the possible exception of his fellow inmate, with whom he fought on one occasion, Zamora threatened no one with physical violence while in the custody of the Skagit County Jail. The County had no duty to treat Zamora, to further detain him, or to warn the public at large in a manner to prevent his utterly random acts of violence.

C. Respondents have no claim that Skagit County's affirmative actions increased the risk of harm to them.

The Court of Appeals correctly rejected any claim that the County could be liable under *Restatement (Second) of Torts* § 302B (1965), holding that "there simply were no affirmative acts" that

"dramatically increased the risk of harm" to the public." (Op. ¶¶ 57-63) Respondents failed to raise this distinct theory of liability in opposition to summary judgment in the trial court,[11] and have not preserved it as an independent basis for review by this Court.[12]

In any event, the County's alleged "fail[ure] to provide [Zamora] a proper evaluation or treatment" (Petition Answer 9, n.12) is not the type of affirmative misfeasance that created a new danger, as opposed to ameliorating a pre-existing one. *Contrast Robb v. City of Seattle*, 176 Wn.2d 427, 437-38, ¶ 22, 295 P.3d 212 (2013) (officers engaged in no affirmative malfeasance by failing to pick up shot gun shells dropped by suspect) *with Parrilla v. King County*, 138 Wn. App. 427, 440-41, ¶¶ 29-30, 157 P.3d 879 (2007)

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[11] *See* RAP 2.5(a). In the trial court, respondents relied exclusively on the "take charge" theory as a basis for liability against the Skagit County Jail (as opposed to the Sheriff). (CP 2042-47, 2676-80, 3323-24; *see* Skagit Cty. Resp. Br. 29-30)

[12] This Court will review only issues raised in "the petition for review and the answer, unless the Supreme Court orders otherwise." RAP 13.7(b). "If the party [filing an answer] wants to seek review of any issue that is not raised in the petition for review . . . the party must raise those new issues in an answer." RAP 13.4(d). Respondents' answer contained a footnoted reference to the Court of Appeals' holding that "the County did not owe the violence victims a duty under § 302B." (Petition Answer 9, n.12) That meager reference is not a legal argument challenging the Court of Appeals' holding that the County 's failure to treat Zamora's mental illness *created* an identifiable risk of harm. *See State v. Bobic*, 140 Wn.2d 250, 258, 996 P.2d 610 (2000) (refusing to review issue in absence of cross-petition); *Lewis River*, 120 Wn.2d at 725 (refusing to review "incomplete[ly] brief[ed]" issue raised conditionally in answer to petition for review). *See also* note 10, *supra*.

(bus driver increased risk of harm by leaving deranged passenger on board bus on public street with engine running); *Washburn v. City of Federal Way,* 178 Wn.2d 732, 760, ¶ 65, 310 P.3d 1275 (2013) (leaving assailant home alone with victim after serving anti-harassment order "created a new and very real risk to [victim's] safety") and *Restatement (Second) of Torts* § 319 cmt. a, illus. 2 (1965) (liability where through negligence "a homicidal maniac is permitted to escape"). Even were the Court to expand the scope of review, it should reject this theory of recovery.

D. Skagit County's failure to medicate Zamora was neither a legal nor factual cause of his criminal rampage a month after his unconditional release from custody.

Nothing but speculation supports respondents' theory that "but for" Skagit County jail's failure to provide mental health treatment, Zamora would not have committed his crimes. Ignoring the undisputed fact that Zamora consistently refused the psychiatric medication that the County did prescribe him (CP 3700, 3712), respondents' expert asserted that since Zamora "sometimes" took the prescribed Lamictal, "it is not unreasonable to assume" that Zamora would have voluntarily consented to receive "a long-acting injection . . . once every four weeks." (CP 2544) Such conjecture is far too speculative to establish cause in fact. *See*

Hungerford v. Dep't. of Corr., 135 Wn. App. 240, 255, ¶ 37, 139 P.3d 1131 (2006) (expert's testimony that closer financial supervision of offender by DOC would have prevented crimes "is speculative at best."), *rev. denied*, 160 Wn.2d 1013 (2007).

In any event, legal causation limits the scope of liability as a matter of public policy, irrespective of foreseeability.[13] Respondents' contention that Zamora's crimes were "foreseeable" (Amici Answer 19) avoids the policy considerations that compel the conclusion that County is not "answerable in perpetuity for the criminal and tortious conduct of others." *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 205, 15 P.3d 1283 (2001) (quotation omitted).

V. CONCLUSION

The County's duty to control Zamora's behavior terminated upon his release from County custody, and the County's "take charge" relationship with Zamora while in custody did not impose upon the County a duty to cure his mental illness or prevent him from reoffending. Respondents have no claim that Skagit County's

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[13] Thus, for example, while a negligent jailer may be liable to an "escaped criminal's immediate victims, courts would be loathe to extend the jailer's liability to include hundreds or thousands of victims across the country over a period of decades, if the criminal were not recaptured." *Restatement (Third) of Torts: Phys. & Emot. Harm* § 29 cmt. m (2010).

affirmative actions increased the risk of harm to them, and Skagit County's failure to medicate Zamora was neither a legal nor factual cause of his criminal rampage a month after his unconditional release from custody. This Court should reinstate the trial court's dismissal of respondents' claims against Skagit County.

Dated this 25th day of November, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 25, 2015, I arranged for service of the Supplemental Brief of Petitioner Skagit County, to the Court and to the parties to this action as follows:

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DATED at Seattle, Washington this 25th day of November, 2015.

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Attached for filing in searchable .PDF format is the Supplemental Brief of Petitioner Skagit County in *Binschus, et al. v. Skagit County, et al.*, Supreme Court Cause No. 91644-6. The attorneys filing this brief are Howard M. Goodfriend, WSBA No. 14355, e-mail address: howard@washingtonappeals.com and Catherine W. Smith, WSBA No. 9542, e-mail address: cate@washingtonappeals.com

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