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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.

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii-iv
A. INTRODUCTION	1
B. STATEMENT OF THE CASE.....	1
C. SUMMARY OF ARGUMENT	9
D. ARGUMENT	10
(1) <u>The County Owed a Duty of Care to Zamora’s Violence Victims Because It Took Charge of Zamora When It Incarcerated Him</u>	10
(a) <u>The County’s Take Charge Duty</u>	10
(b) <u>Application of This Court’s “Take Charge” Cases Here Will Not Adversely Affect the Fiscal Health of the County or Its Government Amici Allies</u>	22
(2) <u>The County Owed a Duty to Zamora’s Victims under § 302B of the Restatement</u>	28
(3) <u>The Trial Court Erred in Ruling As a Matter of Law that the County’s Breach of Duty Was Not the Proximate Cause of the Death and Injuries to the Violence Victims</u>	32
(a) <u>“But For” Causation</u>	32
(b) <u>Legal Causation</u>	34
E. CONCLUSION.....	36
Appendix	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Beccera v. Expert Janitorial, LLC</i> , 181 Wn.2d 186, 332 P.3d 415 (2014).....	2
<i>Bodin v. City of Stanwood</i> , 130 Wn.2d 726, 927 P.2d 240 (1996)	23
<i>Couch v. Dep't of Corr.</i> , 113 Wn. App. 556, 54 P.3d 197 (2002), <i>review denied</i> , 149 Wn.2d 1012 (2003).....	17
<i>Davis v. Baugh Indus. Contractors, Inc.</i> , 159 Wn.2d 413, 150 P.3d 545 (2007).....	21
<i>Estate of Davis v. Dep't of Corrections</i> , 127 Wn. App. 833, 113 P.3d 487 (2005).....	28
<i>Estate of Jones v. State</i> , 107 Wn.2d 510, 15 P.3d 180 (2000).....	10
<i>Gallo v. Dep't of Labor & Indus.</i> , 155 Wn.2d 470, 120 P.3d 564 (2005).....	14
<i>Gregoire v. City of Oak Harbor</i> , 170 Wn.2d 628, 244 P.3d 924 (2010).....	24, 26, 27
<i>Hartley v. State</i> , 103 Wn.2d 768, 698 P.2d 77 (1985).....	34, 35
<i>Hertog ex rel. S.A.H. v. City of Seattle</i> , 138 Wn.2d 265, 979 P.2d 400 (1999).....	<i>passim</i>
<i>Hungerford v. State</i> , 135 Wn. App. 240, 139 P.3d 1131 (2006)	17, 18
<i>Husah v. McCorkle</i> , 100 Wash. 318, 170 Pac. 1023 (1918).....	24, 26
<i>Husted v. State</i> , 187 Wn. App. 579, 348 P.3d 776 (2015).....	19, 20
<i>Joyce v. State, Dep't of Corrections</i> , 155 Wn.2d 306, 119 P.3d 825 (2005).....	<i>passim</i>
<i>Kim v. Budget Rent A Car Sys., Inc.</i> , 143 Wn.2d 190, 15 P.3d 1283 (2001).....	35
<i>McKown v. Simon Property Group, Inc.</i> , 182 Wn.2d 752, 344 P.3d 661 (2015).....	36
<i>McLeod v. Grant County Sch. Dist. No. 128</i> , 42 Wn.2d 316, 255 P.2d 360 (1953).....	20-21
<i>Melville v. State</i> , 115 Wn.2d 34, 793 P.2d 952 (1990).....	26, 27
<i>Parrilla v. King County</i> , 138 Wn. App. 427, 157 P.3d 879 (2007).....	29, 30
<i>Petersen v. State</i> , 100 Wn.2d 421, 671 P.2d 230 (1983).....	<i>passim</i>

<i>Poletti v. Overlake Hospital Med. Ctr.</i> , 175 Wn. App. 828, 303 P.3d 1079 (2013).....	28
<i>Robb v. City of Seattle</i> , 176 Wn.2d 427, 295 P.3d 212 (2013).....	29
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	32, 35
<i>Shea v. City of Spokane</i> , 17 Wn. App. 236, 562 P.2d 264 (1997), <i>aff'd</i> , 90 Wn.2d 43, 578 P.2d 42 (1978).....	24, 26
<i>Smith v. Wash. State Dep't of Corrections</i> , ___ Wn. App. ___, ___ P.3d ___, 2015 WL 5042152 (2015)	19, 20
<i>State v. Dempsey</i> , 88 Wn. App. 918, 947 P.2d 265 (1997).....	16
<i>Stuart v. Coldwell Banker Commercial Group, Inc.</i> , 109 Wn.2d 406, 745 P.2d 1284 (1987).....	21
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992)	<i>passim</i>
<i>Volk v. Demeerleer</i> , 184 Wn. App. 389, 337 P.3d 372 (2014), <i>review granted</i> , 183 Wn.2d 1007 (2015).....	18, 19, 20
<i>Washburn v. City of Federal Way</i> , 178 Wn.2d 732, 310 P.3d 1275 (2013).....	29, 30, 31

Federal Cases

<i>Brown v. Plata</i> , 563 U.S. 493, 131 S. Ct. 1910, 179 L.Ed.2d 969 (2011)	25
<i>Hudson v. Spokane County</i> , 2013 WL 147812 (E.D. Wash. 2012).....	16
<i>Luchtel v. Hagemann</i> , 623 F.3d 975 (9th Cir. 2010)	16
<i>Trueblood v. Wash. State Dep't of Soc. & Health Servs.</i> , ___ F. Supp. 3d ___, 2015 WL 1526548 (W.D. Wash. 2015).....	23, 24

Statutes

RCW 70.48.071	24
RCW 70.48.130(1).....	25
RCW 71.05.120(1).....	28
RCW 71.05.120(2).....	18
RCW 71.05.150	16
RCW 71.05.150(1).....	2
RCW 71.05.150(2).....	16
RCW 71.05.153	16
RCW 71.05.153(1).....	16

Codes, Rules and Regulations

42 U.S.C. § 198325

Other Authorities

Martha Bellisle, *Western State Hospital in trouble with
federal officials*, *Seattle Times*, October 11, 201524

Martha Bellisle, *Patient attacked as Western State Hospital
faces possible budget cuts*, *Seattle Times*, October 16, 2015.....24

Restatement (Second) of Torts § 302B..... *passim*

Restatement (Second) of Torts §§ 315, 319 *passim*

A. INTRODUCTION

Isaac Zamora was twice incarcerated in the Skagit County Jail (“Jail”) in 2008. Despite the sentencing court’s judgment that his mental condition be evaluated and that he must comply with any treatment that was ordered, his lengthy history of mental health problems, and pleas from his mother and his own requests for mental health treatment, Skagit County (“County”) did not fully evaluate Zamora’s mental health or provide him proper mental health treatment during his incarceration. His mental health deteriorated under the County’s supervision. As a direct result of that deteriorating mental condition during the County’s “take charge” period over him, Zamora became a ticking time bomb. That time bomb went off shortly after his second release from the Jail; Isaac Zamora shot and killed 6 people and wounded 4 others.

The County had a “take charge” duty to the respondents or, alternatively, through its affirmative act of misfeasance, dramatically increased the risk that Zamora’s untreated mental problems would manifest themselves in violence, and consequently owed a duty under § 302B of the *Restatement (Second) of Torts* to the respondents, the estates of the people Zamora killed, and the individuals he wounded (“violence victims”) in his spree of violence.

B. STATEMENT OF THE CASE

The Court of Appeals' recitation of the facts here is correct. Op. at 3-12. The County and its governmental amici allies who supported its petition for review, however, attempt to sanitize the record of Zamora's violent history and conduct during his incarceration in the Jail.¹

Prior to his incarceration in the County's Jail on April 4, 2008, Isaac Zamora had a *long* history of mental instability, violence, and involvement with the criminal justice system. Beginning in 1999, Zamora was arrested 21 times in the County and incarcerated in its Jail 11 times. CP 2651-52, 2655. Zamora had mental health issues dating back at least to 2000. CP 2538. He was involuntarily treated for mental health issues in 2003. CP 2538.²

¹ As the issues here were resolved on summary judgment, this Court must review the facts in a light most favorable to the violence victims as the non-moving parties on summary judgment. *Beccera v. Expert Janitorial, LLC*, 181 Wn.2d 186, 194, 332 P.3d 415 (2014).

² Under RCW 71.05.150(1), Zamora could not have been involuntarily treated unless he was a danger to himself or others, or was gravely disabled. The circumstances of his 2003 involuntary treatment document precisely why he needed such treatment. Suffering from paranoia, anger issues, and hallucinations he was involuntarily treated at North Sound Evaluation and Treatment Center where his physicians gave him Seroquel, an anti-psychotic medication used in the treatment of schizophrenia. CP 2538. Dr. Henry Levine, who evaluated Zamora's competency to stand trial for the crimes committed during his murderous rampage, CP 1965-79, 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.

Officials at all levels of Skagit County government were fully aware of Zamora's mental illness and violence tendencies. County law enforcement officials knew Zamora. CP 2852-53, 2859-60, 2865, 2917, 3105-29, 3160-62.³ Skagit 911 and its dispatchers knew that Zamora had mental problems. CP 3201, 3202 ("His name screen was flagged as a mental, which is a 220."). Because he had serious mental problems, Zamora's CAD file⁴ was tagged with a 220 alert code, meaning that Zamora was mentally unstable or "crazy." CP 2844, 2864, 3105, 3202. Zamora's arrest history and alert code were readily available to all County sheriff deputies via the CAD system that could be accessed from the computers in the deputies' squad cars. CP 2845.

Jail officials knew of Zamora's mental health issues. While incarcerated at the Jail, Zamora was housed in C-Pod, the section of the jail for inmates who were dangerous or assaultive, or had mental health problems. CP 2581, 2899. While incarcerated in the Jail, Jail staff were fully aware of Zamora's aggressiveness, anger, volatility, and dangerousness. CP 2408, 2410, 2412, 2414.

³ Judicial officials in Skagit County also knew of Zamora's mental health issues. On May 29, 2007, law enforcement officers filed a probable cause affidavit in Skagit County Superior Court regarding Zamora and a malicious mischief charge that identified Zamora's mental health problems. CP 2639.

⁴ In order to keep track of deputies in the field, Skagit 911, the entity that coordinates the dispatch of all police, fire and emergency services in the County, operated a computer-aided dispatch ("CAD") system. CP 3185.

When Zamora was convicted of drug possession in May 2008 and sentenced to confinement at the Jail, he was housed in its C-Pod due to his mental condition and violent history. CP 2420. After commencement of that incarceration, Denise Zamora, Isaac's mother, called the Jail on April 7, 2008 requesting that her son see a mental health counselor because he was "aggressive [and] has anger problems." CP 3681. She and her husband feared Isaac. *Id.* Ultimately, Mrs. Zamora made at least *five* requests of County officials for mental health treatment for her son. CP 2591-93, 2928, 2930. Zamora himself requested mental health treatment at least *three times*.⁵

⁵ Responding to one of those requests in which Zamora reported that he was being poisoned and Jail staff were "messing with his brain," CP 3685, Stephanie Inslee, who contracted with the Jail to provide mental health services, saw Zamora and wrote that Zamora was "easily moved into rageful thinking." She specifically stated: "He needs something! Can a person in medical please meet with him if meds are approved and address his fears." CP 3685. Subsequently, without having seen Zamora, a physician approved a Lamictal prescription. Lamictal is prescribed for seizure disorders and is used as a mood stabilizer. It is not an anti-psychotic drug, but its prescription should have put Jail personnel on notice that Zamora's use of it indicated he had mental health issues. CP 2539.

On April 25, 2008, Zamora again requested mental health help. CP 3687. Another County contractor, Cindy Maxwell, responded and reported that Zamora appeared "upset, easily angered [and had] rambling style speech." CP 3687. Maxwell apparently only asked Zamora if he would like a contact from mental health staff; she did not ask a psychologist or psychiatrist to assess Zamora. CP 2539.

Subsequently, Zamora submitted yet another mental health request stating that he wanted to see a mental health worker because he "keep[s] seeing black dots and white flashes." CP 2958. He saw monsters and demons out the window of his room and believed his bed to be electrified. CP 2540. Again, he was neither evaluated nor treated.

When Zamora pleaded guilty to drug possession, the judgment and sentence ordered Zamora to undergo a mental health evaluation and further ordered that he must comply with all treatment recommendations. CP 3693, 3694. Despite the court's directive, Zamora was never actually seen or evaluated by a physician, psychiatrist, or psychologist at the Jail. CP 2533, 2539.

The County claimed in its petition for review at 3 that Zamora "completed his sentence without incident,"⁶ but that assertion is flatly *false*. While in the Jail, the staff there wrote Zamora up for a series of serious infractions. CP 2462, 2464, 2467, 2469-71. Zamora was involved in a violent altercation with another inmate who told Jail staff "that man [Zamora] cut me in the infirmary." CP 2464.

Zamora was released from the Okanogan County Jail⁷ on August 2, 2008. CP 2541. Zamora's psychiatric condition, untreated in either jail, became significantly worse. CP 2541. His hallucinations were more intense and his mood swings more violent. *Id.* He believed people around

⁶ WSAMA similarly told this Court that Zamora had no "violent criminal history" and WCIA told this Court that Zamora had "not shown any dangerous or violent propensities while in jail." WSAMA mot. at 3; WSAMA memo. at 1; WCIA mot. at 3; WCIA memo. at 1.

⁷ Zamora served a portion of his Skagit County sentence at that jail. CP 5678. He received no mental health treatment there. CP 2539. This was true in no small part due to the fact the County provided only truncated records of Zamora's long history of mental health problems to Okanogan County officials. Br. of Appellants at 7-10; reply br. at 8.

him were evil; he spoke of God and his obligation to carry out God's will.

Id.

Less than a month before the shootings and shortly after his release, on August 5, 2008, County deputies were dispatched to remove Zamora from his parents' property because of fears expressed by Denise Zamora arising from Isaac's aggressive and angry outbursts; she told deputies that Zamora was acting in an aggressive and angry fashion toward family members. CP 2568. While at the Zamora residence, Zamora was arrested on an outstanding warrant. CP 2569. While waiting to be processed at the Jail, Zamora acted violently, pounding the walls of the holding room. CP 2465.

After his release, Zamora's father and brother testified that he amassed a cache of weapons. CP 1701-02, 1765-66, 2399-2400. On September 1, 2008, the day before his rampage, a Zamora neighbor, Theo Griffeth, called County authorities to report seeing Zamora engaged in strange behavior. CP 2851, 2852.⁸ Later that same day, Zamora was seen

⁸ When Griffeth got to his driveway, he saw that a sign had been ripped off the gate and became concerned because his wife had just arrived home. CP 2852. Griffeth sensed "something wrong with the kid," and he wanted protection. CP 2852. He asked that a deputy be dispatched to his home, hoping Zamora would be arrested and get "some help." CP 2853. *Three officers* were dispatched to the Griffeth residence in response to Griffeth's call. CP 2854. When deputies arrived at Griffeth's house, Griffeth told deputies to be careful, "[t]his kid is ... he's over the edge." CP 2853. Griffeth described his observations of Zamora over the preceding months: "I think that there's something going on up there that ain't quite right. . . ."); CP 2851. "[T]here was something just

by a psychologist in the parking lot of the Alger Bar & Grill at his father's insistence so that he could qualify for DSHS assistance. CP 2541. When Silverio Arenas, Ph.D. met Zamora -- even with Zamora being *extremely* uncooperative -- he was able to correctly diagnose Zamora as having a "psychotic disorder with paranoid tendencies." *Id.*; CP 2404.⁹

The next day, September 2, 2008, Skagit 911 received yet another call from Denise Zamora, CP 2231, 2257, who told the dispatcher that Zamora was "like totally out of it." CP 2285. The call was deemed a "Mental Problem Call," CP 2146, 2181, 2295, and Skagit 911 dispatched deputies to the scene. CP 2257, 2295.

At a neighbor's residence, a deputy engaged in a gun battle with Isaac Zamora in which 33 shots were exchanged; that deputy and a civilian were killed. CP 2634-38. Thereafter, Zamora went on a spree of violence, shooting victims, cutting people with a saw, stabbing others, and even ramming his victims with a car. Six died and four others were wounded. CP 2360. Zamora was finally subdued and arrested that afternoon.

wrong. There was something that wasn't connecting and it was an aura of -- there was violence." CP 2853.

⁹ This diagnosis was entirely consistent with that of Dr. Hegyvary, the violence victims' expert, who testified that Zamora's actions on September 2 were the product of a "severe, untreated and long-standing mental disease, specifically schizophrenia, paranoid type with associated hallucinations and delusions." CP 2542.

Zamora's post-rampage behavior also documented the violence associated with his mental condition.¹⁰ In the course of the court criminal proceedings, Zamora was uncooperative, threatening, irrational, and provocative, compelling the court to remove him from the courtroom due to his disruptive behavior. CP 1974.

On summary judgment in this case,¹¹ Dr. Csaba Hegyvary testified that he was "of the strong opinion" had the Jail staff properly evaluated and treated Zamora, he would not have undertaken his September 2, 2008 rampage because he would not have been in a psychotic state that day. CP 2537-38.¹²

¹⁰ The doctors at Western State Hospital where he was held and evaluated after the rampage testified 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.*

¹¹ The violence victims also presented evidence from James Esten, an expert with nearly 40 years of experience in corrections, that the Jail had "clear notice" that Zamora needed mental health evaluation and treatment, CP 2532, and that the County breached its duty to provide proper mental health evaluation or treatment to Zamora. *Id.* Esten testified that the County failed to meet reasonably prudent correctional policies, procedures, and practices for an inmate like Zamora. *Id.*; this was "the result of mismanagement and lack of qualification from the top down." CP 2535. The County was "reckless" and breached standard correctional practice in delaying or denying mental health services to a patient like Zamora. CP 2534.

¹² Dr. Hegyvary noted that Jail personnel had adequate information indicating that Zamora needed a proper psychiatric evaluation: "In light of the available information, I find it truly appalling that a mental health evaluation was not undertaken prior to Zamora's release from jail in early August 2008." CP 2543. "Clinical interviews conducted after the shootings confirm that Zamora was, in fact, experiencing severe

C. SUMMARY OF ARGUMENT

The Court of Appeals correctly applied this Court's well-developed "take charge" duty precedents and determined that the County owed a duty to the victims of Isaac Zamora's violent rampage in September 2008 under the *Restatement (Second) of Torts* §§ 315, 319.

Alternatively, the County owed the violence victims a duty of care under the *Restatement (Second) of Torts* § 302B and this Court's precedents interpreting it because the County negligently undertook to provide mental health services to Zamora through two contractors, but ignored their pleas, and those of Zamora and his mother, for more extensive evaluation and treatment of his obviously deteriorating mental health condition. The County's affirmative misfeasance increased the risk that Zamora, already a ticking time bomb, would explode as he did to disastrous effect.

The Court of Appeals correctly recognized that there is a question of fact as to whether the County's negligence during Zamora's confinement in its jail, the "take charge" period, proximately resulted in the harm to the violence victims. For the same reasons duty was present

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. Dr. Hegyvary testified that a proper evaluation would have revealed Zamora's psychosis. CP 2543.

here, legal causation was established, assuming that the County actually preserved the issue for review by this Court.

D. ARGUMENT

(1) The County Owed a Duty of Care to Zamora's Violence Victims Because It Took Charge of Zamora When It Incarcerated Him

(a) The County's Take Charge Duty

The Court of Appeals faithfully applied this Court's "take charge" duty case law. Op. at 18. The violence victims ask nothing more than this Court reaffirm the principles established in those cases. This Court has found such a duty in a series of cases beginning with *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999), culminating in *Joyce v. State, Dep't of Corrections*, 155 Wn.2d 306, 119 P.3d 825 (2005), where the defendant "takes charge" of the perpetrator of the crime. See also, *Estate of Jones v. State*, 107 Wn.2d 510, 15 P.3d 180 (2000) (group care facility on contract with State and juvenile offender).

To have a "take charge" duty over an offender or mental health patient because a special relationship exists between the defendant and the offender/patient which imposes a duty upon the defendant to control the offender's/patient's conduct, the defendant must control the conduct of

the offender or patient as to prevent him/her from causing physical harm to another. *Taggart*, 118 Wn.2d at 218 (citing *Restatement (Second) of Torts* § 315 (1965)). Such a relationship arises when a defendant "takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled," and the defendant is therefore "under a duty to exercise reasonable care to control the third person to prevent him from doing ... harm." *Id.* at 219 (quoting *Restatement (Second) of Torts* § 319 (1965)). As this Court noted in *Joyce*, the "relevant threshold questions are whether the State had a take charge relationship with the offender, and whether the State knew or should have known of the offender's dangerous propensities." *Joyce*, 155 Wn.2d at 318.

The duty is clear. The *Taggart* court found that the State had a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of the offenders. 118 Wn.2d at 217. This duty extends not just to readily identifiable victims, but *anyone foreseeably endangered by the offender's condition*. *Id.* at 219.

Coincidentally, in *Taggart*, *Hertog*, and *Joyce* the harm occurred during the take charge period, respectively during an offender's period of parole, a probationer's pretrial release, and an offender's period of

community supervision. *Petersen* is different, and controls here. There, this Court held that a state psychiatrist owed a duty of care to the plaintiff, who was injured in a motor-vehicle collision with the psychiatrist's former patient. The psychiatrist had diagnosed the patient with a schizophrenic-like reaction caused by consumption of the drug PCP or "angel dust." 100 Wn.2d at 424. After treating the patient with a drug called Navane, the psychiatrist concluded that the patient "was in full contact with reality, and was back to his usual type of personality and behavior." *Id.* When the accident occurred five days later, the patient appeared to witnesses to be greatly influenced by drugs, and it was later learned that he had flushed his supply of Navane down the toilet. *Id.* at 423-24.

The *Petersen* court affirmed a jury verdict in the plaintiff's favor, rejecting the State's argument that it owed no duty to Petersen; *id.* at 424-28, and holding that the psychiatrist "incurred a duty to take reasonable precautions to protect anyone who might foreseeably be endangered by [the patient]'s drug-related mental problems." *Id.* at 428.

Importantly, in *Petersen*, the State had "take charge" liability for activities that occurred during the "take charge" period, but were manifested subsequently, just as here.¹³

¹³ 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

A defendant has a duty, during the "take charge" period, to address the person's risk to others, even if that risk is manifested after the "take charge" period ends. The *Taggart* court specifically rejected the proposition that the duty ends at the time of the patient/offender's release from institutional care. 118 Wn.2d at 223. "Whether the patient is a hospital patient or an outpatient is not important."

Once the County undertook its special "take charge" relationship with Zamora, it had a duty to use reasonable care to protect against reasonably foreseeable dangers he posed. In *Joyce*, this Court ruled that a community corrections officer supervising a felon with convictions for assault and possession of stolen property owed a duty to a woman killed when the offender stole a car, ran a red light, and collided with her vehicle. The limit on the "take charge" duty is that the offender/patient's dangerous propensities must be reasonably foreseeable and the government's obligation is to take reasonable precautions to address such propensities. *Joyce*, 155 Wn.2d at 310 (citations omitted).¹⁴

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. Below, the 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 the County, it knew, or should have known, by proper evaluation of his deteriorating mental condition, that Zamora presented a risk of harm to others. See also, *Taggart*, 118 Wn.2d at 223.

¹⁴ "[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

Rather than forthrightly addressing this Court's controlling precedents, the County ignores them, seeking to narrow the "take charge" duty and instead focuses on various Court of Appeals decisions that address the edges of that body of law.¹⁵

as Zamora's victims. *Taggart*, 118 Wn.2d at 219. In *Taggart*, while on parole, the offender assaulted Taggart, a woman with whom he had not been previously acquainted. *Id.* at 200-01. To establish that the duty described by the court extended to her, Taggart had only to show that she was "foreseeably endangered," not that she herself was "the foreseeable victim of [the offender's] criminal tendencies..." *Id.* at 224-25.

¹⁵ In their review-related pleadings, the County's governmental allies went farther. They *distorted* the violence victims' argument. For example, the State *repeatedly* sought to misshape the Court of Appeals decision, and the violence victims' argument, as one of imposing a duty to treat and rehabilitate violent offenders. *E.g.*, State memo. at 2. That has *never* been the violence victims' position, nor did the Court of Appeals decision reflect such an analysis. As in *Petersen*, the County's duty was to prevent the deterioration of the condition of the individual over which it had to control to such a degree that such individual foreseeably would cause harm to others, as Zamora did here. WSAMA dramatically misstated the scope of the County's take charge duty, 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 memo. at 5-8. The County never made such an argument. *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 495 n.12, 120 P.3d 564 (2005) (argument cannot be raised for the first time by an amicus). That argument is not supported by *any* of this Court's "take charge" duty cases. In fact, none of those cases including *Petersen* (released WSH patient); *Taggart* (parolees); *Hertog* (probationer); or *Joyce* (parolee), so narrowly construe the "take charge" conduct, limiting it only to preventing escapes and/or improper releases of an individual from custody. These cases generally involve improper supervision during the "take charge" period. If WSAMA's analysis was the law, and it is not, there would have not been a duty in *any* of those cases.

Moreover, 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 memo. at 7 n.6. 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.

The initial issue in any “take charge” liability cases is whether the County “took charge” of Zamora. *Joyce*, 155 Wn.2d at 318. It did, twice incarcerating him; it *conceded* that it took charge of him. Op. at 15. The County had a duty to control Zamora’s conduct to prevent him from causing physical harm to others, given this special relationship. *Taggart*, 118 Wn.2d at 219 (quoting *Restatement (Second) of Torts* § 319 (1965)).

The duration of this “take charge” duty is not, as the County contends, confined to the exact period of the “take charge” responsibility. It may arise from events, as here, that occurred *during the “take charge” period*, left unchecked by the defendant. Coincidentally, in *Taggart*, *Hertog*, and *Joyce*, the harm occurred during the “take charge” period, respectively during an offender’s period of parole, a probationer’s pretrial release, and an offender’s period of community supervision. *Petersen* is different, and controls here.

In *Petersen*, the State had “take charge” liability for activities that occurred during the “take charge” period, but were manifested subsequently, just as here. This Court noted, for example, that the State’s psychiatrist could have petitioned for additional involuntary treatment for 90 days under RCW 71.05. *Id.* at 428-29.¹⁶ The *Petersen* court made very

¹⁶ The County attempts to argue that the State psychiatrist in *Petersen* had a duty under the Involuntary Treatment Act, RCW 71.05 (“ITA”) to seek further involuntary treatment for the patient, citing a Court of Appeals’ decision characterization

clear that a defendant with “take charge” responsibility over an individual cannot disregard that individual's risk to others, even if that risk is manifested after the “take charge” period ends.

As in *Petersen*, the liability-causing event here took place during the County’s “take charge” control over Zamora. Isaac Zamora had

of this Court's *Petersen* holding. Pet. at 13. This Court's actual language in *Petersen* is nowhere so limited. This Court's decision rested squarely on a duty under § 315. 100 Wn.2d at 421 (“Dr. Miller incurred a duty to take reasonable precautions to protect anyone who might foreseeably be endangered by Larry Knox’s drug-related mental problems.” The Court then indicated involuntary treatment “or other reasonable precautions” satisfied the duty). Similarly, the Court of Appeals here did not rest its decision on the ITA. Op. at 26.

This issue is more properly characterized as a breach of duty issue, a *question of fact*. *Hertog*, 137 Wn.2d at 275. Were the Court to reach the issue of breach of duty, there were ample grounds for Zamora's involuntary treatment under RCW 71.05, something the County never sought. As in *Petersen*, County staff could have sought involuntary treatment for Zamora. Under RCW 71.05.150, either County could have reported Zamora's condition to a county-designated mental health professional who could have sought a court order mandating 72-hour involuntary evaluation and treatment period, RCW 71.05.150(2), to begin the process for Zamora's treatment. More critically, RCW 71.05.153 permitted either County to seek emergency steps for treatment of an individual like Zamora whose risk of harm to himself or others was "imminent." RCW 71.05.153(1). A county-designated mental health professional could have ordered emergency custody for 72 hours for treatment. *Id.* Alternatively, a peace officer could take a person like Zamora directly to one of a number of emergency treatment facilities. RCW 71.05.153. Zamora's untreated schizophrenia qualified for emergency involuntary treatment. *See, e.g., State v. Dempsey*, 88 Wn. App. 918, 923-24, 947 P.2d 265 (1997) (defendant called police twice for protection from imaginary homicidal pursuers; parents called police for protection from defendant and defendant assaulted father in front of officers); *Luchtel v. Hagemann*, 623 F.3d 975 (9th Cir. 2010) (officers had probable cause to take person to hospital for treatment where she was hiding under car with her son, she screamed that someone was trying to kill her, she asserted officers were assassins sent to kill her, and indicated that she would kill herself); *Hudson v. Spokane County*, 2013 WL 147812 (E.D. Wash. 2012) (person threatened to kill himself or anyone who came onto his property, had access to weapons, and was unresponsive to anyone for a number of days).

Of course, the failure of either County to formally evaluate Zamora's patient mental health condition forestalled the ability of either County to pursue RCW 71.05 treatment for Zamora.

manifest mental health problems, well known to County judges, law enforcement, and jailers, from his lengthy history interacting with them, his judgment and sentence, and his “treatment” in the Jail,¹⁷ that were exhibited in violent outbursts and aggressiveness. Despite this knowledge, the County did not properly evaluate or treat his mental health problems.

The County falls back on a number of distinguishable Court of Appeals decisions to support its position on a narrow "take charge" duty. For example, the County contends that its responsibility ended when Zamora was released, citing *Hungerford v. State*, 135 Wn. App. 240, 139 P.3d 1131 (2006), a case where Division II found the State had no “take charge” responsibility as to an offender who committed murder while he was under DOC supervisions for legal financial obligations (“LFO”). Pet. at 9-10. Division II actually held that there was no “take charge” liability for the State at all where a court ended the offender's active probation and limited any supervision to whether the offender paid his LFOs. Citing *Couch v. Dep't of Corr.*, 113 Wn. App. 556, 54 P.3d 197 (2002), *review denied*, 149 Wn.2d 1012 (2003),¹⁸ the court concluded when an offender is

¹⁷ As Dr. Hegyvary testified: “At that point, reasonably prudent corrections staff would have summoned a psychologist or psychiatrist to conduct a full evaluation of Mr. Zamora-without regard to whether Zamora ever sought out or ‘wanted’ mental healthcare. Sadly, this was never done.” CP 2533.

¹⁸ *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. Upon carefully review of *Couch*, the only logical

only being supervised for compliance with LFOs, there is no “take charge” duty. *Hungerford*, 135 Wn. App. at 257.

The question is not whether it had a “take charge” relationship with Zamora when he committed the shootings, but rather, whether it had a “take charge” relationship with Zamora *at the time that the Jail breached its duty of care that ensued from their special relationship*. Obviously, here, the liability-producing conduct took place squarely during the County’s incarceration of Zamora, a period during which there is no question it “took charge” of him.

In *Volk v. Demeerleer*, 184 Wn. App. 389, 337 P.3d 372 (2014), *review granted*, 183 Wn.2d 1007 (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

interpretation of that decision is that 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.

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.

In *Husted v. State*, 187 Wn. App. 579, 348 P.3d 776 (2015), Division I determined that the State had no "take charge" duty to the victims of an offender on community supervision where the offender, prior to committing a murder and an assault, failed to obey the terms of his community supervision, absconded, and a warrant for his arrest had been issued. The court concluded that the take charge duty no longer existed.

Similarly, in *Smith v. Wash. State Dep't of Corrections*, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 5042152 (2015), Division II affirmed the trial court's dismissal of a victim's estate's take charge liability case where an offender murdered a victim while on community supervision after absconding from supervision. As in *Husted*, DOC had sought, and a court issued, a warrant for the offender's arrest, Division II determined no "take charge" duty existed once the offender absconded and a warrant issued, but it then correctly considered whether the State owed a duty to the victims in connection with its negligent conduct *during the time period the offender was under DOC's supervision*. The court concluded that while such a duty existed, its breach was not the proximate cause of the

victim's death as a matter of law, rejecting the proposition that DOC might have terminated the offender's community supervision and incarcerated him, thereby preventing his criminal behavior or that DOC might have rehabilitated the offender, preventing his crimes. Importantly, Division II noted that the estate failed to present admissible evidence on the former argument. *Id.* at *6 n.9.

These decisions do not help the County. *Volk* supports the crime victims on the scope of this Court's *Petersen* decision. *Husted* fails to conduct the proper analysis undertaken by Division II in *Smith* on the negligence of the entity that took charge of the offender *during the "take charge" period*. *Smith*, although it conducts the correct analysis, is factually distinguishable. The County owed the violence victims a take charge duty for its negligent conduct during the period Zamora was in its Jail for failing to address his deteriorating mental health; as ample evidence documented, there was a question of fact as to the breach of that duty by the County and proximate cause, as the Court of Appeals discerned.

Once the County undertook its special "take charge" relationship with Zamora, it had a duty to use reasonable care to protect against reasonably foreseeable dangers he posed. *Joyce*, 155 Wn.2d at 310. In other words, the harm must be *in the general field of danger*. *McLeod v.*

Grant County Sch. Dist. No. 128, 42 Wn.2d 316, 321, 255 P.2d 360 (1953). “[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 the violence victims here. *Taggart*, 118 Wn.2d at 219.¹⁹ It was entirely foreseeable that Isaac Zamora, with his propensity for aggressive, violent outbursts, would do harm to the violence victims when his mental condition was left untreated and allowed to deteriorate. The violence victims were plainly within the general field of danger for Zamora’s rage, but that issue is squarely a question of fact for the jury.

A duty here serves a vital public policy imperative.²⁰ The County and its governmental allies incarcerate individuals in the name of implementing public safety. Those inmates have mental health problems that the County and its allies want to ignore. It is easy to understand why the County here did not want to heed the pleas for serious treatment from

¹⁹ In *Taggart*, while on parole, the offender assaulted Taggart, a woman with whom he had not been previously acquainted. *Id.* at 200-01. To establish that the duty described by the court extended to her, Taggart had only to show that she was “foreseeably endangered,” not that she herself was “the foreseeable victim of [the offender’s] criminal tendencies...” *Id.* at 224-25.

²⁰ Tort law, at its most basic, deters wrongful conduct by imposing civil liability upon the entity failing to recognize its obligations. *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 420, 745 P.2d 1284 (1987) (recognizing that tort law is concerned with obligations imposed by law and redresses injuries); *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 419-20, 150 P.3d 545 (2007) (recognizing deterrent effect of tort law).

Inslee, Maxwell, Denise Zamora, or Zamora himself. It did not want to incur the expense of real evaluation or treatment of Zamora. Zamora's violence victims paid the price of the County's negligence.

This Court should reaffirm the principles articulated in *Petersen*, *Hertog*, and *Joyce* for "take charge" liability for a claim:

- (1) there must be a special, take charge relationship between a defendant and an offender/patient;
- (2) the defendant must be negligent in failing to address the dangerous propensities of that offender/patient during the "take charge" period;
- (3) as a result, the offender/patient must cause harm to individuals who are foreseeably within the field of danger of that offender/patient's dangerous propensities.

(b) Application of This Court's "Take Charge" Cases Here Will Not Adversely Affect the Fiscal Health of the County or Its Government Amici Allies

The County's and its governmental allies' protestations that enforcement of this Court's "take charge" liability precedents will have dire fiscal implications for taxpayers and their effort 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,²¹

²¹ WCIA described the Court of Appeals' decision as "a broad extension of tort liability to jailors for crimes committed by former jail inmates." WCIA mot. at 2. The State asserted the Court of Appeals has created "new liability" "for failing to rehabilitate offenders and mental health patients to prevent harm to the public." State mot. at 1. WSAMA then articulated what is actually at play for these self-interested amici when it referenced the cities' alleged "limited financial resources available to them," WSAMA mot. at 2, and that the Court of Appeals' decision was saddling "the taxpaying public

should not have any place in this Court's delineation of tort duties under § 315 or § 319.²² Such self-interested arguments ring entirely hollow in light of the ongoing failure of state and local government to seriously address their obligations to accused who are mentally ill and mentally ill offenders, all of whom are residents in Washington local jails, and given their plain constitutionally-based obligations to provide mental health treatment to inmates like Zamora described *supra*.

Although some of the amici profess new-found concerns about forcing jail inmates to take anti-psychotic medications, *e.g.*, WCIA memo. at 9-10, it is worth noting that such regard for the therapeutic or forensic needs of jail or correctional inmates has not been evidenced in practice.²³

with an immense potential financial burden," created an alleged "unfunded mandate," WSAMA memo. at 2, 4.

²² This type of fiscal complaint often arises in cases of government liability but the evidence of fiscal constraints is tantamount to a "poverty defense" and is unavailable to them, as a majority of this Court reasoned in *Bodin v. City of Stanwod*, 130 Wn.2d 726, 927 P.2d 240 (1996). Five justices determined that a poverty defense has no place in a negligence action. *Id.* at 743 (Johnson, J. dissenting) (poverty defense "is not allowed in negligence actions because the duty of care owed to another does not change according to a party's financial situation."); *id.* at 742 (Alexander, J. concurring).

²³ In *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, ___ F. Supp. 3d ___, 2015 WL 1526548 (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 "demonstrate 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 *14. The district court certified a class of such pre-trial detainees in local jails and ordered strict 7-day turnaround on pretrial competency evaluations after court orders for evaluations are signed, in order to avoid having such mentally ill persons languish in jail. It also ordered a 9-month limit on wait

Nor has state and local government in Washington provided mental health services in true good faith.²⁴

For all the complaints by the County and its government amici allies that the Court of Appeals opinion somehow “vastly” expanded their mental health-related obligations to jail inmates, that assertion is simply false because the law requires governments incarcerating individuals to provide them mental health treatment.²⁵

times for services, ordered the necessary staff and bed space to achieve the timelines it ordered, and ordered a long-term plan for competency services. *Id.* at *13.

The *Trueblood* decision fully evidences the fact that the amici’s fiscal concerns about the need to provide mental health evaluations and treatment to jail inmates ring exceedingly hollow. Historically, when push comes to shove, jailers will readily avoid the rights of jail inmates to mental health services.

²⁴ Federal authorities have threatened to cut funding to Western State Hospital on three occasions in the last year alone due to unsafe conditions there. Martha Bellisle, *Western State Hospital in trouble with federal officials*, *Seattle Times*, October 11, 2015; Martha Bellisle, *Patient attacked as Western State Hospital faces possible budget cuts*, *Seattle Times*, October 16, 2015.

²⁵ *Shea v. City of Spokane*, 17 Wn. App. 236, 562 P.2d 264 (1997), *aff’d*, 90 Wn.2d 43, 578 P.2d 42 (1978). In *Shea*, *supra*, 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*, *Husah 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.”). In *Gregoire*, *supra*, 170 Wn.2d at 635-36, this Court made clear that this 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. The 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. *Id.* at 636. *See also*, *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010); *Husah*, 100 Wash. at 325. By statute, local governments like the County must meet federal and state standards for inmate health, safety, and welfare. *Gregoire*, 170 Wn.2d at 636; RCW 70.48.071. Mental health standards are certainly part of that obligation, particularly where the

This Court has made it unambiguously clear that a jailer has a duty to provide mental health services to an inmate during the inmate's incarceration. It is precisely for this reason that the duty articulated by the Court of Appeals should have no fiscal impact; *the duty is required by already-existing law*. RCW 70.48.130(1) requires that all jail inmates receive appropriate and necessary medical care. The only way the duty articulated by the Court of Appeals can have profound fiscal implications is if jailers are routinely violating jail inmates' rights to mental health services. In effect, the County and its allies 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.

deprivation of a prisoner's right to mental health services can constitute cruel and unusual punishment under the Eighth Amendment. *Brown v. Plata*, 563 U.S. 493, 131 S. Ct. 1910, 1928, 179 L.Ed.2d 969 (2011) ("A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in a civilized society."). Under *Brown*, the failure to provide such mental health services violates the Eighth Amendment, and could subject a county to liability under 42 U.S.C. § 1983 for deliberate indifference to those mental health service needs. *See also*, RCW 70.48.130(1) ("It is the intent of the legislature that all jail inmates receive appropriate and cost effective emergency and necessary medical care.").

The County has *admitted* that it has a duty to properly evaluate and treat mental health problems of jail inmates like Zamora. Br. of Resp't at 25 n.8; Pet. at 15-16.²⁶

Ignoring this Court's decision in *Husah, Shea, or Gregoire*, the County and the State argue that this Court has previously rejected a duty to provide mental health services to an inmate in *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990). Pet. at 15; State mot. at 3; State memo. at 4-6.²⁷ But *Melville* is clearly distinguishable. There, this Court rejected the appellant's reliance upon RCW 72.09.010(1)'s general policy statement that “[t]he [state corrections] system should ensure public safety,” as establishing a duty to provide mental health treatment for

²⁶ Unlike WSAMA or the State, neither of whom addressed the already-existing duty owed by jailers to jail inmates to provide mental health services, WCIA correctly acknowledged that such a duty existed. WCIA memo. at 4-5. Indeed, WSAMA went so far as to misrepresent the law on the duty owed by jailers to jail inmates with respect to mental health services when it baldly claimed: “Neither the Legislature nor the constitution imposes upon municipalities the obligation to provide long-term mental health care for individuals who may be arrested, prosecuted and housed in jail facilities.” WSAMA memo. at 4.

WSAMA's statement also missed the actual judgment and sentence entered 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.*

²⁷ 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.

inmates. See *Melville*, 115 Wn.2d at 38. *Melville* is now questionable authority in light of *Gregoire*.²⁸ 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 40-41.²⁹ Here, the record is decidedly to the contrary where Zamora himself sought mental health services while in the Jail and readily accepted anti-psychotic medication when he was at Western State Hospital.

Despite all of the fears expressed by the County and its governmental allies, the duty owed by the County here arises out of the well-worn contours of its already-existing special relationship to inmates to provide mental health services to those inmates during their incarceration. Further, liability for municipalities like the County is not

²⁸ 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.

²⁹ The argument by WCIA that inmates cannot be forced to take anti-psychotic medication, WCIA memo. at 9-10, while interesting, is ultimately irrelevant to the *duty* issues presented by this case. It is a matter that goes to the question of breach, a question of fact for the jury. *Hertog, supra*. 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 State Hospital after his murderous rampage.

automatic, as the amici imply; 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 address the offender's dangerousness, that the victims were foreseeably within the field of danger from the county's failure to provide mental health services, and that any harm occasioned to the victims proximately resulted from the breach.

Finally, left largely unaddressed by any of the amici is the fact that the Legislature has statutorily curtailed the scope of any liability for state and local government, treatment professionals, and law enforcement officers associated with decisions on mental health treatment of patients.³⁰ The cases arising under RCW 71.05.120(1) make clear that a duty, albeit a duty with a higher burden on victims, exists to victims of mental health patients.

(2) The County Owed a Duty to Zamora's Victims under § 302B of the Restatement

The Court of Appeals erred in concluding that the County did not owe the violence victims a duty under § 302B, op. at 19-23, where the

³⁰ 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 health 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).

County's two mental health counselors, but no physicians, saw Zamora and failed to provide him a proper evaluation or treatment, thereby *increasing* Zamora's risk of harming others. The Court of Appeals' decision on § 302B duty conflicted with its own decision in *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007), and this Court's decisions in *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013) and *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013). The trial court erred in essentially determining that the County engaged in an "affirmative act" of negligence. CP 209-10, 213-14.

Liability can follow if, under § 302B, the County enhanced the risk of harm to Zamora's violence victims by improperly evaluating and treating his mental health condition during his incarceration.

This Court has drawn a distinction in § 302B cases between nonfeasance and misfeasance by the defendant, defining misfeasance as actions creating or enhancing the risk of harm. In *Robb*, the Court found no duty for the city to crime victims where a *Terry* stop did not constitute a taking charge special relationship over a person. Moreover, the acts of the city's police officers, who failed to retrieve certain shotgun shells disposed of by the person during the *Terry* stop and later retrieved and used by that person in a killing, did not create a new risk of harm, as required for a § 302B duty, but only failed to eliminate a risk. The Court

specifically contrasted the nonfeasance of the officers in *Robb* with the misfeasance of a METRO bus driver who exited the bus and left the keys in the ignition, with the bus running, to a person high on PCP alone in the bus. *Parrilla, supra*. That person then took the bus and crashed it into the car of unsuspecting plaintiffs. The Court indicated that such affirmative acts that increased the risk of harm were misfeasance: "...the driver's affirmative act of getting off the bus and leaving the engine running with an erratic passenger alone on board exposed motorists to a recognizable high degree of risk that a reasonable person would have foreseen, imposing on the county a duty of care to the injured motorists to guard against the man's criminal conduct." *Id.* at 435.

In *Washburn*, this Court reaffirmed its misfeasance/nonfeasance analysis of § 302B duty. There, the Court held that an officer's failure to properly serve and enforce an anti-harassment order was misfeasance; the officer failed to read the order or the accompanying instructions on the order, and the beneficiary of the order was brutally murdered by its subject. *Id.* at 1290.

In this case, the County's misfeasance in failing to properly evaluate or treat Zamora increased the risk of harm to others from Zamora's deteriorating mental health. Its "evaluation" of Zamora's mental health condition was inadequate. Inslee and Maxwell both saw

Zamora in connection with his mental health condition, but neither performed the type of evaluation that should have been undertaken in connection with his deteriorating status.³¹

The County's conduct increased the risk to others by improperly evaluating and treating Zamora's mental health condition, a condition manifest in his arrest record, his prior involuntary treatment, his mother's pleas for treatment, his status on Skagit County's CAD, his housing in the C-Pod at the Jail, his judgment and sentence, and in his behavior in the Jail. Zamora was a ticking time bomb that the County tinkered with, but chose not to defuse. The County's conduct dramatically increased Zamora's risk to others and they owed a duty to the violence victims as a result under § 302B of the *Restatement*.

The 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.

³¹ Dr. Hegyvary was quite explicit in finding both Counties failure to conduct proper evaluations of Zamora's condition to be negligent. CP 2543. Similarly, James Esten testified that a complete mental health evaluation and appropriate treatment for Zamora were required as a matter of proper correctional policy.

(3) The Trial Court Erred in Ruling As a Matter of Law that the County's Breach of Duty Was Not the Proximate Cause of the Death and Injuries to the Violence Victims

The Court of Appeals correctly determined that “but for” causation here was a question of fact. Op. at 23-26. Now, the County seeks to trivialize its duty owed to the violence victims, describing it disparagingly as “a duty to medicate.” *E.g.*, Pet. at 1.

(a) “But For” Causation³²

The County paid scant attention to “but for” causation in its petition, citing none of *this Court's* key “take charge” liability cases. Pet. at 17-18. This must be so because it has long been a cardinal principle of Washington law that proximate causation – “but for” causation – is generally a *fact question for the jury*. Issues of “but for” causation in “take charge” liability cases are classically *questions of fact*. *E.g.*, *Joyce*, 155 Wn.2d at 322;³³ *Taggart*, 118 Wn.2d at 225-28.³⁴

³² Proximate cause consists of both “but for” causation and legal causation. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998).

³³ In *Joyce*, the jury determined that DOC's negligence in failing to supervise an offender who had serious psychiatric problems was the cause of *Joyce's* injuries. 155 Wn.2d at 312-14, 322-23. The offender stole a car in Seattle and operated it recklessly in Tacoma, running a red light and killing an innocent driver. *Id.* This Court rejected the State's contention that the evidence was insufficient to sustain the jury's determination. *Id.* at 322-23.

³⁴ In *Hertog*, the plaintiff, who was raped by a person while he was on municipal court probation and pretrial release for sexually related charges, sued Seattle and King County, alleged that the City's probation and pretrial release counselors negligently supervised that person. *Hertog*, 138 Wn.2d at 269. The City argued that “but

The County's negligent failure to evaluate and treat Zamora's psychotic condition resulted in the injuries caused by his psychotic outburst on September 2, 2008. There was *ample* testimony on causation from Dr. Hegyvary, an experienced psychiatrist, that but for the County's negligence in failing to properly evaluate and treat Isaac Zamora, he would not have engaged in his violent rampage. Dr. Hegyvary testified that had Zamora's psychotic illness been identified, effective treatment was available. CP 2540-41. He further opined that Zamora would have complied with a regime of antipsychotic medication, and that such a regime would have been effective at eliminating his psychosis. CP 2544-45. "Importantly, we know that Zamora's schizophrenia *was*, in fact, treatable with antipsychotic medications – as evidenced by his course upon admission to Western State Hospital after the shootings." CP 2545 (emphasis in original). According to Dr. Levine, appropriate medication rendered Zamora competent to stand trial, further indicating that a proper treatment regime would have prevented his rampage. CP 1966, 1979. Even if he did want treatment, Zamora could have received it involuntarily. CP 2543-44. Finally, Dr. Hegyvary concluded that if

for" causation was lacking because, based on the knowledge he had, the counselor could have done nothing to prevent the rape. *Id.* at 283. This Court rejected that argument. *Id.*

Zamora had been properly evaluated and treated, the events of September 2nd likely would have been avoided. CP 2545.³⁵

Given the County's knowledge of Zamora's mental health history, and his violent propensities, the County should have known that Zamora needed mental health evaluation and treatment given the severity and frequency of Zamora's problems. "But for" causation was properly a question of fact. Op. at 18, 23-26.

(b) Legal Causation

The Court of Appeals correctly rejected the County's legal causation argument, op. at 23-26, contrary to the County's argument. Pet. at 19. Again, the County offers scant attention to this issue, treating it as an afterthought to its duty argument. *Id.*³⁶

Legal causation involves considerations of "logic, common sense, justice, policy and precedent." *Hartley v. State*, 103 Wn.2d 768, 779, 698

³⁵ The violence victims anticipate that the County may argue that it is speculative to assume that Zamora would have complied with a regime of anti-psychotic medication. There is evidence in the record to support the proposition that Zamora would have complied. First, Zamora himself sought mental health treatment while in the Jail three times. CP 2958, 3685, 3687, indicating a willingness to utilize such services and any prescribed treatment, and Zamora freely discussed Lamictal while at Okanogan County Jail, CP 3700, hardly the conduct of one who willfully refused to be medicated. Second, while at Western State Hospital, after his rampage, Zamora *voluntarily* took anti-psychotic medications. CP 2545. This was an issue of fact for the jury.

³⁶ The trial court did not base its decision below on legal causation; rather, it determined that the County did not owe the violence victims a duty and the violence victims failed to establish "but for" proximate cause as a matter of law. CP 212-13, 215. The County devoted only 2 pages of its 48-page opening brief to the legal causation issue.

P.2d 77 (1985); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998). It is intimately associated with duty.

This Court has *repeatedly* rejected a legal causation argument in a take charge liability setting; the harm to crime victims is not attenuated or remote. Justice Chambers' analysis of legal causation in *Joyce* is particularly compelling. 155 Wn.2d at 321. There is no appreciable difference between this Court's rejection of the defendants' failed legal causation arguments in *Petersen*, *Taggart*, *Hertog*, and *Joyce*³⁷ and the County's argument here. The Court of Appeals resolved the legal causation issue consistently with this Court's precedents.³⁸

³⁷ 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*, 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. In *Hertog*, this Court 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 in *Joyce* again rejected essentially the identical argument made by the County here. 155 Wn.2d at 321.

³⁸ The cases upon which the County and its governmental amici allies rely are not "take charge" duty cases and are distinguishable. In *Hartley*, this Court found that legal causation principles applied where the plaintiffs argued that the State was liable 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

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. Because the County permitted Zamora's psychosis to persist unevaluated and untreated during his incarceration in its Jail, Zamora's rampage was neither too remote nor insubstantial for liability to follow for its conduct. The Court of Appeals correctly resolved the legal causation issue.

E. CONCLUSION

The Court of Appeals correctly concluded under this Court's well-established authorities 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 *during* the "take charge period," and yet it neither to evaluated nor treated his problems when he was incarcerated in its Jail, allowing Zamora's festering mental problems to explode into violence upon his release from the Jail. Alternatively, the County owed a

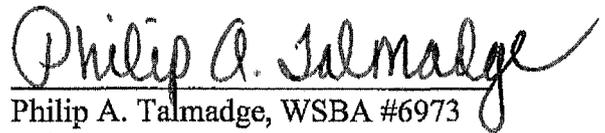
205. In *Colbert*, the court found that legal causation limited the duty owed to family members to avoid negligent infliction of emotional distress to persons physically present at an accident scene or who arrive shortly thereafter because they experienced the immediacy of the distressful situation. 163 Wn.2d at 51-53. *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 344 P.3d 661 (2015) is a premises liability case that relates to a landowner's *duty* to business invitees to protect them from criminal conduct on their premises. *It has nothing to do with causation.* In fact, the Court of Appeals' analysis of foreseeability in the duty context, op. at 18-19, is fully consistent with this Court's treatment of foreseeability in *McKown* where this Court noted that foreseeability can be both a component of whether a duty exists at all or a limitation on such a duty. 182 Wn.2d at 764.

duty to the violence victims whether this Court's "take charge" duty cases of § 302B of the *Restatement (Second) of Torts*. Similarly, the Court of Appeals correctly resolved the causation issues here.

This Court should affirm the Court of Appeals and award costs on appeal to the violence victims.

DATED this ~~25th~~^{25th} day of November, 2015.

Respectfully submitted,



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APPENDIX

Restatement (Second) of Torts § 302B:

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

Restatement (Second) of Torts § 315:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Restatement (Second) of Torts § 319:

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

IN THE COURT OF APPEALS 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. 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,

Appellants,

v.

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

Respondents.

No. 71752-9-1

DIVISION ONE

PUBLISHED OPINION

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STATE OF WASHINGTON
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FILED: February 23, 2015

TRICKEY, J. — On September 2, 2008, Isaac Zamora killed six people and injured several others. Shortly before the tragic incident, Zamora had been incarcerated in Skagit County and Okanogan County Jails for committing non-

violent crimes. At the time of the shooting, Zamora was experiencing a psychotic episode.

The estates of five people Zamora killed, together with four people he injured (collectively Binschus), brought the present lawsuit against Okanogan and Skagit Counties, Skagit Emergency Communications Center (Skagit 911), and Washington State Department of Corrections (DOC), alleging negligence. Binschus claimed, among other things, that, although the counties knew or should have known of Zamora's deteriorating mental illness during his incarceration, they failed to provide a thorough mental evaluation and appropriate treatment for his schizophrenia. The trial court granted Okanogan and Skagit Counties' motions for summary judgment, concluding that the counties owed no duty to the victims and, even if they did, Binschus failed to prove proximate causation.

On appeal, Binschus contends that the trial court erred in granting the counties' motions for summary judgment, arguing that the counties owed a legal duty to protect the victims from Zamora's violent propensities because the counties (1) had a "take charge" relationship with Zamora under §§ 315 and 319 of the Restatement (Second) of Torts (1965) or (2) committed misfeasance under § 302B of the Restatement (Second) of Torts.¹ Binschus additionally argues that the counties' purported breach was the cause in fact of the victims' injuries.

We hold that, with regard to Skagit County, material issues of fact precludes summary judgment on the question of whether §§ 315 and 319 imposed a legal duty upon the counties. We further hold that material issues of fact remain as to

¹ Br. of Appellant at 1, 19, 21.

whether the alleged breach was the cause in fact of the victims' injuries. We hold, however, that a duty is not established under § 302B. Accordingly, we reverse and remand for additional proceedings.

FACTS

Zamora "had a long-standing psychiatric disorder that began to emerge when Zamora was in his late-teens, more than a decade before the incident on September 2, 2008."² In May 2000, Zamora began experiencing symptoms of insomnia, paranoia, and anger. In 2003, Zamora was involuntarily committed at North Sound Evaluation and Treatment Center, where he endorsed hallucinations and was prescribed an antipsychotic medication that is commonly used for treatment of schizophrenia. According to Binschus's expert psychiatrist, Dr. Csaba Hegyvary, Zamora was not given a proper diagnosis at that time.

Skagit County Jail

On April 4, 2008, Skagit County police officers responded to Zamora's parents' residence to investigate a 911 hang-up call from the residence. The officers soon discovered that Skagit County District Court had issued warrants for Zamora's arrest. Zamora complained of a sore shoulder when arrested. As a result, the officers transported Zamora to a local hospital to determine whether he was fit for jail. The hospital subsequently released Zamora, who then was transported to Skagit County Jail.

Zamora remained in the Skagit County Jail pending trial and his eventual guilty pleas. On May 15, 2008, the Skagit County Superior Court sentenced him

² Clerk's Papers (CP) at 2538 (Dr. Csaba Hegyvary's Deposition).

to six months of confinement for malicious mischief in the second degree and possession of a controlled substance. The six-month term was to be followed by 12 months of community supervision by DOC. Under the community supervision provision of the judgment and sentence, the trial court ordered "mental health eval/treatment" and "drug evaluation to comply with all treatment recommendation."³ The trial court did not make any specific findings regarding Zamora's mental health.

Zamora remained in custody and began serving his sentence at the Skagit County Jail. The jail housed Zamora in a jail unit known as "C-Pod."⁴ The C-Pod unit is more secure and isolated than other units in the jail. The Skagit County Jail would place a particular class of inmates in the C-Pod unit: inmates who fought with others; who threatened the general population of the jail; who were considered "anti-social;" who had severe behavioral issues; who were in protective custody; and who had mental health issues.⁵

During his time at the jail, Zamora's mother, Dennise Zamora,⁶ made several requests to the Skagit County Jail and the county prosecutor, asking that Zamora receive mental health assistance. Dennise made such a request to the jail on April 7, 2008. She informed the Skagit County Jail that Zamora was bipolar, aggressive, and had anger problems. Dennise added that Zamora refused to obtain treatment and medication. She also reported that she and her husband

³ CP at 3499.

⁴ CP at 2581.

⁵ CP at 2581, 2599.

⁶ We refer to Dennise Zamora by her first name for ease of reference. We intend no disrespect.

were in fear of Zamora. In response, on April 11, 2008, Stephanie Inslee, a licensed mental health care professional, visited Zamora at the jail. In a document referred to as "Skagit County Jail Multi-Purpose Request Form," Inslee noted:

Persecutorial thoughts, easily moved into rageful thinking, . . . feels victimized by just about everyone in his world. Some grandiosity about his education / intelligence and his role in the world: to fix the crazy systems, make people treat him better. Very focused on the issue of chronic pain and poor Reports anxiety . . . sounds like panic attack. He needs something! Recommend beginning Lamictal: He is paranoid about poison and not messing w/ his brain. Can a person in medical please meet with him if meds are approved and address his fears?⁷

Three days later, a physician approved the Lamictal prescription. According to Dr. Hegyvary, Lamictal is prescribed for seizure disorders and commonly used as a mood stabilizer. Lamictal is not an antipsychotic medication.

On April 23, 2008, another mental health counselor, Cindy Maxwell, saw Zamora after he submitted a mental health request. According to the "Skagit County Multi-Purpose Request Form" memorializing that visit, Zamora was refusing to take the Lamictal medication.⁸ Zamora told Maxwell, however, that he was only taking the prescription because it helped him sleep. He said that he preferred to refrain from taking any type of mental health medications. In addition, Zamora expressed extreme anger toward his mother for calling the jail. Maxwell noted that Zamora appeared upset, easily angered, and that his speech was rambling. Maxwell recommended that the jail continue to offer Zamora "psych. meds."⁹

⁷ CP at 3685.

⁸ CP at 3687.

⁹ CP at 3687.

On May 10, 2008, Zamora submitted a request to see a mental health counselor. He reported that he was seeing black dots and white flashes. The request form does not indicate whether jail staff responded to his request.

The only evidence of any violent occurrence involving Zamora was a jail record reporting that another inmate attacked Zamora and was charged with assaulting Zamora. Otherwise, there were reports describing Zamora's insolent demeanor toward jail staff. Most commonly, however, Zamora complained that he was not receiving adequate medical care for his fractured clavicle and protested his placement in the C-Pod unit.

Okanogan County Jail

On May 29, 2008, Skagit County Jail transferred Zamora to the Okanogan County Jail. At the time of Zamora's transfer, Okanogan County Jail was a party to a contract with Skagit County Jail for the housing of Skagit County Jail inmates. During the term of the contract, when a Skagit County Jail inmate was transferred to Okanogan County Jail, Skagit County Jail would prepare a "Skagit County Jail Transport Form," which was usually sent to Okanogan County Jail in advance of the inmate's arrival.¹⁰ The form identified the inmate, provided basic information about the Skagit County charges for which the inmate was serving time, indicated whether the inmate presented a risk of escape or violence, and listed the inmate's release date.

The contract required that Skagit County Jail send all of an Inmate's medical records when it transferred an inmate to Okanogan County Jail. However, during

¹⁰ CP at 3649.

the term of the contract, Skagit County Jail developed a practice in which it only transmitted records dealing with current problems that the jail deemed pertinent to the inmate's management. When Skagit County Jail transferred Zamora to Okanogan County Jail, it did not send the "Skagit County Multi-Purpose Request Form[s]" that memorialized Zamora's three mental health requests and visits with mental health professionals, as detailed above.¹¹ One of those forms documented the April 7, 2008 call made by Zamora's mother, requesting that Zamora receive mental health assistance. Skagit County Jail did send a copy of Zamora's medication log, however, which listed the Lamictal prescription. Otherwise, the records that were transferred generally only reported Zamora's clavicle, shoulder and back problems, and his request for pain medication.

When Zamora arrived at Okanogan County Jail, the booking corrections officer asked him a series of questions. Those officers were trained to watch for signs of mental illness or problems. They noted no behavioral issues exhibited by Zamora during the booking process.

Based on Zamora's behavior and information transmitted by Skagit County Jail, Okanogan County Jail classified Zamora as a minimum custody inmate and housed him in "F module," a dormitory style unit for inmates without any special needs or risk factors.¹² The Okanogan County Jail inspection records indicate that Zamora did not display any unusual or inappropriate behavior while incarcerated there.

¹¹ CP at 3146-51.

¹² CP at 3650.

Inmates at Okanogan County Jail can request assistance or voice concern through a "kite" system.¹³ Zamora never submitted a kite request asking to see a mental health counselor or expressing any mental health issue or concern. No other inmate submitted a kite request, or any other type of complaint regarding Zamora.

According to the terms of its contract with Skagit County Jail, Okanogan County Jail had the right to refuse an inmate. However, according to Noah Stewart, the chief corrections deputy at the time of Zamora's incarceration, the jail had only refused an inmate on one occasion due to a behavioral issue. Stewart stated that Okanogan County Jail would not have accepted an inmate with a serious psychiatric issue. But knowledge that an inmate saw a mental health professional for a mental health concern would not keep the jail from accepting that inmate. Stewart testified that had Skagit County Jail transferred the missing mental records to Okanogan County Jail, Okanogan County Jail would still have accepted Zamora. The jail would have monitored him and based its decision on whether to continue housing him on his behavior at the jail. Zamora did not exhibit any conduct, or make any statements suggesting that he presented a risk to himself or others or that he had a significant mental health problem.

Zamora submitted two "kites" requesting treatment for his shoulder.¹⁴ Consequently, Kevin Mallory, a physician's assistant at the Okanogan County Jail, performed a "med call" on Zamora on May 30, 2008.¹⁵ During that visit, Mallory

¹³ CP at 3650

¹⁴ CP at 3700.

¹⁵ CP at 3699, 3700.

reviewed the medication log that Skagit County Jail had sent, along with other Skagit County Jail records relating to Zamora's orthopedic issues. When Mallory noticed on the medication log the prescription for Lamictal, he asked Zamora about it. Zamora replied that he had not been taking it and did not wish to do so.

Zamora's response was consistent with the Skagit County Jail log, which conveyed Zamora's refusal to take the medication. In fact, the only medication Zamora was interested in taking was narcotic pain medication. During Mallory's interaction with Zamora, Zamora did not display any behaviors indicative of a mood disorder or any other mental health problems. Because Mallory believed Zamora was engaged in drug seeking behavior, he only prescribed ibuprofen, and discontinued Zamora's prescription for Lamictal.

Zamora subsequently submitted additional "kites" relating to shoulder pain, nasal congestion, and digestive problems.¹⁶ He did not submit any request regarding mental health care.

Zamora was released from Okanogan County Jail on August 2, 2008.

Skagit County Jail

On August 5, 2008, three days after his release from Okanogan County Jail, Dennise called 911, requesting that police remove Zamora from her residence because he was disrupting the family. The responding officer arrested Zamora at his parents' residence on an outstanding misdemeanor warrant for failing to appear in court. Before leaving the residence, Dennise advised the officer that Zamora

¹⁶ CP at 3701.

was suffering from an undiagnosed and untreated mental illness and had been for some time. The officer transported Zamora for booking at Skagit County Jail.

While waiting to be booked, Zamora was reportedly pounding on the walls of the holding room. He was nevertheless "changed down with out [sic] incident" and there is no evidence of additional behavioral problems.¹⁷

Zamora was released on his own recognizance on August 6, 2008.

Zamora never received a full evaluation by a psychologist or psychiatrist at either jail.

Events Post-Incarceration

That same day, on August 6, 2008, Zamora arrived by ambulance to a local hospital emergency room, complaining of sudden onset of nausea, vomiting, and diarrhea. Hospital staff noted that he appeared awake and cognizant of his surroundings. Zamora was prescribed an anti-nausea medication and he was released. Zamora did not manifest any symptoms of a mental health crisis.

On August 13, 2008, Skagit County police received a 911 hang-up telephone call from Zamora's parents' home where Zamora was residing. A Skagit County police officer responded to the residence and spoke with Zamora and his mother, both of whom denied making the call. No further action was taken.

On August 18, 2008, a 911 caller reported that someone was riding a motorcycle on state owned property in Alger, Washington. A Skagit County police officer responded and contacted Zamora. The officer told Zamora that he was not permitted to enter that area and that he was trespassing. Shortly after the

¹⁷ CP at 3563.

encounter, Zamora was involved in a motor vehicle accident on his parents' property and was injured. As a result, Zamora was taken to a nearby hospital. One of the doctors who examined him concluded that Zamora had adequate decisional capacity to decline care and had no suicidal or homicidal ideations. The doctor further noted that Zamora presented no imminent threat of harm to himself or others. He concluded that there was no basis upon which to contact a designated mental health professional for further evaluation of Zamora and that Zamora did not meet the criteria for detaining for a psychiatric evaluation.

On September 2, 2008, Zamora committed the crimes that are issue.

Procedural History

Following this tragic incident, Zamora pleaded guilty to 18 charges.¹⁸ On November 30, 2009, the trial court imposed a sentence of life without parole for the murder charges and several hundred months for the other charges.

Binschus filed the present action in Snohomish County Superior Court on September 6, 2011.¹⁹ He filed suit against DOC,²⁰ Skagit 911, Skagit County, and Okanogan County. Binschus alleged negligence on the part of the counties and that the negligence was a proximate cause of the shooting and resulting deaths and injuries to the victims.

Binschus argued the counties owed the victims a duty under two theories. First, Binschus asserted that the counties had a special relationship with Zamora

¹⁸ Zamora was found not guilty by reason of insanity on two counts of aggravated murder.

¹⁹ The estate of one of the murdered victims and one of the injured victims are not parties to this lawsuit.

²⁰ In July and August 2013, each of the plaintiffs entered into a settlement agreement with DOC. The trial court entered stipulated judgments with respect to each plaintiff.

that gave rise to a duty to protect the victims under the Restatement (Second) of Torts §§ 315 and 319. Second, Binschus contended that the counties' actions created a recognizable high degree of risk of harm that constituted misfeasance under the Restatement (Second) of Torts § 302B.²¹

Skagit and Okanogan Counties moved for summary judgment on all claims against them.²² Okanogan County moved for summary judgment on the theory that it had no duty to third parties injured after Zamora's release based on its alleged failure to identify, diagnose, and treat Zamora's mental illness. Skagit County claimed that it had no duty to control Zamora after his release. Binschus moved for partial summary judgment only on the issue of duty, contending that the public duty doctrine did not apply to bar his claims. The trial court granted the counties' summary judgment motions on the issues of duty and proximate cause.

Binschus appeals.

ANALYSIS

Standard of Review

We review a trial court's summary judgment order de novo. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Hertog, ex rel. S.A.H. v. City of Seattle,

²¹ Binschus also raised a claim of negligence against Skagit County for the actions of Deputy Terry Esskew, arguing that her actions constituted an affirmative act under the Restatement (Second) of Torts § 302B. The trial court found that no duty was imposed under this theory. It additionally ruled that even if such duty had been imposed, it denied Skagit County's summary judgment motion on the issue of proximate cause. Binschus does not make a specific argument as to Deputy Esskew's alleged negligence on appeal and, thus, the court's decision as to Deputy Esskew is not pertinent to this appeal.

²² Skagit 911 also moved for summary judgment.

138 Wn.2d 265, 275, 979 P.2d 400 (1999) (citing Taggart v. State, 118 Wn.2d 195, 199, 822 P.2d 243 (1992); CR 56(c)).

The court must construe all facts and inferences in the light most favorable to the nonmoving party. Hertog, 138 Wn.2d at 275 (citing Taggart, 118 Wn.2d at 199). "Questions of fact may be determined as a matter of law 'when reasonable minds could reach but one conclusion.'" Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) (quoting Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)).

If the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment is proper. Young v. Key Pharms., 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

To prevail on a claim of negligence, a party must prove the following elements: (1) existence of a legal duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. Christensen v. Royal Sch. Dist. No. 160, 156 Wn.2d 62, 66, 124 P.3d 283 (2005). In the present case, only duty and causation are at issue.

Duty

It is well settled that the existence of a legal duty owed to the plaintiff is an essential element in any negligence action. Petersen v. State, 100 Wn.2d 421, 425-26, 671 P.2d 230 (1983). Whether a given defendant owes a duty is generally a question of law. Yong Tao v. Heng Bin Li, 140 Wn. App. 825, 833, 166 P.3d 1263, 1268 (2007). "But where duty depends on proof of certain facts, which may be disputed, summary judgment is inappropriate." Siogren v. Props. of the Pac. N.W., LLC, 118 Wn. App. 144, 148, 75 P.3d 592 (2003).

Binschus contends that pursuant to the Restatement (Second) of Torts §§ 315 and 319, Skagit and Okanogan Counties had a "take charge" relationship with Zamora that gave rise to a duty to guard against the foreseeable dangers posed by Zamora's violent propensities. Specifically, Binschus asserts that the counties had a duty to provide Zamora with a mental health evaluation and treatment because they were aware of his dangerous propensities. For this claim, we hold that Skagit County potentially owed a duty to the victims, and genuine issues of material fact preclude summary judgment.

Generally, "our common law imposes no duty to prevent a third person from causing physical injury to another." Sheikh v. Choe, 156 Wn.2d 441, 448, 128 P.3d 574 (2006). Section 315 of the Restatement (Second) of Torts carves out one exception to this rule:²³

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

²³ This special relation exception also is an exception to the public duty doctrine. Hertog, 138 Wn.2d at 276 (quoting Taggart, 118 Wn.2d at 219 n.4).

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

The "take charge" relationship, as set forth in the Restatement (Second) of Torts § 319, is one subset of special relationships contemplated in § 315. Accordingly,

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

RESTATEMENT (SECOND) OF TORTS § 319.

Once the "take charge" relationship is established, the actor "has a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of [the third party]." Joyce v. State, Dep't of Corr., 155 Wn.2d 306, 310, 119 P.3d 825 (2005) (emphasis omitted) (quoting Taggart, 118 Wn.2d at 217). Thus, the relevant threshold questions for purposes of §§ 315 and 319 are whether the actor has taken charge of the third party²⁴ and whether the actor knows or should know of the danger posed by the third party. Bishop v. Miche, 137 Wn.2d 518, 527, 973 P.2d 465 (1999).

At oral argument before this court, Skagit County conceded that while Zamora was in custody at Skagit County Jail, the jail had a "take charge" relationship with him. We accept this concession. Since Petersen first announced that a special relationship exists between a state psychiatrist and his or her patient,

²⁴ To determine whether an actor has taken charge of the third party, there must be a "definite, established, and continuing relationship between the defendant and the third party." Taggart, 118 Wn.2d at 219 (quoting Honcoop v. State, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988)); see also Sheikh, 156 Wn.2d at 448-49; Hertog, 138 Wn.2d at 276.

100 Wn.2d at 428, Washington courts have broadened the scope of the "take charge" relationship to exist between correction officers and offenders. See, e.g., Taggart, 118 Wn.2d at 223-24; Hertog, 138 Wn.2d at 281; Bishop, 137 Wn.2d at 531. We consider the first relevant question satisfied as for Skagit and Okanogan Counties.

The next question we examine, therefore, is whether the counties knew or should have known of Zamora's violent propensities. We hold that material questions of fact remain as to whether Skagit County knew or should have known of Zamora's dangerous tendencies. The same, however, is not true for Okanogan County. Evidence in the record indicates that Skagit County was likely aware that Zamora had potentially dangerous and criminal inclinations.

Zamora had an extensive criminal history. By September 2008, he had been arrested 21 times in Skagit County and incarcerated 11 times. Skagit County Jail had a list of Zamora's criminal history at the time of his 2008 incarceration.

In addition, the record evinces that during the years preceding the September 2008 tragedy, Zamora had several encounters with Skagit County police whereby police officers became aware of Zamora's mental illness. On April 27, 2004, Skagit County police responded to Zamora's parents' residence, where Zamora resided, after Zamora called DSHS indicating he was cutting himself. Police officers responded and contacted Dennise, who informed them that Zamora had previously cut himself. After the Skagit County officers were unable to locate Zamora, Dennise contacted them, reporting that Zamora was at her residence, was off his medications, but not harmed and not threatening suicide. The Skagit

County police incident report noted: "At this time we are aware that ISAAC ZAMORA does have some mental problems and his mom will be monitoring him."²⁵ Furthermore, in May 2007, Zamora called Skagit County police, concerned that someone in his house "was out to get him."²⁶ The police officer who spoke with Zamora believed Zamora was intoxicated and that there was no threat to his well-being.

Additionally, while at the Skagit County Jail, Zamora was incarcerated in the C-Pod unit, known for inmates who had severe behavioral issues and mental health issues, among other things. Dennise also informed the jail and the Skagit County prosecutor that Zamora had severe and untreated mental health issues and requested that he receive mental health treatment. She also made clear that she and her husband were fearful of Zamora. Significantly, when mental health professional Inslee visited Zamora at jail, she submitted a strongly worded statement expressing concern regarding Zamora's mental health, noting his "rageful thinking."²⁷ Another mental health counselor, Maxwell, later made note of Zamora's erratic and angry temperament and appearance, recommending that Zamora continue taking "psych. meds."²⁸

Finally, we note that on September 2, 2008, Zamora's name on the computer screen at the 911 call center was tagged with a 220 alert code, which indicated that Zamora had mental health issues and was unstable.

²⁵ CP at 3551.

²⁶ CP at 3552.

²⁷ CP at 3685.

²⁸ CP at 3687.

Given these numerous contacts between Zamora and Skagit County, reasonable minds could conclude that Skagit County was aware of the risk posed by Zamora's violent propensities. Summary judgment in Skagit County's favor was inappropriate.

The record does not indicate that a material question of fact remained as to whether Okanogan County was aware of Zamora's violent disposition. Nothing in the record establishes Okanogan County knew or should have known of Zamora's unstable mental health condition. Therefore, we affirm the trial court's decision to summarily adjudicate the question of duty in favor of Okanogan County.

The counties contend that no duty can be imposed because any "take charge" relationship terminated once the counties released Zamora from custody. But this argument confuses the existence of a duty with the scope of the duty, which is limited by the foreseeability of the danger to the victims. Christen v. Lee, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989) ("The concept of foreseeability limits the scope of the duty owed.").

"Once the theoretical duty exists, the question remains whether the injury was reasonably foreseeable." Joyce, 155 Wn.2d at 315 (citing Taggart, 118 Wn.2d at 217). The plaintiff's harm must be reasonably perceived as within the general field of danger that should have been anticipated. Christen, 113 Wn.2d at 492. "Foreseeability is normally an issue for the jury, but it will be decided as a matter of law where reasonable minds cannot differ." Taggart, 118 Wn.2d at 224 (quoting Christen, 113 Wn.2d at 492). Here, it was within the jury's province to determine whether the injuries to the victims were reasonably foreseeable.

Accordingly, viewing the facts in the light most favorable to Binschus, we conclude that genuine issues of material fact preclude summary judgment on the question of whether Skagit County owed a "take charge" duty to the victims.

Binschus next contends that the counties owed a duty to Zamora's victims because their purportedly improper mental health evaluation and treatment of Zamora "dramatically increased" the risk of harm to the victims.²⁹ Binschus bases this argument on the Restatement (Second) of Torts § 302B. We find that no such duty is compelled by § 302B.

The Restatement (Second) of Torts § 302B provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." The duty to protect victims against a third party's criminal act may be imposed "where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct." Robb v. City of Seattle, 176 Wn.2d 427, 434, 295 P.3d 212 (2013) (emphasis omitted) (quoting RESTATEMENT § 302B cmt. e).³⁰

²⁹ Appellant's Br. at 33.

³⁰ Comment e provides, in pertinent part:

There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where . . . the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.

RESTATEMENT (SECOND) OF TORTS § 302B (emphasis added).

In Parilla v. King County, we held that § 302B can impose a duty of care against a third party's criminal acts even where no special relationship existed. 138 Wn. App. 427, 439, 157 P.3d 879 (2007); see also § 302B cmt. e. In Parilla, a county bus driver exited a bus on a public street while the engine was running and when a passenger was still on board. Parilla, 138 Wn. App. at 431. When the driver re-entered the bus, he observed the passenger "exhibiting bizarre behavior." Parilla, 138 Wn. App. at 431. The driver again exited the bus with the engine still running. Parilla, 138 Wn. App. at 431. The passenger moved into the driver's seat and drove the bus until it collided with several vehicles. Parilla, 138 Wn. App. at 431. We held that under those circumstances, the driver's affirmative actions created a high degree of risk that a reasonable person would have foreseen and, thus, pursuant to § 302B comment e, the county owed a duty of care to protect the victims of the collision. Parilla, 138 Wn. App. at 438-41.

In Robb, the Supreme Court reaffirmed that "Restatement § 302B may create an independent duty to protect against the criminal acts of a third party where the actor's own affirmative act creates or exposes another to the recognizable high degree of risk of harm." 176 Wn.2d at 429-30. In that case, two police officers initiated a Terry³¹ stop of Behre and his companion on suspicion of burglary. Robb, 176 Wn.2d at 430. During the stop, the officers noticed several shotgun shells on the ground but did not question the suspects or pick up the shells. Robb, 176 Wn.2d at 430. The officers released Behre and the other suspect. Robb, 176 Wn.2d at 430. After Behre walked away, he returned to the

³¹ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

scene to grab the shells and then shot and killed Robb. Robb, 176 Wn.2d at 430. The officers had encountered Behre prior to the shooting and were aware of his strange behavior during the days leading up to the shooting. Robb, 176 Wn.2d at 431. Four days before the shooting, Behre had been transported to Harborview Medical Center for an involuntary mental health assessment and then had been released. Robb, 176 Wn.2d at 431.

Robb's widow sued the city, claiming that the officers owed a duty to Robb under § 302B. Robb, 176 Wn.2d at 429. Our Supreme Court distinguished its case from Parilla, finding that the officer's failure to pick up the shells was an omission, not an affirmative act like that in Parilla. Robb, 176 Wn.2d at 436-38. The court held that a duty may arise under § 302B only where the actor's conduct constitutes misfeasance (an affirmative act), rather than nonfeasance (an omission). Robb, 176 Wn.2d at 439-40. The court explained that an affirmative act—or misfeasance—involves the creation of a new risk of harm to plaintiffs. Robb, 176 Wn.2d at 437. On the other hand, an omission—or nonfeasance—merely makes the risk of harm no worse. Robb, 176 Wn.2d at 437. The court held that the officer's failure to pick up the shotgun shells was an omission, not an affirmative act, which was insufficient to impose a duty under § 302B. Robb, 176 Wn.2d at 430, 437-39.

More recently, in Washburn v. City of Federal Way, the Supreme Court held that a police officer created a new, affirmative risk to a murder victim's safety when the officer improperly served an antiharassment order to the subject of the order while the subject was home alone with the victim. 178 Wn.2d 732, 759-60, 310

P.3d 1275 (2013). The court found that the officer knew or should have known that the subject would react violently when he received the order, and knew or should have known that after he served the order, he left the subject home alone with victim. Washburn, 178 Wn.2d at 759-60. Binschus contends that, unlike the nonfeasance committed by the officers in Robb, and similar to the misfeasance in Washburn, here, the counties engaged in misfeasance by increasing the risk of harm when they failed to "properly evaluate and treat" Zamora.³² Binschus supports this contention by pointing to evidence that two of Skagit County Jail's mental health counselors saw Zamora in connection with his mental health condition but did not offer an appropriate mental health evaluation. As for Okanagan County, Binschus argues that although Mallory saw Zamora, he did not properly evaluate his mental health condition even though he knew that Skagit County Jail had prescribed Binschus with Lamictal. Binschus also points to evidence demonstrating the counties' awareness of Zamora's deteriorating mental health.³³ Binschus references the opinion of Dr. Hegyvary, who testified that had the counties evaluated Zamora, they would have identified his psychosis.

In an effort to bring his claims within the scope of § 302B, Binschus characterizes the counties' conduct as an improper evaluation and treatment, which, he contends, constitutes affirmative acts or misfeasance. But Binschus's attempt to frame the issue in this way is unconvincing because here, there simply

³² Appellant's Br. at 39.

³³ Binschus references the following in support of his argument: Zamora's lengthy criminal record, his past involuntary treatment, his mother's calls for treatment, his status on Skagit County's 911 call center's computer, his housing in the C-Pod at Skagit County Jail, his judgment and sentence, and his behavior in both jails. Appellant's Br. at 37; Appellant's Reply Br. at 25.

were no affirmative acts. Rather, the counties' failure to evaluate Zamora and provide mental health treatment was an omission.

Furthermore, as established in Robb, § 302B only applies if the entity's affirmative act creates a new recognizable high degree of risk of harm to the plaintiffs. Like the officers in Robb, the counties did not create a new risk. Although it is possible that the jail medical staff could have mitigated the risk posed by Zamora's deteriorating mental health, this is not sufficient to justify an imposition of duty under § 302B. And Binschus cites to no evidence demonstrating that the visits or the prescription of Lamictal created a new recognizable risk or exacerbated the risk that already existed. At best, it purports to show that the counties were aware of Zamora's mental health condition or would have been able to identify his condition had they examined him properly. Nevertheless, the evidence does not establish that the counties' failure to evaluate Zamora more thoroughly or provide treatment constitutes an affirmative act or misfeasance. Instead, the counties committed nonfeasance, which does not give rise to liability under § 302B.

Proximate Cause

Binschus contends that summary adjudication of his claims against the counties was improper because a jury could reasonably find that the counties proximately caused the victims' injuries because of their failure to properly evaluate and treat Zamora during his incarceration. We agree.

Proximate cause contains two separate elements: cause in fact and legal causation. Hartley, 103 Wn.2d at 777. Cause in fact, is, in addition to legal

causation, an element of proximate cause. It "refers to 'the physical connection between an act and an injury.'" M.H. v. Corp. of Catholic Archbishop of Seattle, 162 Wn. App. 183, 194, 252 P.3d 914 (2011) (internal quotation marks omitted) (quoting Ang v. Martin, 154 Wn.2d 477, 482, 114 P.3d 637 (2005)). Cause in fact is usually a question for the jury, but it may be decided as a matter of law if the causal connection between the act and the injury is "so speculative and indirect that reasonable minds could not differ." Moore v. Hagge, 158 Wn. App. 137, 148, 241 P.3d 787 (2010) (quoting Doherty v. Mun. of Metro. Seattle, 83 Wn. App. 464, 469, 921 P.2d 1098 (1996)). Causation is speculative "when, from a consideration of all the facts, it is as likely that it happened from one cause as another." Moore, 158 Wn. App. at 148 (internal quotation marks omitted) (quoting Jankelson v. Sisters of Charity of House of Providence in Territory of Wash., 17 Wn.2d 631, 643, 136 P.2d 720 (1943)).

Binschus asserts that the counties' negligent failure to evaluate and treat Zamora's mental illness was the cause in fact of Zamora's psychotic outburst on September 2, 2008. To support this contention, Binschus relies heavily on expert witness Dr. Hegyvary's declaration:

[H]ad Zamora been subjected to a mental health evaluation been [sic] during his time at either Skagit County Jail or Okanogan County Jail, the examiner would have discovered Mr. Zamora's psychosis and begun the process of formulating a diagnosis. At this point the standard of care required administration of one or more of the antipsychotic medications.^[34]

³⁴ CP at 2540-41.

Dr. Hegyvary also opined that for patients suffering with schizophrenia, "[m]ore often than not, skilled persuasion is all that is required."³⁵ He also stated that the jails could have provided long-acting treatment to Zamora that would have been effective long after his release:

Mr. Zamora may have had difficulty complying with an oral regimen of antipsychotic medications requiring daily administration, but there are long-acting, injectable medications for use in [sic] these situations. Haloperidol 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. Because the medication is administered directly by the psychiatrist, only once per month, compliance can be documented and is virtually assured. The positive, therapeutic effects of the Haloperidol Decanoate last 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. Another such medication is Risperdal Consta (risperidone), which is a depot injection administered once every two 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.³⁶

Dr. Hegyvary also concluded that had either counties provided Zamora with a proper mental health evaluation, a mental health provider would have been able to identify his psychosis and place him on a treatment plan that would include a long-acting antipsychotic medication. Had the counties done so, Dr. Hegyvary opined, Zamora would not have been in a psychotic state on September 2, leading to the victims' tragic deaths and injuries.

³⁵ CP at 2544.

³⁶ CP at 2544-45.

Based on this evidence, we conclude that Binschus has demonstrated that material questions of fact exist that, but for the counties' alleged negligence, Zamora would not have engaged in the violent rampage.³⁷

We hold that summary judgment should not have been granted in this case. We reverse the trial court's summary judgment order and remand for further proceedings consistent with this opinion.

Trickey, J

WE CONCUR:

[Signature]

[Signature]

³⁷ Binschus additionally argues that a county official could have sought involuntary treatment for Zamora under the involuntary treatment act (ITA), ch. 71.06 RCW. Binschus did not argue to the trial court that Zamora could have or should have been detained beyond his release date of August 2, 2008, under the ITA. Binschus waives this argument by raising it for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); see also RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."). Thus, we decline to reach its merits.

DECLARATION OF SERVICE

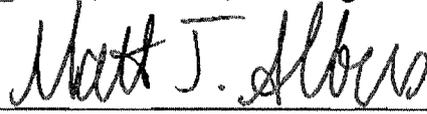
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 25th, 2015, at Seattle, Washington.

A handwritten signature in cursive script that reads "Matt J. Albers". The signature is written in black ink and is positioned above a horizontal line.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

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Subject: Fred Binschus, et al. v. Skagit County, et al. - Supreme Ct Cause #91644-6

Good morning,

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

Documents to be filed: 1.) Motion for Leave to File Over-Length Supplemental Brief of Respondents, and 2.) Supplemental Brief of Respondents

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

Case Cause Number: 91644-6

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

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