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NO. 67475-7-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

THE ESTATE OF ZINA LINNIK, and MIKHAIL and VALENTINA
LINNIK, a married couple, and STANISLAV M. LINNIK, and NINA
LINNIK, and MIKHAIL LINNIK, as parent and guardian for PAVEL
LINNIK, SVETLANA LINNIK, OKSANA LINNIK, VADIM LINNIK,
SAMUEL LINNIK, his minor children,

Appellants

vs.

STATE OF WASHINGTON, by and through its various state agencies
and subdivisions, including DEPARTMENT OF CORRECTIONS and
CHILD PROTECTIVE SERVICES, and PIERCE COUNTY, a
municipal corporation, and CITY OF TACOMA,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
NO. 10-2-13557-2 KNT

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR 26 PM 3:58

 ORIGINAL

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I. INTRODUCTION

This case is about the kidnapping, rape, and murder of 12-year-old Zina Linnik. On July 4, 2007, Zina was taken from the alley behind her family's Tacoma home by Terapon Adhahn, an unregistered sex offender and noncitizen responsible for a continuous string of child rapes and killings stretching back to the 1990 rape of his half-sister. Adhahn was free to act as he did only due to a mind-boggling series of errors and omissions by the State of Washington and Pierce County. Even after Adhahn kidnapped Zina, the City of Tacoma failed to issue an Amber Alert for over 12 hours, again due to a series of painful errors. Although Washington was one of the leading states in the nation in putting together legal and supervisory mechanisms to deal with sex offenders, all of those mechanisms failed here, even in the face of prescient warnings in a psychosexual evaluation of Adhahn done at the time of the 1990 rape.

At the trial court, the defendants argued for summary judgment dismissal on two primary bases: that they owed no duty to Zina, and that their errors were not the proximate cause of the harm she suffered. For their duty arguments, the defendants relied on a narrow version of the public duty doctrine that is no longer in accord with Washington law after the Supreme Court's decision in *Osborn v. Mason County* and this Division's decision in *Robb v. Seattle*. *Osborn v. Mason County*, 157 Wn.2d 18, 27-8, 134 P.3d 197 (2006); *Robb v. Seattle*, 159 Wn. App. 133, 145, 133 P.3d 242 (2010). For

their causation arguments, the defendants maintained either that their negligence was “too remote in time” and therefore not the legal cause of Zina’s kidnapping, rape, and murder, or that there was not sufficient certainty that but for any one act or omission, Adhahn would have been deported, incarcerated, or otherwise unable to harm Zina.

Both of defendants’ arguments are incorrect. The public duty doctrine does not create tort immunity for public entities—it merely requires an inquiry into whether a duty exists under basic tort principles. Under traditional tort principles based on foreseeability and under established public duty doctrine exceptions, the defendants owed Zina a duty to non-negligently supervise Adhahn, follow up on DSHS referrals, and issue an Amber Alert. Under fundamental principles governing legal causation and causation by multiple events, the defendants’ negligent acts caused Zina’s harm.

II. ASSIGNMENTS OF ERROR

1. The trial court committed an error of law by granting the State of Washington’s motion for summary judgment because the State owed a duty to the plaintiffs and their breach of that duty caused Zina’s harms.
2. The trial court committed an error of law by granting Pierce County’s motion for summary judgment because the County owed a duty to the plaintiffs and their breach of that duty caused Zina’s harms.
3. The trial court committed an error of law by granting the City of Tacoma’s motion for summary judgment because the City owed a duty to the plaintiffs and their breach of that duty caused Zina’s harms.
4. The trial court abused its discretion and committed an error of law by denying Plaintiff’s Motion to Reconsider or in the Alternative motion to Amend.

III. STATEMENT OF THE CASE

On July 4, 2007, Terapon Adhahn forced 12-year-old Zinaida (Zina) Linnik into a van in the alley behind her family's Tacoma home. Adhahn then orally, vaginally, and anally raped Zina at Adhahn's home in Parkland, before killing her and dumping her naked body near Eatonville. (CP 414-416). The rape of Zina Linnik was not Adhahn's first rape of a child. Adhahn had been known to authorities for nearly two decades.

A. Adhahn violently rapes his half-sister in 1990.

Terapon Adhahn first entered the United States from Thailand in 1976. Adhahn was a legal resident of the United States, but not a citizen. (CP 418-419). Adhahn first became known to authorities after raping his 16 year old half-sister in March, 1990. (CP 421-453). During the rape, Adhahn held his young relative down, choked her, ripped her clothes off, punched her, threatened her with a knife, forced her thighs apart, smeared Vaseline on her vagina and anus, put his fingers in her anus, and vaginally raped her, repeatedly. (CP 421-453). Adhahn was arrested for second degree rape after confessing. He was allowed to plead guilty to first degree incest after agreeing to five years of community supervision and sex offender treatment. (CP 455-462). Even in the plea documents, Adhahn minimized his crime, attributing his acts to alcohol. (CP 464-466). In other accounts of the crime, he claims his half-sister lay down with him and he doesn't know what happened next. (CP 421-453).

The plea in Adhahn's 1990 rape was driven by a desire to see Adhahn subjected to lengthy supervision and intensive therapy for his sexual deviance and other problems. A psychosexual evaluation and treatment plan completed by Dr. Michael Comte before Adhahn's sentencing concluded:

In summary, Mr. Adhahn's violent sexual assault on his half-sister provides ample evidence of his violent proclivities and assaultive potential, especially under the influence of alcohol. He is an angry and poorly controlled man with a plethora of psychological, emotional and behavioral problems. Long-term intensive psychotherapy and monitoring of his behavior will be necessary to ensure the safety of the community. (CP 383-392).

Adhahn was diagnosed with Paraphilia, Pedophilia (Prepubescent Female), Sadism and Rape, Dysthymia, Alcoholism, and a Personality Disorder with Borderline and Paranoid Features. (CP 383-392) (emphasis added). The evaluator specifically recommended intensive weekly individual and group psychotherapy monitored by polygraph and penile plethysmograph for "many years," sobriety because "under the influence of alcohol, he would be at extreme risk for further assaultive behavior," and "ongoing and active probation supervision...to ensure there is no relapse in his alcoholism and control of his anger and sexual impulses," with "immediate court review" for any substance abuse violation. (CP 383-392)

On September 4, 1990, the sentencing judge ordered 60 months of community supervision. Inpatient sex offender treatment was required. Other sentencing conditions included "Remain within the state of Washington unless receives military orders reporting him from state. No contact with

victim unless victim, her therapist (if any) and defendant therapist agree. Also receive and successfully complete alcohol counseling program,” and “consume no drugs or alcohol or have contact with minor children.” (CP 377-381).

B. Adhahn’s five years of lax state supervision.

For the next five years, the State’s supervision was characterized by negligence and a willingness to overlook the same behaviors that the psychosexual evaluation had identified as red flags. (CP 1739). Adhahn was required to check in only once a month, and often didn’t even see his Community Corrections Officer (CCO), but filled out a form instead. The CCO rarely visited Adhahn’s home or workplace, and had no idea of Adhahn’s activities or associates in the community. (CP 468-480, 1734-1740). Although the conditions of Adhahn’s supervision specifically forbade him to have contact with the victim, in 1996 he did. (CP 468-480). Although the conditions of Adhahn’s supervision specifically forbade him to leave the state, he was allowed to go to Texas for a wedding in 1994 and visit Thailand for a month in 1995—this despite the fact that he was a child rapist and Thailand is a known haven for pedophiles. (CP 468-480, 1740).

After completing alcohol treatment in 1991, Adhahn was not monitored for alcohol use despite the fact that a March, 1992 polygraph indicated that Adhahn “had continued to drink about a six pack a night on weekends.” (CP 482-483). Although Adhahn’s discharge from alcohol

treatment in 1991 required him to attend Alcoholics Anonymous meetings and “work closely with an AA sponsor,” he never did, and his CCOs never required it, and never reported any of these violations to the sentencing judge. (CP 485-491; 468-480; 1733-1761).

Although the pre-sentencing psychosexual evaluation recommended that probation supervision be especially vigilant for relapses in alcoholism and anger control, the State failed to follow up on Adhahn’s 1992 conviction for brandishing a weapon outside a bar (RCW 9.41.270). (CP 394-403; 490-491). In June 1992, Adhahn pointed a handgun at a man’s chest at point-blank range, then chased another man across a parking lot while brandishing the gun. Both men feared for their lives. Adhahn was convicted by a jury after a one-day trial in Tacoma Municipal Court on September 9, 1992, and was sentenced to five days in jail. Faced with this evidence of alcohol use, violence, and impulse control problems from their sex offender, who “under the influence of alcohol...would be at extreme risk for further assaultive behavior,” and who needed “ongoing and active probation supervision...to ensure there is no relapse in his alcoholism and control of his anger and sexual impulses,” the State did nothing. (CP 383-392; 468-480; 1734-1740).

The State failed to report the conviction the judge supervising Adhahn’s sentence, and also failed to report the conviction to federal immigration authorities, who would have deported Adhahn for a second crime. (CP 1735-1738; 65-366; 362; 1707-1714). And in fact, after Adhahn

became a suspect in the Linnik murder, Immigrations and Customs Enforcement detained him and commenced deportation proceedings on the basis that Adhahn had been convicted of two crimes of moral turpitude—the 1990 incest conviction, and the 1992 intimidation with a weapon conviction, at that time the only convictions Adhahn had. (CP 1715). The DOC also failed to refer the conviction to Pierce County prosecutors for pursuit of a charge of felon in possession. This is significant not just because it would have been a second felony, but also because the INS generally learns of and pursues noncitizen felons when they are in jail. (CP 1738; 365-366). Any jail time Adhahn served, either for a new felony or for revocation of his community release, would have been an additional opportunity for deportation. *Id.* In fact, Adhahn’s CCOs never even made contact with immigration authorities, despite the fact that doing so was standard procedure when supervising a noncitizen. (CP 1735-1738).

The State similarly failed to follow up on Adhahn’s apparent solicitation of a prostitute in 1994. (CP 493-494). A 1995 polygraph that was supposed to explore the incident failed to ask about it. (CP 496)

C. Adhahn completes once-a-week treatment and is deemed a success.

The State also failed to ensure that Adhahn’s treatment complied with his sentence and with Dr. Comte’s recommendations. The Sentencing Order clearly states that Adhahn was to receive inpatient sex offender treatment. (CP 377-381). Dr. Comte recommended intensive individual counseling. (CP

383-392). Adhahn received neither. After his sentencing, Adhahn failed to start treatment for sexual deviancy until ordered by the court. (CP 499-501). The mental health professional overseeing his counseling, Dr. Daniel DeWaelche, noted: "It is my impression from Terapon's discussions that he does not understand the full significance of the need for him to attend therapy." (CP 503). In a 1992 polygraph, Adhahn admitted to prior significant sexual deviancies including homosexual activity, peeping, and bestiality. (CP 482-483). Adhahn would miss therapy sessions on a bi-weekly basis. These absences were reported to his CCO, but never dealt with.

The inpatient treatment required by the court never happened. Dr. Comte's pre-sentencing treatment plan recommended that Adhahn receive intensive individual and group treatment monitored by polygraph and penile plethysmograph. The State never ensured that Adhahn received inpatient therapy or any individual therapy, and his group treatment was far less than "intensive." Adhahn's treatment failed to address the role of alcohol in his crime. Adhahn received only a few polygraphs. Therapeutic "assignments," particularly those regarding Adhahn's deviant arousal patterns, were allowed to languish for years with the DOC's full knowledge. (CP 513-514). Adhahn's therapy was evaluated by plethysmograph exactly twice in five years, and the second plethysmograph happened only after Adhahn's sentencing judge ordered it. (CP 405). Yet by the end of his treatment a few months later, Adhahn was deemed a success: "Terapon has demonstrated that

he is using the skills and techniques, gleaned in sex-offender treatment, on a day-to-day basis to avoid recidivism," DeWaelche wrote in 1997. "It has been a pleasure working with Terapon." (CP 516-517).

D. The State fails to report relevant information to immigration or to the sentencing judge.

In 1996, several months before releasing Adhahn from supervision, Judge Strombom ordered the State "to check for any criminal charges against the defendant since 11/90." (CP 405). Even when specifically ordered to look for new convictions, the State failed to report the 1992 weapons conviction to Judge Strombom or to immigration authorities. Adhahn's treatment and supervision were terminated on July 8, 1997. (CP 1738).

E. Adhahn is classified as a "low risk" offender despite his violent rape of a child and his psychological problems.

Despite the fact that Adhahn's rape of his sister was violent and involved the threatened use of a weapon, despite the fact that Adhahn's psychosexual evaluation indicated a high level of psychopathology and characteristics indicating a high risk of recidivism, and despite Dr. Comte's conclusion that Adhahn presented significant risk to the community and was likely to reoffend without close supervision, Adhahn was eventually classified as a Level 1 sex offender—the least dangerous level, requiring little supervision and rated least likely to reoffend. The State claims it did not classify Adhahn, but statutory language from 1997 indicates that the Department of Corrections was, at that time, responsible for forwarding

classifications to local law enforcement. (CP 505-511). An extensive review of public records produced by the defendants before this suit was filed was unable to locate any documentation of the classification decision.

F. Adhahn fails to register, and continues to rape children.

Adhahn was required to register as a sex offender until September 2007. When he was released from supervision, Adhahn did not register. He had not registered since October 1990. (CP 519-521). Although he had moved over ten times while under active DOC supervision for a sex offense, DOC apparently never noticed that their supervised sex offender hadn't been registering. (CP 1739). Had DOC reported Adhahn for failure to register, that would have been an additional crime resulting in revocation of his community release, jail time, and deportation. In April 2002, Adhahn came in contact with law enforcement officers (apparently for a traffic stop) and was made to update his registration. (CP 519-521). After being released from DOC supervision in 1997, Adhahn had moved several more times before registering in 2002, and moved at least three more times, never registering, between 2002 and 2007. (CP 523-547).

After his release from DOC supervision, Adhahn also started raping children again—if he had ever stopped. In 2007, after Zina Linnik was killed, police matched Adhahn's DNA to semen taken from Sabrina Rasmussen, an 11-year-old girl abducted while walking to school on May 31, 2000. (CP 549-551). Sabrina was bound, gagged, and blindfolded with duct tape, and

repeatedly raped over a period of hours. Sabrina was left in a secluded area on the Fort Lewis Air Force base with her hands bound and her eyes covered. Eventually she made her way to a highway and was picked up by military personnel. She had suffered vaginal injuries requiring surgery. As part of the investigation of the rape and kidnapping, Adhahn's DNA was collected. At that time, it did not match any sample in the state's criminal database, so it was filed as part of a "John Doe" indictment in 2002. (CP 1051-1055).

The State knew about some of Adhahn's new crimes at the time, yet did nothing. In 2004 CPS received detailed referrals reporting that Adhahn, a registered sex offender, was living with a young girl who he purchased in exchange for furniture. This part of the referral was inaccurate—according to Adhahn he had actually paid \$2,000 for the girl. (CP 2976). The referral created by the State contains an allegation that that a 15-year-old, L.T.N., had been "sold" by her mother to Adhahn for sex. The referral indicated that Adhahn was the girl's caretaker. CPS intake personnel created an ID number for Terapon Adhahn on January 26, 2004. (CP 2993). As of January 26, 2004, Terapon Adhahn was an absconded unregistered sex offender.

CPS did not investigate this referral itself, but "screened it out" to law enforcement because the intake worker believed the only allegation was one of "third-party abuse" by Adhahn. (CP 1254). CPS's child abuse investigation manuals make clear that the referral should have been screened in and investigated by CPS, either because L.T.N.'s mother, in selling her to

Adhahn, was failing to protect her, or because Adhahn, as the only adult living with the child, was acting in loco parentis. (CP 2901-2947). (CP 2902-2903, § 2210(D)).

The referral stated that L.T.N.'s mother sold her to Adhahn, which is abuse that CPS must provide services for under § 2210(D)(1). It also stated that Adhahn was sexually abusing L.T.N. by having sex with her when she was under 16 years old, which is abuse that CPS must provide services for under § 2210(D)(3) because the referral also stated that Adhahn was living with L.T.N. The CPS manual further provides, at § 2220(B), that allegations should be screened in for investigation where the worker has sufficient information to locate the child, the alleged perpetrator is a caretaker or the parent has failed to protect the child from the perpetrator, and either there is a specific allegation of abuse or neglect, or risk factors indicate imminent harm. Here, these criteria were met, but the intake worker failed to screen the referral in and investigate. Had the intake worker investigated enough to learn the risk factors outlined at § 2220 (A)(6), he would have learned, without even leaving the office, that Terapon Adhahn was a registered sex offender, and that his previous conviction involved incest with a female relative near L.T.N.'s age. (CP 2902, 2905 and 2947). § 2572 (directing criminal history checks for alleged perpetrators on screened-in investigations).

In an article published following Zina's murder DSHS personnel admitted that the referral regarding L.T.N. should have been "screened in" for

investigation by CPS. (CP 1145-1147). CPS Supervisor Dawn Cooper, who at the time of the 2004 referral was a supervisor within the office where the referral was handled, stated that the referral should have been screened in, “with the mom as the subject” for failing to protect L.T.N. (CP 2830-2864).

DSHS is also required by statute to assign abuse reports a risk level indicating what level of threat is presented and how soon a DSHS caseworker must contact the child. RCW 26.44.030(15). No risk level was assigned.

Instead, CPS improperly referred the case to Pierce County for investigation. CPS claims it also sent follow-up referral information to Pierce County. Pierce County denies that CPS sent any additional information. The follow-up referral, dated February 4, 2004, included Terapon Adhahn’s name and clarified that the victim was 15 at the time. The first referral, dated January 26, 2004, did not. Pierce County Deputy Lund, who investigated the abuse allegation, stated in his deposition that his practice where information was scant would be to “call CPS and see if they have any more information.” (CP 2739). Lund also testified that where he had a perpetrator name, it would be his usual practice to do background investigation on that person, including reviewing that person’s criminal records. *Id.* at 23. Thus, by the standard set forth by Lund himself, he should have called DSHS and followed up.

Terapon Adhahn’s name was added to the referral record when the referral was first taken on January 26, 2004. (CP 2992-2994). Thus, had Lund investigated non-negligently and called DSHS on the day Pierce County

claims he investigated the allegation (either January 29, 2004 or January 30, 2004) (CP 1368-1369), he would have been told Adhahn's name and would, by his own testimony, have conducted a background investigation on Adhahn. Adhahn had a 1990 conviction for incest stemming from the forcible rape of his half-sister, a girl roughly the same age in 1990 as L.T.N. was in 2004. In her deposition, Teresa Berg stated that Lund's investigation consisted of going to the address listed on the referral, failing to find Adhahn and L.T.N. there, and doing nothing further. (CP 2739).

After Adhahn kidnapped, raped, and murdered Zina Linnik, he was convicted of the L.T.N. rapes as well. Documents from that investigation reveal that L.T.N. was not yet 13 years old when Adhahn held her arms down and forcibly spread her legs before raping her vaginally. (CP 2648). A few months later, Adhahn came home drunk and anally raped the girl while she screamed and bled. (CP 2648). After that, Adhahn began raping the girl weekly—"too many times to count." (CP 2648) In 2004 or 2005, when the girl was 16, she told Adhahn that she "would not do that any more." Adhahn anally and vaginally raped her one last time at gunpoint, after which she fled the house. (CP 2647-2651). Adhahn was not covert about his sexual relationship with the girl. Co-workers remember him claiming she was his daughter, yet kissing her in public. (CP 2768-2769). After the girl left Adhahn's house, she began dating a boy her own age, and Adhahn vandalized the boy's house, breaking his windows, slashing his tires, and threatening to

kill L.T.N. (CP 2768-2769).

Adhahn is also the leading suspect in the December, 2005 kidnapping and murder of 10-year-old Adre'Anna Jackson in Lakewood, Washington. Like Sabrina Rasmussen, Adre'Anna disappeared while walking to school. Four months later, her decomposing body was found in a vacant lot in Woodbrook—3 miles from where Adhahn lived at the time, and at the edge of Fort Lewis, where Adhahn raped Sabrina Rasmussen. (CP 1694-1698).

Had any of the agencies involved here done their jobs, Adhahn would not have kidnapped, raped, and killed Zina Linnik because by 2007, he would have either been deported or been in prison where he belonged. (CP 1739); (CP 1724-1725); (CP 1014); CP 1707-1714). Had the DOC reported Adhahn's original crime and his subsequent weapons conviction to immigration authorities, he would have been deported. (CP 1713). Had the DOC taken his crime and his severe pathology seriously, he would not have been classified as a Level 1 sex offender, and he would have been subject to more stringent registration and tracking requirements. He also would have been a higher priority when he failed to register. Had DSHS ever followed up on the 2004 referral that Adhahn was sexually abusing a young girl in his care, his DNA would have been drawn and he would have been convicted for the 2000 rape of Sabrina Rasmussen, the rapes of L.T.N., failure to register as a sex offender, or all three. Had DOC reported Adhahn's 1992 conviction to Judge Strombohm when the Judge specifically ordered DOC to do so, the

conviction would have been reported to immigration authorities and resulted in Adhahn's deportation. Had DOC referred Adhahn to prosecutors for investigation of felon in possession, he would have served additional jail time and come to the attention of INS that way.

G. The Tacoma Police Department quickly determines that Zina was kidnapped by a stranger.

At around 9:40 p.m. on July 4, 2007, Terapon Adhahn kidnapped Zina Linnik from the alley behind her Tacoma home. (CP 2119). The family immediately concluded that Zina had been kidnapped "because we saw a gray van driving by and uh, we heard my little sister scream." (CP 2119). The family also found one of the flip-flops Zina had been wearing in the alley. (CP 2120). During the initial 911 call, Nina Linnik also reported a partial plate, "1677" with letters. *Id.* Patrol Officer Brian Kelley recalls that the Linniks were able to tell him that the plate ended with "B." (CP 2224). Mikhail Linnik had seen the van driving away and gotten the complete plate number. (CP 2334, 2337). Unfortunately, Mr. Linnik speaks Ukrainian and it was four days before police asked him about the plate number with a translator. (CP 2337). Nina was also able to give the 911 operator an accurate description of her sister and a good description of Adhahn and his van, identifying Adhahn's ethnicity, hair color, clothing, and build. (CP 2120).

Patrol Officers Brian Kelley and Michael Lim were dispatched at 9:56 p.m. and arrived at the Linnik home by 9:59 p.m. (CP 2106-2114; CP 2230).

Patrol Sergeant Barry Paris was dispatched at 9:57 and arrived at 10:02. (CP 2230). The officers questioned the family, checked the home, and concluded that the incident was a kidnapping. (CP 2253-2254). It was about 10:07 to 10:12 p.m. (CP 2260). The Linnik family had also indicated that a neighbor, Samnith Khann, drove a grey van and was an approximate match for the abductor's physical description. (CP 2260). Sgt. Paris had done a sweep of the area and been unable to find Khann or his van, so it was his conclusion that whoever the abductor was, he had fled with Zina. (CP 2251, 2262).

H. The Tacoma Police Department unreasonably delays issuing an Amber Alert.

Shortly after 10 p.m. on July 4, 2007, Patrol Sergeant Barry Paris requested an Amber Alert. During an Amber Alert, "an urgent news bulletin is broadcast...to enlist the aid of the public in finding an abducted child and stopping the perpetrator." (CP 2153-2154). The goal of an Amber Alert is "to instantly galvanize the entire community to assist in the search for and the safe recovery of the child." (CP 2103 (U.S. Department of Justice Amber Alert website)). Because nearly three quarters of children abducted by strangers are dead within three hours, time is of the essence.

In March 2007, less than four months before Zina Linnik was abducted, Detective Mark Fulghum and other officers who worked as Public Information Officers for the Tacoma Police Department attended an Amber Alert training in Waikiki, Hawaii. (CP 2142-2194; 2297). Fulghum had also

attended similar training the year before in San Diego. (CP 2287). Materials from that training program emphasize that time is of the essence:

- The goal of AMBER Alert is to recover abducted children before they meet physical harm. (CP 2153-5154).
- The need for rapid response in a missing child case cannot be overemphasized (CP 2147). Most Important Consideration **TIME IT IS OF THE ESSENCE** (CP 2158) (emphasis in original).
- Respond to any disappearance of a child as an abduction case until further information is developed. (CP 2158).
- Without Delay, Broadcast All Points Bulletin to the Following.... AMBER Alert. (CP 2162).
- Washington State Child Homicide Study (2000) –44% die within the first hour. –74% die within the first 3 hours....**THE CLOCK IS TICKING.** (CP 2176) (emphasis in original).

An Amber Alert should be issued when there is confirmation by a law enforcement agency that an abduction has occurred, the child is 17 years old or younger, the child is believed to be in danger of serious bodily harm or death, and there is adequate descriptive information available such that its dissemination to the public could help locate the child, the suspect, or the suspect's vehicle. (CP 2153-2154). The training also emphasized the need to have protocols, procedures, and training in place for all personnel so that when an abduction happens, the police agency can respond with all possible speed. (CP 2159; 2174-2185).

Sgt. Paris understood the Amber Alert criteria and the importance of issuing the Alert promptly because he had been involved in an earlier Alert. From that earlier experience, he had learned that Amber Alerts should be issued as quickly as possible whenever a stranger kidnapping was suspected

because a child in such a situation is always in imminent danger. (CP 2244-2275, CP 2254-2256).

There was no written Amber Alert policy in July 2007, and most police personnel received no training. (CP 2286). The unwritten policy was that all Amber Alerts issued by the Tacoma Police Department had to be routed through and approved by the PIO. (CP 2197-2202, January 16, 2008 letter at 2 (“At the time of the Linnik investigation only the Public Information Officers were authorized to issue an Amber Alert..”)) After Sgt. Paris contacted LESA, the LESA dispatcher had to get approval from PIO Mark Fulghum. Fulghum delayed the Alert to contact Detective Sergeant Davidson, the lead detective that night. Fulghum arrived on the scene around midnight—nearly two hours after Sgt. Paris had requested the alert—and asked Det. Davidson about whether he wanted to issue an Amber Alert. (CP 2292-2293). Although Fulghum was the only officer with any formal training in Amber Alerts, he deferred to Davidson’s judgment. (CP 2319-2320).

Detective Davidson’s stated reason for wanting to delay the Amber Alert was that he felt the police were “catching up to” their lead suspect at that time—the Linniks’ neighbor Samnith Khann. (CP 2257). However, at that time, no one knew where Khann was, or whether he had Zina with him. Sgt. Paris explained in his deposition why his decision making was different: it was his perspective that even if Khann did have Zina, an Amber Alert was merited because officers had no idea where Khann was. (CP 2261-2262).

By 12:44 a.m., police had located Khann and his van, but not Zina. (CP 2304-2305). Davidson still did not call for an Amber Alert at this point, but waited until between 3:30 and 4:00 a.m. after Khann had been interviewed and eliminated as a suspect. (CP 2295). Davidson called Fulghum and told him “they had the wrong guy, and they wanted to get the alert out.” (CP 2296). Fulghum had gone home shortly after 1:00 a.m., taken a sleeping pill, and gone to bed. (CP 2295). After talking to Davidson, Fulghum fell back asleep and failed to issue the Amber Alert, which did not go out until around 10:00 the following morning. (CP 2296).

After the abduction, many news reports questioned why the Amber Alert was so tardy. (CP 2094-2100; 2205-2706). The reason given for the 12-hour delay was that there was “conflicting information at the scene” or that police didn’t want to “spook” a suspect. (CP 2205-2206). This was a partial truth. Davidson’s unfortunate decision to focus on Khann did account for the first 6 hours of delay. The last 6 hours were due to Fulghum falling asleep.

At the time of Zina Linnik’s abduction, Tacoma had no written Amber Alert procedure in place and neither patrol officers nor detectives received any training on Amber Alerts. (CP 2290, 2254, 2212) As a result, 12 hours were wasted before Zina’s Amber Alert was issued. After Zina’s death, the Tacoma Police Department did an After Action Review and issued an After Action Report. (CP 2197-2202). Based on those reviews, changes were made in the Amber Alert system, including eliminating the PIO as a

bottleneck and training all personnel. The After Action Report at one point observes that Zina Linnik was Tacoma's first Amber Alert, by way of explaining how so much could go wrong. It then lays out a plan to study Amber Alert best practices and train Tacoma personnel. Tacoma already had access to Amber Alert best practices through the training attended by Fulghum and the other PIOs—Fulghum just hadn't implemented that knowledge once he got home from Hawaii.

I. The trial court unreasonably denied plaintiffs' motion to reconsider striking briefing and plaintiffs' alternative motion to amend their complaint.

After deposing key Tacoma police department personnel and learning what they knew at the time they failed to issue the Amber Alert, plaintiffs concluded that a colorable argument could be made that Tacoma owed a duty to Zina Linnik under RCW 26.44.050. (CP 2592-2593). Plaintiffs made that argument in a supplemental brief filed in response to Tacoma's Summary Judgment motion. At oral argument on the City of Tacoma's Motion for Summary Judgment on April 28, 2011, Tacoma argued that the supplemental briefing on duty under RCW 26.44.050 should be stricken, either as untimely, or because the Complaint did not assert a "negligent investigation claim under RCW 26.44.050" against Tacoma, or because in the course of its summary judgment briefing, the City had relied upon the plaintiffs' earlier representation that they did not believe they had such a claim.

IV. ARGUMENT

A. The defendants owed duties at tort to the plaintiffs.

1. In Washington, public entities have broad liability at tort, and their duties are determined by fundamental tort principles.

In 1963, the Washington State Legislature unequivocally waived sovereign immunity.

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCWA 4.92.090. In 1967, the legislature waived sovereign immunity for counties and municipalities. RCW 4.96.010(1).

After the Legislature waived sovereign immunity, Washington courts created the public duty doctrine, holding that to recover against a public entity, plaintiffs must demonstrate that the duty breached was owed to the plaintiff particularly, not just to the public in general. *See, e.g. Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975). Nearly as quickly as the public duty doctrine was created, exceptions were developed, recognizing circumstances under which a plaintiff had demonstrated a particularized duty. These public duty doctrine exceptions reflect basic principles of tort duty under the Restatement. *See, e.g. Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 545 P.2d 13 (1975) (rescue, Rest. (2d) Torts § 323); *Campbell v. City of Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975) (failure to enforce, Rest. § 286); *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1120 (1978) (legislative

intent, Rest. § 286). As the decades passed, Washington courts continued to apply basic principles to find liability against public entities and create new “public duty doctrine exceptions.” See, e.g. *Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988) (special relationship, Rest. § 315); *Babcock v. State*, 116 Wn.2d 596, 641, 809 P.2d 143 (1991) (parens patriae); *Joyce v. State*, 155 Wn.2d 306, 119 P.3d 825 (2005) (take-charge, Rest. § 319).

Despite the fact that the public duty doctrine and its so-called “exceptions” have been markedly unstable and have continued to evolve, public entity defendants routinely argue at the trial court level that they are not bound by general tort principles, and that the public duty doctrine exceptions are islands of liability in a sea of immunity. Often, as in this case, public entity defendants also seize on the particular facts of the exception cases to argue that they owe no duty unless the present case precisely mirrors the facts of the exception case. This dynamic has led to repeated calls to abolish the public duty doctrine as incompatible with the statutory waiver of sovereign immunity, and led the Washington Supreme Court in *Osborn v. Mason County* to issue the following corrective statement:

Because a public entity is liable in tort “to the same extent as if it were a private person or corporation,” former RCW 4.92.090 (1963) (state) and former 4.96.010 (1967) (municipality), the public duty doctrine does not—cannot—provide immunity from liability. Rather, it is a “focusing tool” we use to determine whether a public entity owed a duty to a “nebulous public” or a particular individual. The public duty doctrine simply reminds us that a public entity—like any other defendant—is liable for negligence only if it has a statutory or common law duty of care. And its “exceptions” indicate when a

statutory or common law duty exists. “The question whether an exception to the public duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff.”

Osborn, 157 Wn.2d at 27-28 (some citations omitted).

Despite *Osborn*'s clear statement that there is no sovereign immunity and public entities are bound by broad tort principles of duty, public entity defendants continue to argue as if the previously-created public duty doctrine exceptions exhaust the universe of public entity liability. For example, in *Robb v. Seattle*, the City of Seattle argued to this Division that “the public duty doctrine bars Robb’s negligence action because none of the four exceptions to the doctrine are present.” *Robb v. Seattle*, 159 Wn. App. 133, 145, 133 P.3d 242 (2010), *review granted June 8, 2011*. The *Robb* court held that Restatement (Second) of Torts § 302(B) comment e created a duty in Robb’s case because “If a private actor can owe a duty under section 302B, as a consequence of the abolition of sovereign immunity the same must be true of a governmental actor.” *Id.* at 12.

Public duty doctrine “exceptions” continue to function after *Osborne* and *Robb*, denoting fact patterns where a duty has previously been found under traditional tort principles, and may likely be found again. However, it is clear from *Robb* and *Osborne* that the existing exceptions do not exhaust the universe of liability for public entity defendants. Under *Osborne* and *Robb*, a duty may be found in any circumstance where it is supported by fundamental tort principles. Foremost among these principles is foreseeability, because

“the existence of a duty turns on the foreseeability of the risk created.” *Robb*, 159 Wn. App. at 142 (citing *Higgins v. Intex Recreation Corp.*, 123 Wn. App. 821, 837, 99 P.3d 421 (2004)). The existence of a duty is a particularized assessment in each case. *Osborn*, 157 Wn.2d at 27-8.

2. Under traditional tort analysis, neither duties nor causation may be parsed out act by act—instead, the defendants’ negligence must be considered as a whole.

Each defendant here has argued that their negligent acts should be parsed out, temporally limited and divided into separate sub-categories of negligence involving various micro-duties. As an example, the State argues that it can only be sued as either the Department of Corrections or as CPS, and that the legal analysis must proceed act by act, finding a “public duty doctrine exception” for each act, and then proving that that act, taken alone, caused Zina’s harms. Similarly, Pierce County argues that its numerous failures must be parsed out, each failure examined individually by narrowly comparing the various negligent acts to the facts of existing case law.

The defendants are incorrect. The existence of a duty is a question of law determined in each case by a particularized assessment under traditional tort principles. *Osborn*, 157 Wn.2d at 27-8. The existence of a prior identical case is not a requirement for deciding whether a duty exists.

When determining whether the law imposes a duty on a particular defendant, courts consider “the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the [defendant's]

conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the [defendant].” *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo. 1987) (citing *Iverson v. Solsbery*, 641 P.2d 314, 316 (Colo.App.1982)). Other considerations may also be relevant, depending on the circumstances of each particular case. *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* §§ 31, 53 (5th ed. 1984). No one factor is controlling, and the question of whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards—whether reasonable persons would recognize a duty and agree that it exists. *See* W. Keeton, § 53, at 359; *Taco Bell*, 744 P.2d at 46; *see also*, Prosser, *Palsgraf Revisited* (1953) 52 Mich.L.Rev. 1, 15.

Each of the defendants also seek to parse out the issue of causation, arguing that if each negligent act alone did not ultimately cause the harm, there is no causation. Under traditional tort principles, multiple negligent acts, each of which would by itself be insufficient to be a more-than-likely but-for cause of the plaintiff’s harm, may be considered together where, as here, they combine to cause an indivisible harm—Zina’s death. A classic example from a torts treatise is the situation where:

“A, B and C each push, independently of each other and with approximately equal force, on the plaintiff’s automobile, and by their combined pushing they push the car over a precipice. Let us assume that the pushing of any two would have moved the car and would have been sufficient to push the car over the precipice. . . . The

pushing of A, B or C was not a necessary factor in causing the car to go over the precipice. But is it not perfectly clear that each, A, B and C, were causes of the car going over the precipice? The question of causation is not whether it would be unfair to the plaintiff to refuse to hold the defendant liable, but did the defendant push substantially on the car, and that is a question properly left to the jury, as provided in the [first] Restatement.”

Charles E. Carpenter, *Concurrent Causation*, 83 U. Pa. L. Rev. 941, 948 (1935). The question to ask is: are all of the acts negligent, and, combined, are they more likely than not a but-for cause of the harm? In Washington, this principle has been repeatedly applied in multiple-tortfeasor cases involving a single agent of harm. *See, e.g. Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 896 P.2d 682 (1995) (toxic cloud); *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 935 P.2d 684 (1997) (asbestos exposure).

In this case there are a series of negligent failures by multiple tortfeasors over a period of years. The end result is that Adhahn was free in the Tacoma area when he should have been either deported or in jail. The “but for” question is “had the State, Pierce County, and Tacoma acted non-negligently regarding Adhahn’s original supervision, his 1992 crime, his sex offender registration, mandatory reports to INS, proper classification, the 2004 rape of L.T.N., and the Amber Alert, would Zina Linnik be alive today”? A reasonable jury could conclude on the facts of this case that the answer is “yes.”

3. The State of Washington and Pierce County owed a “take charge” duty to the plaintiffs under the facts of this case.

- a. **Under the “take charge” analysis, public entities have a duty to take reasonable precautions to protect against foreseeable dangers posed by the known dangerous propensities of criminals.**

The “take charge duty” provides that a government agency charged with the supervision of a dangerous individual owes a duty to plaintiffs whose harms are foreseeable from the supervised individual’s dangerous tendencies. *Osborn v. Mason County*, 157 Wn.2d 18, 24, 134 P.3d 197 (2006). For a “take charge” duty to arise, it is not necessary that the public entity have custodial control—a take-charge duty may arise out of responsibilities to monitor and report. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 279, 979 P.2d 400 (1999). The entity simply has duty to control dangerous individuals “to the extent it has authority to control them.” *Osborn*, 157 Wn.2d at 24. Thus, the duty is coextensive with the purpose of the agency’s authority, and its limits are determined by the foreseeable harm.

- b. **The State of Washington had a take-charge duty to non-negligently supervise and classify Adhahn.**

In this case, the State contended on summary judgment that it had no duty to protect Zina in particular as opposed to the public as a whole, and further contended that its responsibility for harms should terminate when Department of Corrections supervision of Adhahn terminated in 1997. However, these arguments are based on the false premise of state immunity. Under traditional negligence principles, whether a particular class of defendants owes a duty to a particular class of plaintiffs is a question of law

and depends on mixed considerations of “logic, common sense, justice, policy, and precedent.” *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). These considerations include “the policy of preventing future harm, [and] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach....” *Village of Cross Keys, Inc. v. U.S. Gypsum Co.*, 315 Md. 741, 752, 556 A.2d 1126 (1989). Here, the duty to be imposed would correlate with the most significant public policy regularly enunciated by the legislature—the protection of children from sex offenders.

Thus, the question when properly framed is whether the State of Washington owed a duty to foreseeable victims of Adhahn. It was foreseeable that Adhahn would do exactly what Dr. Comte warned that he would do if he was not properly supervised and treated—assault prepubescent females. Dr. Comte also warned that the risk of reoffense would be increased if Adhahn continued to use alcohol or demonstrated other impulse control problems. It became increasingly foreseeable that Adhahn would assault prepubescent females as he continued to do so, purchasing a young girl for \$2,000 in 2004 specifically in order to get sexual access to her. The State also knew about that girl.

Imposing liability for the State’s failure to protect children would simply further a critically important public policy repeatedly asserted by the Legislature. There is no inverse policy to be balanced. And in fact, in other

cases the State has advocated that these policies be placed at the forefront. As an example, in *Tyner v. State Dept. of Social and Health Services*, 141 Wn.2d 68, 77, 1 P.3d 1148, 1153 (2000), “The State [proposed] a jury instruction reciting the overriding goal of child protection laws, stating that these “laws are designed to protect the safety and welfare of children who have been or may be victims of child abuse.” *Tyner*, 141 Wn.2d at 77. The State takes a contrary position in this case.

The State contended on summary judgment that any liability stemming from its duty to non-negligently supervise Adhahn was terminated when Adhahn was released from DOC supervision. It is not the law in Washington, however, that a take-charge duty terminates when the take-charge relationship does. *Petersen*, 100 Wn.2d 421 (psychiatrist held responsible after patient’s release). The *Petersen* holding is not possible if the State’s theory of liability is accurate. In *Petersen* the patient had been released from supervision and then caused the damage. The *Petersen* court did not ask whether the take-charge relationship was in effect at the time the plaintiff suffered harm—it simply concerned itself with the control that the psychiatrist could have exercised, but did not, and with whether that failure foreseeably caused the harm. The State’s arguments would also defy basic tort principles by creating a perverse incentive for the State to negligently terminate supervision and thereby terminate liability. Similar erroneous arguments have been rejected in other states. See *Smith v. Hope Village, Inc.*,

481 F. Supp. 2d 172 (2007); *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 77 Ohio St.3d 284, 312, 673 N.E.2d 1311, 1332 (1997); *Littleton v. Good Samaritan Hosp. & Health Center*, 39 Ohio St.3d 86, 92, 529 N.E.2d 449, 455 (1988).

In this case, the State had a take charge duty to supervise Adhahn during his seven years of community custody. *Joyce*, 155 Wn.2d at 322-323. The State breached its duty to supervise Adhahn in a non-negligent manner. (CP 332-360). The State construes its duty as limited to preventing Adhahn from committing new crimes while under DOC supervision. This is contrary to binding Washington case law stating the duty is one to “take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of parolees.” *Taggart v. State*, 118 Wn.2d 195, 217, 822 P.2d 243 (1992). It is plain from *Petersen* that breaches of this duty during the period of active control may give rise to claims for injuries taking place afterward.

c. Pierce County had take-charge duties to monitor Adhahn’s sex offender registration and report Adhahn to immigration authorities.

Under the sex offender registration statute, RCW 9A.44.135, Pierce County had a duty to monitor Adhahn and forward information to the sex offender registry. To the extent that Adhahn was subject to arrest for violation of sex offender registration statutes, the County also had authority to control him by arresting him for failure to register. The tendency that made Adhahn

dangerous was his history of pedophilia and rape, from which it was foreseeable that he would rape other female children of approximately the same age as his previous victims. Therefore, the County had a take-charge duty running to Zina Linnik as a foreseeable victim.

By 2004, Pierce County's take-charge duty was strengthened by the fact that the County knew, or should have known, that Adhahn was in the County and was raping another child in his care. At that point, the foreseeability of harm to other children was strengthened because the County knew Adhahn was reoffending, and it had authority to control Adhahn by arresting him under the sex offender registration statute and child rape statutes, RCW 9A.44.073 - .089.

When Adhahn served time in the Pierce County Jail, the County also negligently failed to report either of Adhahn's convictions to immigration authorities. This is a duty that arose when Adhahn was in the County's custodial control, and is thus, also, a take-charge duty. As discussed above, those having charge of dangerous offenders have an obligation to take the steps available to them to protect others from those offenders. Reporting Adhahn to immigration was a step available to the County, and one it did not take.

- 4. The State of Washington and Pierce County owed a "legislative intent" duty to the plaintiffs under RCW 26.44.050 and 26.44.030.**
 - a. Both RCW 26.44.030 and 26.44.050 have repeatedly been held to create duties running at tort.**

The protection of children has consistently been a paramount concern to the legislature of the State of Washington, and this is reflected in the statutes it has passed. RCW 26.44.050 establishes that the State has a duty to investigate reports of child abuse. This statute has repeatedly been held to create a duty running in tort. *See, e.g. Tyner v. DSHS*, 141 Wn.2d 68, 79, 1 P.3d 1140 (2000); *Yonker v. DSHS*, 85 Wn. App. 71, 79-82, 930 P.2d 958 (1997) (duty runs to children who may be victims of abuse, or who “may be abused”). Via procedures set forth in RCW 26.44.030, also repeatedly held actionable at tort, the legislature requires that CPS relay reports of sexual abuse to law enforcement (RCW 26.44.030(4)), and that law enforcement report sexual abuse in writing to county prosecutors “for appropriate action” whenever the investigation (mandatory under RCW 26.44.050) indicates that a crime has been committed. RCW 26.44.030(5). *See Beggs v. State, Dept. of Social & Health Services*, 171 Wn.2d 69, 247 P.3d 421 (2011) (RCW 26.44.030 actionable at tort); *Doe v. Latter Day Saints*, 141 Wn. App. 407, 421-22, 167 P.3d 1193 (2007) (same). These statutes have one overriding purpose—to protect children from abuse, either via the removal of the subject child from the situation of abuse, or by ensuring that the child abuser is prosecuted, or both.

b. The State of Washington had a duty to investigate 2004 referral, and that duty runs to Zina.

The State argued that because Zina was not the subject of the 2004

CPS referral, no duty runs to her. This is untrue under Washington case law, and is also untrue under fundamental tort principles of foreseeability. The State has cited a number of cases in which Washington courts have held that the duty set forth in RCW 26.44.050 does not run to adults other than a child's biological or adoptive parents. *See, e.g. Ducote v. State*, 167 Wn.2d 697, 222 P.3d 785 (2009). The duties owed to children are broader, and Washington courts have so held. *Lewis v. Whatcom County*, 136 Wn. App. 450, 460, 149 P.3d 636 (2006) (“[n]othing in our previous opinions limiting the rights of alleged abusers to sue for negligent investigation can or should be read to limit the duty of law enforcement to protect children from abuse.”) (emphasis added). In *Lewis*, Whatcom County advanced the same argument the State does here, arguing that the statutory duty under RCW 26.44.050 extended only to children abused by their parents, and that the statutory duty only encompassed harms arising from placement decisions. *Id.* at 454, 458. The *Lewis* court rejected both arguments. First, the *Lewis* court held that both the statutory language and prior Washington case law provided that “children who may be abused or neglected” were the class protected by the statute. *Id.* at 454-57 (citing RCW 26.44.010 (statutory purpose includes “preventing further abuses”) (emphasis added); RCW 26.44.020(18) (defining “child protective services” as “those services provided by the department designed to protect children from abuse and neglect”) (emphasis added); *Yonker v. DSHS*, 85 Wn. App. 71, 79-82, 930 P.2d 958 (1997) (duty runs to children

who may be victims of abuse, or who “may be abused”); *Tyner*, 141 Wn.2d at 79 (purpose of the statute is to protect child victims of abuse, and there exists a hierarchy of interests in which the protection of the child prevails).

RCW 26.44.030 and .050 impose a duty to protect children from abuse at the hands of known abusers. RCW 26.44 functions as part of the enforcement and surveillance mechanism for criminal statutes on child sex abuse, and it is proper to look to those statutes, too, to determine what the class protected by the statute is. *See Tyner*, 141 Wn.2d at 77-80 (looking to related statutes to determine class protected by statute); *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998) (same).

In those related statutes, the Legislature has repeatedly and unmistakably articulated an intent to protect children in particular from sexual predators. *See, e.g.* RCW 9A.44.010, Intent 1994 c 271 “The Legislature hereby reaffirms its desire to protect the children of Washington from sexual abuse;” RCW 9.68A.001 “The legislature finds that the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance;” RCW 9.69.100(1)(b) (Making it a gross misdemeanor for any citizen to witness child sexual abuse and fail to report it); RCW 4.24.550, Findings--1997 c 113 “Child victims are especially vulnerable and unable to protect themselves;” *Id.*, Finding—Policy—1990 c 3 § 117 “...sex offenders pose a high risk of engaging in sex offenses even after being released from incarceration or commitment;” RCW 43.43.754,

Findings—1999 c. 329 “The legislature further finds that there is a high rate of recidivism among certain types of violent sex offenders.” Taken as part of this larger scheme, the clear legislative intent behind the processes set out in RCW 26.44 is to protect foreseeable child victims of abusers by ensuring that allegations are investigated and referred for prosecution.

Rather than being arbitrarily limited to the child named in the abuse referral, this duty should instead be limited by whether Zina was a foreseeable victim. Foreseeability is generally a question for the jury: “Once it is determined that a legal duty exists, it is generally the jury's function to decide the foreseeable range of danger, thus limiting the scope of that duty.” *Briggs v. Pacificorp*, 120 Wn. App. 319, 322-23, 85 P.3d 369 (2003) (citing *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)). “Ordinarily, foreseeability is a question of fact for the jury unless the circumstances of the injury ‘are so highly extraordinary or improbable as to be wholly beyond the range of expectability.’” *Seeberger v. Burlington N. R.R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999).

In addition, it is not necessary that the particular plaintiff, as an individual, be foreseeable. It is only necessary that it be foreseeable to a reasonable person that an unreasonable risk of harm to someone is created. See *Robb*, 159 Wn. App. at 135-37; *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987).

On the facts of this case, Zina Linnik was a reasonably foreseeable

victim to whom a duty should run. Particularly given what CPS and Pierce County would have learned had their investigation of the 2004 CPS referral been non-negligent (that Adhahn was reoffending, that he had forcibly raped L.T.N. in early adolescence, that he was a registered sex offender, and that he had kidnapped and raped 11-year-old Sabrina Rasmussen in 2000), a reasonable jury could conclude that it is imminently foreseeable that, if not imprisoned or deported, Adhahn would have (and did) continue raping and kidnapping 11-14 year old girls in the Tacoma area, which is precisely what happened.

c. Pierce County had a duty to investigate and refer for prosecution.

As discussed above, RCW 26.44.050 establishes that police agencies have a duty to investigate reports of child abuse. Police agencies also have duties under RCW 26.44.030 to refer the results of such investigations for prosecution. Pierce County argues that because Zina was not the subject of the 2004 CPS referral, no duty runs to her. The merits of that argument are addressed above.

Pierce County's argument is weaker than the State's because it attempts to use the County's own failures, and in particular its failure to reasonably investigate the 2004 CPS referral, to insulate itself from liability because it "didn't know" of Adhahn's crimes or "couldn't foresee" the danger he posed. As a matter of tort law analysis, this is ineffective. Risks are foreseeable when a reasonable person would have foreseen them. *Robb*, at

142. In other words, foreseeability is judged from the perspective of the reasonable, non-negligent actor. The County would have foreseeability judged instead from the perspective of its own negligence.

5. Pierce County also owed the plaintiffs a duty under the “failure to enforce” exception.

a. The “failure to enforce” exception to the public duty doctrine imposes a duty when a public entity has actual knowledge of a statutory violation and fails to take corrective action when it has a duty to do so.

A “failure to enforce” duty will run to an individual plaintiff where government officials responsible for enforcing a statute had actual knowledge of its violation, failed to take corrective action, had a statutory duty to take corrective action, and the plaintiff is within the class of foreseeable victims the statute intended to protect. See, e.g. *Campbell v. City of Bellevue*, 85 Wn.2d 1, 530 P.2d 234; *Bailey*, 108 Wn.2d 262. This is known as the “failure to enforce” exception to the public duty doctrine. *Id.*

b. Pierce County had a duty to enforce the sex offender registration statutes, and Zina was within the class of foreseeable victims.

The failure to enforce exception applies to Pierce County’s failure to do its duty under RCW 9A.44.135 because in 2005, Pierce County possessed actual knowledge of Adhahn’s failure to register as a sex offender, and Pierce County failed to take the statutorily required corrective action (making reasonable attempts to locate Adhahn). Therefore, the County had a duty, running to Zina, if she was within the class of foreseeable victims the statute

intended to protect. She was. This error was compounded because in 2004, Pierce County had already received a CPS referral indicating that Adhahn had purchased a child and was abusing her in its jurisdiction.

As discussed above, foreseeability is generally a matter of fact for the jury. In this case, Adhahn was a repeat pedophile, and Pierce County would have known that were it not for the County's own repeated negligence. The Legislature has repeatedly recognized that sex offenders have a high rate of recidivism—the 1990 Community Protection Act alone refers to the risk of recidivism no less than three times. See Laws of 1990, ch.3, § 117. Given what is known about sex offenders, and what should have been known about Adhahn, Zina was a foreseeable victim.

- 6. Under the rescue doctrine, Tacoma owed a duty to non-negligently issue the Amber Alert.**
 - a. The rescue doctrine imposes a duty at tort when a voluntary rescue attempt is negligently undertaken.**

The Amber Alert program is explicitly a voluntary program. Although nationwide policies (in which Tacoma personnel had been trained) provide that an Amber Alert should issue within 4 hours of a kidnapping by a stranger, nothing in the state or federal statutes creating the Amber Alert program requires that police agencies issue Amber Alerts or participate in the Amber Alert program. It is voluntary.

However, duties may arise even for voluntary undertakings. In particular, one who voluntarily undertakes rescue efforts is “required by

Washington law to exercise reasonable care in his or her efforts.” *Folsom v. Burger King*, 135 Wn.2d 658, 676, 958 P.2d 301 (1998). As set forth in *Ganno v. Lanoga Corp.*, 119 Wn. App. 310, 316, 80 P.3d 183 (2003):

Under the voluntary rescue doctrine, a duty to rescue arises when the rescuer knows a danger is present and takes steps to aid an individual in need. RESTATEMENT (SECOND) OF TORTS §§ 323, 324A (1965); *French v. Chase*, 48 Wn.2d 825, 829-30, 297 P.2d 235 (1956). A person may be liable for attempting a voluntary rescue and making the plaintiff's situation worse if that person (1) increases the danger; (2) misleads the plaintiff into believing the danger has been removed; or (3) deprives the plaintiff of possible help from others.

Folsom, 135 Wn.2d at 676. Under *Brown v. MacPherson's*, the rescue doctrine also applies to public entities. *Brown v. MacPherson's*, 86 Wn.2d 293.

b. Under the facts of this case, Tacoma owed Zina Linnik a duty under the rescue doctrine.

A rescue attempt requires that the would-be rescuer know a danger is present, know that a particular individual is in danger, and take steps to aid that individual. *Ganno*, 119 Wn. App. at 316 (citing Rest. (2d) Torts § 323, 324A; *French*, 48 Wn.2d 825). The rescue attempt must take place after the particular danger is known. *Id.* Where there is no rescue attempt, the voluntary rescue duty does not arise. *Id.* The duty also does not arise when voluntary efforts are undertaken generally, but not for a particular endangered plaintiff. *Murphy v. State*, 115 Wn. App. 297, 62 P.3d 533 (2003).

Issuance of an Amber Alert is a rescue attempt. An Amber Alert may only issue when a particular child has been subjected to the known danger of

kidnapping. As stated in the training materials used by Tacoma Police Department Personnel, and on the US Department of Justice's Amber Alert website, "The goal of an AMBER Alert is to instantly galvanize the entire community to assist in the search for and the safe recovery of the child." (CP 2103). From this evidence, a reasonable jury could conclude that an Amber Alert is a rescue attempt.

Additionally, a reasonable jury could conclude that Fulghum and Davidson's negligence either deprived Zina of other sources of help, increased the danger to Zina, or both. Fulghum and Davidson's decisions to delay the Amber Alert deprived Zina of the timely Amber Alert she would have received if Sgt. Paris had been allowed to issue the Amber Alert when he wanted to—at 10:15 p.m.. When Fulghum fell back asleep and failed to issue the Amber Alert when Davidson finally requested it at 3:30 or 4:00 a.m., he again deprived Zina of the help she would have received from an Amber Alert issued at that time. Either of these Alerts would have brought Zina other sources of help from citizens—the entire purpose of an Amber Alert.

The delay in the Amber Alert also increased the danger to Zina. At the March, 2007 Amber Alert training in Hawaii, Det. Fulghum received training materials indicating that a child's chance of being killed increases sharply as time goes by—44% of children abducted by strangers are killed in the first hour, 74% are killed within the first three hours, and 91% are killed

within the first 24 hours. (CP 2176). In other cases involving the rescue doctrine, delay that reduces a chance of survival has been held to meet the “increased danger” prong. See *Torres v. City of Chicago*, 352 Ill.App.3d 533, 816 N.E.2d 816 (2004) (90-minute delay in sending for an ambulance met the “increased danger” prong). In medical malpractice cases, delayed treatment or diagnosis has been held to meet the “increased danger” prong where it reduces the chance of survival. See, e.g. *Herskovits v. Group Health Cooperative*, 99 Wn.2d 609, 613, 664 P.2d 474 (1983).

7. The State, Pierce County, and Tacoma also owed duties to the plaintiffs under the special circumstances exception as set forth in *Robb v. City of Seattle*.

a. Where a defendant’s Explain special circumstances exception.

A duty to protect others from criminal conduct may also arise where the defendant has affirmatively acted in a way that exposes another to an unreasonable risk of harm via a third party. *Robb*, 159 Wash. App. 133. A bus driver who leaves the engine running while an unstable person remains on the bus, *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007), or police officers who take control of a situation and then ignore shotgun shells within easy reach of a mentally disturbed individual, *Robb* at 133, are subject to liability if their negligent acts cause damage.

b. The State of Washington had a duty under *Robb*.

Sex offenders present exactly the sort of enhanced risk discussed in the above cases. The State is in a position analogous to the City of Seattle

police officers—various state agents in DOC and DSHS were well aware of the danger Adhahn posed, yet DOC repeatedly acted in ways that increased Adhahn’s dangerousness, as by allowing him to continue to drink, choosing for him a treatment program different than that recommended by Dr. Comte and ordered by the court, and failing to follow up on other criminal violations. DSHS affirmatively acted negligently by screening the 2004 referral out to law enforcement rather than investigating it internally, as was required. As discussed extensively above, given what was known and should have been known about Adhahn, it was foreseeable that he was an ongoing danger to 11-14 year old girls in the Tacoma area.

c. Pierce County had a duty under *Robb*.

On the facts of this case, the County also owed Zina a duty under *Robb*. In *Robb*, the officers owed the duty because they had allowed a mentally disturbed man known to have a shotgun go free after investigating him for involvement in a robbery. *Id.* at 5. In this case, Pierce County owes a duty because they allowed Terapon Adhahn, a repeat child rapist, to remain free in the community even after receiving information in 2004 indicating that he was still assaulting children 14 years after his original incest conviction. Pierce County’s negligence was compounded when it failed to monitor Adhahn as a sex offender.

d. Tacoma had a duty under *Robb*.

Tacoma’s failures are also cognizable under *Robb*. At all times after

Zina was kidnapped, Tacoma personnel had specific knowledge of danger to Zina Linnik, yet multiple officers, including both Sgt. Davidson and PIO Fulghum, affirmatively acted to delay the Amber Alert in ways that increased the danger to Zina. PIO Fulghum's decision to sleep rather than issuing the Alert is also such an affirmative act.

B. The defendants' acts and omissions caused the plaintiffs' harms.

Only the State of Washington and Pierce County moved for summary judgment on the basis of proximate cause.

Proximate causation includes both cause in fact and legal causation." *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 256, 978 P.2d 505 (1999). "To establish cause in fact, a claimant must establish that the harm suffered would not have occurred but for an act or omission of the defendant. There must be a direct, unbroken sequence of events that link the actions of the defendant and the injury to the plaintiff." *Joyce*, 155 Wn.2d at 322-323. In most cases, cause in fact is a jury question. *Id.* Petitioners here can establish cause in fact.

1. The State's negligence proximately caused Zina's harms.

To survive summary judgment on cause in fact, the plaintiffs must come forward with evidence from which a reasonable jury could conclude that, but for the State's negligence, Terapon Adhahn would have been unable to harm Zina Linnik. Cause in fact can be established by expert testimony that the State's negligence caused the injury. *Bordon*, 122 Wn. App. at 243-44

(citing *Joyce*). Cause in fact can also be established by “expert testimony about how judges rule in particular proceedings, factual evidence that the very nature of the negligence led to an offender’s release, testimony of the sentencing judge, or expert testimony that the State’s negligence directly caused the injury.” *Id.* In this list, *Bordon* summarized evidence that Washington courts had previously held sufficient. The list is not exhaustive or exclusive.

Here, the plaintiff comes forward with facts and expert opinion from which a reasonable jury could conclude that but for the State’s negligence, Adhahn would have been unable to harm Zina Linnik because he would have been deported or incarcerated before 2007. The facts establish that Adhahn’s original incest conviction was for a violent sexual assault on a minor, and was considered a crime of moral turpitude by immigration authorities. (CP 365-366; 362; 1715). They also establish that he was convicted of a weapons charge in 1992 and that the State failed to pursue him for failure to register. William Stough’s declaration establishes that it was negligence for Adhahn’s CCOs to fail to establish and maintain contact with immigration authorities and report Adhahn’s violations, original crime, and new crimes to them. (CP 332-360). Carlos Sosa’s declaration establishes that if Adhahn’s original violent rape of his minor and his later weapons conviction had been reported to immigration authorities, it is more likely than not that Adhahn would have been deported. (CP 365-366).

Additionally, had CPS non-negligently investigated the 2004 referral, the evidence is that some kind of conviction likely would have resulted—either for the rapes of L.T.N., or, even if that prosecution somehow fell apart, for failure to register. (CP 3088-3093). Even though conviction for failure to register would have resulted in a minimal prison term, it would have resulted in a DNA draw and a high likelihood of conviction for the kidnapping and rape of Sabrina Rasmussen, for which Adhahn’s DNA on file since 2002 with the “John Doe” information. Any conviction for his assaults on L.T.N. or Sabrina Rasmussen would have more likely than not resulted in Adhahn’s deportation as an aggravated felon. (CP 3005-3022). Even a conviction for failure to register would have made Adhahn subject to deportation. (CP 3005-3022). Adhahn testified in his deposition that he would not have contested deportation, and in fact, in 2007 he did not contest deportation, but asked to be deported as quickly as possible. (CP 2953; 2729). Given the magnitude of Adhahn’s undiscovered offenses by 2004, a jury could well conclude that, but for the State’s negligence, Adhahn’s incarceration and deportation were not merely likely, but inevitable. This conclusion is bolstered by the fact that in July 2007, when Adhahn’s only two convictions were the incest conviction and the intimidation conviction, ICE regarded him as deportable. (CP 1715).

The State additionally argues that this Court should hold there is no legal causation as a matter of law because the 2004 referral did not involve abuse to Zina (essentially a duplication of their duty argument), there is

insufficient temporal proximity, and DSHS, as a matter of policy, “should not be held legally liable for any harm a third party may cause to any child in Washington.” (CP 2547). In fact, when DSHS is found liable for harm to children, the harm is frequently not harm inflicted by DSHS itself, but harm inflicted by third-party abusers. *See, e.g. Lewis*, 136 Wn. App. 450 (abusive uncle); *Yonker*, 85 Wn. App. 71 (abusive father).

The State further argued that each of its failures, whether by the DOC or by CPS, should not, as a matter of policy, be held to be legal causes of Zina’s death because they are too remote in time. It cites no case holding that a three-year gap under this type of circumstance should defeat legal causation. The analysis in Washington, as elsewhere, “is grounded in policy determinations as to how far the consequences of a defendant’s acts should extend.” *Schooley*, 134 Wn.2d at 478. A lapse of time does not, in itself, break the chain of legal causation. “Remoteness in time...may give rise to the likelihood that other intervening causes have taken over the responsibility. But when causation is found, and other factors are eliminated, it is not easy to discover any merit whatever in the contention that such physical remoteness should of itself bar recovery.” W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 43, at 283 (5th ed. 1984). Where the initial act was negligent at the time, and where the results are foreseeable, legal cause is found. The results of allowing a repeat child rapist to remain at large are foreseeable. Legal causation should be found.

There is also a strong policy rationale for finding legal causation in this case. Over the past two decades the Legislature has been at pains to set up a comprehensive web of statutes for tracking, apprehending, and convicting child sex abusers. The particular danger that repeat sexual abusers pose to children has been recognized in multiple sections of the RCW, as discussed above, and the Legislature has gone so far as to say that “the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” RCW 9.68A.001. Liability for the foreseeable consequences of ignoring such laws should attach as a matter of policy.

2. Pierce County’s negligence proximately caused Zina’s harms.

The County, like the State, argues that its failures did not proximately cause Zina’s death, either because they were “too remote in time” and therefore not the legal cause of Zina’s kidnapping, rape, and murder, or because there is not sufficient certainty that but for any one act or omission, Adhahn would have been deported, incarcerated, or otherwise unable to harm Zina. As discussed above, the sheer passage of time will not destroy legal causation where the original act is negligent and the consequences are foreseeable.

As for cause in fact, should be for the jury in this case. The plaintiffs introduce evidence from which a reasonable jury could find that, were it not for the defendants’ multiple negligent acts, Terapon Adhahn would have been

deported or incarcerated before he had the opportunity to harm Zina Linnik. This is a result that can be reached by many paths. Had the County reported the 1992 conviction to immigration authorities, Adhahn would have been deportable starting then, and given the fact that the incest conviction was for a forcible sexual assault, and the content of his psychological evaluation was extremely disturbing, it is likely that he would have been a high priority for deportation. (CP 1018-1019). Had the County pursued Adhahn for failure to register in 2005, and had he spent any time in jail or under DOC for that conviction, it is more likely that DOC or the jail would have reported his offenses to immigration, and that he would have been deported for all three crimes. Any conviction for failure to register after 2002 would have resulted in Adhahn's DNA being drawn—DNA that was already on file with the John Doe Information in Rasmussen, again, a deportable crime. Had the County non-negligently investigated the 2004 CPS referral, the evidence is that some kind of conviction likely would have resulted—either for the rapes of L.T.N., or, even if that prosecution somehow fell apart, for failure to register. Again, resulting in a DNA draw and deportation, either for two or more crimes of moral turpitude, or one aggravated felony. (CP 1013-1020). But for Pierce County's negligence, Adhahn's incarceration and deportation were not merely likely, but inevitable.

C. It was Error to deny Plaintiff's Motion to Reconsider Striking Briefing on RCW 26.44.050 or in the Alternative Amend their Complaint

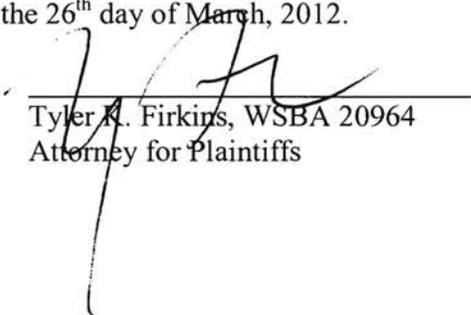
The trial court, well before discovery cut off or the last date to file summary judgment, rejected the plaintiffs' briefing on the law regarding a claim against Tacoma under RCW 26.44.050, and also refused to permit the plaintiffs to amend their complaint to add a claim that already existed—negligence.

Either the briefing should not have been stricken, or the plaintiffs should have been given leave to amend. Washington is a notice pleading state. CR 8(a). As long as a pleading sets forth the general theory of recovery and the grounds supporting it, the notice pleading standard is met. *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986). Where there is no prejudice to the defendant, leave to amend should be given freely. See, e.g. *Bacon v. Gardner*, 38 Wn.2d 299, 229 P.2d 523 (1951) (true test for permitting amendment to pleading is whether opposing party is prepared to meet the new issue). It was error to deny plaintiffs leave to amend.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the summary judgment orders in this case.

DATED this the 26th day of March, 2012.



Tyler A. Firkins, WSBA 20964
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CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on March 26, 2012, she caused the foregoing *Brief of Appellant* to be served on the following parties of record and/or interested parties by regular US Mail and email transmission the same day:

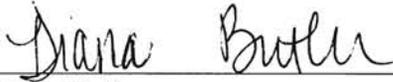
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