No. 1040989

SUPREME COURT
OF THE STATE OF WASHINGTON

ESTATE OF EMIL ROBERT ZLATICH, JR., by and through its personal representative, Daniel Zlatich, individually , and on behalf of EMIL ROBERT ZLATICH III, CHARLES BRADEN ZLATICH, BRIAN EUGENE ZLATICH, BRENT ALLEN ZLATICH, and EMIL ROBERT ZLATICH IV,

PETITIONERS,

v.

ESTATE OF VICKIE KAUFMAN, through its personal representative, HEIDI ZANOTELLI; and ESTATE OF DANIEL KAUFMAN, through its personal representative, HEIDI ZANOTELLI,

RESPONDENTS.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Respondents, which are the respective Estates Vickie Kaufman and Daniel Kaufman, through both Estates' personal representative, Heidi Zanotelli,[1] respectfully request this Court to deny review.

In an unpublished decision, Division III of the Court of Appeals correctly held that parents do not have a duty to "take charge" of and prevent their mentally disabled adult child from harming third persons, where the adult child does not live with his parents and is not subject to a guardianship or conservatorship – Division III's decision appropriately acknowledges the reality that parents do not have the right, ability or authority to control their adult child.

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[1] Vickie and Daniel Kaufman were Ryan Kaufman's parents and are referred to as "the Kaufmans." Ryan Kaufman is referred to by his first name.

Petitioners, on the other hand, ask this Court – for the first time in Washington – to extend parents' duty to reasonably control and supervise their ***minor*** child (over which parents do have the right and ability to control) to parents of an autonomous mentally disabled *adult* child.

Division III's decision did not create new law, but was consistent with this Court's prior decisions analyzing when a duty will or will not arise from a special relationship. Moreover, it was based on sound policy reasons against imposing such a duty on parents. There are no grounds to review Division III's well-reasoned decision.

Petitioners also ask this Court to review Division III's discretionary exercise of RAP 2.5 to decline consideration of multiple new theories of liability that were presented for the first time on appeal. Contrary to Petitioners' assertions, the decision does not create "a *de facto* new code pleading standard for complaints alleging negligence" that will have "broad consequence for civil litigants and the court system." (Petition at

2, 27.) It cannot; as the decision is unpublished and has no precedential value. Regardless, Division III's decision to decline review of multiple issues that were not properly raised to the trial court was well within its broad discretion and review is unwarranted.

STATEMENT OF THE CASE[2]

On August 25, 2021, Ryan Kaufman, a 43-year-old man with severe mental disabilities, entered the home of his neighbor, Emil Zlatich, Jr., and, outfitted in full tactical gear, shot and killed Mr. Zlatich. He also shot and seriously injured Mr. Zlatich's son, Emil Zlatich III, and grandson, Emil Zlatich IV, who also resided in the home. Thereafter, Ryan set fire to the Zlatich's home. Before he went to the Zlatich home, Ryan also

[2] Like Division III, Respondents glean the facts from Petitioners' Amended Complaint (CP 111-119) and the multiple declarations and exhibits presented to the trial court both in response to the CR 12(b)(6) motion. (CP 35-66.)

set fire to his own home and the outbuildings on his property. (CP 112-13, 115.)

Sadly, the tragic events of that day continued. After his attack on the Zlatich family, Ryan travelled to the home of his own parents, Vickie and Daniel Kaufman, and shot and killed both of them. (CP 112-13, 115-16.) After attempting to set fire to his parents' home, Ryan traveled to an International Brotherhood of Electrical Workers ("IBEW") building in Kennewick and set it on fire; traveled to and set fire to an IBEW training facility in Richland; and, and also set random brush fires by releasing flares from his moving vehicle in the course of his travels. (CP 112-13, 115-16.) This tragic episode ended when Ryan was killed in a shootout with police. (CP 113, 116.)

Ryan, who lived alone with his dog, had been Mr. Zlatich's neighbor since 2002. (CP 113, 54, 61.) Ryan was diagnosed with depression and psychosis approximately ten years prior to the tragic event of August 25, 2021, and he suffered from paranoid delusions. (CP 114.) Ryan believed that he had a

twin sister that his parents sold to the government. (CP 114.) He also believed his food was being poisoned by "the neighbors or whoever." (CP. 114, 44.) Ryan's brother told police that Ryan had "booby trapped" his front door with a shotgun. (CP 54.) It was also alleged that Ryan had an indoor firing range in his basement. (CP 106, 133.)

Though he had once been on medications, Ryan had stopped taking them in the months leading to the August 2021 incident, and his mental health was deteriorating. (CP 54.) The Kaufmans were aware of Ryan's mental health struggles and were aware that he was off his medications and "not feeling right." (CP 54, 65.) They loved their son and tried to guide and help him as they could. They assisted him financially, providing Ryan with money to help pay his mortgage. (CP 52.) His parents also tried to help him obtain mental health treatment. (CP 52.) The Kaufmans even consulted an attorney about involuntary commitment or guardianship (CP 105). However, though he once voluntarily submitted to treatment for a short period of time

(CP 39), Ryan was an adult who lived autonomously in his own home, and was not subject to a guardianship or conservatorship.

Though the Kaufman also lost their lives in the same event, Petitioners assert that the Kaufmans are liable for the criminal acts of their adult son. On June 27, 2023, Petitioners, on behalf of the Estate of Emil Robert Jr., and its beneficiaries, filed suit against the Respondents, alleging that the Kaufmans were liable under the theory of "Negligent Supervision" under Restatement (Second) of Torts §315 and §319. (CP 1, 5-6.) Specifically, Petitioners' theory of liability was pled as follows:

> **VI. Negligent Supervision**
>
> **6.1** According to the 25-minute recorded statement given to the Kennewick Police by Mrs. Zanotelli, the surviving sister of decedent Ryan Kaufman and personal representative of his estate, their parents, decedents Bob [sic] and Vickie Kaufman, were aware of Ryan Kaufman's severe mental problems for over 10 years since 2010 or 2011. The family was aware that Ryan needed constant medication, and aware that

Ryan's most recent psychiatrist had discharged him from his practice due to non-compliance.

6.2 At all times material hereto, decedents Daniel and Vickie Kaufman assumed the role of supervising decedent Ryan's medication and activities, in a consistent and continuous fashion, as contemplated by Restatement (Second) of Torts, §§ 315 and 319, which state as follows:

> **Restatement (Second) of Torts §315:**
> There is no duty so to control the conduct of a person to prevent him from causing physical harm to another unless
>
> (1) the defendant has a special relationship with the third person that imposes a duty to control that person's conduct or
>
> (2) the defendant has a special relationship with the victim that gives the victim 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.
>
> Both of the foregoing sections have been adopted in Washington State, per *Taggart v. State,* 118 Wn.2d 195, 822 P.2d 243 (1992).
>
> **6.3** On information and belief, decedent Daniel and Vickie Kaufman could have prevented the Zlatich Estate's loses [sic] by warnings to them, an involuntary guardianship, and/or more aggressive supervision of their son, decedent Ryan Kaufman.

(CP 5-6.)

On July 5, 2023, Respondents moved to dismiss the lawsuit pursuant to CR 12(b)(6), addressing the legal viability of the pled "Negligent Supervision" claim under Restatement (Second) of Torts §315 and §319, considering all facts alleged and all facts that can be inferred from the allegations. (CP 9-19.)

Petitioners opposed the motion directly and further responded with a motion to amend their Complaint "to add more detail from the police investigations and also from the Zlatich

family." (CP 24-25.) Petitioners' supported their response with several declarations, police reports, and other evidence from the police investigations. (CP 21, 35-66.)

Though Petitioners amended their Complaint to add factual allegations, the legal theory for liability was unchanged – the identical "Negligent Supervision" claim, founded only upon Restatements §315 and §319, was presented in the Amended Complaint. (*Compare* CP 5-6 to CP 116-117.) No new theories of liability were presented or inferred in the Amended Complaint. (*Compare* CP 1-9 to CP 111-19.)

Respondents did not oppose the motion to amend, nor did Respondents object to consideration of the proffered declarations, police reports, and police interviews. Rather, Respondents explicitly asked the trial court to authorize the amendment and consider all of the submitted evidence as proffered hypotheticals. (CP 70.) Respondents nonetheless still sought dismissal for failure to state a claim upon which relief may granted, arguing that "[n]one of the material changes the

fact that parents do not have a duty to third parties in regard to the actions of their adult children." (*Id*.)

The trial court authorized the amendment (CP 75-76.) It thereafter granted the CR 12(b)(6) motion, concluding that Petitioners failed to state a claim upon which relief could be granted because the Kaufmans "did not have the ability to monitor, supervise and control the individual's conduct." (CP 78.)

Division III affirmed the dismissal. The Court appropriately considered as true all allegations in the Amended Complaint,[3] and also considered a broad range of facts and hypotheticals beyond those alleged in the Amended Complaint, including an allegation made in a different lawsuit that the Kaufmans had keys to an indoor shooting range that Ryan

[3] Opinion at 2, n.1.

maintained on his property.[4] But even considering all allegations, the Court concluded that the trial court properly dismissed the lawsuit.

> The Estate of Zlatich argues the Kaufmans took charge of Ryan by generally supervising and caring for him, including regularly picking him up and driving him away from his property, possessing keys to his house and outbuildings, and controlling his financial welfare by paying his mortgage. However, even these hypothetical facts are insufficient to impose a "take charge" duty to control Ryan on the Kaufmans. Ryan was not subject to a guardianship or conservatorship and, despite the Kaufmans' efforts, if any, to keep Ryan on the right path, Ryan maintained the autonomy to do as he chose.

(Opinion at 8.) The Court concluded:

> The Kaufmans did not have the right, ability, or authority to control Ryan. Thus, they did not have

---

[4] Opinion at 3, n. 3. That other lawsuit was filed by Emil Zlatich III and Emil Zlatich IV against the Kaufmans' Estates.

> a special relationship with him sufficient to impose a duty on them to prevent Ryan from harming Mr. Zlatich. The Estate of Zlatich's claim for "negligent supervision" grounded in sections 315 and 319 of the *Restatement* was therefore properly dismissed.

(*Id.* at p. 9.)

Invoking RAP 2.5, the Majority declined to consider the multiple new theories of liability under *Restatement (Second) of Torts* §§ 281, 302B, 328E, 343, and 390. Chief Judge Lawrence-Berrey dissented, but only for a narrow remand regarding one of the newly raised theories. (Dissent at 4.)

RESTATEMENT OF ISSUES

1. Did the Court of Appeals correctly conclude that parents do not have a duty to prevent the criminal acts of their severely disabled adult child who lived autonomously and was not subject to a guardianship or conservatorship?

2. Did the Court of Appeals properly exercise its discretion under RAP 2.5 when it declined to consider legal theories of liability that were not raised before the trial court?

ARGUMENT

A. Division III's Decision That The Kaufmans Did Not Have A Duty To Prevent Criminal Acts By Their Adult Son Does Not Contravene With This Court's Precedent And Does Not Warrant Review.

Petitioners' arguments are somewhat incongruous. They argue guidance is needed from this Court regarding parent liability for conduct of their adult children, but also complain that "Division III erroneously focused on the parent-child relationship."[5] They state that Division III decided a matter of first impression, yet simultaneously argue that the decision "is deeply at odds with this Court's precedents."[6] Respondents agree that no Washington Court has imposed liability on parents for the

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[5] Petition at 9-10.

[6] Petition at 1, 9.

criminal acts of their adult child who does not live with them or subject to a guardianship. Division III's unpublished decision not to impose liability in light of the allegations is consistent with prior precedent.

Central to this appeal is *Restatement (Second) of Torts* §315, which was explicitly adopted by this Court in *Peterson v. State,* 100 Wn.2d 421, 426, 671 P.2d 230 (1983). Section 315 articulates the general rule that an individual generally does not have a duty to prevent a third person from causing harm to others in the absence of a special relationship. Section 315 provides:

> 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.

Section 315 identifies two distinct types of relationships that may give rise to an exception to the general rule. Though Petitioners often conflate the two to advance their position, they are distinct and are subject to different analyses.

Section 315(a) provides that a duty may arise if there is a relationship between the defendant and the perpetrator of a crime. A determination regarding applicability of §315(a) necessarily focuses on whether the actor (the Kaufmans) have sufficient control over the third person (Ryan).

Section 315(b), on the other hand, provides that a duty may be present when the defendant (Kaufmans) has a special relationship *with the crime victim/plaintiff* (Zlatich). A defendant's special relationship with a potential tortfeasor's victim may give the potential victim the right of protection. Thus, the §315(b) relationship is often described by the courts as a protective special relationship. *H.B.H. v. State,* 192 Wn.2d. 154, 169, 429 P.3d 484 (2018). "Common examples of §315(b) special relationships include the relationship between schools

and their students, innkeepers and their guests, common carriers and their passengers, and hospitals and their patients." *Id*.

Comment c to §315 confirms that the analysis to determine if a §315(a) or a §315(b) special relationship exists is different. *H.B.H.,* 192 Wn.2d at 171, n. 6. Comment c provides:

> The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316-319. The relations between the actor and the other which require the actor to control the conduct of third persons for the protection of the other are stated in §§ 314A and 320.

Both exceptions were discussed, but Petitioners' emphasis has been on imposing liability under §315(a), and the corresponding §319 "take charge" duty. Petitioners seek to establish a duty-imposing special relationship between the Kaufmans and Ryan (the perpetrator).

1. The Kaufmans did not have a special relationship with Ryan under § 315(a).

After considering all the presented hypothetical facts, Division III properly focused upon the Kaufmans' lack of "right, ability and authority to control Ryan." (Opinion at 8.)

Petitioners first argue that Division III placed undue influence on cases discussing duty arising from "criminal justice system or therapist-patient controls." Petitioners claim this emphasis was inappropriate because "a take charge duty does not require custodial control." Petition at 10, *citing Volk v. Demeerleer,* 187 Wn.2d 241, 286 P.3d 254 (2016). But, Division III specifically acknowledged this legal principal in the Majority Opinion. (Opinion at 7 ("A custodial relationship is not required for the duty to attach," *citing Taggart v. State,* 118 Wn.2d 195, 222-23, 822 P.2d 243 (1992)).)

Moreover, Petitioners' attempt to apply *Volk* to minimize the reality of the Kaufmans' limited control over Ryan to impose a special relationship-based duty on the Kaufmans belies the carefully explained rationale of the *Volk* Court's decision.

Notably, the special relationship-based duty arising from the psychiatrists-outpatient relationship imposed by *Volk* was *not* founded upon *Restatement* §319. Indeed, the Court expressly rejected that the level of control required to impose a §319 duty must be present to establish a special relationship-based duty for a psychiatrist under §315. 187 Wn.2d at 261-62. The *Volk* Court's analysis of §319,nonetheless confirmed that Division III correctly concluded that the high degree of control presented in *Taggart* (parole officer/parolee),[7] *Hertog* (probation officer/probationer),[8] *and Joyce* (community correction officers/offenders),[9] is indeed necessary to establish a "take charge" duty under §319. *Id*. at 259-262.

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[7] *Taggart, supra,* 118 Wn.2d 195.

[8] *Hertog, et rel. S.A.H v. City of Seattle,* 138 Wn.2d 265, 279 P.2d 400 (1999).

[9] *Joyce v. Dep't Corr.,* 155 Wn.2d 306, 119 P.2d 825 (2005).

Though less than the level of control necessary to impose a §319 duty, *Volk* held that, "for a special relationship to exist under §315 and impose a corresponding duty, there must be some ability to 'control' the third person's conduct, or else the duty contemplated … would be essentially one of strictly liability." 187 Wn.2d at 264 (citations omitted). Thus, the ability to control the third-party actor remained a prerequisite to imposing a duty. In *Volk,* this Court determined that psychiatrists had sufficient control to impose a duty because "there are a number of preventive measures mental health professional can undertake in the outpatient setting, even without custodial control." *Id*. at 265.

Ultimately, *Volk* holds that, "after a special relationship is formed between a mental health professional and his or her outpatient satisfying *Restatement* §315, *the mental health professional* is under a duty of reasonable care *to act consistent with the standards of the mental health profession*, in order to protect foreseeable victims of his or her patient." 187 Wn.2d at 262 (emphasis added).

This Court explained that *Restatement* §315 imposes an alternate duty to that imposed by medical malpractice. "The foreseeability of the victim, as well as what actions are required to fulfill this duty, *is informed by the standards of the medical health profession*." *Id*. at 255 (emphasis added). The relationship and the corresponding duty is fundamentally founded upon the special knowledge and expertise that a psychiatrist possesses, which expertise uniquely allows her to makes informed assessments. *Id*. at 267.

Parents, or lay people generally, do not have the special expertise and knowledge or the unique ability to control that was fundamental to the *Volk* Court's reasoning and holdings. To the contrary, parents not only lack the special training and expertise, they are also arguably lacking in objectivity to make informed assessments that a mental health professional can make. There is no analysis in *Volk* that supports extension of its holdings to parents of mentally disabled, adult children, or to conclude that

the Kaufmans' had a §315 special relationship with Ryan irrespective of their status as parents.

2. The Kaufmans did not have a special relationship with Mr. Zlatich under § 315(b).

Petitioners next argue: "Rather than physical or custodial control, this Court's precedents establish that a supervisory role over another constitutes the requisite control for a 'take charge' duty." (Petition at 10.) Yet, the "supervisory role" cases Petitioners cite are all protective special relationship cases akin to application of the protective special relationship described in §315(b) – which would require a special relationship between the Kaufmans and Mr. Zlatich. The cited cases do not apply here to impose on the Kaufmans a duty to control Ryan.

Petitioners first cite *C.J.C. v. Corp. of the Catholic Bishop of Yakima,* 138 Wn.2d 699, 985 P.2d 262 (1999). *C.J.C.* held that a church owed a §315(b) protective duty to children of the church congregation. There, a church deacon molested young members of the church he babysat off church premises. The *C.J.C.* Court held that a church's duties to its youth are the same as a school's

if the molestation occurs during church activities, when the children are in the custody and care of the church. 138 Wn.2d at 721-22. The *C.J.C.* Court ultimately held that the protective special relationship-based duty there did not require the children to be in the church's physical custody while the abuse occurred:

> Where a protective special relationship exists, a principal is not free to ignore the risk posed by its agents, place such agents into association with vulnerable persons it would otherwise be required to protect, and then escape liability simply because the harm was accomplished off premises or after-hours.

138 Wn.2d at 724.

H.B.H., supra, likewise applied §315(b) to hold that the Washington State Department of Social and Health Services ("DSHS") had a protective relationship with foster children in its charge, which imposed a duty for DSHS to protect foster children from foreseeable harm. 192 Wn.2d at 168-178. There is no such protective relationship between the Kaufmans and Mr. Zlatich.

Petitioners seem to argue that the Kaufmans had a special relationship with Mr. Zlatich simply because they were aware of Ryan's paranoid belief that he was threatened by Mr. Zlatich. But if Petitioners' argument is accepted, any person in any circumstance who had knowledge of a third person's potential propensity to act dangerously would have a duty to affirmatively intervene or face liability. No analysis in *C.J.C.* or *H.B.H* supports applying §315 to impose on the Kaufmans a protective special relationship with their adult son's neighbors. Division III's decision is consistent with *C.J.C.* and *H.B.H*.

Finally, Petitioners imply that Division III's decision relied too heavily on Petitioners' failure to cite any precedent "recognizing a parent having a duty to use reasonable care to warn third persons or otherwise protect them from danger from their adult child." (Petition at 12.) Petitioners infer that, in the absence of direct precedent, Division III failed to give appropriate consideration to "logic, common sense, [and] policy" to address the question of duty. (*Id.* at 12.) Notably, Division

III's comment addressed Petitioners' bold assertion in their briefing, made without citation to any authority, that the *Restatement (Second) of Torts* §316 duty for parents to exercise reasonable care to control ***minor*** children "applies with equal vigor to the parents of adult children with mental disabilities. (Opinion at 9.) Division III's comment, in context, was appropriate.

More importantly, Division III did not dogmatically demand precedent in the absence of other analysis and reason. Division III did, in fact, give appropriate consideration to and weigh policy. After carefully analyzing and applying relevant common law principles, the Majority stated:

> Further, as articulated in the dissenting opinion, there are policy reasons that dissuade us from imposing a "take charge" duty on parents who have adult children with mental health infirmities. Imposing such a duty would discourage parents, who are likely most motivated and best situated to assist a child

> floundering with mental health issues, from having any type of relationship.

(Opinion at 9. *See also,* Dissent at 3-4.)

Division III did not "refuse to weigh the general principals and other considerations" when it concluded that the Kaufmans did not have a duty in this case. The decision was well-reasoned and consistent with common law principles; and review is unwarranted.

B. Division III Appropriately Exercised Its Discretion To Decline Consideration Of New Theories Of Liability Not Raised To The Trial Court.

RAP 2.5(a) provides that an appellate court "may refuse to consider any claim of error which was not raised in the trial court." This rule is generally applied to preclude a party from raising new issues on appeal. *Smith v. Shannon,* 100 Wn.2d 26, 37, 666 P.2d 351 (1983). As the Majority noted, "the purpose of this rule is to afford the trial court the ability to apply the proffered law and the opportunity to correct error. (Opinion at 10, *citing Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett,*

146 Wn. 2d 29, 37, 42 P.3d 1265 (2002).) "[T]he application of RAP 2.5(a) is ultimately in the reviewing court's discretion." *Bennett v. Hardy,* 113 Wn.2d 912, 918, 784 P.3d 1258 (1990).

Invoking this rule, the Majority declined to consider multiple new theories of liability under *Restatement (Second) of Torts* §281 (regarding liability for the invasion of interests of others), §302B (regarding certain acts or omissions), §328E and §343 (regarding liability of a possessor of land), and §390 (regarding liability of one who supplies chattel), all of which were raised for the first time on appeal. (Opinion at 10.) The Majority reasoned:

> The Estate of Zlatich asserts completely new legal theories not raised below. As such, the trial court was never given the opportunity to apply the law nor to correct and potential error.

(*Id.* at 11-12.)[10]

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[10] The Chief Judge dissented, but only with regard to one of Petitioners' new arguments based on *Restatement* §390

Petitioners do not dispute that the trial court pleadings failed to raise their newly proffered legal theories. Instead, Petitioners argue that the Majority's exercise of discretion contravenes CR 8, which only requires pleadings to be sufficient to give notice to the court and the opponent of the general nature of the claim asserted. *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 23-24, 974 P.2d 847 (1999). Petitioners seem to argue that, on an appeal of a CR 12(b)(6) motion, the trial court pleadings

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(presented at pages 44-46 of Appellants' Brief below). (Dissent at 4.) To the trial court, Petitioners alleged that the Kaufmans knew Ryan had firearms because Ryan hunted with his Dad. (CP 41.) On appeal, Petitioners hypothesized for the first time that the Kaufmans *supplied* Ryan with firearms or provided him money to purchase firearms. Petitioners then argued: "If Ryan received the firearms from the Kaufmans, they then had a duty to Emil Jr. under *Restatement (Second) of Torts* §390" as the supplier of chattel. (Appellants' Brief at p. 44.) The dissenting Judge said he would "remand for the narrow purpose of permitting discovery into this new theory…" (*Id* 4.)

effectively become irrelevant, and an appellant should be free to raise any new argument without constraint by RAP 2.5.

But, while inexpert pleading is permitted and may be forgiven under CR 8, *insufficient pleading is not*. *Dewey,* 95 Wn. App at 23-24. *"*A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests." *Northwest Line Constructors Chapter of Nat'l Electric Contractors v. Snohomish County Public Utility Dist.,* 104 Wn. App. 842, 848-49, 17 P.3d 1251 (2001) (citation omitted).

Notably, the Majority exercised its discretion in the following context:

- Petitioners only alleged a single theory of liability in its Complaint – "Negligent Supervision" founded on *Restatements* §§ 315 and 319.
- Faced with the CR 12(b)(6) motion (asserting that establishing duty for a Negligent Supervision claim may not be legally viable under the alleged facts),

Petitioners requested and were granted authority to amend their Complaint. Yet, Petitioners failed to utilize that opportunity to raise the new legal theories they raised on appeal. Petitioners likewise failed to present any of their new theories of liability in their briefing to the trial court.

- Both the trial court and Division III considered the multiple declarations filed by Petitioners, but those declarations likewise failed to allege facts to provide notice of the new theories of liability.

Even when afforded opportunity to amend, Petitioners failed to raise their new legal theories in their pleadings and provide Respondents and the trial court the requisite fair notice. Petitioners' pleadings were legally insufficient and the Majority was well within its discretion to decline consideration of the newly raised legal issues.

Turner v. Wash. State Dept. of Social & Health Services, 198 Wn.2d 273, 493 P.3d 117 (2021), is inapposite. There, the

Court addressed, among other issues the scope of the public duty doctrine and its exceptions. The Court held it was appropriate to exercise its discretion to consider previously uncited *Restatements* regarding exceptions to the public duty doctrine, since exceptions to the public duty doctrine were generally raised below and the record was developed to address the issue – the trial court effectively had notice of the theories. Such is not the case here.

Petitioners argue that because they assert negligence, they are free to raise any authority, whether presented below or not, that pertains to the question of duty, irrespective if the authority relates to the facts alleged. But their position is unreasonable, as the question of duty is too broad to relieve a litigant of their CR 8 obligation to at least provide notice of the primary legal theories presented. Notably, the many *Restatements (Second) of Torts* are organized in "Chapters," and then further divided into "Topics." Chapter 12 of these *Restatements* sets forth general principles of negligence. Among the many Topics in Chapter 12,

"Topic 7" sets forth *Restatements* regarding "Duties of Affirmative Action." *Restatements (Second) of Torts* §315 and §319 are within Topic 7, as are §§ 315-320, which also address the "duty to control others." Further evidencing that the newly raised *Restatement* sections are insufficiently related to those pled below to provide notice, none of the newly cited *Restatements* and associated legal theories are within Topic 7; some are not even in Chapter 12. For example, §390 is set forth in Chapter 14 – "Liability of Persons Supplying Chattel – Rules Applied to Suppliers."

Finally, Petitioners assert that Division III's discretionary exercise of RAP 2.5 to decline consideration of multiple new theories of liability creates "a *de facto* new code pleading standard for complaints alleging negligence" that will have "broad consequence for civil litigants and the court system." (Petition at 2, 27.) But unpublished opinions have no precedential value and are not binding on <u>*any*</u> court, and, in the absence of other precedent, are not even to be cited to our courts

of appeal. GR 13. The unpublished decision cannot and does not alter Washington's rules regarding notice pleading. And regardless, application of RAP 2.5 is at the discretion of the appellate courts and remains so under the Majority's decision. The Majority's decision in no way limits any Washington appellate court's future discretion to apply the rule.

Regardless, Division III properly exercised its RAP 2.5 discretion and review is unwarranted.

CONCLUSION

Respondents respectfully request this Court to deny review.

I certify that this memorandum contains 4,998 words, in compliance with RAP 18.17(b)

Dated this 23rd day of May, 2025.

Respectfully submitted,

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DECLARATION OF SERIVCE

I hereby certify under penalty of perjury that on the date below, I caused a true and correct copy of the foregoing to be served on all counsel of record via the Supreme Court Portal:

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Court of Appeals, Division III – Original via COA Portal

Dated this 23rd day of May, 2025

/s/ Kimberly Harmon
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