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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 ERIK KESSACK, individually,

CASE NO.4:13-CV-5062-EFS

8 Plaintiff,

9 v.

**ORDER GRANTTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT, AND
AMENDING CAPTION**

10 WALLA WALLA COUNTY; J. MICHAEL
11 HUMPHREYS, in his individual
12 capacity; JAMES ROMINE, in his
13 individual capacity; RYAN L.
14 ALLEN, in his individual capacity;
15 TANNER HARRIS, in his individual
16 capacity; and JOHN DOES 1-5, in
17 their individual capacities,

18 Defendants.

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20 When Plaintiff Erik Kessack was an inmate at Walla Walla County
21 Jail, he was attacked and injured by a fellow inmate, Fernando Saenz,
22 Jr. Mr. Kessack filed this lawsuit seeking recovery under 42 U.S.C. §
23 1983 and Washington state law. Defendants seek summary judgment in
24 their favor because Plaintiff Eric Kessack 1) failed to exhaust his
25 administrative remedies, 2) failed to present evidence that any of the
26 Defendants knew that Mr. Saenz presented a safety risk to Mr. Kessack,
3) failed to present evidence that any Defendant negligently supervised
Mr. Kessack, and 4) failed to identify a deficiency in the Walla Walla
County training program that caused Mr. Kessack's injury. ECF No. 28.
Mr. Kessack opposes the motion in its entirety and also clarifies his

1 claims. This Order supplements and memorializes the Court's oral¹
2 rulings. The Court grants Defendants summary judgment as to Mr.
3 Kessack's 42 U.S.C. § 1983 claim and denies summary judgment as to 1)
4 Mr. Kessack's state-law claims against Walla Walla County and 2)
5 Defendants' failure-to-exhaust administrative-remedies affirmative
6 defense.

7 **A. Factual Background²**

8 **1. Incident**

9 Mr. Kessack was incarcerated at the Walla Walla County Jail from
10 July 20, 2010, to October 27, 2010. After his intake, Mr. Kessack was
11 assigned to a housing pod near the officer's booth. According to Mr.
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14 ¹ A telephonic hearing occurred on December 18, 2014. Mr. Kessack
15 was represented by Loren Cochran, and Ken Miller appeared on
16 Defendants' behalf.

17 ² The parties submitted a Joint Statement of Uncontroverted Facts.
18 ECF No. 40. These facts are established consistent with Federal
19 Rule of Civil Procedure 56(d), and are set forth in this "Factual
20 Background" without citation to the record. When considering this
21 motion and creating this factual section, the Court 1) believed the
22 undisputed facts and Mr. Kessack's evidence and 2) drew all
23 justifiable inferences in Mr. Kessack's favor unless they were flatly
24 contradicted by the record. See *Anderson v. Liberty Lobby*, 477 U.S.
25 242, 255 (1986); *Scott v. Harris*, 550 U.S. 372, 380 (2007).
26

1 Kessack, many inmates in that housing pod were gang members affiliated
2 with the 18th Street Sureños. Although Mr. Kessack was not affiliated
3 with a gang and did not previously have problems with gangs, he started
4 having problems in the housing pod. For instance, Mr. Kessack disagreed
5 with Jacihel Contreras, a Sureños gang member, regarding television
6 usage. ECF No. 29, Ex. A at 23:10-25. Because of his problems with
7 Mr. Contreras and the Sureños, Mr. Kessack orally requested a housing
8 move from either Officer Tanner Harris, Officer Brian Martin, or Officer
9 Brian Allen. ECF No. 29, Ex. A at 25:2-11; ECF No. 34, Ex. 1 at 24:17
10 & 89:2. No immediate action was taken by the officers. Mr. Kessack
11 then called his defense attorney Jerry Makus and told him of the problems
12 he was having in his pod with the gang members. ECF No. 34, Ex. 1 at
13 32: 4-14. Mr. Makus then called the Walla Walla County Jail and spoke
14 to Officer Jean Hall. ECF No. 34, Ex. 2 at 19:4-22; ECF No. 34, Ex. 6.
15 Officer Hall then spoke to Captain James Romine and advised him that
16 Mr. Makus had called and reported that Mr. Kessack was having problems
17 with gang members. ECF No. 34, Ex. 2 at 1-6. Within approximately ten
18 minutes of Mr. Kessack's telephone call to Mr. Makus, Mr. Kessack was
19 moved from his initial pod to pod two. ECF No. 34, Ex. 1 at 32:15-20.
20 The current record does not identify whether pod two did, or did not
21 have, Sureños gang members. No notation of this phone call and its
22 substance was recorded in the jail's books or prisoner computer records.

23 On August 6, 2010, Mr. Kessack was injured in the shower. At his
24 deposition, Mr. Kessack stated that he slipped in the shower and injured
25 himself; his injuries necessitated a hospital emergency room visit. ECF
26 No. 29, Ex. A at 31:4-22. During his time at the emergency room, pod

1 two was locked down so that jail staff could conduct an investigation
2 as to Mr. Kessack's shower incident. ECF No. 34, Ex. 3.

3 After Mr. Kessack returned from the hospital, Officer Lucille
4 (Lucy) Brown Piorier transferred Mr. Kessack to a housing unit with
5 Fernando Saenz, Jr., who, along with Mr. Contreras, was an 18th Street
6 Sureños gang member facing charges pertaining to a March 2010 birthday
7 party where multiple victims were stabbed. ECF No. 34, Ex. 3. Mr.
8 Kessack states that Sergeant Brown Piorier transferred him to a cell³
9 with a gang member because she believed that Mr. Kessack intentionally
10 injured himself in the shower in order to try and escape from jail. ECF
11 No. 29, Ex. A at 31:4-11. Yet, in an August 12, 2010 email to Captain
12 Romine, Sergeant Brown Piorier states that she housed Mr. Kessack with
13 Mr. Saenz because she was concerned that individuals in pod two would
14 retaliate against Mr. Kessack given that pod two had been locked down
15 during the investigation regarding his fall in the shower. ECF No. 34,
16 Ex. 3. Sergeant Brown Piorier mentions in the email that there was
17 nothing in the jail's computers or books that indicated Mr. Kessack
18 should not be housed with gang members. ECF No. 34, Ex. 3. There is no
19 documentation submitted to the Court to challenge her assertion.

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21 ³ Based on the record, it is unclear whether Mr. Kessack and Mr. Saenz
22 were housed together in a two-person cell or whether they were
23 housed in a small unit with separate cells. On the current record,
24 the Court understands it was the latter given the incident report's
25 discussion of different F cells and reference that Mr. Kessack and
26 Mr. Saenz were playing cards at a day-room table. ECF No. 34, Ex.
4 at 2-3.

1 While Mr. Kessack was housed with Mr. Saenz, he learned Mr. Saenz
2 was a Sureños gang member. Notwithstanding this knowledge, Mr. Kessack
3 did not request to be moved to a different housing unit as he and Mr.
4 Saenz had not yet had any confrontation. Mr. Kessack and Mr. Saenz
5 interacted socially by playing cards and watching TV with each other,
6 but otherwise kept to themselves. ECF No. 29, Ex. A at 46:5-21. Then
7 on August 8, 2010, when Mr. Kessack and Mr. Saenz were playing cards,
8 Mr. Saenz became upset and assaulted Mr. Kessack. Mr. Kessack suffered
9 injuries and was taken to St. Mary's Hospital in Walla Walla, where a
10 CT scan showed that he suffered several facial fractures.

11 Walla Walla County Deputy Jeff Jackson investigated the attack and
12 took formal statements from Mr. Saenz, Mr. Kessack, and Officers Harris
13 and Allen. Mr. Saenz admitted he assaulted Mr. Kessack. Formal charges
14 were filed against Mr. Saenz, but these charges were later dropped in
15 exchange for Mr. Saenz's guilty plea to the March 2010 knife attacks.

16 On August 10, 2010, Mr. Makus wrote a letter to the Walla Walla
17 County Prosecuting Attorney's Office demanding to know why his prior
18 calls for Mr. Kessack's safety while in custody at the jail were ignored.

19 On August 11, 2010, Mr. Saenz made a comment to Sergeant Brown
20 Poirier, which was overheard by Officer Loudermilk, that Mr. Saenz had
21 understood that Sergeant Brown Piorier housed him with Mr. Kessack in
22 order that he "take care of" Mr. Kessack. ECF No. 34, Ex. 11. Later
23 that day, Mr. Saenz retracted this statement when Officer Loudermilk
24 questioned him about it. *Id.*

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1 **2. Grievance Policy**

2 The Walla Walla County Jail has a Corrections Facility Grievance
3 System Policy ("Grievance Policy"), ECF No. 30, Ex. A. Pursuant to the
4 Grievance Policy, an inmate may submit a cite. On the single-page cite,
5 the inmate may 1) make a request, 2) file a grievance, 3) request an
6 explanation, or 4) seek medical attention. Before filing a cite,
7 inmates are encouraged to "resolve disputes or complaints informally
8 prior to filing a written grievance on the matter. However, under no
9 circumstances will a deputy or any other staff member (contract or
10 otherwise) attempt to discourage or threaten any inmate desiring to file
11 a written grievance." *Id.*, Ex. A at 1. The Grievance Policy requires
12 the corrections captain to designate a corrections deputy to serve as
13 the grievance coordinator. *Id.* Jail personnel are required to ensure
14 that adequate cite forms are available and that inmates have
15 unrestricted access to the forms. The Grievance Policy requires the
16 inmate to complete a cite within one week⁴ of the incident or onset of
17 the grieved problem and return the cite to a corrections deputy for
18 submission to the grievance coordinator. *Id.*, Ex. A at 2. The
19 corrections deputy is to place a completed grievance in the "grievances"
20 file box prior to the end of his shift. *Id.*, Ex. A at 3. The Grievance
21 Policy provides an appeals process for any cite. To appeal a decision

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24 ⁴ At the hearing, counsel stated that an inmate has five days to file
25 a grievance. However, the Grievance Policy sets a one-week cite
26 filing deadline, and a five-day deadline to appeal the decision on
the cite.

1 on a cite, an inmate submits a written appeal to the corrections captain
2 within five days of his receipt of the grievance coordinator's response.

3 Within his approximate three-month stay at the Walla Walla County
4 Jail, Mr. Kessack submitted thirty-eight cites, which requested special
5 food due to his injuries, mouthwash to treat sores in his mouth, a mat,
6 medical treatment, prescription refills, and permission for his mother
7 to pick up his medical file. Many of these cites sought treatment for
8 Mr. Kessack's pain or medical conditions resulting at least in part
9 from the August 8, 2010 assault. *Id.*, Ex. B (cites on August 15, 17,
10 18, 20, 22, 26, and 31, 2010; September 11, 14, 26, and 28, 2010; October
11 9, 14, and 19, 2010). Based on the record, it is unclear whether Mr.
12 Kessack appealed any of the cites; however, it is undisputed that Mr.
13 Kessack did not appeal an October 14, 2010 cite in which he grieved the
14 adequacy of his medical treatment. Either before or after Mr. Saenz's
15 assault, Mr. Kessack did not submit a cite complaining that he felt
16 unsafe or in danger, as he did not understand that he needed to file a
17 cite if staff members responded to his oral requests concerning such
18 housing issues.

19 **3. Other Events**

20 Mr. Kessack was released from Walla Walla County Jail on October
21 27, 2010.

22 Beginning December 15, 2012, Mr. Kessack was in the custody of
23 Pierce County Jail, until July 26, 2013. While he was housed at Pierce
24 County Jail, Mr. Kessack, through counsel, filed a tort claim form under
25 RCW 4.96.020, with Walla Walla County pertaining to the August 8, 2010
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1 attack. This lawsuit was later filed on June 5, 2013, by his counsel.
2 ECF No. 1.

3 **B. Summary-Judgment Standard**

4 Summary judgment is appropriate if the record establishes "no
5 genuine dispute as to any material fact and the movant is entitled to
6 judgment as a matter of law." Fed. R. Civ. P. 56(a). The party opposing
7 summary judgment must point to specific facts establishing a genuine
8 dispute of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S.
9 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
10 U.S. 574, 586-87 (1986). If the non-moving party fails to make such a
11 showing for any of the elements essential to its case for which it bears
12 the burden of proof, the trial court should grant the summary-judgment
13 motion. *Celotex Corp.*, 477 U.S. at 322.

14 **C. Authority and Analysis**

15 **1. Administrative Remedies**

16 The parties disagree whether Mr. Kessack was required to exhaust
17 administrative remedies under the Grievance Policy before filing this
18 lawsuit and, if required, whether he exhausted the available
19 administrative remedies. The Prisoner Litigation Reform Act (PRLA)
20 mandates that prisoners exhaust all available administrative remedies
21 before filing "any suit challenging prison conditions." 42 U.S.C. §
22 1997e(a). This exhaustion requirement applies to "all inmate suits
23 about prison life, whether they involve general circumstances or
24 particular episodes, and whether they allege excessive force or some
25 other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

1 First, as to whether Mr. Kessack is subject to the PLRA, Defendants
2 rely on *Gibson v. Brooks*, 335 F. Supp. 2d 325 (D. Conn. 2004), to argue
3 that because Mr. Kessack was in jail when he filed this lawsuit he was
4 a "prisoner" for PLRA purposes and he must have exhausted administrative
5 remedies under the Grievance Policy before filing this lawsuit, and his
6 failure to do so results in dismissal of this lawsuit. Mr. Kessack
7 argues that the PLRA's administrative-exhaustion requirement does not
8 apply to him because he was not in Walla Walla County Jail custody when
9 this lawsuit was filed, relying on *Talamantes v. Leyva*, 575 F.3d 1021
10 (9th Cir. 2009).

11 The Court finds the PLRA administrative-exhaustion requirement
12 does not apply to this lawsuit. The PLRA mandates that a "prisoner"
13 exhaust all administrative remedies before filing "any suit challenging
14 prison conditions." 42 U.S.C. § 1997e(a). The PLRA defines "prisoner"
15 as "any person incarcerated or detained in any facility who is accused
16 of, convicted of, sentenced for, or adjudicated delinquent for,
17 violations of criminal law or the terms and conditions of parole,
18 probation, pretrial release or diversionary program." 42 U.S.C. §
19 1997e(h). Given the PLRA's application to "prisoners," the Ninth
20 Circuit determined that grievance procedures need not be exhausted by
21 individuals, who are released from prison and who then bring a lawsuit
22 challenging prior confinement conditions. *Talamantes*, 575 F.3d at 1024;
23 see also *Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999). The Ninth
24 Circuit stated, "If Congress had intended for all individuals, including
25 former prisoners, who wished to bring an action regarding prison
26 conditions to exhaust all available administrative remedies, it could

1 have expressed that intention in the statute. Congress did not do so."

2 *Id.*

3 Although Mr. Kessack was in custody—a prisoner—when he filed this
4 lawsuit, he was not in the custody of Walla Walla County. Therefore,
5 the Court finds the purposes of the PLRA are not furthered by applying
6 the PLRA administrative-exhaustion requirement to this lawsuit. See
7 *Talamantes*, 575 F.3d at 1024 (concluding that the PLRA's purpose was to
8 reduce frivolous lawsuits filed by prisoners who have the opportunity
9 and motivation to bog down the jail's litigation system). Mr. Kessack
10 challenges conditions in a prison facility different than the prison
11 facility that he was a prisoner in when he filed the lawsuit; in
12 addition, Pierce County Jail is not operated by Walla Walla County.

13 Therefore the facts here differ from those in *Gibson*, 335 F. Supp.
14 2d 325, which is relied on by Defendants. In *Gibson*, like the plaintiff
15 in *Berry v. Kerik*, 366 F.3d 85 (2d Cir. 2003), the plaintiff was
16 incarcerated (for a second time) at the same institution against which
17 he filed a grievance pertaining to his first incarceration. Here, Mr.
18 Kessack was not at Walla Walla County Jail when he filed this lawsuit
19 but rather was at Pierce County Jail. Mr. Kessack would have been
20 unable to exhaust his Walla Walla County Jail administrative
21 requirements when housed at Pierce County Jail because the Grievance
22 Policy required him to submit a cite to a corrections deputy at the
23 Walla Walla County Jail, who then was to physically place the cite in
24 the grievance file box. Furthermore, per the terms of the Grievance
25 Policy, a Walla Walla County Jail prisoner could file a cite pertaining
26 to "[a] condition[] within the corrections facility," which given the

1 title, terms, and purpose of the Grievance Policy, clearly referred to
2 Walla Walla County Jail.

3 Accordingly, the Court determines the PLRA's administrative-
4 exhaustion requirement does not apply to Mr. Kessack's lawsuit filed
5 against Walla Walla County Jail, when he was housed in Pierce County
6 Jail. The Court denies Defendants' summary-judgment motion in this
7 regard.

8 Even assuming that the PLRA applies to this lawsuit, the Court
9 finds Mr. Kessack sufficiently exhausted the administrative remedies of
10 which Walla Walla County had advised him were available. Defendants,
11 as the correctional institution, have the burden to prove there was an
12 administrative remedy available to the prisoner, Mr. Kessack, and that
13 the administrative remedy was not exhausted. See *Albino v. Baca*, 747
14 F.3d 1162, 1166, 1171-72 (9th Cir. 2014). Once the Defendants carry
15 their burden, Mr. Kessack must produce evidence to show that the
16 existing and generally available administrative remedies were
17 effectively unavailable to him. *Id.* at 1172. Requiring prisoners to
18 exhaust the available administrative remedies ensures that the
19 correctional institution has the opportunity to correct any mistakes
20 itself and promotes efficient claims resolution. *Woodford v. Ngo*, 548
21 U.S. 81, 89 (2006).

22 The Grievance Policy required Mr. Kessack to file a cite within
23 one week of the incident or onset of the problem for which he was
24 submitting a cite. Through his § 1983 claim, Mr. Kessack challenges
25 Sergeant Brown Piorier's decision to house him with Mr. Saenz.
26 Following the attack on August 6, 2010, Mr. Kessack was no longer housed

1 with Mr. Saenz. Accordingly, there was no reason for Mr. Kessack to
2 file a cite seeking different housing. In addition, it had been Mr.
3 Kessack's experience that he could orally request a housing change. As
4 to matters that Mr. Kessack did seek relief from the jail by filing a
5 cite following his assault, such as medical treatment for his injuries
6 suffered during the attack, Defendants highlight that Mr. Kessack never
7 appealed the grievance coordinator's response to these cites as is
8 required by the Grievance Policy. However, Defendants did not submit
9 evidence to show that Mr. Kessack was aware of the Grievance Policy's
10 appeal process. There is no evidence submitted that Mr. Kessack
11 obtained a copy of the Grievance Policy while he was at Walla Walla
12 County Jail. And the cite form itself does not reference the right
13 (and process) to appeal the grievance coordinator's decision.
14 Therefore, Defendants failed to establish that Mr. Kessack was aware of
15 the appeal process.

16 Under these circumstances, the Court finds Mr. Kessack has shown
17 he took advantage of the grievance process that he was advised was
18 available to him: he was unaware of the need to file a cite pertaining
19 to a housing decision, which post-incident no longer applied; he filed
20 cites seeking medical treatment for his suffered injuries; and there is
21 no evidence that he was aware of the need to file an appeal of a cite
22 decision. For these reasons, Defendants are not entitled to summary
23 judgment based on their failure-to-exhaust administrative-remedies
24 affirmative defense.

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1 **2. Plaintiff's Claims**

2 Defendants ask the Court to find that Mr. Kessack fails to present
3 evidence to support his 42 U.S.C. § 1983 claim and state-law claims.
4 For the reasons set forth below, the Court grants Defendants' summary-
5 judgment motion as to the § 1983 claim and denies the motion as to the
6 state-law claims brought against Walla Walla County.

7 **a. 42 U.S.C. § 1983: Failure to Protect Claim**

8 Section 1983 provides a cause of action against persons acting
9 under color of state law who have violated rights guaranteed by the
10 U.S. Constitution or federal statutes. 42 U.S.C. § 1983⁵; *Buckley v.*
11 *City of Redding*, 66 F.3d 188, 190 (9th Cir. 1995). For purposes of
12 this motion, the parties agree Defendants acted under color of state
13 law. The focus is instead on whether Mr. Kessack presented evidence to
14 establish a genuine dispute of fact as to whether Defendants violated
15 a constitutional right held by Mr. Kessack. The specific constitutional
16 right at issue is Mr. Kessack's right to be free from injury from a

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20 ⁵Section 1983 provides:

21 Every person who, under color of any statute, ordinance,
22 regulation, custom, or usage, of any State . . . subjects,
23 or causes to be subjected, any citizen . . . to the
24 deprivation of any rights, privileges, or immunities secured
by the Constitution and laws, shall be liable to the party
injured in an action at law, suit in equity, or other proper
proceeding for redress

25 42 U.S.C. § 1983.
26

1 state-created danger pursuant to the Fourteenth Amendment's due-process
2 clause.

3 This due-process right requires that prison officials not be
4 deliberately indifferent to their duty to protect an inmate from
5 substantial risk of serious harm from other inmates. *L.W. v. Grubbs*,
6 92 F.3d 894, 898-99 (9th Cir. 1996); see also *Farmer v. Brennan*, 511
7 U.S. 825, 834 (1994); *McGrath v. Scott*, 250 F. Supp. 2d 1218, 1224-25
8 (D. Ariz. 2003) (discussing the framework for analyzing Fourteenth
9 Amendment state-created-danger claims and utilizing the Eighth
10 Amendment's deliberate-indifference objective and subjective
11 standards). "Deliberate indifference" has both a subjective and an
12 objective component: "[a] prison official must be 'aware of facts from
13 which the inference could be drawn that a substantial risk of serious
14 harm exists, and . . . must also draw the inference.'" *Labatad v. Corr.*
15 *Corp. of Am.*, 714 F.3d 1155, 1160 (9th Cir. 2013) (quoting *Farmer*, 511
16 U.S. at 837). Given the subjective component to deliberate
17 indifference, "[l]iability may follow only if a prison official 'knows
18 that inmates face a substantial risk of serious harm and disregards
19 that risk by failing to take reasonable measures to abate it.'" *Id.*
20 (quoting *Farmer*, 511 U.S. at 947).

21 The record does not establish a genuine dispute of fact as to
22 whether Sergeant Brown Piorier's decision to house Mr. Kessack with Mr.
23 Saenz was made with knowledge that Mr. Kessack faced a substantial risk
24 that Mr. Saenz would harm him, and that she chose to disregard that
25 risk. There is no documentation or evidence that Sergeant Brown Piorier
26 knew there was a concern with housing Mr. Kessack with Mr. Saenz, or a

1 Sureños gang member. Although Mr. Kessack had reported problems with
2 gang members in pod one, there is no record he reported similar problems
3 with gang members in pod two. And Mr. Kessack had not previously told
4 jail staff that he was concerned with being housed with Mr. Saenz, even
5 though he knew Mr. Saenz was a Sureños gang member. In fact, Captain
6 Romine stated at his deposition that Sergeant Brown Piorier was not
7 aware of the concern of Mr. Kessack being housed with gang members. ECF
8 No. 34, Ex. 10 at 45:20-25 & 46:1.

9 Mr. Kessack did present evidence that Mr. Saenz made a post-attack
10 comment to Sergeant Brown Piorier on August 11, 2010, that he understood
11 he was to "take care of" Mr. Kessack. Yet, Mr. Saenz withdrew this
12 statement later that day when Officer Loudermilk questioned him about
13 it.

14 And although Captain Romine stated during his deposition that he
15 would not have housed Mr. Kessack and Mr. Saenz in the same cell because
16 they were both unable to "get along with people," ECF No. 34, Ex. 10 at
17 33:9-23, and "neither play[ed] well with others," there is no
18 information in the record that Sergeant Brown Piorier knew that Mr.
19 Kessack should not be housed with Mr. Saenz or a Sureños gang member,
20 or that she should have known such if she had reviewed the jail's board
21 or computer files. There also is no evidence regarding Mr. Saenz's
22 prior jail conduct and whether he had a disciplinary record that
23 reflected that he posed a substantial danger to a cellmate.

24 In summary, the record fails to establish a genuine dispute of
25 fact that Sergeant Brown Piorier, and Walla Walla County, was
26 deliberately indifferent to Mr. Kessack's right to be free from a state-

1 created danger. See *Labatad*, 714 F.3d at 1160 (“Without more, such as
2 information about who Labatad spoke to or what he said, we cannot infer
3 that any of the defendants or officials responsible for making the
4 [cell] assignment were aware that Labatad faced a substantial risk of
5 harm [by a rival gang member housed with him].”); *Banks v. Deschutes*
6 *Cnty.*, 408 Fed. App’x 94, 95 (9th Cir. 2011) (“Holland’s disciplinary
7 record does not prove that Holland posed a *substantial* risk of serious
8 harm to Banks, and it does not prove that prison officials were
9 subjectively aware of any risk Holland posed.”); *Carter v. Galloway*,
10 352 F.3d 1346, 1349 (11th Cir. 2003) (determining that evidence that
11 prison officials knew that plaintiff’s cellmate acted like “a caged
12 animal” was insufficient evidence to establish a genuine dispute of fact
13 as to whether the prison officials deliberately disregarded the risk
14 that the inmate posed to plaintiff’s safety); *Klebanowski v. Sheahan*,
15 540 F.3d 633, 639-40 (7th Cir. 2008) (finding summary judgment in
16 defendants’ favor appropriate because plaintiff’s two statements to
17 prison officials that he feared for his life were insufficient for the
18 officers to know that the plaintiff was at risk of being physically
19 assaulted by gang members because of his non-gang member status). For
20 these reasons, the Court grants summary judgment in Defendants’ favor
21 on the § 1983 claim.

22 **b. State-Law Claims**

23 In his response, ECF No. 33, Mr. Kessack clarifies that he asserts
24 only state-law 1) negligent-supervision and 2) negligent-training
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1 claims against Walla Walla County.⁶ See also ECF No. 1 at 10-12.
2 Because these claims are not brought against the individual Defendants,
3 nor are facts presented at summary judgment to support the assertion of
4 these negligence claims against the individual Defendants, the Court
5 grants summary judgment to Defendants James Romine, Ryan Allen, Tanner
6 Harris, and the deceased J. Michael Humphreys.

7 Under Washington law, Mr. Kessack must support his negligence
8 claims by proving 1) Walla Walla County owed him a duty, 2) Walla Walla
9 County breached that duty, 3) Mr. Kessack suffered injuries, and 4) his
10 injuries were proximately caused by the breach of the duty. See *Degel*
11 *v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48 (1996). The Court
12 proceeds to apply these elements to Mr. Kessack's negligent-supervision
13 and negligent-training claims.

14 As to Mr. Kessack's negligent-supervision claim against Walla
15 Walla County, there generally is no duty to prevent a third party from
16 intentionally harming another. *Niece v. Elmview Group Home*, 131 Wn.2d
17 39, 43 (1997). However, a duty arises where:

- 18 (a) a special relation exists between the [defendant] and the
19 third person which imposes a duty upon the [defendant] to
20 control the third person's conduct, or
21 (b) a special relation exists between the [defendant] and the
22 other which gives the other a right to protection.

21 *Peterson v. State*, 100 Wn.2d 421, 426 (1983) (quoting Restatement
22 (Second) of Torts § 315 (1965)). Based on these duty principles, a
23 prison has a special relationship with an individual in its charge and
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25 ⁶ Plaintiff's counsel failed to comply with the Scheduling Order's
26 requirement of filing a notice of to-be-adjudicated claims.

1 owes that inmate a duty to "exercise reasonable and ordinary care to
2 protect [a] prisoner's life and health." *Kusah v. McCorkle*, 100 Wash.
3 318, 323 (1918) (internal quotation removed). However, a prison and
4 its officials are not the insurer of inmate safety, *Woody v. Ohio Dep't*
5 *of Rehabilitation & Corr'n*, 61 Ohio Misc. 2d 275, 277 (1988), and cannot
6 be found negligent for "failing to prevent what he could not reasonably
7 anticipate," *Riggs v. German*, 81 Wash. 128, 131 (1914). Therefore,
8 "to hold the [municipality] liable for injury to one inmate inflicted
9 by another inmate, there must be proof of knowledge on the part of
10 prison officials that such an injury will be inflicted, or good reason
11 to anticipate such, and then there must be a showing of negligence on
12 the part of these officials in failing to prevent the injury." *Winston*
13 *v. State*, 130 Wash. App. 61, 64 (2005); see also Restatement (Second)
14 of Torts § 314A, Cmt. (e) ("The duty in each case is only one to exercise
15 reasonable care under the circumstances. The defendant is not liable
16 where he neither knows nor should know of the unreasonable risk, or of
17 the illness or injury. He is not required to take precautions against
18 a sudden attack from a third person which he has no reason to
19 anticipate.").

20 The Court finds whether Walla Walla County Jail officials should
21 have had good reason to anticipate the injury inflicted by Mr. Saenz on
22 Mr. Kessack is a triable issue of fact. This negligence standard is a
23 lower standard than the § 1983 deliberate-indifference standard. Here,
24 the jury could reasonably determine that Walla Walla County Jail
25 officials had good reason to anticipate that Mr. Saenz would inflict
26 injury on Mr. Kessack because 1) of Mr. Saenz's suspected violent

1 assaultive conduct, 2) Mr. Saenz was a Sureños gang member and an alleged
2 accomplish of Mr. Contreras, with whom Mr. Kessack had prior
3 disagreements with concerning the television, and 3) Mr. Kessack and
4 his counsel had previously advised jail staff that Mr. Kessack was
5 concerned about being housed with gang members. Although the evidence
6 is insufficient to establish a triable issue of fact as to the § 1983
7 claim, the evidence is sufficient to establish genuine disputes of fact
8 as to whether the Walla Walla County Jail officers failed to use
9 reasonable care to protect Mr. Kessack from an attack by Mr. Saenz.
10 Accordingly, the Court denies Defendants' motion in this regard.

11 As to Mr. Kessack's negligent-training claim against Walla Walla
12 County, the Court also denies summary judgment in this regard. As
13 mentioned above, Walla Walla County had a duty to "exercise reasonable
14 and ordinary care to protect [a] prisoner's life and health." *Kusah*,
15 100 Wash. at 323. Walla Walla County likewise had a duty to adequately
16 train its officers to satisfy this standard.

17 Here, the officers, who received complaints from Mr. Kessack
18 regarding Sureños gang members and his safety concerns, and Officer
19 Hall, who received such information from Mr. Makus, did not note that
20 information in Mr. Kessack's jail records, the computer, the pass-on
21 books, or the boards. The jury could reasonably determine that Walla
22 Walla County failed to properly train its jail staff to record such
23 information—information that is reasonably necessary to protect a
24 prisoner's life or health. The jury could also reasonably find that if
25 jail staff had recorded Mr. Kessack's concerns about being housed with
26 gang members, Sergeant Brown Piorier would not have housed him together

1 with Mr. Saenz. Accordingly, the Court finds there are triable issues
2 of fact as to what Walla Walla County's training was regarding
3 memorializing an inmate's housing requests and concerns, and
4 communicating such information amongst the officers, and whether a
5 failure to train in this regard, if any, proximately caused Mr.
6 Kessack's injuries.

7 **D. Conclusion**

8 Accordingly, **IT IS HEREBY ORDERED:**

- 9 1. Defendants' Motion for Summary Judgment, **ECF No. 28**, is
10 **GRANTED IN PART** (§ 1983 claim and state-law claims against
11 individual Defendants) **and DENIED IN PART** (remainder).
12 2. The caption shall be **AMENDED** as follows:

13 ERIK KESSACK, individually,

14 Plaintiff,

15 v.

16 WALLA WALLA COUNTY,

17 Defendant.

18 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
19 Order and provide copies to all counsel.

20 **DATED** this 23rd day of December 2014.

21 _____
s/Edward F. Shea

EDWARD F. SHEA

22 Senior United States District Judge
23
24
25
26