No. 95511 -5

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPT. OF CORRECTIONS,

Petitioner,

v.

CATHY HARPER, et al,

Respondents.

ON PETITION FOR REVIEW
FROM COURT OF APPEALS, DIVISION I, No. 76008-4

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Department of Corrections ("DOC") seeks review of the Court of Appeals' straight-forward application of the gross negligence standard in reversing the trial court's erroneous grant of summary judgment in this case.

Before Scottye Miller murdered Tricia Patricelli on October 30, 2012, he was convicted four times for domestic violence (DV) offenses against her. While in the community custody of DOC for those offenses, Miller performed very poorly by lying to DOC while violating no-contact orders and committing new crimes against Patricelli. DOC ignored this long and detailed history — as well as its own policies for supervising DV offenders — in carrying out its duty to take charge of Miller and protect Patricelli.

The Court of Appeals reversed the trial court's grant of summary judgment for DOC on these facts, finding that they amounted to evidence of serious negligence and that the claims should be resolved by a jury at trial.

This court should deny the petition for review.

II. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in applying the gross negligence standard of *Nist* to the take-charge duty of *Taggart* and in holding that a reasonable juror could find that DOC failed to exercise slight care to protect Tricia Patricelli?
2. In its application of the *Nist* gross negligence standard, did the Court of Appeals err by focusing on DOC's failure to consider Miller's detailed history of lying to his CCOs in assessing his compliance with his no-contact order with Patricelli?

III. STATEMENT OF THE CASE

A. The trial court granted summary judgment against plaintiffs, finding that no reasonable jurors could find gross negligence.

On October 30, 2012, Scottye Miller killed Tricia Patricelli by stabbing her over 20 times. CP 325-27, 655-58, 794-97. At the time of the murder, DOC was required supervise Miller for a 2010 conviction for violating a no-contact order against Patricelli. CP 980-87. That 2010 encounter had been prohibited by a domestic violence (DV) no-contact order imposed after Miller's 2009 felony conviction for assaulting Patricelli. CP 952-65.

Miller's supervision on the 2010 case was interrupted in 2012 when he was convicted and incarcerated for assaulting and threatening to kill Patricelli at the end of 2011. CP 1047-68. Supervision for the 2010 case resumed on October 15, 2012, when Miller was released from prison after serving his sentence following the 2012 conviction. CP 1071. For custody and supervision purposes, DOC long ago had assigned Miller a risk-level classification of "high violent." CP 399-400.

On release, Miller's supervision was assigned to Rhonda Freeland, a community corrections officer (CCO) who had just returned to the department after a three-year layoff, during which she worked an entirely unrelated job at Washington's Employment Security Department. CP 469, 1118. In her previous work at DOC, Freeland was a CCO for cases of low-risk offenders whose nominal supervision never required that she leave her desk. CP 470-71, 1106-16.

In two weeks of supervising Miller before he murdered Patricelli, Freeland saw Miller twice at her office. CP 488, 707. She tried to call Patricelli once but never reached her because she had called the wrong number. CP 706-09. Freeland never tried a second time to reach Patricelli, who was at least four times a victim of Miller's domestic violence over the previous four years, and never sought her address. Freeland otherwise

subjected Miller to two urinalyses and instructed him to schedule a mental health evaluation. CP 707-08.

DOC's DV policy and training protocols, meanwhile, are robust. They explicitly warn of the potentially fatal consequences of domestic violence, and they propose a comprehensive suite of techniques to supervise offenders who pose a DV risk. CP 337-65.

These policies show that DOC knows that DV dynamics require proactive, hyper-vigilant supervision of these dangerous offenders, using tactics that take into account the behavior patterns of each offender. CP 347-48, 359. DOC has created training that should be provided to all CCOs. CP 337-365.

DOC's training protocols note that "DV Behaviors are targeted and repeated; violence increases in frequency and intensity; death is always a potential outcome." CP 358. Community corrections staff are to be reminded that "Domestic violence intervention = homicide prevention." CP 358. For this reason, when supervising a DV offender, the victim's safety is the CCO's "primary consideration." CP 345.

According to DOC materials, CCOs should know that prior physical abuse and threats to kill are important predictors of DV killings.

CP 358. The training cites data showing that 88% of DV murders had a history of physical abuse, and 44% had prior threats to kill. *Id*.

DV offenders are deceptive and might present a false image of compliance to their CCOs. DOC training recognizes that "[m]anipulation is at the center of domestic violence behavior. An outwardly compliant offender does not mean that the victim is safe." CP 358. (See also CP 347: "An offender's success on supervision is not a true indicator of possible domestic violence at home.") This manipulative, deceptive character of DV offenders requires extremely vigilant and responsive supervision: DV offenders "will get an inch & take a mile, if not addressed & held accountable." CP 347.

On these facts, the trial court granted summary judgment in favor of DOC, finding that no reasonable juror could find the supervision of Miller to be grossly negligent.

B. The Court of Appeals reversed the trial court, finding that a reasonable juror could conclude that that DOC — if nothing else — failed to exercise slight care in enforcing the no-contact order between Miller and Patricelli.

In reversing the trial court, the Court of Appeals held that the record demonstrated evidence of serious negligence that warranted a jury trial to resolve plaintiffs' claims against DOC.

The court applied the gross negligence standard — as set by RCW 72.09.320 and defined by *Nist v. Tudor*, 67 Wn.2d 322, 407 P.2d 798 (1965) — to analyze the facts of this case. The court's "analysis necessarily focuses on the sentencing condition most pertinent to Patricelli's safety—the no-contact order." *Harper v. Dep't of Corr.*, No. 76008-4, slip op. at 12.

The court held that, in ignoring Miller's history or criminal offenses and poor performance on community custody, DOC arguably failed to exercise slight care to take charge of Miller and thereby committed gross negligence.

IV. ARGUMENT

DOC claims that the Court of Appeals' decision is in conflict with a prior decision of this Court and with prior decisions of the Court of Appeals. DOC is mistaken. The Harper decision does nothing more than properly apply the reasoning of prior cases to the unique facts of this case.

DOC has a duty to "take charge" of the offenders it supervises. *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 119 P.3d 825 (2005). *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992). As this court has long recognized, "once the State has taken charge of an offender, 'the State has a duty to take reasonable precautions to protect against *reasonably*

foreseeable dangers posed by the dangerous propensities of parolees.'" *Joyce*, 155 Wn.2d 306, 310, 119 P.3d 825 (citing and adding emphasis to *Taggart*, 118 Wn.2d 195, 217, 822 P.2d 243).

Under RCW 72.09.320, DOC's civil liability for breaches of this duty are subject to the gross negligence standard, which this court defined in *Nist*, 67 Wn.2d 322, 407 P.2d 798, as the failure to exercise slight care in satisfying its duty.

A. Reversing dismissal of the gross negligence claim is consistent with *Nist v. Tudor*.

In its petition, DOC claims that the Court of Appeals's decision conflicts with *Nist*, pointing to the *Harper* court's observation that resolving gross negligence claims "will almost always require the fact-finding judgment of a jury[.]" Petition, at 8; *Harper*, slip op. at 12.

DOC is wrong. The appellate court's comment on the difficulty of distinguishing degrees of negligence as a matter of law is not a novel holding and certainly does not conflict with precedent of this court, which has long emphasized the same point.

The *Nist* opinion itself remarked that so long as there was sufficient evidence of serious negligence, "the issue of gross negligence should be resolved by the jury under proper instructions." *Nist*, 67 Wn.2d

322, 332, 407 P.2d 798 (1965). The appellate court accurately restated and applied this standard, quoting *Nist:*

> The court then reviewed its decades old decisions, noting that, "[a]lthough retaining slight care as a standard, this court has in recent years, where there is substantial evidence of acts or omissions seriously negligent in character, inclined toward leaving the question of gross negligence to the jury."

Harper, slip op. at 9 (quoting *Nist*, 67 Wn.2d at 326).

In fact, this understanding from *Nist* is a staple a Washington caselaw on gross negligence and related tort law standards. Just recently in *Swank v. Valley Christian School,* 188 Wn.2d 663, 398 P.3d 1108 (2017), this court discussed distinctions among simple negligence, gross negligence, and recklessness. This court unanimously held that, "[b]ecause each of the three standards turns on a fine-grained factual analysis, 'issues of negligence and proximate cause are ***generally not susceptible to summary judgment.***'" *Swank,* 188 Wn.2d at 685 (quoting *Owen v. Burlington N. Santa Fe R.R. Co*., 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) and *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995))(emphasis added).

Here, the Court of Appeals identified, cited, and applied the correct legal standards to the unique facts of this case and reached the correct

conclusion: A jury must decide gross negligence here. DOC's disagreement with that result does not create a conflict between *Harper* and *Nist;* rather, *Harper* simply followed 53-year-old Washington law that was reiterated only five months earlier by a unanimous Court in *Swank*.

B. The decision also is consistent with Court of Appeals precedent.

DOC next argues that the Court of Appeals' decision conflicts with that court's prior decisions. The appellate cases cited by DOC, however, merely applied the same standards to their own unique facts.

The Court of Appeals in both *Kelley* and *Whitehall* cited the same standard applied here and drawn from *Nist.* See *Kelley v. State,* 104 Wn.App. 328, 333, 336, 17 P.3d 1189 (2000); *Whitehall v. King County*, 140 Wn.App. 761, 767, 167 P.3d 1184 (2007).

Having identified *Nist's* formulation of gross negligence, all further analysis of the trial court's summary judgment in *Kelley* and *Whitehall* related to the specific facts of each case. In *Kelley*, the court acknowledged that a jury could find the CCO negligent but found that on its facts, the earnest-but-failed efforts of the CCO "fell short" of "substantial evidence of serious negligence." *Kelley*, 104 Wn.App. at 338.

The *Whitehall* court summarized *Kelley*, noting that:

> [t]he [*Kelley*] court acknowledged that a jury could find that [the CCO's] deficiencies constituted negligence, but held that this was not substantial evidence of serious negligence, and thus felt short of gross negligence.

Whitehall, 140 Wn.App. at 768.

The *Whitehall* court ultimately held that "under the facts of the [Whitehall] case," there was "no substantial evidence of serious negligence, and thus no showing of gross negligence." *Whitehall*, 140 Wn.App. at 769.

DOC makes much of *Kelley's* passing reference to a CCO's failure to investigate as opposed to a failure to act on information actually received, Petition at 15, but this was not part of the holding and is dicta. The court did not explain this distinction except to the extent that it found that the CCO's efforts on these facts amounted to slight care.

Still, that passage in *Kelley* was not necessary to the decision, which instead was based on the court's finding that, in the unique facts of its case, there was not sufficient evidence to warrant a trial on gross negligence. *See Bennett v. Smith Bundy Berman Britton, PS*, 176 Wn.2d 303, 291 P.3d 886 (2013), citing *Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 320, 352 P.2d 1025 (1960) (statements in an opinion that were "not necessary to the decision in [the] case" are dicta and do not control future

cases); *Noble Manor v. Pierce County*, 133 Wn.2d 269, 289, 943 P.2d 1378 (1997) (Sanders, J., concurring) (dicta is not controlling precedent). Similarly, as described above, while the *Whitehall* case refers to *Kelley*, the holding of that case was likewise that there was not sufficient evidence for trial, given the unique facts of that case.

The Court of Appeals here, however, focused appropriately on the facts of *this* case and found substantial evidence of serious negligence. In doing so, the court's opinion "necessarily focuses on the sentencing condition most pertinent to Patricelli's safety — the no-contact order." *Harper*, slip op. at 12, because "'(i)n determining the degree of negligence, the law must necessarily look to the hazards of the situation confronting the actor.'" *Id*. at 10 (quoting *Nist*, 67 Wn.2d 322, 331, 407 P. 2d 798.)

The court here recognized that DOC's own records "detailed that Miller had a long history of violating no-contact orders prohibiting him from contacting PatriceIli and of lying to community corrections officers when asked if he was contacting or residing with Patricelli." *Id*. at 13. The court further recognized that CCO Freeland, according to her deposition testimony, was unwilling to consider this detailed history in evaluating

Miller's superficial compliance as demonstrated by his self-reported housing logs:

> … Freeland reviewed Miller's housing report logs in the same manner as she would have with any other offender, notwithstanding Miller's clear record of violating no-contact orders so that he could reside with Patricelli and lying to DOC officers about whether he had been residing with her.

Id.

Freeland's and DOC's failure to exercise slight care in this context is all the more egregious in light of the trial-court record that demonstrates that, despite developing comprehensive DV supervision policies and training, DOC appears to have made no effort to ensure that its Auburn field staff was adequately trained.

Miller's last two CCOs were Heidi Ellis and Freeland, both of whom worked in the Auburn office under CCS Curtis Crisp. CP 383, 473. Crisp had no knowledge of the DOC DV training and indeed believed many things about his job that are in direct conflict with it. CP 538-40.

Crisp does not believe that there is any difference in approach to supervising a DV offender as opposed to any other offender such as a property crime offender. CP 538-540. In his deposition in April of 2016, Crisp saw no reason that he should directly and actively collaborate with

CCOs to gather information plan for the supervision of DV offenders; instead, he simply "defer[red] to their professionalism" that they were adequately addressing DV issues and would not have known whether the CCOs were gathering background information on DV offenders or not. CP 530, 539.

Crisp testified that it would not be his place as a supervisor to encourage CCOs to impose additional conditions such as GPS for DV offenders. CP 539. Crisp did not see any problem with relying on the DV offender's victim to report violations. CP 539.

After Patricelli's 2012 murder, DOC completed a "Critical Incident Review Report" ("CIR") which is a summary of events and DOC actions preceding the murder. CP 574-92. A key finding of that review was that DOC needed to create "specialized caseloads and/or train[ing] staff on the dynamics involved in supervising DV offenders." CP 591.

Following the CIR, DOC issued a "Critical Incident Review Corrective Action Plan," assigning responsibility to designated staff members to implement the CIR recommendations. CP 594-95. By March 29, 2013, Crisp was directed to:

> Train staff on the dynamics involved in supervising DV offenders. CCS will discuss/review DOC Policy 390.300 Victim Services with the Unit. Staff will be expected to

> understand policy and policy expectations. Supervisor will review with staff the Domestic Violence Training that was presented to all CCSs by the Crime Victim Liaisons.

CP 594.

Crisp had never given that training to his CCOs before that assignment, and he never did it after being again directly instructed to do so, either. CP 406, 494. In her deposition in June of 2016, CCO Freeland still believed that supervising a DV offender is no different than any other offender and does not understand the DOC policy for imposing GPS monitoring on an offender. CP 486.

This stands in stark contrast to the known dynamics of DV relationships recognized by DOC's training and by the Court of Appeals two decades ago, which found that "victims of DV often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others." *State v. Grant*, 83 Wn. App. 98, 107, 920 P.2d 609 (1996). In *Grant*, the court further found:

> A victim's apparently inconsistent response to abuse may stem from any number of reasons. Some victims minimize or deny abuse because they fear retaliation by the abuser: the perpetrators in these cases may have terrorized the abused party over the period of time between the assault and the time of the court proceeding in order to coerce the abused party into lying. The perpetrator may increase the

> violence and the threats of violence, or they may bargain with the abused party to change the story with promises that if they do, the violence will stop.

Grant, 83 Wn. App. at 111 fn. 5. The court also remarked:

> Sometimes … the abused party has learned that the systems with the power to intervene will not act. Thus they are forced to try to work out their own deals with the abuser in hopes of stopping the abuse.
> [...]
> Victims may know from past experience that the violence gets worse whenever they attempt to get help... Perpetrators may repeatedly tell the abused party that she/he will never be free of them. The abused party believes this as a result of past experience. When they did attempt to leave, the perpetrator may have tracked them down or abducted the children in the attempt to get the victim back.

Id.

Yet despite this extensive and longstanding body of knowledge about the peculiar dangers presented by DV offenders, the DOC staffers responsible here for protecting Patricelli — CCO Freeland and CCS Crisp — continued to deny any such distinction more than three years after her murder. Their failure to grasp this basic but critical tenet of correctional supervision is substantial evidence of serious negligence that requires that a jury decide the fate of plaintiffs' claims.

Harper, *Kelley* and *Whitehall* are in sync: Each applies the *Nist* standard, differing only on the outcomes dictated by the unique facts of each case. There is no conflict.

C. DOC conflates "gross negligence" with "recklessness."

Further confirming that DOC has misread *Kelley* and *Whitehall* is the fact that DOC's interpretation of those cases would conflict with Washington law. DOC would stretch that dicta from *Kelley* to pass for a holding that would conflate gross negligence with a different mental state, recklessness.

The distinction between gross negligence and recklessness was recently discussed by this Court in the unanimous opinion in *Swank,* where this Court noted that "'Reckless misconduct differs from negligence in several important particulars.'" *Swank*, 188 Wn.2d at 685, quoting *Adkisson v. City of Seattle*, 42 Wn.2d 676, 686, 258 P.2d 461 (1953) (quoting Restatement of Torts § 500 cmt. g (Am. Law Inst. 1934)). The Court confirmed that recklessness is defined by actual knowledge: "[t]o be reckless, 'the actor ... must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent.'" *Id*. (quoting Restatement § 500 cmt. g).

Thus, "[r]eckless misconduct, unlike gross negligence, 'requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man.'" *Id*. (quoting Restatement § 500 cmt. g); see also *State v. Graham*, 153 Wn.2d 400, 408, 103 P.3d 1238 (2005) (stating that "'[a] person is reckless or acts recklessly when he *knows of and disregards* a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.'" (alteration in original) (quoting former RCW 9A.08.010(1)(c) (1975))) (emphasis added).

This distinction between recklessness and gross negligence illustrates the flaw in DOC's reading of *Kelley* and *Whitehall*. DOC reads those cases to require proof of *actual knowledge*, Petition at 15-16*,* on the part of a CCO before a gross negligence claim can be tried by a jury. This is contrary to Washington law, which clearly imposes no such requirement under the gross negligence standard. DOC's strained reading of *Kelley* and *Whitehall* proposes to create a conflict with *Harper* where none exists.

D. The Court of Appeals decision here does not create a "negligent investigation" claim.

DOC cites to unrelated caselaw to argue that the Court of Appeals here recognized a previously rejected tort of "negligent investigation." Petition at 16.

Of DOC's cited cases, one deals with a foster parent claiming "negligent investigation" by the Department of Social and Health Services for its later-reversed administrative finding that he committed abuse. *Blackwell v. State Dep't of Soc. & Health Servs.*, 131 Wn.App. 372, 127 P. 3d 752 (2006). Another deals with the claim of "negligent investigation" by a foster child against DSHS for an overly invasive sexual assault exam. *M.W. v. Dept of Soc. & Health Servs.*, 149 Wn.2d 589, 70 P.3d 954 (2003). A third case cited by DOC involved a claim of negligent infliction of emotional distress by a childcare director against DSHS for wrongful allegations of child abuse. *Pettis v. State*, 98 Wn.App. 553, 990 P.2d 453 (1999). Lastly, DOC cites to a case in which the estate of a DV murder victim sued Seattle police for failing — in their general law enforcement duties — to search for the victim's assailant after a previous assault against her.

In none of these opinions does the reviewing court analyze its facts within the context of the take-charge duty that applies to DOC in this case. DOC had a duty to take charge of Scottye Miller as prescribed by relevant caselaw. Moreover, in that caselaw, this court previously rejected DOC's argument for limiting its responsibility for investigating an offender's progress during supervision.

In *Joyce*, this Court stated:

> We also rejected the State's argument that recognizing this duty would require the State to monitor more intensively than the State's resources allow. We reasoned: The parole officer is the person through whom the State ensures that the parolee obeys the terms of his or her parole. Additionally, parole officers **are, or should be**, aware of their parolees' criminal histories, and **monitor, or should monitor**, their parolees' progress during parole. Because of these factors, we hold that parole officers have "taken charge" of the parolees they supervise for purposes of § 319. When a parolee's criminal history and progress during parole show that the parolee is likely to cause bodily harm to others if not controlled, the parole officer is under a duty to exercise reasonable care to control the parolee and to prevent him or her from doing such harm.

Joyce, 155 Wn.2d at 316, citing *Taggart*, 118 Wn.2d at 220, 822 P.2d 243 (emphasis added).

It has long been true that DOC is liable for its gross negligence in failing to perform its duties, whether based on grossly negligent

investigation or grossly negligent enforcement. That remains true today. The *Harper* decision broke no new ground in so holding, nor did it create a new cause of action.

V. CONCLUSION

For the reasons discussed above, this Court should deny the petition for review and allow the case to be remanded back to the Superior Court for trial.

Respectfully submitted on March 14, 2018.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing answer to Paul Triesch and Kaylynn What, petitioner's attorneys, at pault@atg.wa.gov; kaylynnw@atg.wa.gov; and TorSeaEF@atg.wa.gov as a function of the court's efiling system on March 14, 2018.

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