NO. 100217-3

SUPREME COURT OF THE STATE OF WASHINGTON

JACOB IVAN SCHMITT, Appellant

v.

POLLARD FAALOGO; PIERCE COUNTY JAIL; PIERCE COUNTY DEPUTIES WHALES and RANKIN; RN FRANKLIN; JANE DOE 1-10; and JOHN DOE 1-10, Respondents

---

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

MARY E. ROBNETT
Pierce County Prosecuting Attorney

By JANA R. HARTMAN
Deputy Prosecuting Attorney
Attorneys for Pierce County Respondents

955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402
253-798-7748
jana.hartman@piercecountywa.gov

Table of Contents

Page

Table of Authorities

Page

Cases

Rules

Secondary Sources

I. INTRODUCTION

Pierce County and Deputy Wales provides this answer to Jacob Schmitt's Petition for Review.

This case arises from an inmate-to-inmate assault that occurred on June 17, 2014. This case seeks damages for injuries sustained by Mr. Schmitt during the assault.

The portion of the Court of Appeals' unpublished decision in this case which Mr. Schmitt appeals is founded on the well-established principle that expert testimony is required to establish a breach in the standard of care regarding jail classification[1]. Appendix A, p. 10-11.

Mr. Schmitt's Petition for Review does nothing to counter the Court of Appeals' conclusion concerning the complete absence of evidence challenging the County's expert witness that the standard of care was met as to classification determinations. Rather, Mr. Schmitt simply reasserts his

[1] Neither party seeks review of those portions of the Court of Appeals' decision overruling summary judgment and remanding back to Superior Court for further proceedings.

position, unsupported by controlling caselaw or other legal authority, that expert testimony was not required. This is an insufficient basis for review. RAP 13.4(b)(1), (4).

II. STATEMENT OF THE CASE

In a well-reasoned opinion, Division III of the Court of Appeals affirmed the trial court's award of summary judgment as to the requirement for expert testimony when determining whether the standard of care was breached regarding safety protocols that led to his classification. Appendix A (Court of Appeals No. 37974-4-III). Mr. Schmitt seeks review of part of Division III"s decision.

The panel having determined that its ruling should not be published, presumably because it was not of general public interest or importance and did not satisfy the requirements of RAP 12.3(d)[2]. Appendix A, p. 14.

[2] Mr. Schmitt's Petition for Review relies upon RAP 13.4(b) as the basis for review but does not address the Court of Appeal's definitive determination, implicit in its decision not to publish, that the case is not of general public interest or importance.

In support of his petition, Mr. Schmitt submits "additional facts" that post-date the time period relevant to his negligence claim. In addition, in violation of ER 408, Mr. Schmitt submits to this court information regarding settlement negotiations. Respondent requests this Court disregard Mr. Schmitt's "additional facts".

III. ARGUMENT

This case arises from an inmate-to-inmate assault that occurred on June 17, 2014. At that time, Mr. Jacob Schmitt (the Petitioner) and Pollard Faalogo occupied adjacent cells within Pierce County Jail's maximum-security unit. The Petitioner described his interactions with Mr. Faalogo as "agreeable" and showed no indication of hostility or heightened tensions between the two individuals. CP 211. However, on the morning of June 17, 2014, Mr. Faalogo unexpectedly attacked the petitioner, causing him injury.

Suing the County three years after the assault, the Petitioner argued that Pierce County Jail and its deputies "were

negligent in putting a violent inmate in a position where he could assault [Mr. Schmitt] and negligently failed to provide necessary medical attention to his injuries." CP 4. Filing a motion for summary judgement, Pierce County argued that the Petitioner failed "to establish the standard of care owed to him by the jail or its deputies." Specifically, Pierce County relied on expert testimony and a report from Richard Bishop, a correctional facilities expert, to examine and outline Pierce County Jail's standard operating procedures to determine what standard of care was owed. The trial court granted summary judgement, concluding that an expert was necessary to determine what standard of care the County jail, and its deputies, owed to the inmates.

On appeal, the petitioner argued the County acted negligently in three aspects of the assault: (1) a deputy unlocking the Petitioner's cell when he was asleep, (2) failing to respond to the emergency call system, and (3) failing to check the safety of the inmates after hearing screaming.

Schmitt v. Faalogo, 18 Wn. App. 2d 1016, at *3 (July 6, 2021) (unpublished). Specifically, the Petitioner relied on the Restatement of Torts § 302(b) and argued that these claims did not require expert testimony. *Id.* Regarding the jail's duty to the Petitioner on the first claim, the appellate court disagreed, holding that an expert was required to determine whether the County properly placed the Petitioner and Mr. Faalago in the same area. *Id.* at *4. It reasoned that "inmate classification and recreation protocols involve multiple competing considerations requiring professional analysis. According to Pierce County's expert, the jail met professional standards in developing its policies." *Id.* It further reasoned that, because the Petitioner "did not present any expert opinion to the contrary," the Petitioner did not provide any evidence that Mr. Faalogo presented a particular threat to him. *Id.* Therefore, the court concluded that "under these circumstances, Mr. Schmitt has not produced sufficient facts alleging Pierce County negligently failed to prevent Mr. Faalogo's assault." *Id.* (citing *Winston v.*

Dep't of Corr., 130 Wn. App. 61, 64, 121 P.3d 1201 (2005)).

This Court should deny Mr. Schmitt's petition for discretionary review because it does not comport with the requirements set forth in RAP 13.4(b). RAP 13.4(b) expressly provides that a petition for review is only acceptable when (1) the Court of Appeals decision conflicts with a decision from this Court, (2) the decision conflicts with another Court of Appeals decision, (3) the decision raises a significant question of law under the Washington or United States Constitutions, or (4) the petition involves an issue of substantial public interest to be determined by this Court. RAP 13.4(b).

1. <u>This Court should deny Mr. Schmitt's petition under the Supreme Court Precedent prong because the appellate court's decision does not directly conflict with any of this Court's prior decisions.</u>

As admitted by Mr. Schmitt, the appellate court's decision does not directly conflict with any existing precedent from this Court. As a preliminary matter, because Mr. Schmitt flatly admits that this Court has not directly addressed

affirmative actions by jailors in the Restatement 302(b) context, this Court should conclude that the appellate court's decision does not openly conflict with a decision from this Court. Schmitt Petition for Review at 8; *see* RAP 13.4(b).

Further, this Court should conclude that the appellate court's decision does not directly conflict with any of this Court's prior decisions because the Restatement of Torts provision cited by Mr. Schmitt is discretionary. As this Court explained in *Robb v. City of Seattle*, "we have also recognized under Restatement § 302(b) that a duty to third parties *may* arise in the limited circumstances that the actor's own affirmative act creates a recognizable high degree of risk of harm." 176 Wn.2d 427, 433, 295 P.3d 212 (2013) (emphasis added). Because both this Court and the Restatement implement the term "may," this doctrine requires a discretionary, case-by-case, analysis. *See Matter of Recall of Snaza*, 197 Wn.2d 104, 114, 480 P.3d (2021) ("As a general rule ... the word 'may' is permissive only and operates to confer

discretion.") (quoting *Spokane County ex rel. Sullivan v. Glover*, 2 Wn.2d 162, 169, 97 P.2d 628 (1940)). Accordingly, because the Restatement's application is discretionary, this Court should conclude that a conflict is only triggered by a case with a similar set of operative facts.

Here, the cases cited by Mr. Schmitt do not share similar facts to create a conflict with this Court's application of the Restatement. In *Robb*, this Court held that the Restatement § 302(b) did not apply to police officers' failure to pick up ammunition because that case involved nonfeasance. 176 Wn.2d at 437-39. In *Kim v. Budget Rent-A-Car*, this Court also held that the Restatement § 302(b) did not apply to the defendant's failure to remove keys from its cars because it never suffered a prior vehicle theft in the lot's area. 143 Wn.2d 190, 196, 15 P.3d 1283 (2001). Because neither of those cases involve the operation of a jail, this Court should conclude that the appellate court's decision regarding the duties involved in jail operations does not directly conflict with this Court's prior

decisions. *Id.*; *Robb*, 176 Wn.2d at 437-39.

2. This Court should deny Mr. Schmitt's petition under the Appellate Court Precedent prong because the appellate court correctly applied existing precedent governing negligent jail operations claims.

The appellate court's decision does not conflict with prior Court of Appeals opinions because it directly applied the governing precedent to Mr. Schmitt's case. In *Winston v. Dep't of Corrections*, the Division III's governing case on prison related assaults, the plaintiff sued the State of Washington and the Department of Corrections and alleged that they acted negligently when it failed to prevent an inmate-to-inmate assault. 130 Wn. App. at 63. On appeal from a granted motion for summary judgement, the court held that the plaintiff failed to establish specific facts regarding his negligence claim. *Id.* at 64. The court established that, "In order to hold the State liable for injury to one inmate inflicted by another inmate, there must be proof of knowledge on the part of prison officials that such an injury will be inflicted, or good reason to anticipate such,

and then there must be a showing of negligence on the part of these officials in failing to prevent the injury." *Id.* (citing *Kusah v. McCorkle*, 100 Wn. 318, 323, 170 P. 1023 (1918)). Further, relying on this Court's holding in *Riggs v. German*, the court reiterated that there is a rebuttable presumption that the correctional officer performed their duties. *Id.* (citing 81 Wash. 128, 131, 142 P. 479 (1914)). Applied to the *Winston* case, the court held that "Mr. Winston failed to show that the prison officials had any reason to believe he would be attacked." *Id.* It reasoned that, because Mr. Winston's own deposition refuted the claims regarding the tense prison atmosphere and his "previous problems with the assailant," the summary judgement was appropriate. *Id.*

Applied to this case, Mr. Schmitt's testimony is analogous to Mr. Winston's because it similarly contradicts his assertion that Deputy Wales and the Pierce County Jail had reason to know that Mr. Faalogo would harm him. *Id.* Because Mr. Schmitt's own testimony establishes that he and Mr.

Faalogo acted cordially towards one another, there was no indication that Mr. Faalogo would specifically attack Mr. Schmitt. Therefore, this Court should conclude that the appellate court correctly applied existing precedent and deny Mr. Schmitt's petition for review. RAP 13.4(b).

3. This Court should deny this petition under the Constitutional Conflicts prong because it only raises common law tort issues.

This petition does not raise any significant questions of law under the United States or Washington Constitutions because the claims rely solely on common-law torts principles and do not implicate any constitutional protections afforded to the Petitioner. As this Court explained in *Ehrhart v. King County*, tort liability for negligence is governed by the common law principle that "[a] cause of action for negligence will not lie unless the defendant owes a duty of care to [the] plaintiff." 195 Wn.2d 388, 398, 460 P.3d 612, 618 (2020) (quoting *Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983)). Thus, the Petitioner's claim is squarely rooted in

common law principles and does not allege a deprivation of a constitutional right. Therefore, this Court should conclude that Mr. Schmitt's petition does not implicate any constitutional conflicts and deny the petition.

4. This Court should deny Mr. Schmitt's petition under the Issue of Substantial Public Interest prong because the appellate court's opinion is not likely to affect a number of proceedings or cause confusion.

Since the appellate court did not publish their decision in this case, it does not raise any issues of significant public interest. Reiterated in *In re Flippo*, this Court explained that "[a] decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue." 185 Wn.2d 1032, 380 P.3d 413, 414 (2016) (Mem) (citing *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005)). In that case, this Court held that review under this prong was appropriate because "there [were] numerous now-pending personal restraint

petitions challenging the imposition of LFOs more than one year after judgments became final and making claims similar to those asserted by Mr. Flippo." *Id.* Further, "some of these issues [were] pending in other divisions of the Court of Appeals. *Id.*

Here, Mr. Schmitt's petition is distinguishable from Mr. Flippo's petition because the Division III Court of Appeals did not publish their opinion regarding Mr. Schmitt's case. *See generally Schmitt v. Faalogo*, 18 Wn. App. 2d 1016 (July 6, 2021) (unpublished). Because the appellate court's decision is unpublished, it does not raise a potential of confusion or wide-ranging effects upon concurrent litigation. *In re Flippo*, 380 P.3d at 414 (citing *Watson*, 155 Wn.2d at 577. Therefore, this Court should conclude that Mr. Schmitt's petition fails to raise an issue of substantial public interest. RAP 13.4(b).

IV. CONCLUSION

Pierce County requests that, insofar as Mr. Schmitt's Petition for Review seeks review of the Court of Appeals

decision concerning section B of the decision, be denied. The Court of Appeals decision concerning Pierce County was governed by well-established case law and the Petition for Review cannot satisfy the requirements of RAP 13.4(b).

I certify that this brief contains 2646 (limit is 5,000) words and complies with the length limitations of RAP 18.17(c).

DATED this 1st day of December, 2021.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ JANA R. HARTMAN
JANA R. HARTMAN, WSBA # 35524
Deputy Prosecuting Attorney / Civil
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160
Ph: 253-798-7748 / Fax: 253-798-6713
jana.hartman@co.pierce.wa.us
Attorneys for Pierce County Respondents

CERTIFICATE OF SERVICE

On December 1, 2021, I hereby certify that I delivered a true and correct copy of the foregoing ANSWER TO PETITION FOR DISCRETIONARY REVIEW to the U.S. Postal Service, postage pre-paid, addressed to the following:

Jacob Ivan Schmitt / DOC #711473
Monroe Correctional Complex TRU
P.O. Box 888
Monroe, WA 98272

s/ ELIZABETH BURLINGAME
ELIZABETH BURLINGAME
Legal Assistant
Pierce County Prosecutor's Office
Civil Division, Suite 301
955 Tacoma Avenue South
Tacoma, WA 98402-2160
Ph: 253-798-6082 / Fax: 253-798-6713
elizabeth.burlingame@piercecountywa.gov

APPENDIX A

claims Mr. Schmitt cannot meet these elements because he has not produced expert testimony to elucidate the standard applicable to the elements of duty and breach.[4] Mr. Schmitt disagrees with the necessity of an expert.

"As a general proposition, expert testimony is not required to establish" a claim of negligence. *Petersen v. State*, 100 Wn.2d 421, 437, 671 P.2d 230 (1983). Nevertheless, expert testimony may be required in cases involving alleged violations of professional standards. *Id.* In such circumstances, the question of whether the defendant's conduct fell outside the required standard of care is a matter outside the knowledge of average jurors. *See Harris v. Robert C. Groth, M.D. Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983).

Resolving whether expert testimony is necessary in Mr. Schmitt's case requires closely analyzing the types of claims raised. It is readily agreed that jails owe inmates in their custody a duty to ensure health, welfare and safety. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010) (plurality opinion). But what it takes for a jail to meet this obligation is not always apparent. Jails are complex institutions. Many of a

[4] Pierce County also argues Mr. Schmitt's briefing fails to comply with RAP 10.3. While there are some technical deficiencies with Mr. Schmitt's pro se brief, we are able to discern the nature of his arguments and the citations to the record. Accordingly, we review the merits of his claims. *See State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995).

jail's operational decisions require professional expertise outside the knowledge of an average juror. Nevertheless, some obligations are so basic and apparent that no expertise is necessary.

Keeping in mind that the necessity of an expert depends on the complexity of a plaintiff's claims, we analyze each of Mr. Schmitt's allegations of negligence against Pierce County.

One of the primary claims brought by Mr. Schmitt against Pierce County is that Pierce County negligently failed to prevent Mr. Faalogo's assault. Mr. Schmitt contends Mr. Faalogo's background should have prompted Pierce County to place Mr. Faalogo in a higher security setting. He also claims Pierce County should not have unlocked cells for recreation time without first ensuring the cell's occupants are awake and alert.

Mr. Schmitt's criticisms of Pierce County's safety protocols involve the type of professional judgment that require expert assistance. Inmate classification and recreation protocols involve multiple competing considerations requiring professional analysis. According to Pierce County's expert, the jail met professional standards in developing its policies. Mr. Schmitt did not present any expert opinion to the contrary. There is no evidence of specific threats by Mr. Faalogo that would have alerted the jail of a particular cause for concern. The assault surprised everyone, even Mr. Schmitt. Under these

this regard. Thus, this claim was also not subject to Pierce County's arguments for summary judgment.

CONCLUSION

Summary judgment is reversed as to Mr. Schmitt's claims regarding the negligent failure to respond to the call light and the negligent failure to provide prescribed medications. In all other respects, the order of summary judgment is affirmed. This matter is remanded for further proceedings.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, C.J.

WE CONCUR:

Siddoway, J.

Staab, J.

PIERCE COUNTY PROSECUTING ATTORNEY CIVIL DIVISION

December 01, 2021 - 2:14 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,217-3
Appellate Court Case Title:	Jacob I. Schmitt v. Pierce County, et al.
Superior Court Case Number:	17-2-01111-0

The following documents have been uploaded:

- 1002173_Answer_Reply_20211201141210SC663357_1990.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 2021-12-01 PC's Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- TorTacEF@atg.wa.gov

Comments:

Answer to Petition for Discretionary Review

Sender Name: Elizabeth Burlingame - Email: elizabeth.burlingame@piercecountywa.gov
Filing on Behalf of: Jana Ranae Hartman - Email: jana.hartman@piercecountywa.gov (Alternate Email: pcpatvecf@piercecountywa.gov)

Address:
955 Tacoma Ave S Ste 301
Tacoma, WA, 98402-2160
Phone: (253) 798-6732

Note: The Filing Id is 20211201141210SC663357