100892-9

No. 82897-5-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

SINA GHODSEE, an individual, through Litigation Guardian ad Litem, JOSHUA BROTHERS,

Petitioners,

and

SHAHRBANOO GHODSEE, an individual,

Plaintiff,

v.

CITY OF KENT, a political subdivision of the State of Washington,

Respondent.

and

KING COUNTY, d/b/a King County Crisis and Commitment Services,

Defendant.

PETITION FOR REVIEW

John R. Connelly, Jr.
WSBA #12183
Meaghan M. Driscoll
WSBA #49863
Samuel J. Daheim
WSBA #52746
Connelly Law Offices, PLLC
2301 North 30th Street
Tacoma, WA 98403
(253) 593-5100

Philip A. Talmadge
WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Federal Cases

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONERS

Sina Ghodsee, through Litigation GAL Joshua Brothers, seeks review of Division I's published opinion (Part B) as to the liability of the City of Kent ("City").

B. COURT OF APPEALS DECISION TERMINATING REVIEW

Division I filed its sweeping published opinion on April 18, 2022. *See* Appendix. As noted there, this case involves the City's egregious negligence in executing an Involuntary Treatment Act, RCW 71.05 ("ITA") court order mandating the emergency detention and treatment of a severely mentally ill man.

C. ISSUES PRESENTED FOR REVIEW

1. Did Division I err in concluding that KPD officers owed no duty to a severely mentally ill person to execute a court's ITA detention order in a non-negligent fashion under the *Reinstatement (Second) of Torts* § 281 when the court determined that the person presented a likelihood of inflicting harm on others?

2. Did Division I err in applying the public duty doctrine to a common law action?

3. Did Division I err in ruling on breach of duty as a matter of law, concluding that the KPD officers' actions were reasonable and that law enforcement officers could not enter a house pursuant to a court's ITA detention order to detain a severely mentally ill person?

4. Did Division I err in applying RCW 71.05.120(1) to the City's negligent execution of a court's ITA detention order?

D. STATEMENT OF THE CASE[1]

Division I's opinion discusses the facts, op. at 2-3, but in that brief discussion it fails to convey Sina Ghodsee's manifest danger, the critical mandatory detention language of Judge Bender's detention order, or the inexplicable dithering of the law enforcement officers over the course of nearly two weeks while Sina descended into his deep mental distress.

On June 23, 2017, Shari Ghodsee, Sina's mother, called King County Crisis and Commitment Services ("KCCCS"), to request that her son, Sina, be involuntarily detained pursuant to the ITA due to his mental health crisis. CP 315-18. Shari

[1] King County's Diane Swanberg prepared a chronology of events in the case. CP 365-67.

reported that Sina was not taking his anti-psychotic medications, CP 106, and conveyed her concern for her personal safety due to Sina's recent aggressiveness toward her prompted by his unstable mental illness. She left her home and remained away for a majority of the past two weeks because of her fear that he would harm her because he was the King of England and owned the house; he physically pushed her out of the home, and threatened her with a table leg. CP 329. Sina's threats and screaming prevented Shari from living in her own home. CP 320 ("mother has not been staying in the home due to [patient's] aggressive and frightening behavior"), 332.

Sina had a *long* history of bipolar disorder and schizophrenia, CP 598-99, and an *extensive* criminal and ITA detention history. CP 106, 157, 166-86, 316. In 2012, law enforcement officers entered Sina's home to effectuate an ITA detention by tackling him. CP 157.

KCCCS initially treated Shari's contact as non-emergent, simply putting Sina's case "in the pile." CP 357. KCCCS sent

a team to the house on June 28, 2017; three County DMHPs[2] met Shari at her home. CP 366. An ambulance was summoned to take Sina to a hospital. CP 381. Suffering a psychotic episode, Sina would not speak with the DMHPs and made shooting gestures at them from a second story window using a table leg. *Id.* He put a chair against the door to prevent their access to him. CP 423. The DMHPs determined that Sina presented an emergency, CP 379-80, meeting the criteria for ITA detention because he was imminently likely to hurt himself or others, if he wasn't detained. CP 237, 243, 378-80, 382, 428. The DMHPs needed law enforcement assistance to effectuate Sina's detention. CP 245.[3]

---

[2] A DMHP was formerly the county official who made initial detention decisions under the ITA. Op. at 2 n.3.

[3] Those law enforcement officers had independent authority under the ITA to detain Sina in any event, as the KPD officers themselves testified. CP 115, 136, 412, 455. They did not need traditional probable cause to do so. CP 457.

The DMHPs summoned the Kent Police Department ("KPD") on June 28 to assist in detaining Sina. CP 381-82. Five or six officers responded. CP 381, 424-25. The officers were told about Sina's history, advised that there were guns in the home believed to be in a locked safe in the garage, and told that he had threatened police in the past. CP 381, 423.

After attempting to contact Sina through the closed door, a KPD officer opened the door to try and contact Sina, and stepped into the home. CP 467-69. He saw Sina swinging a skateboard, but did not observe guns. CP 383, 426-27, 430-31, 467, 472, 485. That officer stated that he was "in a deadly force encounter," justifying the use of his gun. CP 467. He then stepped back out of the home and "closed the door real quick." *Id*. The KPD officers abandoned any effort to detain Sina that day. CP 435, 472, 477, 485.[4] They told the DMHPs that they

[4] KPD Commander Rob Scholl later acknowledged that his officers missed an opportunity to seize Sina on June 28: "We could have grabbed him, you know, reached in and grabbed him or – and if it went badly, we could have, what they

would not enter the house to detain Sina without a court order. CP 366.

The DMHPs initially drafted their own detention order that would have been effective to detain Sina, CP 378, but they subsequently tore it up. CP 387, 392-93.[5] Given their evaluation of Sina, and the imminent risk of "something bad" happening based on his deteriorating mental condition, the DMHPs sought an order from the court, authorizing law enforcement officers to immediately take Sina into custody

---

call, bum-rush him." CP 135, 543. Scholl "definitely said that there were some interventions that could have been done on that day that would have led to a different result." CP 138. Scholl mentioned the use of tasers or rubber bullets. CP 135-36. Swanberg agreed, noting that the KPD officers "had to intervene in order for this to stop. It was not gonna stop any other way." CP 546.

[5] DMHPs also have authority under the ITA to detain a person without a court order. CP 377-78. That emergency authority, like that of law enforcement, is not subject to judicial review, *In re Detention of Johnson*, 179 Wn. App. 579, 587, 322 P.3d 22, *review denied*, 181 Wn.2d 1005 (2014), and is constitutional. *Id*. at 587-91.

because he posed an imminent threat of harm. CP 329-35, 380-81.

After the June 28, 2017 encounter, the DMHPs presented a petition for a judicial detention order, CP 329-32, to King County Superior Court Judge Johanna Bender, who signed an order[6] the next day (June 29), ruling that Sina was a danger to others, CP 333, that "[p]robable cause exists to order the respondent detained to an evaluation and treatment facility," and ordering that Sina *shall* be detained by a DMHP for evaluation and treatment under the ITA for up to 72 hours. CP 334. The order further specified: "When notified by a Designated Mental Health Professional for King County of this Order to Detain the King County Sheriff's Office or any peace officer *shall* take the respondent into custody ..." CP 334-35 (emphasis added).

[6] Although called a "Nonemergent Detention Order" ("NED"), such an order, authorizes immediate detention of an individual. CP 387.

Despite the court's mandatory order, a pattern of action then ensued. Although SWAT involvement was needed, CP 265, KPD did not call its SWAT unit because "SWAT is for criminal cases." CP 266. Its officers would go to the Ghodsee house and then do nothing. CP 321 (June 30); CP 322 (July 1).[7]

According to Diane Swanberg, the County's KCCCS Coordinator, the KPD made a decision to *never* enter the Ghodsee house. CP 540, 542, 545. The KPD's refusal to act became a source of intense frustration, boiling over into a verbal shouting match on the street near the Ghodsee home between the DMHPs and the police. CP 537-38.

In the meanwhile, Swanberg testified that Sina only deteriorated further. CP 538 ("My team was frustrated because the patient was very sick and was getting progressively more and more dangerous."), CP 556. Sina's increasing volatility was communicated to KPD Commander Scholl. CP 539.

[7] At all pertinent times, Shari had keys to the home and gave permission to the officers to enter it. CP 261, 266.

On July 2, 2017, Sina stepped outside of the home with a rifle and pointed it at a neighbor who was doing yardwork, screaming and yelling incoherent, but threatening, statements. CP 494. KPD officers responded, but took no action.

On July 3, 2017, Scholl demanded a plan from his officers for Sina's detention, but he also stated his officers must not force their way into the house. CP 323, 497. No further action was taken by the KPD until July 7, 2017 when a "plan" to detain Sina once he exited the house for groceries was developed. CP 498. That "plan" failed on July 9, 2017. CP 499. KPD officers then went to the Ghodsee residence later on July 9, but again took no action to detain Sina. CP 499.

Approximately 24 hours later, a number of noise complaints were reported to the KPD from the neighborhood about "loud music and yelling coming from Ghodsee's residence." CP 500. Three KPD officers responded, CP 106-07, 109, but again KPD officers took no action, gave up, and left. *Id.*

The following day, July 10, 2017, Sina came out of his home with the gun he had pointed at a neighbor over a week earlier, and pointed it into a neighbor's home, yelling for them to get out of his house and that they were terrorists. CP 501-02. He then shot into the home. *Id.* Multiple 9-1-1 calls resulted from the incident. CP 501-19. KPD officers responded, this time employing SWAT officers, CP 502, and an armored vehicle. CP 204. KPD officers shot Sina in the head, which he survived, CP 527, resulting in "significant cognitive impairments, including deficits in his speech and comprehension." CP 530.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

(1) The City Owed Sina a Duty of Care to Detain Him for Necessary Treatment

Division I's analysis of the City's duty to Sina, op. at 4-5, 9-16, is flawed on several levels. That court improperly applied the public duty doctrine, got caught up in whether Judge Bender's detention order was based on whether Sina was a

danger to himself or others, and failed to grasp the duty of law enforcement officers under *Restatement (Second) of Torts* § 281, recognized by this Court in numerous cases.

The City owed a *common law* duty of care under § 281 to Sina arising out of its duty to execute Judge Bender's detention order. It is that order, properly issued by Judge Bender,[8] that is the predicate for the City's common law duty, not the ITA itself. The ITA creates no private right of action, as the City *conceded* below. City br. at 15. *See Konicke v. Evergreen Emergency Services, P.S.*, 16 Wn. App. 2d 131, 146, 480 P.3d 424 (2021) (RCW 71.05.120 "does not create an independent cause of action, but, rather, serves to modify already existing causes of action."). Rather, a common law duty to Sina arose out of Judge Bender's order, as Division I *conceded*. Op. at 10 ("…the plain language of the court order directing the

[8] Sina argued below that Judge Bender's order was entirely within her authority under the ITA. Br. of Appellants at 28-31. Division I's opinion nowhere disagrees with that assertion and assumes the order's validity. Op. at 10.

government to detain Ghodsee creates a legal duty.").

There can be little question that a § 281 duty was owed by the City to Sina after this Court's decisions in *Washburn v. City of Federal Way*, 178 Wn.2d 732, 759-61, 310 P.3d 1275 (2013); *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550-57, 442 P.3d 608 (2019); *Mancini v. City of Tacoma*, 196 Wn.2d 864, 886, 479 P.3d 656 (2021).

The City's § 281 duty to Sina derives from its negligent execution of Judge Bender's detention order, an order whose explicit terms the KPD officers were obligated to obey.[9] Judge

[9] KPD officers had a duty to enforce Judge Bender's order *as written*. *Miller v. Pierce County*, 16 Wn. App. 2d 1036, 2021 WL 463453 (2021) is directly on point. There, Division II held that the plaintiff stated a "take charge" duty in a case where there was an order of commitment that directed an offender's supervision on probation or incarceration in the County Jail but, inexplicably, the County failed to enforce it, allowing the offender to brutally assault his estranged wife while he was free. Just as Division II ruled in *Miller*, proper enforcement of court orders is *mandatory* for law enforcement. For Division I to imply otherwise, op. at 9-11, raises the specter that law enforcement officers may disregard court orders, a policy this Court cannot condone.

Bender's order was explicit, and *mandatory*. Sina was a harm to others as a result of his mental order. CP 333. He would not utilize voluntary treatment services for his mental disorder. CP 334. The court directed DMHPs to detain him. CP 334 ("*shall* be detained by a designated Mental Health Professional for King County…") (emphasis added). And, where law enforcement officers were assisting the DMHPs, their duty was clearly *mandatory*. *Id*. ("the King County Sheriff's office or any peace officers *shall* take the respondent into custody of the evaluation and treatment facility designated by the Designated Mental Health Professional for King County…") (emphasis added). *Id*. at 334-35.[10]

§ 281 imposes a duty upon law enforcement to employ reasonable care in discharging their responsibilities. In *Washburn*, this Court had little difficulty in discerning a duty

[10] Moreover, the officers knew Sina was dangerous, met the criteria for ITA detention as of June 28, and that they had independent authority under the ITA to detain him.

owed by Federal Way officers to a harassment victim when they served an anti-harassment order on the harasser. Those officers saw that the victim was in the house, but were negligent in failing to take precautions to protect the harasser's victim. Officers cannot be oblivious to the totality of the circumstances presented in executing a court order. In *Beltran-Serrano*, 193 Wn.2d at 550, a police officer encountered a homeless, mentally ill Hispanic man and negligently used deadly force against him. This Court held that the City owed that man a duty of care. Similarly, in *Mancini*, in a case involving the egregiously negligent execution of a search warrant upon the incorrect party, the Court again recognized the traditional common law negligence duty that applies in the law enforcement setting. 196 Wn.2d at 879. In fact, the Court observed that claims of negligent law enforcement are not novel, citing numerous instances of such claims. *Id*. at 880 n.8.

But while Division I seemingly agrees with the existence of a City duty to Sina, it determined that the public duty

doctrine foreclosed any duty and held as *a matter of law* that the KPD officers' conduct in breach of the City's duty to Sina was "reasonable," intruding upon the jury's role. Here, where the KPD officers undertook actions as to Sina, they had a duty to do so in a non-negligent fashion. They did not. Division I erred. Review is merited. RAP 13.4(b)(1).

(2) The Public Duty Doctrine Does Not Apply

Contrary to Division I's view, op. at 5, in evaluating the duty of a government, courts do *not* necessarily have to consider the public duty doctrine. That doctrine does not apply to Sina's common law negligence claims.

That doctrine is not an immunity – a surreptitious restoration of sovereign immunity abolished by RCW 4.92.090 and RCW 4.96.010. This Court has *repeatedly* confined the doctrine to legal obligations imposed by a statute, ordinance, or regulation. *Munich v. Skagit Emergency Comm. Ctr.*, 175 Wn.2d 871, 886-87, 288 P.3d 328 (2012); *Beltran-Serrano*, 193 Wn.2d at 549-50. *See also, Mita v. Guardsmark, LLC*, 182 Wn.

App. 76, 84, 328 P.3d 962 (2014) (public duty doctrine inapplicable to common law claims). The City *admitted* below that the doctrine does not apply to common law actions, citing *Beltran-Serrano*, City Br. at 7. As noted *supra*, Sina's is a common law action, not an action under the ITA. The doctrine does not apply.

It is inapplicable as well in police practices cases. *Beltran-Serrano*, 193 Wn.2d at 550-57; *Washburn*, 178 Wn.2d at 759-61. *Mancini*, 196 Wn.2d at 886.

It is specifically inapplicable to officers negligent handling of an ITA order. *Watness v. City of Seattle*, 16 Wn. App. 297, 307, 481 P.3d 570 (2021) (citing *Beltran-Serrano*, 193 Wn.2d at 551). *Norg v. City of Seattle*, 18 Wn. App. 2d 399, 491 P.3d 237 (2021), *review granted*, 501 P.3d 150 (2022) (rejecting application of public duty doctrine to law enforcement common law duty to exercise reasonable care in providing emergency medical services citing *Beltran-Serrano* and *Mancini*).

Finally, the public duty doctrine, if applicable at all here, is a focusing tool to avoid a duty to the nebulous public. Although Division I concedes the City owed Sina a duty, it asserts that "this duty is one owed to the public at large, not an individual duty owed to Ghodsee." Op. at 10, 12. That statement is flatly wrong. Judge Bender's order, the basis for the actions of the KPD officers, was not directed at the nebulous public, it was aimed at a specific, readily identifiable individual – Sina Ghodsee.

Division I's published opinion improperly applies the public duty doctrine. Review is merited. RAP 13.4(b)(1)-(2).

(3) Division I Improperly Ruled on Breach as a Matter of Law

While acknowledging that police "had a duty to exercise reasonable care when discharging their duties, including effectuating court orders," op. at 13, Division I, nevertheless, determined what is "reasonable" *as a matter of law*, opining that police have discretion as to how to carry out their role. Op.

at 13-16. But that analysis fails to appreciate that the negligent exercise of such discretion constitutes a breach of the law enforcement officers' duty to Sina and is a *question of fact*. *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). *Davis v. King County*, 16 Wn. App. 2d. 64, 479 P.3d 1181 (2021) (deputies shoot and kill suicidal woman with history of mental issues who was allegedly engaged in assault on officers; fact questions on her intent assault officers).[11] Merely stating that police officers have discretion does not resolve whether officers exercised discretion in a negligent fashion after *Washburn*, *Beltran-Serrano*, and

[11] Documenting that breach is an issue of fact in the police negligence setting, federal courts have routinely denied summary judgment to governmental defendants after *Beltran-Serrano/Mancini*. *E.g.*, *Estate of Leng, by and through Yang v. City of Issaquah*, 2020 WL 7398749 (W.D. Wash. 2020) (shooting death in domestic dispute); *Estate of Heath v. Pierce County*, 2021 WL 2682513 (W.D. Wash. 2021) (shooting death of person in mental distress); *Joseph v. City of Kent*, 2021 WL 391763 (W.D. Wash. 2021) (shooting death in violation of KPD policy; fact issues as to felony defense of RCW 4.24.420); *Gill v. Magan*, 2021 WL 928174 (W.D. Wash. 2021) (execution of search warrant on wrong party).

Mancini. Here, ample evidence documented the City's breach. Review is merited. RAP 13.4(b)(1).

Sina was *dangerous* to others. The court's order was clear and prescriptive – detain him *now* for reasons of public safety. That order did not contemplate the nearly *two weeks* of delay by KPD officers in failing to enforce Judge Bender's order. To be blunt, it would be a clear-cut case of negligence if a medical provider failed for two weeks to address an emergency medical condition like a broken leg. It is no different for Sina's mental condition.

Division I's opinion ignores the expert testimony documenting that the City's officers failed to exercise their discretion as to Sina's detention reasonably. The County's Diane Swanberg testified that Sina's dangerousness escalated over time. CP 538. Scott A. Defoe, a well-qualified forensic expert witness on police practices, was critical of KPD's failed efforts to detain Sina from June 28 to July 10 that "involved critical errors evidencing a gross lack of care, competence, and

awareness." CP 574. Defoe emphasized that the "circumstances predictably grew more and more dangerous by the day" because of KPD's delays. *Id*. He was particularly critical of the City's abandonment of Officer Blake's advantageous entry of the house on June 28. CP 567-71.

Defoe testified to the fact that officers had a variety of options available to them to execute Judge Bender's order. They could have cut off services to Sina such as food, as they had done before in detaining him. CP 105-07. They could have employed a ruse to lure him out of the house. They could have developed the KPD "plan" long before July 7. They could have forcefully confronted Sina, using a SWAT team, tasers, tear gas or its equivalent, or rubber bullets/bean bags. CP 566-67. Instead, KPD officers failed to act.

This opinion was shared by Susan Peters, another well-qualified expert, who concluded that the KPD's "haphazard, disjointed, and entirely reactive approach" fell below the requisite standard of care, CP 589, stating: "The response was

essentially to throw their hands collectively in the air and repeatedly walk away from a dangerous circumstance that was clearly escalating and become more dangerous by the day. This is an egregious example of officer and departmental complacency and a misunderstanding of the role of a law enforcement agency in assisting in mental health emergency detentions." CP 590. Further, David Stewart also testified that the KPD officers were negligent in their failure to detain Sina. CP 646.

Moreover, a particularly troubling aspect of Division I's published opinion is its assertion in passing, that Judge Bender's detention order did not authorize KPD officers to enter Sina's house to detain him. Op. at 16. ("…the NED order does not function as a warrant or otherwise suspend Ghodsee's individual rights…") Not only is that wrong, it is pernicious public policy.

The City argued below that its officers could not enter the Ghodsee home given the constitutional protections that are

present. Indeed, this is a topic of substantial misinformation, as Swanberg testified; although KPD officers told the DMHPs they could not enter the house, CP 544, officers in other jurisdictions do so. CP 549. The KPD officers here believed they had authority to enter the house. CP 410, 470. They had done so in 2012. Moreover, they had Shari's permission to enter the house.

Division I's ruling on the authority of officers to enter a house pursuant to a court's ITA detention order is unsupported. More importantly, Judge Bender's order satisfies any Fourth Amendment concerns. Reply br. at 39-41.[12] An impartial magistrate entered an order determining that there was *probable*

[12] And even if officers' entry was warrantless on June 28, it would have been justified given Sina's plain distress or Shari's permission, contrary to Division I's belief. (Op. at 16). Justice Charles W. Johnson, Justice Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2013 Update*, 36 Seattle U. L. Rev. 1581 (2013) (parent can consent to entry into home (1722); community caretaker function/aid to victims (1705-06)); *State v. Weller*, 185 Wn. App. 913, 344 P.3d 695, *review denied*, 183 Wn.2d 1010 (2015) (upholding warrantless entry to aid abused children).

cause for Sina's detention. If Division I is correct, DMHPs or law enforcement officers executing an ITA detention order must stop at the door of a house while the mentally ill person who is a danger to himself or others, or is gravely disabled decompensates, until a *further* order is obtained. That is profoundly dangerous for a severely mentally ill individual who needs detention, as well as the affected public. This issue merits a far more robust treatment than that offered in Division I's published opinion. The overall breach issue also merits this Court's review. RAP 13.4(b)(1), (4).[13]

(4) A Gross Negligence Standard Does Not Apply to the City's Negligent Conduct

Because the trial court did not clearly articulate the duties

[13] Similarly, Division I's discussion of "de-escalation" tactics for police officers as an excuse for the KPD officers' dithering, op. at 19-20, does not support resolution of breach as a matter of law. Such tactics, mandated by statutes enacted after the facts in this case, may, at most, be *a factor* in any breach analysis, but do not overcome the legally relevant point that breach is *a fact question*, given Sina's obvious escalation of his risk to others on July 2 and the expert testimony supporting Sina's breach argument.

owed to Sina by the City, it assumed that the ITA's limited liability provision applied to them. CP 724-27, 759-60. Division I agreed that RCW 71.05.120 applied to the City's action. That was error because RCW 71.05.120(1) is narrower than the trial court understood. Review is merited. RAP 13.4(b)(4).

By its express language,[14] RCW 71.05.120, as it existed in 2017,[15] (*see* Appendix), creates a good faith/gross negligence standard for decisions "*whether* to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment." (emphasis added). The KPD

[14] This Court in *Federal Home Loan Bank of Seattle v. Credit Suisse Sec. (USA) LLC*, 194 Wn.2d 253, 258, 449 P.3d 1019 (2019) reaffirmed that the "bedrock principle of statutory interpretation" is the statute's "plain language."

[15] RCW 71.05.120 modifies the common law. *Konicke*, 16 Wn. App. 2d at 146 (stating that the statute " serves to modify already existing causes of action."). Statutory grants of immunity in derogation of the common law are *strictly construed*. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 600, 257 P.3d 532 (2011); *Harris v. Federal Way Pub. Schools*, __ Wn. App. 2d __, 505 P.3d 140 at ¶ 35 (2022).

officers' actions at issue here do not implicate the statute as they did not involve the decision *whether* to detain Sina; Judge Bender made that decision. By its express terms the statute does not apply to *how* detention was effectuated.

Moreover, unaddressed by Division I is that even if gross negligence applies, there was a question of fact on that issue. In *Harper v. Dep't of Corrections*, 192 Wn.2d 328, 429 P.3d 1071 (2018), this Court refined the gross negligence analysis, reaffirming that gross negligence remains a *question of fact* for the jury. *See* WPI 10.07. The *Harper* court noted that a plaintiff must adduce substantial evidence that the defendant exercised substantially or appreciably less than that degree of care a reasonably prudent entity would have exercised in the same or similar circumstances for gross negligence to go to the jury. A court must have a "baseline" on which to assess gross negligence. *Id*. at 342-45. Once that baseline of potential gross negligence is established, the *Harper* court held that gross negligence is an issue of fact to be decided by the jury. *Id*. at

345-46 ("If reasonable minds could differ…the court should not grant summary judgment").

Washington courts have *frequently* held that gross negligence is a *fact question* for the jury, particularly where, as here, a plaintiff provides substantial lay and expert testimony on the defendant's gross negligence.[16]

Division I's published opinion erroneously addresses RCW 71.05.120(1). Review is merited. RAP 13.4(b)(1), (4).

---

[16] *E.g.*, *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) (treating physician failed to commit patient who relapsed on drugs and injured a woman in a car crash five days after release from Western State Hospital); *Volk v. DeMeerleer*, 187 Wn.2d 241, 386 P.3d 254 (2016) (psychiatrist treating a patient in outpatient setting who expressed homicidal ideations and then acted on them). The Court of Appeals has often reversed summary judgment where gross negligence was a fact question or upheld jury verdicts finding gross negligence factually. *See, e.g.*, *Bader v. State*, 43 Wn. App. 223, 716 P.2d 925 (1986); *Poletti v. Overlake Hosp. Medical Ctr.*, 175 Wn. App. 828, 303 P.3d 1079 (2013); *Lennox v. Lourdes Health Network*, 195 Wn. App. 1003, 2016 WL 3854589 (2016), *review denied*, 187 Wn.2d 1013 (2017); *Dalen v. St. John Med. Ctr.*, 8 Wn. App. 2d 49, 436 P.3d 877 (2019); *Kelly v. County of Snohomish*, 8 Wn. App. 2d 1038, 2019 WL 1772329, *review denied*, 194 Wn.2d 1011 (2019).

F. CONCLUSION

Division I's published opinion touches upon a number of critical issues associated with law enforcement's liability in tort arising out of the blatantly negligent effectuation of a court-ordered detention of a severely mentally ill man. Those issues, including the erroneous treatment of the officers' duty to execute a mandatory court order, the public duty doctrine, the limited immunity afforded persons under RCW 71.05.120, and the officers' authority to enter a house to accomplish a severely mentally ill man's detention, have profound significance for mentally ill people and public safety in Washington. Review is crucial. RAP 13.4(b). This Court should reverse the trial court's order on summary judgment as to the City. Costs on appeal should be awarded to Sina.

This document contains 4,880 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 29th day of April, 2022.

Respectfully submitted,

/s/ Philip A. Talmadge
Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

John R. Connelly, Jr., WSBA #12183
Meaghan M. Driscoll, WSBA #49863
Samuel J. Daheim, WSBA #52746
Connelly Law Offices, PLLC
2301 North 30th Street
Tacoma, WA 98403
(253) 593-5100

Attorneys for Petitioners

APPENDIX

Ch. 158, Laws of 2016, § 4:

(1) No officer of a public or private agency, nor the superintendent, professional person in charge, his or her professional designee, or attending staff of any such agency, nor any public official performing functions necessary to the administration of this chapter, nor peace officer responsible for detaining a person pursuant to this chapter, nor any county designated mental health professional, nor the state, a unit of local government, or an evaluation and treatment facility shall be civilly or criminally liable for performing duties pursuant to this chapter with regard to the decision of whether to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment: PROVIDED, That such duties were performed in good faith and without gross negligence.

FILED
4/18/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SINA GHODSEE, an individual, through Litigation Guardian ad Litem, JOSHUA BROTHERS, Appellant, and SHAHRBANOO GHODSEE, an individual, Plaintiff, v. CITY OF KENT, a political subdivision of the State of Washington, and KING COUNTY, d/b/a King County Crisis and Commitment Services, Respondents.	)	No. 82897-5-I DIVISION ONE PUBLISHED OPINION

HAZELRIGG, J. — Sina Ghodsee appeals from an order granting summary judgment in favor of King County and the City of Kent. Ghodsee sued in negligence, alleging both government entities failed to exercise reasonable care in detaining him under the involuntary treatment act.[1] Ghodsee fails to meet his burden of raising a material issue of fact as to each of the essential elements of

[1] Ch. 71.05 RCW.

negligence or demonstrate that the entities were not entitled to statutory immunity. Accordingly, summary judgment dismissal was proper and we affirm.

FACTS

On Friday, June 23, 2017, Shahrbanoo Ghodsee[2] contacted King County Crisis and Commitment Services (KCCCS) with concerns about her son, Sina Ghodsee. Shahrbanoo reported Ghodsee was not taking his medication, was "agitated" and "delusional," and she had left the home to stay elsewhere. Four days later, a "Designated Mental Health Professional" (DMHP)[3] called to schedule an appointment for a team of DMHPs to meet with Shahrbanoo at the Ghodsee home. The DMHPs intended to interview Ghodsee pursuant to the involuntary treatment act (ITA), but were unsuccessful and eventually left the home after Ghodsee pointed "what appeared to be a table leg at [them] like a gun." They called the police; officers from the Kent Police Department (KPD) responded and attempted to make contact with Ghodsee, but were similarly unsuccessful and disengaged.[4] On Thursday, June 29, a DMHP filed a Petition for Initial Detention (Non-Emergency) in King County Superior Court, which the court granted.

On Friday, June 30 and again on Saturday, July 1, a team of DMHPs and several officers from KPD went back to the Ghodsee home but were ultimately unable to detain Ghodsee. On Sunday, July 2, KPD was dispatched to the

[2] Shahrbanoo is a plaintiff in the case but not a party to the appeal. We refer to her by her first name and her son, the appellant, as Ghodsee. No disrespect is intended.

[3] Subsequent amendments to the involuntary treatment act replaced the term "Designated Mental Health Professional," or DMHP, with "Designated Crisis Responders" (DCRs). This opinion uses the terminology applicable at the time of the events at issue.

[4] KPD reported Ghodsee swung a skateboard at them "like a bat" when an officer attempted contact.

Ghodsee home after a neighbor called law enforcement concerned that Ghodsee was threatening someone and possibly carrying a rifle. The caller could not state with any certainty that he saw a gun, and KPD never observed a crime, so the officers eventually left without attempting to contact Ghodsee. The next week, on Friday, July 7, KPD officers formulated a plan to take Ghodsee into custody when he left his home to get groceries or cigarettes. Around midnight on July 9, the manager at a local grocery store called KPD to inform them Ghodsee was on site, but by the time officers arrived Ghodsee had left.

On Monday, July 10, KPD received two emergency calls from Ghodsee's neighbors, reporting Ghodsee had shot at the neighbor's occupied home. KPD responded and saw Ghodsee in the window of his home with a rifle raised, pointed in the direction of the officers. Two officers simultaneously fired, and Ghodsee disappeared from sight. Officers on the scene used a drone to see inside of the home, where they observed Ghodsee laying on the floor. Ghodsee was taken into custody. He sustained a gunshot wound to the head, surviving but suffering significant and life-changing injuries.

On May 28, 2020, Ghodsee, through a litigation guardian ad litem, and Shahrbanoo filed a civil complaint against the City of Kent (City). They later amended their complaint to add King County (County), doing business as KCCCS, as a defendant. On May 21, 2021, both defendants moved for summary judgment dismissal on the basis of the public duty doctrine and claims of statutory immunity. The motion was heard on June 18, 2021. The trial court granted summary judgment for both defendants on July 8, 2021. Ghodsee timely appeals.

ANALYSIS

I. Standard of Review

This court reviews a summary judgment order de novo, engaging "in the same inquiry as the trial court." Wallace v. Lewis County., 134 Wn. App. 1, 12, 137 P.3d 101 (2006). Like the trial court, this court "review[s] all evidence and reasonable inferences in the light most favorable to the nonmoving party," affirming if there are no genuine issues of material fact "and the moving party is entitled to judgment as a matter of law." Dalen v. St. John Med. Ctr., 8 Wn. App. 2d 49, 57, 436 P.3d 877 (2019). A genuine issue of material fact exists if reasonable minds could differ on facts which control the outcome of the proceeding. Id. at 58.

A negligence action contains four elements: (1) duty, (2) breach, (3) injury, and (4) proximate cause. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). "If any of these elements cannot be met as a matter of law, summary judgment for the defendant is proper." Id.

II. Duty of Care and the Public Duty Doctrine

Ghodsee first argues both entities owed him a duty of care. He contends the County owed him (1) a "take charge duty" under the special relationship exception to the public duty doctrine, and (2) a duty to enforce the non-emergency detention order (NED) issued by the trial court. He asserts the City owed him a duty (1) to exercise reasonable care in discharging its responsibilities, and (2) to enforce the NED. This court reviews "the existence of a duty as a question of law" de novo. Washburn v. City of Fed. Way, 178 Wn.2d 732, 753, 310 P.3d 1275

(2013). Duty is a "threshold issue." Mita v. Guardsmark, LLC, 182 Wn. App. 76, 83, 328 P.3d 962 (2014).

In evaluating the duty of a governmental entity, we must also consider the public duty doctrine. Washburn, 178 Wn.2d at 753–54. To succeed in a negligence claim against a governmental entity, the plaintiff must demonstrate the government owed a duty to the individual plaintiff, rather than the public at large. Id. at 754. "[A] duty to all is a duty to no one." J & B Dev. Co. v. King County, 100 Wn.2d 299, 303, 669 P.2d 468 (1983) (overruled on other grounds by Meaney v. Dodd, 111 Wn.2d 174, 179–80, 759 P.2d 455 (1988)). While similar to sovereign immunity, the public duty doctrine uniquely "recognizes the existence of a tort, authorizes the filing of a claim against a [government entity] and also recognizes applicable liability subject to some limitations." Id. This differs from sovereign immunity, which denies all liability. Id.

There are several exceptions to the public duty doctrine, which are "used as 'focusing tools' to determine whether the public entity had a duty to the injured plaintiff." Taggart v. State, 118 Wn.2d 195, 218, 822 P.2d 243 (1992). The four exceptions are (1) legislative intent, (2) failure to enforce, (3) rescue doctrine, and (4) special relationship. Beltran-Serrano v. City of Tacoma, 193 Wn.2d 537, 549 n.7, 442 P.3d 608 (2019); [5] see also Cummins v. Lewis County, 156 Wn.2d 844, 853 n.7, 133 P.3d 458 (2006).

[5] Beltran-Serrano noted the public duty doctrine does not lessen the government's duty of reasonable care in direct interactions with others, specifically law enforcement's "duty to refrain from directly causing harm to another through affirmative acts of misfeasance." Id. at 550.

A. Whether the County Has a Duty Based on a Special Relationship

Ghodsee first argues the County owed him an individualized duty akin to the take charge duty or provider-patient special relationship exception to the public duty doctrine. He specifically alleges the language and posture of the NED order created a take-charge-like relationship between Ghodsee and the DMHPs.[6]

Under the Restatement (Second) of Torts § 315 (Am. Law Inst. 1965), there is generally no duty to prevent a third party from harming another. If, however, "a special relation exists between the actor and the third person," there may be a duty to "control the third person's conduct." Id. One such special relationship arises when an actor "takes charge of a third person whom [they] know or should know to be likely to cause bodily harm to others if not controlled," creating "a duty to exercise reasonable care." Id. at § 319. Our courts have held "this duty extends to self-inflicted harm." Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 639, 244 P.3d 924 (2010). Our courts have recognized a special relationship, separate from a take charge duty, between mental health providers and patients under § 315 of the Restatement. See Petersen v. State, 100 Wn.2d 421, 426–27, 671 P.2d 230 (1983).

In Estate of Davis v. Department of Corrections, the Washington State Supreme Court considered whether there was a special relationship between an

[6] The respondents argue this issue is not properly before this court because it was not raised in the trial court. This court only considers issues raised on summary judgment before the trial court "to ensure that we engage in the same inquiry as the trial court." Kave v. McIntosh Ridge Primary Rd. Ass'n, 198 Wn. App. 812, 823, 394 P.3d 446 (2017). However, Ghodsee did argue duty based on the special relationship exception before the superior court and the record provided is sufficient for us to consider this issue. See Turner v. Dep't of Soc. & Health Servs., 198 Wn.2d 273, 293 n.15, 493 P.3d 117 (2021) (citing RAP 2.5(a) (court reached an issue not brought before the trial court on summary judgment)).

individual on community custody and a mental health counselor who conducted "an initial assessment" to evaluate whether counseling would be beneficial to the person under supervision by the Department of Corrections. 127 Wn. App. 833, 837, 113 P.3d 487, 491 (2005). The court found there was no special relationship because the counselor met with the individual "only one time," to provide an initial assessment. Id. at 842. This brief interaction was "not a definite, established, and continuing relationship that would trigger a legal duty." Id.

Our Supreme Court then reviewed whether there was a special relationship between a mental health professional and patient in Volk v. DeMeerleer. There, the court held a psychiatrist and their outpatient client had a nine-year relationship which triggered a duty under § 315 of the Restatement. Volk, 187 Wn.2d 241, 274, 386 P.3d 254 (2016). More recently in Konicke v. Evergreen Emergency Services, P.S., this court analyzed the existence of a special relationship between a patient and an emergency health provider. We found there was no "definite, established, and continuing" relationship where the patient made a single visit to the emergency room. 16 Wn. App. 2d 131, 138, 480 P.3d 424 (2021) (quoting Volk, 187 Wn.2d at 256).

The statutory role of the DMHP, now "Designated Crisis Responder" (DCR), is to investigate and evaluate information, determine whether to file a petition for initial detention or involuntary outpatient evaluation, and personally interview the individual to determine if they will voluntarily receive evaluation and treatment. See former RCW 71.05.150 (2015), amended by LAWS of 2016, ch. 29 § 211. Even viewing the evidence in the light most favorable to Ghodsee, there was no definite,

established, and continuing relationship here. The first indirect interaction the DMHPs had with Ghodsee was on June 23, when Shahrbanoo contacted KCCCS. A DMHP team attempted to conduct an initial assessment on June 28 but never made direct contact with Ghodsee. After the DMHPs heard yelling inside and saw Ghodsee holding "something" that looked like a rifle in an upstairs window, they left. Based on the information available to the DMHPs through those limited interactions, the County filed a petition for non-emergency detention the next day, June 29, but did not attempt to make contact with Ghodsee. The DMHP team next had limited interaction with Ghodsee on June 30, when they accompanied KPD to the home in an attempt to effectuate the NED order. They did not make direct contact. The DMHPs returned again on July 1, with police, but again did not make direct contact with Ghodsee due to safety concerns. After that date, the DMHPs never returned to the home or made direct contact with Ghodsee at any point prior to the shooting.

Based on the statutory role of DMHPs, now DCRs, and the actions of the specific DMHPs at issue here, there was no continuing, definite, and established relationship giving rise to a legal duty. The DMHP-potential detainee relationship is more akin to a patient and emergency room provider (Konicke) or a client and mental health provider in the context of an initial assessment (Davis), and less similar to a nine-year outpatient therapeutic relationship between a psychiatrist and patient (Volk). If the DMHPs had any direct contact with Ghodsee, their role would have been limited to conducting an investigation and filing a petition for detention if they felt it was called for. See former RCW 71.05.150. Viewing the facts in the

light most favorable to Ghodsee as we must when reviewing an order on summary judgment, the period of time during which the DMHPs were tangentially involved with Ghodsee was brief, lasting only from June 23 until July 10. This differs starkly from cases where our courts have found a special relationship.

The limited role of the DMHP as defined by statute, and the brief relationship between Ghodsee and the specific DMHPs at issue here, does not rise to the level of a "definite, established, and continuing relationship" to support a legal duty within the framework of the public duty doctrine.

B. Whether the County or City Has a Duty Under the NED Order

In analyzing whether a "take charge" duty under § 319 of the Restatement exists, we first look to the nature of the relationship. Davis, 127 Wn. App. at 842. In Davis, the court held "[t]he two most important considerations are the court order placing the corrections officer in charge and the statutes giving the officer the power to act." Id. Our courts have applied this duty in the context of "various types of community supervision programs," including the duties of community corrections officers, city probation counselors, county pretrial release counselors, and county probation officers. See Harper v. State, 192 Wn.2d 328, 342, 429 P.3d 1071 (2018) (internal citations omitted). Ghodsee asks us to extend the application of this type of duty outside the context of corrections or community supervision based on the NED order.

Ghodsee argues the language of the NED order created a take charge duty by directing DMHPs and KPD to detain him. However, we consider a court order and statutory authority to act. See Davis, 127 Wn. App. at 842, see also Miller v.

Pierce County, No. 53344-8-II (Wash. Ct. App. Feb. 9, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2053344-8-II%20Unpublished%20Opinion.pdf (county owed a duty under its statutory authority to confine an individual "and the court's order requiring it to do so" pursuant to a judgment and sentence).[7] Former RCW 71.05.150(4) only grants DMHPs authority to "notify a peace officer to take such person or cause such person to be taken into custody." They have no statutory authority nor statutory mandate to physically detain an individual themselves. Rather the statute is clear that they "may notify" a peace officer to take an individual into custody. See Id.

The language of the NED order is similarly clear. The superior court found Ghodsee "presents a likelihood of serious harm to others," but did not find he presented a likelihood of harm to himself. The court ordered that Ghodsee "shall be detained by a [DMHP]" and further ordered "any peace officer shall take the respondent into custody." Washington case law has consistently held "'that the word "shall" in a statute is presumptively imperative and operates to create a duty.'" In re Dependency of T.P., 12 Wn. App. 2d 538, 548, 458 P.3d 825 (2020) (quoting In re Parental Rights to K.J.B., 187 Wn.2d 592, 601, 387 P.3d 1072 (2017)). Likewise, the plain language of the court order directing the government to detain Ghodsee creates a legal duty. However, this duty is one owed to the public at large, not an individual duty owed to Ghodsee. See Osborn v. Mason County, 157 Wn.2d 18, 28, 134 P.3d 197 (2006) ("County has a 'duty' to protect its citizens in

[7] We may utilize unpublished opinions when "necessary for a reasoned decision." GR 14.1(c). Miller provides a helpful analysis of duty in the context of a court order.

a colloquial sense, but it does not have a legal duty to prevent every foreseeable injury.").

For example, in Miller, the County had a duty to an individual under the special relationship and take charge doctrines where the County was authorized by statute to confine an offender pursuant to a criminal conviction and a superior court "order required the County to ensure Robinson reported for [electronic home monitoring] or reported to the jail on August 5, 2016." No. 53344-8-II, slip. op. at 7 (analyzing dismissal of a complaint under CR 12(b)(6)). A critical factual distinction from the case before us is that Miller was ordered remanded to the custody of the county pursuant to a felony judgment and sentence and accompanying warrant of commitment. Id. at 2–3. In contrast, the NED order did not direct any specific law enforcement agency to detain Ghodsee, nor did it dictate any particular date or mechanism for detaining Ghodsee.

In evaluating a take charge relationship, the inquiry is specific to "the relationship" between the government actor and tortfeasor.[8] Hertog, ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 279, 979 P.2d 400 (1999). Hertog analyzed the relationship between a pre-trial probation officer and probationer, holding that because the probation officer "is clearly in charge of monitoring the probationer [ ] and has a duty to report violations to the court," there is a take charge duty. Id. The probation officer-probationer relationship differs significantly from an officer ordered to detain an individual under the ITA. There is no ongoing, monitoring

[8] Our courts have held this duty includes protection from self-inflicted harm. Gregoire, 170 Wn.2d at 639. Ghodsee alleges the County and City had a duty to protect him from self-inflicted harm under the take charge duty.

relationship and no duty to report actions to the court. In a probation officer-probationer relationship, "two of the most important features" are a court order placing an offender "on the supervising officer's caseload and the statutes that describe and circumscribe the officer's power to act." Couch v. Dep't of Corr., 113 Wn. App. 556, 565, 54 P.3d 197 (2002). This individualized responsibility differs from the general language in the NED order, and there is no similar language in the order or in the ITA that "describe[s] and circumscribe[s]" how the officers may act in effectuating the detention order. Id.

There are three historical purposes underlying the public duty doctrine: (1) preventing excessive liability for government entities, (2) avoiding "hindering the governing process," and (3) providing "a mechanism for focusing" the element of duty. J & B Dev. Co., 100 Wn.2d at 304. This doctrine balances the rights of an injured plaintiff with the need to limit governmental liability "[b]ecause governments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort law." See Washburn, 178 Wn.2d at 753, see also Osborn, 157 Wn.2d at 28 ("the public duty doctrine helps us distinguish proper legal duties from mere hortatory 'duties.'").

Ghodsee bears the burden to demonstrate the government owed him an individual duty, rather than a duty to the public at large, in order to survive summary judgment. Viewing the facts in the light most favorable to Ghodsee, he fails to show an actionable duty based on the NED order as to either the County or the City. For this reason, his negligence claim fails as a matter of law.

C. Law Enforcement Duty of Care

Ghodsee also argues KPD breached its duty of reasonable care in its direct interaction with him by failing to detain him more swiftly after the NED order was issued. His claim is essentially that, had he been detained sooner, he would not have been shot by KPD or suffered the serious injuries that resulted from the shooting. Generally, "'every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interaction with others,'" including law enforcement officers. Mancini v. City of Tacoma, 196 Wn.2d 864, 879, 479 P.3d 656 (2021) (quoting Beltran-Serrano, 193 Wn.2d at 550). Washington case law has held this duty applies in direct interactions with individuals. See, e.g., Watness v. City of Seattle, 16 Wn. App. 2d 297, 307, 481 P.3d 570 (2021) ("an officer owes a legal duty to exercise reasonable care when engaging in affirmative conduct toward others.") (emphasis added)); Robb v. City of Seattle, 176 Wn.2d 427, 439, 295 P.3d 212 (2013) ("In order to properly separate conduct giving rise to liability from other conduct, courts have maintained a firm line between misfeasance and nonfeasance.").

Police have a duty to exercise reasonable care when discharging their duties, including effectuating court orders. See Mancini, 196 Wn.2d at 880. This necessarily includes the exercise of discretion by law enforcement as to how to effectuate those court orders. There is nothing in statute or in the NED order that required KPD to enforce the detention order in any particular way; the officers had discretion to determine the safest way to carry out the court's order. Their actions in effectuating the NED order were further constrained by various constitutional

considerations that necessitate a flexible response based on the particular circumstances of the interaction.

In Konicke, this court declined to recognize a claimed duty for emergency healthcare providers to detain patients under the ITA in part because it would "seriously undermine[] the legislative goal of safeguarding the individual rights of such patients." 16 Wn. App. 2d at 144. Likewise, finding legal liability on the part of a governmental entity based on detaining an individual would also seriously undermine this legislative goal. In Robb, our Supreme Court discussed the distinction in tort law between misfeasance and nonfeasance, holding that where officers "did not affirmatively create a new risk," the act was nonfeasance and did not give rise to liability. 176 Wn.2d at 437–39. To hold otherwise would lead to "an unpredictable and unprecedented expansion of . . . liability." Id. at 439.

As Konicke noted, "chapter 71.05 RCW was not enacted for the particular benefit of third parties injured by people suffering from serious behavioral health disorders but, rather, for the benefit of people with behavioral health disorders themselves." 16 Wn. App. 2d 140–41. While the legislative intent of the statute includes "'protect[ing] public safety through use of the parens patriae and police powers of the state,'" applying broad liability "runs counter to the statutory scheme, which specifically limits liability for the detention decisions made by emergency healthcare providers" and government actors. Id. at 143 (quoting RCW 71.05.010). Additional legislative intent expressed in former RCW 71.05 is preventing inappropriate or indefinite commitment, safeguarding individual rights,

and providing continuity of care.[9] Allowing for broad liability of government entities does not support any of these purposes, and as this court noted in Konicke, expanding liability seriously undercuts the purpose of safeguarding individual rights.

To expand liability of a law enforcement agency based on failure to detain pursuant to the ITA or a NED order in a particular way or within a particular timeframe would undermine the very language of the ITA itself, which seeks to safeguard individual rights. The risk that imposing liability "could encourage" law enforcement "to detain patients merely to avoid potential liability to third parties," presents a significant challenge to the individual rights of potential detainees who are protected under the ITA. See Id. at 144.

Importantly, the NED order only ordered Ghodsee to be detained by law enforcement. Exercising reasonable care, particularly in the constantly evolving circumstances of a mental health crisis, necessitated discretion on the part of police in terms of how that order would be carried out. The existence of the NED did not suspend Ghodsee's right to privacy in his home, for example, or to be free from search or seizure in the absence of either a warrant or applicable exception to state and federal warrant requirements.[10] While a neighbor reported Ghodsee "was threatening some unknown individual and had a gun," when officers responded, the neighbor admitted he did not see Ghodsee "directly threatening

[9] The statements of legislative intent expressed in the former version of RCW 71.05.010, applicable at the time of the incident, are identical to those expressed in the current version discussed in Konicke.

[10] "Officers must have a warrant or a well-established exception to the warrant requirement before intruding into a home." City of Shoreline v. McLemore, 193 Wn.2d 225, 226 (2019).

anyone nor could he be sure he saw a firearm." The City argues that no exception to the warrant requirement applied, as there was no probable cause that a crime had occurred which would have been a prerequisite to arresting Ghodsee[11] on that date and there were no exigent circumstances to justify entering the home.[12] Contrary to Ghodsee's assertion, the NED order does not function as a warrant or otherwise suspend Ghodsee's individual rights protected by warrant requirements and other constraints on the actions of law enforcement.

Viewing the evidence in the light most favorable to Ghodsee, he fails to demonstrate that the City owed him a duty beyond the exercise of reasonable care, or that there exists a material issue of fact as to this claim, and summary judgment in favor of the City is proper.

III. Whether the County or City Is Entitled to Immunity Under Former RCW 71.05.120

Ghodsee next alleges the trial court erred in finding that both government entities had immunity under former RCW 71.05.120. (Laws of 2016, ch. 29 § 208). He concedes the statute applies to the County's "belated decision to detain Sina," but asserts that it does not apply to its actions "in the execution of the detention order." Ghodsee argues he raised a material question of fact as to whether the County was grossly negligent sufficient to defeat any claim of statutory immunity.

[11] Probable cause alone is not sufficient for a warrantless search, but may support an arrest, which in turn supports a search incident to arrest. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010); State v. Salinas, 169 Wn. App. 210, 216, 279 P.3d 917 (2012).

[12] "The exigent circumstances exception to the warrant requirement applies where 'obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape[,] or permit the destruction of evidence.'" Tibbles, 169 Wn.2d at 370 (internal quotation marks omitted).

For both entities, Ghodsee contends the statute is inapplicable because the allegedly negligent acts were unrelated to the "decision of whether to . . . detain" Ghodsee as the superior court had already made that decision when it signed the NED order. Former RCW 71.05.120 states:

> (1) No officer of a public or private agency, nor the superintendent, professional person in charge, his or her professional designee, or attending staff of any such agency, nor any public official performing functions necessary to the administration of this chapter, nor peace officer responsible for detaining a person pursuant to this chapter, nor any designated crisis responder, nor the state, a unit of local government, an evaluation and treatment facility, a secure detoxification facility, or an approved substance use disorder treatment program shall be civilly or criminally liable for performing duties pursuant to this chapter with regard to the decision of whether to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment: PROVIDED, That such duties were performed in good faith and without gross negligence.

The statutory language addresses detention, but also expressly includes a variety of other duties—admitting or discharging a patient, releasing a patient, and administering medication. Id., see also Konicke, 16 Wn. App. 2d at 145–46. These duties are more than mere mental decisions, but encompass the acts taken to effectuate those decisions. Potential civil liability does not only arise from the choice to administer medications or detain an individual, but also the acts taken to carry out those decisions. To hold otherwise would result in an unlikely or illogical outcome. "We interpret statutes to avoid unlikely, strained, or absurd consequences." Michel v. City of Seattle, 19 Wn. App. 2d 783, 792, 498 P.3d 522 (2021). And while, as Ghodsee notes, we do "generally construe statutory immunities narrowly," if "the plain meaning is unambiguous, statutory construction

is inappropriate." Leishman v. Ogden Murphy Wallace, PLLC, 196 Wn.2d 898, 906, 479 P.3d 688 (2021).[13] The statute uses the phrases "performing functions" and "performing duties," which clearly intends to capture actions taken "with regard to" the decisions made as to detention and treatment of a person under the ITA. The plain meaning of the statute is unambiguous.

Because the plain language of the statute provides immunity for actions as well as decision-making, both the City and County are entitled to statutory immunity for their actions "with regard to" the decision to detain and Ghodsee must demonstrate gross negligence in order to overcome immunity. However, because Ghodsee fails to demonstrate either entity owed him an individualized duty of care as a matter of law, we need not reach the issue of gross negligence. To survive summary judgment, Ghodsee must raise a material issue of fact as to all four elements of negligence: duty, breach, damage and causation. Because the failure to meet his burden on the element of duty is fatal to his claim, we need not review the other elements.[14]

[13] Per Montoya-Lewis, J., with three justices concurring and one justice concurring separately.

[14] The City dedicated a portion of its brief, and its oral argument, to the felony defense to Ghodsee's excessive force and assault claims. RCW 4.24.420 provides a "complete defense" to an action against law enforcement for personal injuries or death if the injured person "was engaged in the commission of a felony at the time." The trial court found Ghodsee's excessive force and assault claims (Cause of Action V) were barred under RCW 4.24.420. Ghodsee does not assign error to this decision, and states explicitly he is not advancing his excessive force argument on appeal.

While Ghodsee's reply brief contains a heading stating "Trial Court Erred in Applying the Felony Defense," RCW 4.24.420 was applied only to the excessive force and assault claims, which Ghodsee concedes he is not appealing. The City likewise does not assign error to the trial court's limitation of RCW 4.24.420 to assault and excessive force. As such, we decline to reach the merits of this issue.

Ghodsee suffered immense injuries as a result of a devastating situation. He survived a gunshot wound to the head, but suffered a traumatic brain injury and severe cognitive impairments. He may never regain full independence. We acknowledge that Ghodsee and his family have suffered, and we are aware that by affirming the trial court, his civil claim is dismissed. We, however, also recognize that responding to mental health crises necessarily requires flexibility and individualized responses.

Our state legislature has made clear that officers must retain discretion as they interact with individuals in our communities so that they may be appropriately responsive to the circumstances presented to them. SUBSTITUTE H.B. 1735, 67th Leg., Reg. Sess. (Wash. 2022).[15] The law recognized that specific de-escalation tactics "[d]epend[] on the circumstances," (Section 2), but also clarifies that physical force may still be used in certain circumstances, including in detaining an individual under the ITA. Our legislature has also implemented crisis intervention training requirements for law enforcement officers. See RCW 43.101.427. There are crucial policy reasons, including the very nature of mental health crises and de-escalation, to empower agencies to adapt and respond to each unique situation as it unfolds. Our legislature has directed that agencies must be able to work responsively, and be able to prioritize de-escalation. Even in amending RCW 10.120.020, the legislature acknowledged that the statute "represents national

[15] We recognize this law, passed in 2022, was inapplicable at the time of the incident. However, Ghodsee submitted the session law, in its entirety, to this court as an additional authority under RAP 10.8. While he urged this court to focus on sections 3(1)(d), 3(1)(f) and 3(5)(a)-(b), we would be remiss if we ignored the other sections which assist in our analysis. We cite to this law for its persuasive value as it sheds light on how our legislature navigates issues of de-escalation by law enforcement agencies.

best practices." SUBSTITUTE H.B. 1735. Washington statute requires law enforcement officers to "[w]hen possible, use all de-escalation tactics that are available and appropriate under the circumstances before using physical force." RCW 10.120.020(3)(a).

When KPD made direct contact with Ghodsee on June 28, he responded in a threatening manner and the officer implemented the de-escalation technique of shielding by retreating from the home and closing the door between himself and Ghodsee. Ghodsee's argument that the officer should have been more aggressive in that moment so that the detention could have been completed, and thus avoiding the tragic shooting days later, runs counter to the clear policy considerations of our legislature. Officers must be empowered to continue utilizing de-escalation techniques whenever possible, as "best practices." The court did not err in granting summary judgment in favor of both the City and County.[16]

Affirmed.

WE CONCUR:

[16] On February 22, Ghodsee filed a Statement of Additional Authorities with this court. The City objected, arguing this court should decline to consider authorities which were published before Ghodsee's reply brief was submitted. The City is correct that the purpose of RAP 10.8 "is to provide parties with an opportunity to bring to the court's attention cases decided after the parties submitted their briefs." See Gull Indus., Inc. v. Granite State Ins. Co., 18 Wn. App. 2d 842, 857 n.11, 493 P.3d 1183 (2021). However, had the authorities been brought to the attention of this court at oral argument, we would have properly considered them and we consider the authorities insofar as they are helpful in reaching our decision.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

In re the Detention of: **GHODSEE, SINA** Respondent.	No. 17-6-02286-6 SEA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER TO DETAIN ☐ CLERK'S ACTION REQUIRED CLOSE

1. FINDINGS OF FACT

The court having ☒ read and reviewed the petition and supporting documents ☐ heard sworn telephonic testimony of the Designated Mental Health Professional for King County initiating the above-entitled and numbered mental illness proceeding finds that there is probable cause to believe that:

1.1 Mental Disorder and Dangerousness. The respondent:

☐ a. As a result of a mental disorder presents a likelihood of serious harm to himself/herself;

☒ b. As a result of a mental disorder presents a likelihood of serious harm to others;

☒ c. As a result of a mental disorder presents a likelihood of serious harm to the property of others;

☐ d. Is gravely disabled.

Daniel T. Satterberg,
Prosecuting Attorney
Involuntary Treatment Section
HMC PO BOX 359987, 325 9th Avenue
Seattle, Washington 98104
Phone 206-296-8936
FAX (206) 296-8720

1.2 No Voluntary Treatment. The respondent has refused, failed to accept, or has not been accepted for appropriate evaluation and treatment voluntarily.

II. CONCLUSIONS OF LAW

On the basis of the foregoing Findings of Fact, the court makes the following Conclusions of Law:

2.1 Jurisdiction. The court has jurisdiction over the subject matter of this mental illness proceeding.

2.2 Probable Cause. Probable cause exists to order the respondent detained to an evaluation and treatment facility for 72-hours of evaluation and treatment pursuant to Chapter RCW 71.05.

III. ORDER

A petition for Initial Detention (Non-Emergency) having come before the court and it appearing to the satisfaction of the court that probable cause exists,

NOW THEREFORE, IT IS ORDERED that:

3.1 Order to Detain. The respondent, GHODSEE, SINA, shall be detained by a Designated Mental Health Professional for King County to an evaluation and treatment facility for up to 72 hours of evaluation and treatment as provided for in RCW 71.05; and,

3.2 Release Unless Further Treatment Sought. Unless further evaluation and treatment is sought pursuant to RCW 71.05, the respondent shall be released from the evaluation and treatment facility not more than 72 hours from the time of detention. The computation of such 72 hour period shall exclude Saturdays, Sundays and holidays; and,

3.3 Assistance of Law Enforcement Officers. When notified by a Designated Mental Health Professional for King County of this Order to Detain, the King County Sheriff's Office or

Daniel T. Satterberg,
Prosecuting Attorney
Involuntary Treatment Section
HMC PO BOX 359967, 325 9th Avenue
Seattle, Washington 98104
Phone 206-296-8936
FAX (206) 296-8720

any peace officer shall take the respondent into custody and deliver the respondent into the custody of the evaluation and treatment facility designated by the Designated Mental Health Professional for King County ; and,

3.4. Designated Counsel. The Defender Association (810 Third Avenue, 8th Floor, Seattle, WA, 98104, (206) 447-3900) is the designated attorney and may be appointed for the respondent unless the respondent has retained his/her own attorney.

DONE this 29 day of JUN 2017, 20____.

Johanna Bender
JUDGE/MENTAL HEALTH COMMISSIONER

☐ This Order to Detain was issued by the above judge, pursuant to the telephonic testimony procedure authorized by RCW 71.05.150 (2), on _____, 20____, at _____ a.m./p.m.

Signature of DMHP authorized to affix Judge's signature to Order to Detain	Printed or Typed name of Designated Mental Health Professional

Reviewed by:

31527
WSBA#
Deputy Prosecuting Attorney
Office I.D. #91002

RESPONDENT NAME: GHODSEE, SINA

Daniel T. Satterberg,
Prosecuting Attorney
Involuntary Treatment Section
HMC PO BOX 359967, 325 9th Avenue
Seattle, Washington 98104
Phone 206-296-8936
FAX (206) 296-8720

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 82897-5-I to the following:

John R. Connelly
Meaghan M. Driscoll
Samuel J. Daheim
Connelly Law Offices, PLLC
2301 North 30th Street
Tacoma, WA 98403

Andrew Cooley
Keating, Bucklin & McCormack, Inc., P.S.
801 Second Avenue, Suite 1210
Seattle, WA 98104

Samantha D. Kanner
Daniel L. Kinerk
Senior Deputy Prosecuting Attorneys
500 Fourth Avenue, Ninth Floor
Seattle, WA 98104

Original E-filed via appellate portal:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 29, 2022 at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

April 29, 2022 - 10:26 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	82897-5
Appellate Court Case Title:	Sina Ghodsee, et al, Appellants v. City of Kent, et ano, Respondents

The following documents have been uploaded:

- 828975_Petition_for_Review_20220429102451D1006849_1174.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR.pdf

A copy of the uploaded files will be sent to:

- Dan.Kinerk@kingcounty.gov
- SDaheim@connelly-law.com
- Samantha.Kanner@kingcounty.gov
- acooley@kbmlawyers.com
- bmarvin@connelly-law.com
- cmarlatte@kbmlawyers.com
- jconnelly@connelly-law.com
- matt@tal-fitzlaw.com
- mdriscoll@connelly-law.com
- will@tal-fitzlaw.com

Comments:

Petition for Review

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com
Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20220429102451D1006849