NO. 45479-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOYCE M. SMITH, Individually and as Personal Representative for the Estate of James W. Smith; IZETTA DILLINGHAM, as Limited Guardian ad Litem for the Minor Children JA'MARI SMITH and JANAIA SMITH; SHAREE DAMMEL, as Limited Guardian Ad Litem for the Minor Child SHALYSE SMITH

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This case involves whether a correctional officer has a tort duty, unlimited in time and scope, to apprehend an offender who absconds from supervision. The trial court correctly concluded no such duty exists. Further, the trial court correctly concluded that, even if such a duty exists, appellants failed to present any competent evidence establishing causation. The trial court's decision was correct and should be affirmed for the following reasons.

First, the trial court properly granted summary judgment because the Department of Corrections ("DOC") did not breach any duty owed to the plaintiffs under *Taggart*.[1] The duty established in *Taggart* is premised on the creation of a definite, established, continuing relationship between the DOC and an offender whereby the community corrections officer can "control" the parolee through the imposition of conditions and by seeking sanctions for violations of the offender's parole. While an offender cannot terminate their period of supervision by absconding, when an offender does abscond, a community corrections officer no longer has the ability to "control" an offender through the imposition of conditions or by seeking sanctions for violations of the offender's parole. As such, DOC did not breach any duty owed to the plaintiffs in this case because once Mr.

[1] *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992).

Goolsby absconded the community corrections officer lacked the ability to control Mr. Goolsby's behavior.

Second, appellants' assertion DOC has a duty to apprehend a fugitive offender is without merit. No law enforcement group, including correctional agencies in the United States, has a tort duty to apprehend fugitive offenders, as any such duty is contrary to public policy. Appellants never address this argument because they cannot refute it. In 2009, the Department of Corrections issued 17,330 arrest warrants alone. The imposition of a duty to apprehend over 17,000 fugitive offenders in Washington as proposed by the appellants exposes correctional agencies to unlimited liability and unnecessarily constrains the discretion a community corrections officer and other members of law enforcement need when making decisions based on the best interests of any ongoing investigations or operations.

Third, summary judgment is proper because the appellants failed to present any admissible evidence to establish that Mr. Goolsby (1) would have been apprehended prior to the shooting if DOC acted differently and (2) that if Goolsby had been apprehended prior to the shooting he would have received a sanction which would have kept him in jail on the day of the shooting thereby preventing the shooting. Absent such evidence,

appellants cannot establish factual causation as the trial court properly concluded.

Fourth, summary judgment was appropriate because the Department of Corrections is not the legal cause of appellants' claims. Appellants' theory posits liability on the Department of Corrections based on the actions of a fugitive over which the Department of Corrections had no control. Appellants attempt to impose on DOC an unlimited duty to rehabilitate offenders and an unlimited duty for DOC to search for fugitives until they are found, or risk incurring liability. Both assertions should be rejected. Imposition of these two extraordinary duties lacks common sense and would be poor public policy.

Finally, the trial court properly granted summary judgment because appellants' assertion that Mr. Goolsby would not have committed a crime if DOC monitored him differently is meritless. These types of "failure to rehabilitate" arguments have been previously rejected because (1) they amount to a claim DOC has a duty to rehabilitate offenders, which it does not, and (2) "failure to rehabilitate" arguments are speculative.

The trial court properly granted summary judgment and the ruling should be affirmed.

II. COUNTER-STATEMENT OF THE ISSUES

1. Whether correctional agencies have liability for failing to find and apprehend fugitives.

2. Whether the appellants failed to establish factual causation when there is no admissible competent evidence establishing that Mr. Goolsby (1) would have been apprehended prior to the shooting and (2) that if he had been apprehended prior to the shooting he would have received a sanction which would have placed him in jail on the day of the shooting thereby preventing the shooting.

3. Whether the trial court properly granted summary judgment based on lack of legal causation when, just as with the police, policy and common sense dictate that DOC should not be liable for crimes committed by fugitives from justice simply because DOC is unable to apprehend the fugitives prior to their committing an additional crime.

4. Whether appellants' "failure to rehabilitate" theory is irrelevant when DOC does not have a duty to rehabilitate offenders.

5. Whether appellants' "failure to rehabilitate" theory is speculative when there is no admissible competent evidence in the record establishing if DOC had monitored Goolsby differently he would not have absconded and/or engaged in criminal behavior.

6. Whether the trial court properly granted summary judgment based on lack of legal causation when as a matter of law, public policy, and common sense, the connection between DOC's actions and Mr. Goolsby's recidivism is too remote to establish liability.

III. COUNTER-STATEMENT OF THE FACTS

A. Supervision History Of Mr. Goolsby

Mr. Antwane Goolsby was released from Monroe Correctional Complex (Monroe) on January 21, 2009, after serving his prison sentence for a Conspiracy to Commit Robbery in the first degree. CP at 61. He was sentenced to a term of 18 – 36 months community custody. CP at 350.

The same day Mr. Goolsby was released, his community corrections officer, Judith Lang, transported Mr. Goolsby from Monroe to Seattle. CP at 61. Ms. Lang reviewed with Goolsby his supervision conditions from the 2004 judgment and sentence and standard conditions of supervision. CP at 61. He was then transported to the King County Sheriff's Department to complete sex offender registration. CP at 61. Afterwards, he was taken to the Seattle Bread of Life Shelter and directed to report daily at DOC's Seattle Day Reporting Office starting the following day. CP at 61.

Mr. Goolsby failed to report the next day and a warrant was issued. CP at 61. On January 26, 2009, Mr. Goolsby reported to DOC's Seattle Day Reporting Program (Day Reporting) and was taken into custody. CP at 61.

Mr. Goolsby was in custody from January 26, 2009 to February 17, 2009. CP at 59-60. A violation hearing was held on February 17, 2009, and he was found guilty of failing to report, failing to report a change of address, and using a controlled substance (marijuana). CP at 59-60. He was sanctioned to credit for time served and released. CP at 59.

Over the next two weeks, Mr. Goolsby reported to DOC with regularity. He reported the very next day after being released on February 18th, 2009. CP at 58. He then reported the remainder of the week on the 19th and 20th. CP at 58-59. Starting again on Monday the 23rd of February, he reported every day through Friday the 27th. CP at 57-58. He reported on the following Monday, March 2, 2009, and again on March 4th. CP at 56.

On March 4th, his failure to report the previous day was addressed. Mr. Goolsby explained he had been busy trying to comply with his other conditions of supervision and was unable to make his appointment. CP at 56. The community corrections officer confirmed Mr. Goolsby had obtained a copy of his birth certificate so he could begin receiving public

benefits, a prerequisite to receiving mental health treatment. He was also admitted into the DOC chemical dependency program with a start date of March 11, 2009. Additionally, Mr. Goolsby self-reported he was now staying at the Airline Motel, which was confirmed by Detective Fields from the Seattle Police Department on March 4, 2009. CP at 55.

Mr. Goolsby again reported as required on the 5th and 6th of March. CP at 56. On March 6, 2009, Rocky Bronkhorst, a DOC supervisor, also made a field visit to Mr. Goolsby at the Airline Motel. CP at 55. While there, Bronkhorst observed one of the residents trying to flush what appeared to be drugs down the toilet and Goolsby attempted to block the officer's way. CP at 55. Mr. Goolsby was detained by Bronkhorst and transported to jail.

Mr. Goolsby was in custody from March 6, 2009 until March 23, 2009. CP at 53. A violation hearing was held on March 23, 2009, and Goolsby was found guilty of associating with known drug users and gang members. CP at 53. He was sanctioned to credit for time served and ordered to report daily for 30 days. CP at 53. Mr. Goolsby reported to DOC as directed the next day. CP at 53.

From March 24, 2009 through April 9, 2009, Mr. Goolsby reported to DOC approximately thirteen times. CP at 50-53. During this time period, Mr. Goolsby reentered treatment and was scheduled for a mental health evaluation on April 21, 2009. CP at 50.

On Friday April 10, 2009, Mr. Goolsby reported to Day Reporting as directed. CP at 50. Shon Cornett, a community corrections officer at Day Reporting called the Downtown Emergency Service Center to see if Mr. Goolsby was staying there at night as directed. CP at 50. The center's records indicated Goolsby had not been staying at the shelter since March 30, 2009. CP at 50. That same day, Ms. Lang met with Goolsby and warned him that any future failure to stay at the shelter would result in a violation and possible arrest. CP at 50. On April 16, 2009, DOC learned Mr. Goolsby had failed to attend a group treatment meeting the previous day. CP at 50. A warrant was immediately requested and issued.

Appellants' assertion at page 21 of their opening brief (Br. Appellant) that DOC did not request a warrant for Goolsby until May 7, 2009 is factually incorrect. A close reading of the record shows on May 7, 2009, the community corrections officer made a notation concerning events which occurred on April 16, 2009, when she requested a

Secretary's Warrant because Mr. Goolsby's location was unknown. CP at 49. The Secretary's Warrant was issued on April 17, 2009. CP at 813-17.

Approximately four months later, on August 5, 2009, Mr. Bernard[2] drove Mr. Goolsby to a party in Tacoma. Mr. Goolsby shot and killed Mr. Smith. Mr. Bernard was arrested the next day for rendering criminal assistance. CP at 68. Mr. Goolsby was later apprehended in Las Vegas on August 24, 2009. CP at 47.

B. There Is No Evidence In The Record That Goolsby Would Have Been In Jail At The Time Of The Shooting

In appellants' opening brief, appellants assert incorrectly that Mr. Stough testified Mr. Goolsby would have been in jail on the date of the shooting if DOC had acted differently. Specifically, appellants state:

> Corrections expert William Stough explained that regardless of the date that DOC would have apprehended Goolsby, Goolsby would have been in violation of many conditions of supervision, each one of which could result in confinement up to 60 days, or a total of 420 days or more. Stough testified given his experience, Goolsby's history, and recent sanctioning practices with regard to Goolsby, Goolsby would have been in jail on the day of the murder of James Smith.

Br. Appellant at 63.

This statement is not supported by the record or any citation to the record. A close reading of the record shows Mr. Stough never offered any

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[2] Mr. Bernard was also on DOC supervision. He last reported to DOC on July 30, 2009. His next scheduled report date was August 6, 2009. CP at 70.

opinions stating Mr. Goolsby would have been apprehended prior to the shooting or offered any opinion about what sanction Mr. Goolsby would have received if he had been apprehended.

DOC noted to the trial court that Mr. Stough failed to offer opinions on these issues and argued that any opinion by Mr. Stough on these issues would be inadmissible in any event because he lacks the personal experience to offer an opinion on what sanction Mr. Goolsby would have received. CP at 787-90. Mr. Stough has never worked under the sanctioning system used by DOC; he has never been a judge or a DOC Hearings Officer. CP at 787-90. Further, there is no statistical evidence in the record concerning DOC sanctions for similar violations, nor does Mr. Stough have the experience to evaluate statistical data. CP at 787-90. The record therefore does not support the assertion that Mr. Goolsby would have been apprehended and in jail at the time of the shooting.

After hearing argument from counsel on the motions, the court granted summary judgment. CP at 825-27.

IV. ARGUMENT

A review of a trial court's ruling granting summary judgment is de novo. *Trimble v. Washington. State Univ.*, 140 Wn.2d 88, 993 P.2d 259 (2000). The trial court properly granted summary judgment because the duty in *Taggart* does not create a duty to apprehend fugitive offenders

who abscond from supervision, appellants did not establish that DOC's actions were the proximate cause of their injuries, and appellants' speculative "failure to rehabilitate" arguments fail to rebut the strong public policy reasons for not imposing such a duty.

A. The Trial Court Properly Granted Summary Judgment Because DOC Does Not Have A Duty To Apprehend Fugitive Felons

Appellants assert the trial court erred in granting summary judgment by arguing the Department of Corrections has a duty to apprehend fugitive offenders. This assertion is without merit.

1. DOC Did Not Breach Any Duty Owed To The Appellants

The trial court properly granted summary judgment because, when an offender absconds, a community corrections officer can no longer control the offender's behavior through the imposition, monitoring, or enforcement of conditions. When Mr. Goolsby absconded from supervision, DOC no longer had the ability to control Mr. Goolsby and as such did not breach any duty owed to the appellants arising under *Taggart*.

Washington recognizes the general rule that there is no duty to control the conduct of a third party so as to prevent him from causing physical harm to another. *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992). However, in *Taggart*, the court recognized an exception to the general rule and held that the relationship between a community

corrections officer and a parolee gives rise to a duty on the part of the community corrections officer to control the conduct of a parolee. *Id.* at 219. The court premised this duty on the *Restatement (Second) of Torts*, Section 319 which provides, "One who takes charge of a third person, whom he knows or should know to be likely to cause bodily harm to others if not controlled, is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Id.*

In finding that a community corrections officer "takes charge" of a parolee, and therefore has a duty to control the parolee, the court noted several aspects of the relationship between the two that gives rise to the duty. The court noted as follows:

> Parole officers have the statutory authority under RCW 72.04A.080 to supervise parolees.
>
> The State can regulate a parolee's movements within the state, require the parolee to report to a parole officer, impose special conditions such as refraining from using alcohol or undergoing drug rehabilitation or psychiatric treatment, and order the parolee not to possess firearms. The parole officer is the person through whom the State ensures that the parolee obeys the terms of his or her parole. Additionally, parole officers are, or should be, aware of their parolees' criminal histories, and monitor, or should monitor their parolee's progress during parole. Because of these factors, we hold that parole officers have "taken charge" of the parolees they supervise for purposes of section 319. When a parolee's criminal history and progress during parole show that the parolee is likely to cause bodily harm to others if not controlled, the parole officer is under a duty to exercise reasonable care to control

> the parolee and to prevent him or her from doing such harm.

Taggart, 118 Wn.2d at 219-20.

The Supreme Court noted in *Taggart* that the duty it created only applies upon a showing of a "definite, established and continuing relationship between the defendant and the third party." *Taggart*, 118 Wn.2d at 219. In a subsequent case, the court framed the question of whether a duty exists as being whether the actor has taken charge of the third party and whether the actor knows or should know of the danger posed by the third party. *Bishop v. Miche*, 137 Wn.2d 518, 526, 973 P.2d 465 (1999).

The need for the community corrections officer to have actually "taken charge" of the parolee through the existence of a "definite, established and continuing relationship" before a duty to control arises is also reflected in the nature of the community corrections officer's duty once it does arise. The community corrections officer's duty is to adequately monitor and report violations of the parolee's conditions of supervision. *Bishop*, 137 Wn.2d at 526.

In RCW 9.94.720, the Legislature codified the actions community corrections officers can take in the course of supervising offenders.[3] The

[3] For reference purposes, RCW 9.94A.720, was repealed in 2008 effective August 1, 2009. Laws of 2008, c. 231 § 57

underlying premise of both *Bishop* and RCW 9.94.720 is that the parolee's conduct is controlled by the specter of being incarcerated, or otherwise punished by the court or other sanctioning authority, if the offender fails to abide by the terms and conditions of his or her parole. When an offender absconds, the community corrections officer no longer has the ability to control the offender's behavior through the actions authorized by the Legislature and recognized by the courts.

Here, the trial court properly granted summary judgment because DOC did not have the ability to control Mr. Goolsby's behavior while he was a fugitive. When Mr. Goolsby absconded, DOC no longer had a definite, established and continuing relationship whereby it could control Mr. Goolsby's behavior through the imposition or monitoring of conditions. Because DOC lacked the ability to control Mr. Goolsby's behavior, DOC did not breach any duty owed to the appellants under *Taggart* or subsequent case law.

Appellants mischaracterize DOC's position by claiming DOC is arguing a felon terminates supervision by absconding. Appellants premise their argument on RCW 9.94A.720 which allows DOC to impose conditions during supervision, among other things.[4] When an offender

[4] DOC's ability to impose conditions of release is akin to the court's authority to impose conditions of release pursuant to CrR 3.2. Like judges who are entitled to judicial immunity for imposing conditions of release, DOC acts in a quasi-judicial function when

fails to report, the ability to impose the conditions, report violations et cetera is lost. Thus, RCW 9.94A.720 has no application here. It does not even mention what to do when an offender absconds.

Contrary to their assertions, the tolling statue does not support their claims either. RCW 9.94A.625(3),[5] the tolling statute, recognizes that there is no supervision when the offender absconds, and that the period of supervision and the duty resume once the offender is apprehended.

Likewise, appellants' arguments fail to recognize the lack of the ability to control. The community corrections officer's duty is to adequately monitor and report violations of the parolee's conditions of supervision. *Bishop*, 137 Wn.2d at 526. When an offender absconds and becomes a fugitive, the community corrections officer has no ability to monitor the offender's behavior and cannot utilize the coercive force of the court or other sanctioning authority to punish the parolee.

In short, summary judgment should be affirmed because a community corrections officer cannot "control" a fugitive parolee when they abscond because the officer lacks the ability to impose conditions, monitor behavior, or punish the parolee for violations by bringing the

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setting, modifying and enforcing conditions of community custody. *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967). RCW 9.94A.704(11); *Taggart*, 118 Wn.2d at 213 (parole officer entitled to quasi-judicial immunity when enforcing conditions of parole).

[5] This statute was recodified as RCW 9.94A.171, effective August 1, 2009. Laws of 2008, c. 231 § 56.

parolee before the court or other sanctioning authority to be punished, if and when the parolee violates the terms of their parole. When Mr. Goolsby absconded, DOC lacked the type of definite, established and continuing relationship with Mr. Goolsby whereby the community corrections officer could control his behavior through the imposition of conditions or sanctions. As such, DOC did not breach any duty owed to the appellants and the trial court's ruling should be affirmed.

2. The Trial Court Properly Granted Summary Judgment Because There Is No Duty To Apprehend A Felon Who Absconds

The trial court properly granted summary judgment because DOC does not have a duty to apprehend fugitive felons. The appellants' assertion that the trial court erred in granting summary judgment because the Department did not apprehend Mr. Goolsby, a fugitive offender, is without merit. Appellants seek the creation of a new duty to apprehend fugitive offenders. This represents a significant departure from the underpinnings of the *Taggart* duty, is not the law, nor should it be.

No court has ever even addressed the specific question of whether a community corrections officer has a duty to apprehend a fugitive actionable in tort. On the other hand, numerous courts have addressed the question of whether the police have a duty to arrest a fugitive on an outstanding warrant actionable in tort and answered it negatively. *See*

generally, *Dore v. City of Fairbanks*, 31 P.3d 788 (2001) and cases cited therein.

The rationale for refusing to impose a duty in such situations was articulated by the Alaska Supreme Court as follows:

> Imposing a duty to execute a warrant would allow claims in all cases where a person with an outstanding warrant injures another. It would also impose liability in those cases where police failure to execute the warrant was determined, with twenty-twenty hindsight, to have been negligent. "Such a decision would invariably lead to the diversion of resources from other projects and investigations. Decisions regarding the allocation of limited resources are better left to their executive branch." (Footnote and citations omitted.) Plus, the decision of when to execute an arrest warrant is a fundamental aspect of police discretion. Imposing a duty to execute warrants will unnecessarily constrain the discretion that the police need in making the "quick and important decisions that characterize a criminal investigation." (footnote and citations omitted.)

Wongittilin v. State, 36 P.3d 678, 684 (2001).[6]

In this case, the trial court properly granted summary judgment because there is no duty in tort to apprehend fugitive felons. Appellants have failed to overcome the strong policy reasons which mitigate against imposing such a duty. The reason such a duty does not exist is because it leads to diversion of resources, and impacts the officer's exercise of

[6] Washington courts and the Legislature have similarly recognized the strong public policy reasons against imposing liability on agencies and individuals engaged in law enforcement activities. *Keates v. City of Vancouver*, 73 Wn. App. 257, 869 P.2d 88 (1994). Law enforcement activities are not typically reachable in negligence. *Id.* at 267. This is based in part on the deterrent effect lawsuits have on the exercise of law enforcement officers' discretion and the inhibiting effect such lawsuits have on law enforcement agencies' performance of their public duties. *Id.* at 268.

discretion as to how and when to search. Further, it would impose liability based on 20/20 hindsight resulting in what amounts to strict liability.

Contrary to appellants' claims in their opening brief at pages 45-47, DOC internal policies and the statutes concerning the supervision of offenders do not create a duty to apprehend fugitive felons. As a preliminary matter, agencies' policies do not give rise to a duty in tort. *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990). Furthermore, appellants cannot identify any statute or policy requiring DOC to search for an offender who has absconded. To the extent the statutes and policies concerning supervision of offenders create any duty concerning fugitive felons, the duty is to issue a warrant when they abscond. That is precisely what DOC did in this case and why the trial court's ruling should be affirmed.

Nothing in *Taggart* or subsequent cases creates a duty to apprehend fugitive offenders. The authority of DOC to resume monitoring of offenders who are no longer fugitives is completely separate from the creation of the extraordinary duty to apprehend fugitive felons, as advocated by appellants.

Appellants ignore the fact that imposition of a duty to apprehend fugitive felons would lead to the diversion of resources from the many other public safety functions DOC performs. As outlined in the

declaration of James Harms, DOC issued 17,330 Secretary's warrants in 2009 alone. CP at 102-04. If a duty to execute on those warrants is recognized, that means there were, at a minimum, 17,330 potential claims against DOC created in 2009.

Rather than the relatively manageable duty of reporting violation behavior to the court based on knowledge gained from an ongoing relationship, appellants' proposed new duty would burden community corrections officers with an unlimited duty to search for and apprehend fugitives or risk being held liable for any new crime committed by the fugitive.[7]

Appellants also fail to recognize or even address the severe impact such a duty would have on a community corrections officer's ability to make necessary discretionary decisions. Just like the police, imposing such a duty would limit an officer's discretion in how and when they decide to execute a warrant, which is impacted by both tactical and safety concerns. Moreover, it impedes their ability to make decisions based on the best interests of any competing ongoing investigations or operations by requiring all resources to be dedicated to the apprehension of a single individual. As other courts have recognized, such a result is contrary to

[7] The fact appellants argue DOC has a duty to rehabilitate offenders or risk being liable for their actions underscores appellants' attempts to have DOC become an insurer of offender's behavior. It also assumes the offender wants to be rehabilitated and would participate in treatment.

public policy. *Wongittilin*, 36 P.3d at 684. There simply is no basis to distinguish between the police and community corrections officers when it comes to their responsibilities, abilities and needs as they relate to apprehending fugitives.

Any claim by appellants that the difference in the nature of the relationship between a community corrections officer and an offender versus other members of law enforcement warrants the creation of a duty to apprehend is without merit. It is without merit because the reason the duty is not imposed does not turn on the relationship between the fugitive and law enforcement. Rather, the rationale is premised on the fact that imposing such a duty would have in unduly hampering law enforcement operations by imposing limitless liability. Those considerations apply to DOC the same as they apply to any law enforcement agency.

Appellants have never made any attempt to rebut the strong policy reasons supporting why, as a public policy matter, community corrections officers like police officers do not have a duty to apprehend fugitive offenders. The reason they do not is obvious, they can't. Nor can they rebut the policy behind the rule. The trial court's summary judgment decision should be affirmed because DOC had not duty to apprehend Mr. Goolsby after he absconded.

B. The Trial Court Properly Granted Summary Judgment Because Appellants Failed To Establish Proximate Cause

The trial court properly granted summary judgment because, even if a duty existed in this case, which it does not, actionable negligence requires that the breach of a duty be the proximate cause of the claimed injury. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985); *Braegelmann v. Snohomish County*, 53 Wn. App. 381, 766 P.2d 1137, *review denied*, 112 Wn.2d 1020 (1989). That is not the case here. Appellants failed to establish cause in fact or legal causation in the present case so the trial court's granting of summary judgment should be affirmed.

1. The Trial Court Properly Granted Summary Judgment Because Appellants Failed To Establish Factual Proximate Cause

As in all cases, summary judgment on proximate cause is proper when the plaintiff fails to affirmatively produce competent admissible evidence of causation that rises beyond mere speculation. The Supreme Court held in *Bell v. State*, 147 Wn.2d 166, 52 P.3d 503 (2002) that the plaintiff bears the burden of proving that DOC's alleged negligent supervision is a proximate cause of the plaintiff's injuries.

Cause in fact is established if the plaintiff's injury would not have occurred "but for" defendant's breach of duty. It is not established if plaintiff's injury would have occurred without defendant's breach of duty.

Walker v. Transamerica Title Ins., 65 Wn. App. 399, 403, 828 P.2d 621 (1992). When the connection between a defendant's conduct and the plaintiff's injury is too speculative and indirect, the cause in fact requirement is not met. *Taggart*, 118 Wn.2d at 227 (quoting *Walters v. Hampton*, 14 Wn. App. 548, 543 P.2d 648 (1975)).

In *Walters*, the plaintiff alleged that the Port Orchard Police failed to protect him from a person with known proclivities for violence with firearms. The police had investigated the man who shot the plaintiff because of several previous violent incidents involving firearms. Police confiscated the man's rifle once, but he was never arrested or prosecuted for these events. The Court addressed factual causation by stating:

> In our view, there are too many gaps in the chain of factual causation to warrant submission of that issue to the fact finder. It would require a high degree of speculation for the jury or the court to conclude that some sort of prosecutorial action by the police against Hampton in September 1970 would have prevented plaintiff's injuries at Hampton's hands in February 1972. Such a conclusion would require the assumption of a successful prosecution of Hampton. This in turn would require an assumption that Mrs. Hampton . . . would cooperate . . . . Finally, we would have to assume that Hampton would be incarcerated for the offense, or unable to procure another weapon in the event the one he possessed was confiscated. Factual causation requires a sufficiently close, actual connection between the complained of conduct and the resulting injures. Where inferences from the facts are remote or unreasonable, as here, factual causation is not established as a matter of law.

Walters, 14 Wn. App. at 555-56.

Turning to the facts of this case, the trial court properly granted summary judgment because the appellants failed to establish cause in fact. Just as in *Walters*, the trial court properly granted summary judgment because there are simply too many gaps in the chain of causation to warrant submission of this case to a jury.

a. Appellants Failed To Provide Admissible Evidence Goolsby Would Have Been Apprehended Prior To The Shooting If DOC Had Acted Differently

The trial court properly granted summary judgment because appellants failed to provide admissible competent evidence that Mr. Goolsby would have been apprehended prior to the shooting if DOC acted differently. Because of the lack of admissible competent evidence, the trial court properly granted summary judgment and its ruling should be affirmed.

Appellants may claim they presented evidence to the trial court that Mr. Goolsby would have been apprehended if DOC acted differently. This would be inaccurate. Appellants' trial court briefing never addressed this issue and, as noted on pages 5-10 of this brief, they failed to provide any admissible evidence to support such a claim. When reviewing a grant of summary judgment, the court considers solely the issues and evidence the parties presented to the trial court in the summary judgment motion.

RAP 9.12. Thus, attempts by appellants to claim Mr. Goolsby would have been apprehended should be rejected because the appellants failed to present any argument to the trial court on this issue and more importantly failed to provide any admissible evidence.

However, even if appellants did not waive the right to address the issue, which they did, the trial court properly granted summary judgment because it is entirely speculative to claim Mr. Goolsby would have been apprehended if DOC had acted differently. Appellants' reliance on Mr. Stough's declaration is misplaced. He is not an expert in fugitive apprehension and does not even opine that if DOC had acted differently Mr. Goolsby would have been apprehended.

Even if Mr. Stough had offered an opinion on this issue, which he did not, reliance on his declaration remains misplaced because his opinions are not based on personal knowledge and contain inferences not in evidence.[8] For example, he claims Mr. Goolsby's arrest warrant was

[8] In *Theonnes v. Hazen*, 37 Wn. App. 644, 681 P.2d 1284 (1984), the Court of Appeals affirmed a summary judgment in favor of the defendant when the plaintiff's expert opinion was based on speculation. "The opinion of an expert must be based on facts. An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury." *Theonnes*, at 648. *See also Group Health Coop. of Puget Sound, Inc. v. Dep't of Rev.*, 106 Wn.2d 391, 400, 722 P.2d 787 (1986); *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940) ("the opinions of expert witnesses are of no weight unless founded upon facts in the case. The law demands that verdicts rest upon testimony, and not upon conjecture and speculation"); 5A K. Tegland, *Washington Practice*, Evidence § 297 (1989).

issued on April 21, 2009, but then goes on to state the warrant was not requested until May 7, 2009. CP at 162. The unspoken inference being Mr. Goolsby would have been apprehended if the warrant had been issued in a timely manner. This is not supported by the record. The record shows the warrant was requested on April 16, 2009, the same day DOC learned Mr. Goolsby failed to attend his treatment class.

More to the point, even if you assume the warrant was not issued timely, which it was, the timing of the issuance of the warrant is irrelevant because there is no evidence Mr. Goolsby came in contact with DOC, or any other member of law enforcement, at any time after he absconded. It is therefore entirely speculative to claim Mr. Goolsby would have been apprehended regardless of when the warrant was issued.

Mr. Stough's assertion DOC knew the hotel where Mr. Goolsby lived at the time he absconded and therefore Lang should have searched for him there prior to issuing the warrant is equally meritless. CP at 162. Again, this statement is not supported by the record. The record shows Mr. Goolsby was supposed to be staying at a homeless shelter at the time he absconded. CP at 50.

However, even if you assume Lang had information Mr. Goolsby was supposed to be staying at a particular hotel, or any other place for that matter, it is irrelevant because it is based on the speculative notion that,

upon going to a location where Mr. Goolsby was believed to be, Mr. Goolsby would actually give himself up. It is also based on the speculative assumption Mr. Goolsby would actually be at the location at that time.

This remains true even if you assume Lang had access to all the motel registries in Seattle as Mr. Stough claims. CP at 162. There is no evidence in the record showing Mr. Goolsby was staying at a motel in Seattle at the time he absconded or at any motel in the state after he absconded. Likewise, there is no evidence in the record Lang had access to motel registry records. But again, even if such evidence is in the record, which it is not, the argument is still meritless because you still must engage in the same speculative assumptions that Mr. Goolsby would be at a particular location at a particular time. The speculative nature of appellants' arguments remains true even if Mr. Goolsby was homeless the entire time he was hiding from law enforcement.

Appellants' claim that Community Corrections Officer Lang should have contacted the Criminal Response Unit earlier is also without merit. CP at 162. Mr. Stough has no personal knowledge of when the unit was made aware of Mr. Goolsby's warrant. Further, it is speculative because it is based on the notion the unit would have been able to locate Mr. Goolsby when there is no evidence in the record anyone in law

enforcement knew the whereabouts of Mr. Goolsby until after the shooting when he was located in Las Vegas.

Appellants' claim is also based on the speculative assumption that Mr. Goolsby would be at a location where the Criminal Response Unit did not need a warrant to enter. DOC cannot enter a home of a private citizen without a warrant simply because a parolee might be a guest there. *State v. Simms*, 10 Wn. App. 75, 516 P.2d 1088 (1973); *Hocker v. Woody*, 26 Wn. App. 393, 613 P.2d 1183 (1980). Alternatively, it is based on the speculative assumption that the unit would have sufficiently identified Mr. Goolsby in some sort of scenario so that they could gain a search warrant to enter a home to make an arrest.

Any claim by appellants that Mr. Goolsby would have been apprehended if DOC acted differently is also without merit because the jury would have to further speculate that, despite the fact Mr. Goolsby avoided contact with any law enforcement for approximately four months, he would not have attempted to avoid arrest even if someone from DOC was able to identify his location.

There is no evidence DOC ever knew where Mr. Goolsby was from the time he absconded until he was arrested in Las Vegas; however even if DOC had information about his location, one would need to speculate that this information would inevitably have led to his

apprehension, one would then have to assume Mr. Goolsby would have been given a sanction that would not have allowed him to be released sometime prior to the shooting. As such, the trial court properly granted summary judgment because appellants' causation arguments are speculative.

b. Appellants Further Failed To Provide Admissible Evidence Goolsby Would Have Been In Jail On The Date Of The Shooting

The trial court properly granted summary judgment because appellants further failed to establish proximate cause by providing evidence that Mr. Goolsby would have been in jail at the time of the shooting. Appellants' assertion they don't have to provide evidence establishing Mr. Goolsby would have been in jail the day of the robbery is without merit for numerous reasons.

First, it is without merit because the Court of Appeals has consistently held that the plaintiff must produce evidence establishing that the offender would have been incarcerated on the date of the plaintiff's injury "but for" the Department's alleged negligence in order to establish causation. None of the cases cited by appellants get around this.

In *Bordon*,[9] the court held that the plaintiff had failed to meet her burden of producing evidence that, but for DOC's failure to report violations to the court, the offender would have been in jail on the date of plaintiff's injury. As a result, the court reversed a verdict in favor of the plaintiff with an order to dismiss. *Bordon,* 122 Wn. App. at 240-47.

In *Hungerford,* this court affirmed an order granting summary judgment when the plaintiffs failed to produce evidence showing the offender would have been in jail at the time of the murder. As noted by the court, plaintiffs failed to establish proximate cause because they failed to present evidence establishing that the offender would have been in jail on the date he murdered Hungerford. *Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 253, 139 P.3d 1131 (2006).

Appellants' attempts to distinguish *Hungerford* from this case are also meritless because as they note in their opening brief (Br. Appellants at 29-30), the *Hungerford* court specifically ruled DOC does not have a duty in tort to rehabilitate offenders. As discussed *infra*, appellants essentially make the same argument here, contrary to the holding in *Hungerford.*

Second, appellants' factual cause argument fails because they have not provided any admissible competent evidence Mr. Goolsby would have

[9] *Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005).

received a sanction which would have kept him in jail at the time of the shooting. Even if appellants could establish, absent speculation, that Goolsby would have been apprehended prior to the shooting a close reading of the record shows there is no evidence before this court establishing what sanction Mr. Goolsby would have received if he had been arrested prior to the shooting.

Competent evidence concerning what sanction an offender would have received may take the form of:

1. Direct testimony of the decision-maker;
2. Qualified expert testimony;
    a. Present or former judges or ISRB members;
    b. Prosecutors or others familiar with the sanction process;
    c. Statistical evidence.

Bordon, 122 Wn. App. at 244. The appropriate person to testify on these matters is a hearings officer, not a layperson. *See Peterson v. State*, 100 Wn.2d 421, 442, 671 P.2d 230 (1983).

In this case, Mr. Stough did not offer an opinion on this issue and is not competent to do so. He is not a former hearings officer or judge. CP at 806. He never worked for the Department using the sanctioning process nor did he engage in any statistical analysis of prior violation sanction hearings. CP at 806. In other words, even if Stough had rendered an opinion, which he did not, he is not competent to do so.

Third, the trial court properly granted summary judgment because appellants' reliance on the holdings of *Joyce*,[10] *Hertog*,[11] *Bishop* and *Taggart* to support their argument on factual proximate cause is misplaced. These cases do not absolve them from having to show through admissible evidence that Goolsby would have been incarcerated the day of the shooting. In fact, these cases all focus the proximate cause determination on whether the offender would be in jail on the date of the plaintiffs' injury.

In *Taggart*, proximate cause was premised in part on the State's failure to issue an arrest warrant the State of Montana was waiting to execute. *Taggart*, 188 Wn.2d at 227. In *Joyce*, proximate cause was established because if a warrant had been issued there was competent evidence the offender would have been in jail. *Joyce*, 155 Wn.2d at 322. In *Bishop*, there was no proximate cause because the court decided not to put the offender in jail, which implicitly recognizes the claim is premised on jailing the offender. *Bishop*, 137 Wn.2d at 518. *Hertog* says the failure to discover and report violations may satisfy proximate cause because it may result in revocation. In other words, all the courts' reasoning relates to whether the offender would have been in jail. *Hertog*, 88 Wn. App. at 57.

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[10] *Joyce v. Dep't. of Corr.*, 155 Wn.2d 308, 119 P.3d 825 (2005).
[11] *Hertog v. City of Seattle*, 88 Wn. App. 41, 943 P.2d 1153 (1997).

Similarly, appellants' citation to *Bell*, *Tyner*[12] and *Estate of Jones*[13] is misplaced. None of these cases rebut the fact they have failed to establish factual cause.

What is clear under *Bell* is the plaintiff must present evidence from which you can conclude the offender, Goolsby in this case, would have been in jail if additional violations had been reported. Plaintiff presented no such evidence in this case.

Tyner is no more helpful for the appellants. *Tyner* was a case where DSHS was arguing that the court's no-contact order was a superseding cause which cut off causation. The court held that the court order would act as a superseding cause only if all material information had been provided to the court. *Tyner*, 141 Wn.2d at 88. As an affirmative defense, the State bore the burden of proof on the issue. Superseding cause is not an issue in the present case and the State does not bear the burden of proof. The causation issue in this case is whether Mr. Goolsby would have been apprehended and in jail at the time of the shooting if DOC acted differently. Appellants bear the burden of proof on this issue and failed to provide any evidence to carry that burden.

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[12] *Tyner v. Dep't of Social & Health Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000).

[13] *Estate of Jones v. State*, 107 Wn. App. 510, 15 P.3d 180 (2000), *review denied*, 146 Wn.2d 1025 (2002).

Appellants' reliance on *Estate of Jones* does not support their claims either. *Jones* was a negligent placement case and primarily involved issues of superseding cause, which like *Tyner* raised issues as to the materiality, not sufficiency, of the evidence. *Estate of Jones*, 107 Wn. App. at 519.

Fourth, appellants' unsupported assertion about what sanction Mr. Mr. Goolsby would have received if he had been apprehended is also unavailing. Br. Appellants at 63. As noted *supra*, Mr. Slough did not actually opine on what sanction Mr. Goolsby would have received. But even if he had, the opinion would have been speculative.[14] Argument by appellants' counsel is not admissible evidence either. The sanction suggested by appellants is exactly the type of speculation Mr. Stough previously engaged in, and which was rejected by the *Bordon* court. *See Bordon*, 122 Wn. App. 227.

Fifth, Mr. Stough's claim DOC should have revoked Mr. Goolsby's probation does not establish Mr. Goolsby would have been in jail the time of the shooting either. This argument is meritless because it

[14] Whether a violation occurred and what sanction is to be imposed are matters entrusted to the discretion of a trained DOC Hearings Officer. In exercising that discretion, the Hearings Officer must consider a number of factors including the nature of the violation, the offender's adjustment otherwise and the impact the sanction will have on the offender's adjustment, among other things. Liability cannot be premised on a Hearings Officer's ruling which is subject to quasi-judicial immunity. RCW 9.94A.704(10).

is neither supported by the facts of this case or any legal authority. The record shows Goolsby had served his maximum sentence date when he was released to community custody. CP at 335. While Mr. Goolsby was subject to potential sanctioning for failure to abide by his conditions of release, there is no evidence in the record that DOC had the authority to revoke his community custody and return Mr. Goolsby to prison to serve out the remainder of the term of his community custody in prison.

Finally, any reliance on the sanction Mr. Goolsby received after the shooting fails as well. It not only requires the jury to speculate he would have received the same sanction even if he had not killed Mr. Smith, it requires the jury to speculate when Mr. Goolsby would have been apprehended.[15] As such, the trial court properly granted summary judgment and the ruling should be affirmed.

c. Appellants Failed To Establish Legal Causation.

The trial court properly granted summary judgment because the appellants failed to establish legal causation. Just as with other members of law enforcement, policy and common sense dictates that DOC should

[15] On November 18, 2009, Mr. Goolsby underwent a full DOC violation hearing for violation of his conditions of parole prior to the shooting. The Department of Corrections Hearings Officer issued a sanction of 120 days with credit for time served for the violations. Mr. Goolsby was eligible for one-third off the overall sanction based on good time. CP at 811.

not be liable for crimes committed by fugitives from justice simply because DOC is unable to apprehend them.

Legal causation is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Schooley v. Pinch's Deli Market*, 124 Wn.2d 468, 478, 951 P.2d 749 (1998). The focus is on whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or unsubstantial to impose liability. *Id.* A determination of legal liability will depend upon "mixed considerations of logic, common sense, justice, policy and precedent." *Hartley,* 103 Wn.2d at 779.

In *Hartley*, the court held that the State was not liable to the estate of a person killed by a drunk driver whose license was renewed when there was clearly cause for revocation due to numerous drunk-driving arrests. *Id.* at 770. The court concluded that "the failure of the government to revoke Johnson's license [was] too remote and insubstantial to impose liability for Johnson's drunk driving." *Hartley,* 103 Wn.2d at 784. The court went on to state:

> While a license is necessary for anyone wishing to drive an automobile legally in this state, a license does not grant authority to disobey the law. [citations omitted.] The failure to revoke Johnson's license (even assuming that Johnson would have honored the revocation and not driven) is simply too attenuated a causal connection to impose liability.

> . . . Public policy considerations also dictate against liability in this case. The government would be open to unlimited liability were we to hold potentially liable every decision by a prosecutor of the DOL to delay proceedings [to revoke a license].

Id. at 785.

In the present case, considerations of logic, policy and common sense dictate that the Department of Corrections not be held liable when an offender absconds from supervision and subsequently causes harm.

The theory underlying the imposition of liability in *Taggart* is that the supervising officer has an ongoing relationship with the offender whereby the community corrections officer is able to observe whether the offender is compliant with the terms of supervision. As an extension of that logic, the officer has the ability to "control" the offender by reporting violations of the conditions of supervision to the court.

While DOC disagrees that this somehow gives the community corrections officer the ability to control the offender's activities, at least the officer knows where the offender is, knows what they are doing, and therefore, has the ability to control the offender through the imposition of sanctions for a violation of the conditions of supervision.

When an offender absconds from supervision, any realistic ability the officer has to control the offender disappears. The officer has no ability to know what behavior the offender is engaging in or affect the

behavior in any way. The officer's ability to impact the offender's behavior through the threat or imposition of sanctions no longer exists. In the absence of the ability to control, it is manifestly unreasonable to continue to hold that DOC retains the duty to control an offender.[16]

DOC did not have the ability to control Goolsby while he was a fugitive, and so what appellants are really claiming in this case is that DOC had a duty to apprehend Mr. Goolsby. However, the same policy considerations which counsel against imposing a duty on police to apprehend fugitives also apply to DOC.

It bears repeating that in 2009 alone, DOC issued 17,330 Secretary's warrants. Requiring DOC to devote the amount of money, time and resources necessary to actively pursue every one of those warrants to avoid the risk of incurring liability would significantly impair DOC's ability to manage its budget and operations. Any claim to the contrary should be rejected. That type of decision is one better left to the Legislative and Executive branches than to a jury.

[16] That principle has been recognized in cases in which appellate courts have held that when the period of supervision ends, the duty to control ends. *See Couch v. State*, 113 Wn. App. 556, 54 P.3d 197 (2002); *Hungerford*, 135 Wn. App. 240.

C. Appellants' Failed To Rebut The Fact DOC Did Not Breach Any Duty Owed To Them

Appellants could not provide the trial court with any legal authority to support their claim DOC owes a duty to apprehend fugitive offenders. Further, they could not provide the trial court with any admissible competent evidence that Goolsby would have been apprehended prior to the shooting and given a sanction which would have kept him in jail during the time of the shooting if DOC acted differently. They instead argued Mr. Goolsby would not have absconded and ultimately shot Mr. Smith if DOC monitored him differently. The trial court properly granted summary judgment because appellants' "failure to rehabilitate" argument fails to rebut the fact DOC did not breach any duty owed to the appellants and it is entirely speculative.

1. DOC Did Not Breach Any Duty Owed To The Appellants Because There is No Duty to Rehabilitate an Offender

Appellants assert the trial court erred in granting summary judgment by arguing if the offender had been supervised differently he would have complied with the conditions of supervision and not have reengaged in criminal activity. This assertion is without merit.

Courts have previously rejected arguments claiming if the offender had been more closely supervised, he or she would have complied with the

conditions of supervision and not engaged in the conduct which injured the plaintiff. *Hungerford*, 135 Wn. App. at 256. These types of "failure to rehabilitate" arguments have been rejected because they amount to claims DOC has a duty to rehabilitate an offender contrary to the court's holding in *Melville*, 115 Wn.2d 34.[17] As noted in *Hungerford*, the Sentencing Reform Act's purpose is primarily punishment, not rehabilitation. RCW 9.94A.010; *see also State v. Rice,* 98 Wn.2d 384, 393, 655 P.2d 1145 (1982) (noting punishment is the paramount purpose of the adult sentencing system).

Here, the trial court properly granted summary judgment because appellants' argument is tantamount to a claim DOC has a duty to rehabilitate offenders. Appellants can cite to no authority which imposes upon DOC the extraordinary duty to rehabilitate offenders or risk incurring liability for their behavior. As such, the trial court properly granted summary judgment.

2. **Appellants' Causation Argument Is Also Speculative Because There is No Evidence Mr. Goolsby Would Have Behaved Differently Had He Been Supervised Differently.**

The trial court also properly granted summary judgment because appellants' theory that Mr. Goolsby would not have committed a crime if

[17] DOC's own policies do not create duties either. *See Melville,* 115 Wn.2d 34; and *Hungerford*, 135 Wn. App. 240.

he had been monitored differently is not supported by admissible evidence and is speculative. The appellants' contrary arguments were properly rejected for four reasons.

First, the trial court properly granted summary judgment because Mr. Stough lacks the expertise to predict an individual's behavior. An expert's affidavit must be factually based and must affirmatively show the affiant is competent to testify to the matters. *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997). Mr. Stough does not have the expertise either through education or experience to predict an individual's behavior.[18]

Further, he lacks the expertise to offer opinions based on the studies he relies on. Mr. Stough's opinion is premised on a series of articles which purportedly discuss offender recidivism. The trial court properly granted summary judgment because Mr. Stough lacks the expertise to interpret these studies. Mr. Stough is not a social scientist nor is he a statistician. He has never published any articles on statistical analysis procedures or conducted any classes concerning the process of collecting statistical information for the purposes of analyzing probability. He therefore lacks the foundation to offer any opinion interpreting statistical data concerning recidivism and supervision. So, regardless of

[18] In reply at summary judgment, counsel objected to inadmissible portions of plaintiffs' response, including portions of Mr. Stough's declarations which contained improper legal conclusions, and speculative assumptions among other things. CP. at 787-790.

how Mr. Goolsby was monitored, Mr. Stough lacks the competence to offer an opinion whether a change in Mr. Goolsby's supervision would have changed Mr. Goolsby's future behavior.

Second, there is no admissible factual evidence in the record supporting appellants' claim that Mr. Goolsby would have been rehabilitated if he had been monitored differently. CR 56(e) requires a declaration be based on admissible evidence.

The admissible evidence in the record shows during the two and a half months after Mr. Goolsby was released from prison he spent approximately 38 days in jail for two separate violations of his release conditions. In addition, he was seen over twenty five times by DOC. Despite this, Mr. Goolsby absconded and ultimately engaged in the behavior that is the subject of this lawsuit.

It is well established that the opinions of an expert witness are of no weight unless founded upon the facts of the case. *Theonnes*, 37 Wn. App. at 649. It follows that, in order to be of any value, the facts upon which the expert bases his opinion must be shown to exist through admissible evidence, or at least be established as being in dispute through admissible evidence. Otherwise, an expert is free to make up facts to support his opinion. Where a declarant relies upon records, files or reports to support the assertion of factual statements in a declaration, the source

documents must be in the record. *Melville*, 115 Wn.2d at 35. Otherwise, the factual statements in the declaration are hearsay which does not meet the admissibility requirements of CR 56(e).

In *Hash v. Children's Orthopedic Hosp.*, the court addressed a situation where a defendant in a malpractice action moved for summary judgment on the basis of an affidavit containing a conclusory opinion unsupported by specific facts. *Hash v. Children's Orthopedic Hospital*, 49 Wn. App. 130, 134, 741 P.2d 584 (1987), *aff'd* 110 Wn.2d 912, 757 P.2d 507 (1988). The court observed in *Hash* that, under ER 705, an expert witness can testify at trial to an opinion without first stating the factual basis for that opinion. As a result, the argument could be made that the opinion of an expert should be given effect in summary judgment proceedings, even though no supporting facts are included in the expert's affidavit. *Id.*

But the court rejected that approach. ER 705 contemplates the opposing party cross-examining the expert as to the factual basis for his opinion. *Hash*, 49 Wn. App. at 134. The court noted that there is no way to cross-examine an affidavit and without a factual basis for the opinion, the court is without a means to evaluate the merits of the opinion. The court also noted the requirement in CR 56(e) that affidavits set forth admissible facts and applied that requirement to expert affidavits. *Id.* One

cannot show there is a genuine factual issue for trial without presenting the court with the facts surrounding the critical issue. *Hash*, 49 Wn. App. at 134-35. The court went on to state that expert opinions must be based on the facts of the case and will be disregarded entirely where the factual basis for the opinion is inadequate. *Id.* at 135, citing *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 106 P.2d 314 (1940) and *Theonnes*, 37 Wn. App. 644.

The concerns raised in *Hash* are equally applicable to Mr. Stough's declaration because his opinions are premised on conclusory statements based on "facts" which are not in evidence. There is no way to cross-examine the expert's declaration nor is there any way for the court to determine if the expert's assertions are correct. An expert's factual assertions themselves are not admissible evidence and, therefore, there are no facts backing up the expert's opinions which would allow the court to evaluate the merits of the opinion.

In this case, Mr. Stough has no personal knowledge of the facts of this case. Since he has no personal knowledge and is relying on documents to establish the facts, the documents have to be in the record. There is no evidence in the record establishing Mr. Goolsby would have acted differently if DOC monitored him differently. Therefore, Mr. Stough's opinions have no evidentiary value.

Third, the trial court properly granted summary judgment because Mr. Stough's opinions don't establish cause in fact. Mr. Stough's opinion suffers from the same problem he had in *Hungerford.* Just as in *Hungerford*, Mr. Stough has never spoken to Mr. Goolsby and, as Mr. Stough has admitted under oath, there are no models which can predict an individual's behavior. CP at 808-09. At most, what has been established is a correlation between supervision and recidivism. Mr. Stough lacks any foundation to claim any difference in Mr. Goolsby's supervision would have resulted in a change in his behavior.

Fourth, appellants' irrelevant arguments concerning DOC's entitlement to discretionary immunity beginning at page 67 of their opening brief does not rebut the fact they have failed to establish cause in fact. They are admittedly not attempting to establish liability based on DOC's high level policy or budgetary decisions, so even if DOC is not entitled to discretionary immunity for high level policy decisions, which it is, appellants have the burden to establish an issue of material fact as to each element of negligence to defeat summary judgment. *Craig v. Wash. Trust Bank,* 94 Wn. App. 820, 824, 976 P.2d 126 (1999).

So, in sum, Mr. Stough lacks the expertise to render his opinion, there is no admissible evidence in the record supporting his opinion, the opinions are speculative, the case law cited by appellants does not rebut the fact they have failed to establish through competent admissible evidence that Mr. Goolsby would have been rehabilitated if DOC had supervised him differently, and, as a matter of law, DOC owed no duty to the appellants to rehabilitate Mr. Goolsby. The trial court's ruling therefore should be affirmed.

3. Appellants' Arguments Failed To Rebut The Strong Public Policy Reasons For Not Imposing A Duty On DOC To Apprehend Offenders

The trial court properly granted summary judgment because appellants failed to establish legal cause. Appellants' "failure to rehabilitate" argument is meritless and does not rebut the strong public policy reasons for not imposing upon DOC an unlimited duty to apprehend offenders.

Because appellants could not rebut the strong public policy reasons which dictate against imposing a duty on DOC to apprehend fugitive offenders, appellants instead have requested this court to require DOC to rehabilitate offenders or risk liability for the actions of offenders. They make this argument despite the fact they are aware previous courts have

rejected this argument because DOC does not have a duty in tort to rehabilitate offenders.

This court should reject their request as well. Imposition of such an unlimited duty would turn DOC into a guarantor of future behavior for all offenders which simply is bad public policy and lacks common sense. Even if DOC had unlimited resources to devote to the supervision of offenders, imposition of a duty requiring DOC to rehabilitate offenders or risk of incurring liability would not only run contrary to the intent of the Legislature when it created the Sentencing Reform Act; it is not based in reality. Appellants have not, and cannot, cite to any authority for the proposition that any particular course of supervision by a correctional agency will insure an offender will not recidivate.

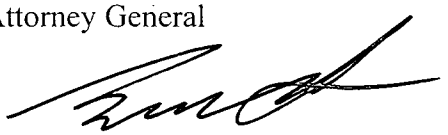
Finally, the connection between the ultimate result and DOC's supervision in this case is too remote to establish liability. Just as in *Hungerford*, DOC's actions concerning the supervision of the offender and alleged failure to rehabilitate the offender does not, as a matter of law, establish legal causation. As such, the trial court's ruling should be affirmed.

V. CONCLUSION

Policy and common sense dictate that the court reject appellants' attempt to impose a duty on DOC that would require DOC to rehabilitate offenders and/or search for DOC fugitives until they are found, or risk incurring liability any time they do not. The trial court properly granted summary judgment and the ruling should be confirmed.

RESPECTFULLY SUBMITTED this 9th day of June, 2014.

ROBERT W. FERGUSON
Attorney General



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PROOF OF SERVICE

I certify that I had served a copy of the Brief of Respondents on appellants' counsel of record on the date below by having it served by e-mail and US Mail on the office of:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of, 2014, at Tacoma, Washington.

CORIE SKAU, Legal Assistant