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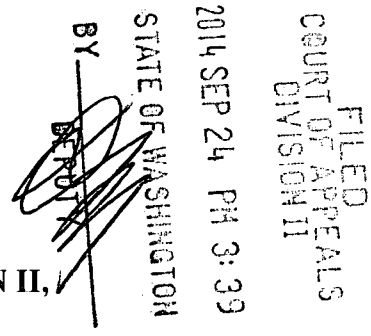

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

JOYCE SMITH, ESTATE OF JAMES SMITH, ET AL,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS.

Respondents.

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION TO REPLY

The position taken by the Washington State Department of Corrections, (hereafter DOC), is as troubling as it is cynical. According to the DOC, its employees can abysmally fail in their obligation to supervise a "violent, high-impact offender" and not be held accountable when the foreseeable consequences of such dereliction of duty come to fruition. (CP 391-94; 410-16). As previously discussed in Appellant's Opening Brief, what is at issue in this case is a legal duty to control, the ability to control and the failure on the part of DOC, and its employees, to use the tools available to meet such obligations. Such duties are already well established under Washington law. See *Taggart v. State* 118 Wn.2d 195, 822 P.2d 324 (1992); *Joyce v. State* 155 Wn.2d 306, 119 P.3d 825 (2005).

What is at issue is a failure to "control" someone who the DOC has the duty to supervise and "control." The Appellate Court should reject DOC's effort to mischaracterize this matter as being a case where the plaintiff is contending that the DOC has failed in a duty to "rehabilitate" a violent offender. That is not what the plaintiff's contending. The only reason DOC is making such an argument is a misguided attempt to try to

"pigeon hole" this case into this Court's prior holding in *Hungerford v. DOC*, 135 Wn.App. 240 139 P.3d 1131 (2006).

In *Hungerford*, which was decided subsequent to *Joyce*, (which will be discussed in more detail below), the Court of Appeals rejected the theory that DOC had breached an enforceable duty to rehabilitate the offender. Also in *Hungerford,* the Appellate Court rejected a secondary theory that there would be a different outcome and a judge who conducted a misdemeanor revocation hearing had additional information prior to placing the offender on only "legal financial obligations" and otherwise suspending other aspects of his supervision. There was simply no evidence that any information had been withheld from the hearing judge.

Here, plaintiff, in his briefing, and by the way of its expert's declaration submitted before the Trial Court in opposition to defendant's motion for summary judgment, never once contended that the duty breached was a duty to "rehabilitate". Thus the Appellate Court should reject the state's efforts to mischaracterize plaintiff's claims.

Nor is plaintiff contending that DOC had an absolute duty to "apprehend" Mr. Goolsby, though that certainly could have been a likely outcome had the DOC only done its job. It is respectfully submitted that the "take charge" relationship and/or duty to control that the law imposes on DOC to regulate the behavior of criminal offenders has at least three

aspects. The first aspect of such a duty to control is to gain control of the offender once they have been released from incarceration and placed under supervision of DOC. The second aspect of such a duty is to maintain control of such a violent offender and the third is to exercise reasonable care in regaining control of such a violent offender should he abscond from supervision or provide DOC personnel clear indicators that, despite its best efforts, the supervised offender presently or in the future is intent on furthering a life of crime.

In this case, a reasonable jury could conclude that DOC failed with respect to all three aspects of its' obligations. As graphically discussed at Pages 11 through 14 of Appellant's Opening Brief, DOC knew, even prior to Mr. Goolsby's release, that it was likely that he would be unmanageable. Despite such foreknowledge, Mr. Goolsby was released to the community, and it can be argued that DOC at no point had "control" over his behaviors, or such control immediately lapsed. As further outlined at Pages 14 through 16 of Appellant's Opening Brief, it can hardly be said that at any time did DOC meet the second prong of "maintaining" control of Mr. Goolsby while he was under their supervision. Indeed it appeared that the only time DOC truly had any contact with Mr. Goolsby was when he was being arrested by the police for engaging in criminal activity including drug use, associating with other

sex offenders. There were even concerns that he was engaging in the despicable conduct of "prostituting girls at the motel" where he was also affiliating with other drug users. (See Page 2 20-21, 260, 286-89, 291, 303, 303-06, 748).

With respect to the third element of such a duty, as outlined above, the mere fact that after five months of Mr. Goolsby's criminality, DOC issued a bench warrant, clearly, according to plaintiff's expert, did not satisfy DOC's obligation to regain control of Mr. Goolsby, the need for which was a foreseeable byproduct of its failure to meet the first two prongs. It is respectfully suggested that the issuance of a bench warrant, at most, is just an effort to comply by the DOC's obligation to regain control of the criminal offender, and in order to act with reasonable care, more effort was required, particularly given the tools reasonable available to DOC which would have aided it in fulfilling this legal obligation.

As the nature of the DOC's breach of its duty involved acts of omission it should not now be rewarded with the benefit of being able to argue that the plaintiff cannot prove its case because it is predicated on "speculation". Had DOC adequately performed its job and the murder of plaintiff's decedent had nevertheless occurred, we simply would not be here. Unfortunately, DOC failed and due to its failure to exercise reasonable care, it should now be held accountable for the foreseeable

consequences of such failures which includes what transpired here, (the callous murder of plaintiff's decedent), which was within the "general field of danger", created by DOC's negligence.

Forseeability is a question of fact for a jury unless the circumstances of the injury are "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Shepard v. Mielke* 75 Wn.App. 201, 206, 877 P.2d 220 (1994), citing to *McLeod v. Grant County School District,* 128, 42 Wn.2d. 316, 323, 255 P.2d 360 (1953). As distilled in WVI 15.01 relating to "superseding cause" provides in part:

> "... If, however, you find that the defendant was negligent and that in the exercise of ordinary care, the defendant should reasonably have anticipated the later independent intervening cause then the cause does not supersede defendant's original negligence and you may find that the defendant's negligence was a proximate cause of the injury/event. It is not necessary that the sequence of events or the particular resultant injury/event be foreseeable. It is only necessary that the resulting injury/event fall within **the general field of danger which the defendant should have reasonably anticipated.**" (Emphasis added) *Materials deleted.*"

The Trial Court erred in granting summary judgment in this case. It should be left to the jury to make a determination as to whether or not DOC's failure to comply with its well-established duties was a proximate cause of plaintiff's decedent's death. It is respectfully suggested it was

and is negligently foreseeable that murders can and do occur when DOC directly performs its duties.

II. ARGUMENT

A. The Testimony of Plaintiff's Expert Submitted Before the Trial Court in and of Itself Should Have Been Sufficient to Warrant Denial of Summary Judgment in this Case.

An expert opinion, even if it is on the "ultimate issue of fact" is sufficient to defeat a motion for summary judgment. See *Xiao Ping Chen v. City of Seattle* 153 Wn.App. 890, 910, 223 P.3d 1230 (2009), citing to *Eriks v. Denver* 118 Wn.2d 451, 457, 824 P.2d 1207 (1992). Although DOC is critical of Mr. Stough's opinions, (at Pages 24 through 26 of its brief), it is respectfully submitted that such criticisms are unfounded and are based on a misunderstanding of the scope and admissibility of permissible expert opinions. Under the terms of ER 703 an expert is allowed to base his opinions on facts not admissible into evidence, if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inference upon the subject ...". Thus, ER 703 "permits expert opinion testimony based on hearsay data that would otherwise be inadmissible evidence ..." See *State v. Russell* 125 Wn.2d. 24, 74, 82 P.2d 747 (1994), *Reese v. Stroh* 128 Wn.2d. 303, 309, 907 P.2d 282 (1995). Given that the "Evidence Rules clearly envisions expert

reliance on hearsay ... and linked up the other party 'the full burden of exploration of the facts such as underlying the testimony of an expert witness ... '" DOC's position that Mr. Stough's opinions must be based on "personal knowledge' is incorrect. *Cornejo v. State* 57 Wn.App. 314, 325-26, 788 P.2d 554 (1990).

Here, the declaration of plaintiff's expert is 51 pages in length (including attachments). His attached curriculum vitae, in great detail, painstakingly outlines his qualifications to render expert opinions in cases involving DOC's failure to supervise offenders. At its essence, Mr. Stough's opinion is that, despite DOC's cynicism to the contrary, properly-performed community supervision can work. It does make a difference.

As indicated above, there is simply no requirement that Mr. Stough's opinion be based on personal knowledge of the underlying facts. His declaration was more than adequate to establish his qualifications to render opinions in this case and to the extent that some level of experience may be lacking, that goes to the weight of his opinions and certainly not its admissibility. As such, his declaration alone should have been deemed sufficient to establish at least at a minimum questions of fact regarding the existence of a duty which was breached.

In more particularity, it clearly served to establish a question of fact with respect to "proximate cause". As indicated by Mr. Stough's declaration, at Pages 12 through 29, a number of studies link recidivism to laxity or absence of proper community supervision. The evidence provided here is much stronger than the expert testimony is in the *Hungerford's* case. Here, plaintiff provided individualized expert testimony and evidence of a causal relationship between an absence of supervision and a continued criminality. Such evidence alone should have been sufficient to warrant the denial of summary judgment particularly as it relates to, "but for" causation.

As the Supreme Court once again hammered home in the case of *Johnston-Forbes v. Matsunaga* – Wn.2d – WL 4247770 (8/28/14), under the auspices of ER 702-705, the admission and value of expert testimony must be determined on a case-by-case basis and its admission ultimately rests on the rather larger amount of discretion vested with the Trial Court. Given such broad standards, it is respectfully suggested that the Appellate Court must reject DOC's contention at Page 30 of its opening brief, that expert testimony can only be presented by a particular individual such as "decision makers", "former judges", and the like, in order to support an expert opinion regarding causation. Such an assertion is premised on a clear misunderstanding of our law relating to experts. The defense cites to

the case of *Perterson v. State* 100 Wn.2d 421, 442, 671 P.2d 230 (1983) for this proposition, when the *Peterson* holding is to the exact contrary. The Washington Supreme Court recognized in *Peterson,* outside of the medical malpractice or personal injury causation context, "expert testimony is not required to establish a standard of care in actions for negligence". Further, there is also nothing within the opinion in *Borden. v. State* 122 Wn.App. 227, 244, 95 P.3d 764 (2004), which support DOC's rather tenuous position.

As it is, Mr. Stough's qualifications and experience are more than adequate under the standards of ER 702-705 to support the creation of a genuine issue of material fact with respect to duty, breach and proximate cause. See also, *Anderson v. Akzo Nobel Coatings, Inc.* 172 Wn.2d 593, 260 P.3d 857 (2011) (surveying Washington law regarding the opinion of experts).

Thus, the DOC's challenges and criticisms to plaintiff's expert's testimony should be rejected. Further, under our case law there is simply no requirement that plaintiff establish that Mr. Goolsby would have been incarcerated (had DOC adequately performed its job) on the date he murdered plaintiff's decedent.

In the seminal *Joyce* case, our Supreme Court rejected an argument similar to the DOC's current argument about a need to show that a court

would have imposed incarceration for violating supervision conditions. See, 155 Wn.2d at 321, 119 P.3d 825. The *Joyce* Court held that the evidence of proximate causation was sufficient where the estate of a motorist killed in an automobile crash sued DOC for negligent supervision of an offender who was driving the other vehicle. *Id.* While on community supervision for an assault conviction, the offender was arrested and charged with various crimes. He also had been admitted to a psychiatric institution and was using illicit drugs. He routinely violated the conditions of his release but his community corrections officer waited months before reporting them to the court. As here, there is considerable evidence showing that DOC knew of the offender's violent tendencies and likelihood of recidivism. *Id.* at 311-13. Eventually, violation reports were filed in *Joyce* recommending jail time but roughly a week later while the offender was under the influence of marijuana he stole a sports utility vehicle and struck decedent's small truck killing her. *Joyce*, 155 Wn.2d at 313-14.

The court rejected the state's proximate cause argument that "even if it had properly monitored Stuart and reported violations to the court, it is unknown what actions, if any, the court would have taken." 155 Wn.2d at 321. The court explained:

> "It is true that if the department had properly supervised the offender and reported his violations, and if a judge had nonetheless to leave Stuart at large in the community, the causal chain may have been broken as a matter of law. That is what we held in *Bishop v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999). Even though the judge in *Bishop* was aware that the supervised offender had violated conditions of probation, that he had severe alcohol problems, and that he had willfully [driven] after his license had been suspended, the judge did not revoke probation. 137 Wn.2d at 532, 973 P.2d 465. As a matter of law the judge's decision not to revoke probation under these circumstances broke any causal connection between any negligence of the accident. *Bishop* Wn.2d at 532, 973 P.2d 465. If the department had properly monitored Stewart and reported his violations to either of the two sentencing judges, and if the department had unsuccessfully asked for judicial action, the causal chain would have been broken. (emphasis added); (citations, in party omitted).

Joyce 155 Wn.2d at 321. The causal chain was not broken in *Joyce* and the state could not avoid the plaintiff's proximate cause showing or liability with that argument. *Id.*

Although obviously proof that the offender would have been incarcerated on the date of the incident at issue would serve to establish cause in fact, it is not the only way that such cause can be established. As *Joyce* establishes however such a showing is certainly not essential and this Court should reject such a proposition.

B. The Duty of the DOC to Supervise Offenders is Well Established.

As discussed in detail in appellant's opening brief and touched upon in the introductory comments above, the DOC's duty to supervise offenders is well established and ensconced within the law of the State of Washington. See, *Taggart supra*, *Joyce supra*, see also *Savage v. State* 127 Wn.2d 434, 899 P.2d 1270 (1995). Thus, the state's suggestion that no such duty exists should be rejected. Further, the state's reliance on the well-seasoned case of *Walters v. Hampton* 14 Wn.App. 458, 443 P.2d 648 (1975), is misguided and should be rejected. The analysis set forth in *Walters* was specifically rejected in *Taggart* over 20 years ago. 118 Wn.2d at 226. To the extent that the defense is also attempting to contend that there is "no enforceable duty to enforce the law", such a proposition has also been rejected as evidenced by *Taggart*, *Joyce* and a number of other cases. There are certainly circumstances, whether by judicial or legislative direction, where law enforcement officials can be held responsible when they fail to enforce specific laws. See, *Bailey v. Town of Forks* 108 Wn.2d 262 737 P.2d 1257, 753 P.2d 523 (1987) (liability for failure to enforce DUI law); see also *Donaldson v. City of Seattle* 65 Wn.App. 661, 831 P.2d 1098 (1992) (mandatory duty to arrest alleged abuser under the Domestic Violent Act and a failure to arrest can be a predicate for liability should the victim come to further harm); see

generally *Washburn v. City of Federal Way* 178 Wn.2d 732, 310 P.3d 1275 (2013).

While it is true that a governmental agency's internal policies and regulations do not create a duty in tort, the failure to comply with such policies do constitute **evidence** that there has been a breach of the applicable standard of care. Compare, *Melville v. State* 115 Wn.2d 34, 793 P.2d 952 (1990), to *Joyce v. State* 155 Wn.2d at 324 (internal directive, departmental policies, and the like may provide evidence of the standard of care and therefore be evidence of negligence." The proposition that internal governmental policies can provide evidence of negligence is now "codified" in the terms of WPI 60.03.

Similarly, the Court also should reject the "plea of poverty" arguments posited by DOC. The Supreme Court has already rejected the argument that the state and its agencies, in this context, can point to the absence of resources as a basis for the evisceration of duty and/or its non-application. As discussed in *Savage,* under the terms of RCW 4.92.090 the state, "shall be liable in the same manner as a private person and corporation ..." and there is simply no private sector parallel which would entitle a jury, (or for that matter the court), to consider the financial circumstances, (or the difficulty of the task), in evaluating the reasonableness of DOC's actions.

Finally, our Supreme Court has already rejected the notion that the DOC's failure to supervise offenders cannot be a "legal cause" under the law. Legal causation rests on a consideration of policy and common sense as to how far the state's responsibility for the consequences of his actions (or inactions) should extend. *Taggart* at 226. Legal causation involves a determination of whether liability should attach given cause and fact as a question of law for the court based on policy considerations as to how far the consequences of the defendant's act should go. *Id.*

While ignoring the line of Washington State's Supreme Court opinions finding legal causation in supervision cases, DOC instead relies on *Hartley v. State* 103 Wn.2d 768, 698 P.2d 777 (1985). *Hartley* involved the failure of the state to revoke the driver's license of a person subject to the habitual traffic offender laws. The driver, while intoxicated struck and killed Ms. Hartley and our Supreme Court rejected the notion that the state's conduct was the legal cause of such a death. It did so primarily on the fact that there was no showing that there was a special relationship between the government, its agents and either the victim or the perpetrator. *Id.* 103 Wn.2d at 784-85.

The *Hartley* Court recognized that the existence of a special relationship is a highly relevant consideration when addressing legal

causation. The Court in *Hertog v. City of Seattle* 138 Wn.2d 265, 284, 979 P.2d 400 (1999) explained;

> "Here the city maintains that cases in which legal causation was found lacking are irreconcilable with the duty accounted in *Taggart*. However none of the cases was a third-party release to supervision of a probation or parole officer, and in none was the special relationship signed by the court. Keeping in mind the establishment of duty does not resolve the proximate cause issue, there is nevertheless a distinction between circumstances where a special relationship is found and where none is found. Policy considerations involved in imposing the duty, such as the parole officer's taking charge of the parolee with the ability and responsibility to supervise parolee, and the knowledge of the one taking charge of the dangerous propensities posing a harm to others, also suggests that where such a relationship is not found, proximate causation may not be so readily found either. Where a special relationship exists based upon taking charge of a third party, the ability and duty to control the third party indicated the defendant's action in failing to meet that duty are not too remote to impose liability. (Citations omitted).

It has already been determined by our Supreme Court that DOC's failure to supervise, particular ultra-violent offenders such as involved in this case, can be a "legal cause". This Court should not ignore the clear guidance already provided by our Supreme Court.

III. CONCLUSION

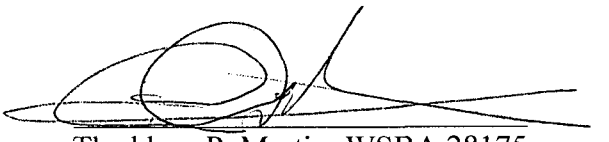
For the reasons stated in Appellant's Opening Brief and herein, the Trial Court erred in granting summary judgment in this case. There are clearly material questions of fact on the issue, whether or not DOC

breached its well-established duty to supervise criminal offenders who come within its control. There are also material issues of fact with respect to the ultimate factual question of whether or not DOC's failures made any difference, i.e., on the question of cause in facts.

As such it is respectfully requested that the Court reverse the Trial Court's summary judgment order, and remand this matter for a full trial on the merits.

DATED this 24th day of September, 2014.

LAW OFFICE OF THADDEUS P. MARTIN



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE OF THE APPELLAN'TS OPENIN BRIEF TO THE COURT OF APPEALS, DIVISION II ON THE FOLLOWING PARTIES IN THE FOLLOWING MANNER(S):

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BY
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[XXX] by causing a full, true, and correct copy thereof to be e-mailed to the party at the above listed addresses, on the date set forth below followed by legal messenger.

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

Executed at Lakewood, Washington on the 24th, day of September, 2014.

Kara Denny

Kara Denny, Legal Assistant