No. 93594-7

IN THE WASHINGTON STATE SUPREME COURT

DANIEL SCHULTE and KARINA ULRIKSEN-SCHULTE, husband and wife; DANIEL SCHULTE as Guardian ad Litem of ELIAS ULRIKSEN-SCHULTE, a minor; MARILYN SCHULTE, individually, and as Personal Representative of the Estate of DENNIS SCHULTE, deceased, and as Personal Representative of the Estate of JUDITH SCHULTE

Respondents,

v.

MARK W. MULLAN and JANE DOE MULLAN, husband and wife,

Defendants,

CITY OF SEATTLE, a municipal corporation,

Appellant.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Respondents Schulte ask this Court to deny discretionary review of the Unpublished Opinion (Becker, J.) refusing to intervene in a trial court ruling (Ramsdell, J.) denying the City of Seattle's motion for summary judgment. *See* ***Schulte v. City of Seattle***, Washington State Court of Appeals No. 72821-1-I, at 12 (Unpub. Op. July 18, 2016) ("we conclude intervention by this court is not warranted"). Numerous genuine issues of material fact precluded summary judgment here. *See, e.g.*, Unpub. Op. at 5, 8, 10.

The Schultes lost two grandparents and suffered serious injuries to mother and child at the hands of a multiple DUI offender on probation. The City's alleged probation "supervision" was grossly inadequate. The surviving family members simply want a jury trial. Judges Ramsdell and Becker, et al., thought that they should have one. Intervention by this Court is unwarranted.

A retired Municipal Court Judge also opined in this case that the City's willful failure to supervise this dangerously alcoholic offender was gross negligence – at best. The City's claim that its administrative rules render this Court's ***Taggart/Hertog*** line of cases ineffective is not even colorable. This Court should deny review and allow this family to seek the justice they deserve now.

RESTATEMENT OF ISSUES

1. Do ***Taggart***,[1] ***Hertog***,[2] and their progeny, impose a "take charge" duty on the City of Seattle to supervise and control known dangerous drunk drivers, where a Seattle Municipal Court Judgment and Sentence expressly requires such supervision and control?

2. Is summary judgment improper, where three experts – including a retired Municipal Court Judge – opined that the City fell woefully below the standard of care, failing to exercise even slight care to supervise a known dangerous drunk driver, proximately causing two deaths and other serious injuries?

3. Are those experts' opinions soundly based on substantial evidence of serious negligence, where the City admits that it failed to supervise its parolee in any way regarding the sentencing conditions that the offender not drink, not drive drunk, and not drive without valid insurance, a valid ignition interlock license, and an ignition interlock device on his truck, and where all of the evidence in the record supports the City's admissions?

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

[2] ***Hertog v. City of Seattle***, 138 Wn.2d 265, 979 P.2d 400 (1999).

4. In the face of such evidence, do this Court's decisions in ***Nist***[3] and ***Roberts***[4] forbid granting summary judgment, where ***Nist*** said gross negligence goes to the jury, and ***Roberts*** struck down the line of cases keeping gross negligence from the jury?

5. Can an administrative court rule strike down all of the above legal authority, particularly where ARLJ 11 does not purport to strike down any Supreme Court precedents, but rather specifies the "core services" that the City's probation officers are required to provide in order to protect public safety by supervising and controlling offenders, protections that the City utterly failed to provide?

6. Where, as here, three experts opined (based on the above noted substantial evidence of serious negligence) that the City proximately caused the two deaths and other injuries to the Schulte family, is proximate cause for the jury?

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[3] ***Nist v. Tudor***, 67 Wn.2d 322, 407 P.2d 798 (1965).

[4] ***Roberts v. Johnson***, 91 Wn.2d 182, 188, 588 P.2d 201 (1978).

STATEMENT OF THE CASE

The facts are accurately stated in the Unpublished Opinion. More details, with accurate record citations, are in the Brief of Respondent. The City's factual allegations, both here and in the Court of Appeals, are inaccurate and improperly stated most favorably to the City. This Court should take the facts in the light most favorable to the Schultes. *See, e.g.*, CR 56; Unpub. Op. at 2-3.

Nor does the City accurately restate the Unpublished Opinion. That opinion nowhere applies a negligence standard, *contra* Petition at (*e.g.*) 2, 8. Rather, the Court of Appeals held that, *assuming without deciding that the City's* [erroneous] *assertions about the limited scope of its duty are correct*, "a trial would still be necessary to determine whether the city breached its duty." Unpub. Op. at 4-5. This is true because genuine issues of material fact preclude summary judgment on (at least) whether the City's own regulations required it (a) to make collateral contacts, and (b) to track its parolee's pending Snohomish County DUI charge.[5] *Id.*

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[5] The City's parolee showed up drunk for his Snohomish County DUI arraignment, and was arrested. *See* BR 4-5, 9-12 While his Seattle parole officer was well aware of his Snohomish DUI, she failed to track it. *Id.*

On gross negligence, Seattle's "probation officer was confronted with the arguably foreseeable hazard that [her parolee] would continue to drink and . . . drive under the influence." Unpub. Op. at 8. This is key under ***Nist***: gross negligence is a form of negligence, derived from the foreseeability of the hazards from which an injury arises; therefore, "the law must necessarily look to the hazards of the situation confronting the actor." *Id.* (citing ***Nist***, 67 Wn.2d at 331). "Following Nist, we conclude that the trial court did not err in allowing the issue of gross negligence to go to the jury." *Id.*

The City briefly raises legal causation.[6] Petition at 19-20. The Court of Appeals correctly held that this Court foreclosed the City's argument in ***Hertog***. Unpub. Op. at 11. It is remarkable that after nearly a quarter century of consistent, binding precedent establishing and reaffirming its "take charge" duty to protect the public from offenders under its supervision and control, the City is still attempting to undermine ***Taggart***, and to avoid its responsibilities to its citizens under ***Hertog v. City of Seattle***.

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[6] The appellate court also addressed cause in fact, which the City had raised, citing ***Estate of Bordon v. Dept. of Corrections***, 122 Wn. App. 227, 95 P.3d 764 (2004). Unpub. Op. at 8-10. The City here abandons this argument, mentioning neither cause in fact nor ***Bordon***.

ARGUMENT

A. The unpublished opinion is consistent with this Court's precedents, like *Taggart*, *Hertog*, *Joyce*, *Nist*, and *Roberts*.

The City first argues that the appellate decision is somehow in conflict with this Court's ***Nist***, but that case supports the Schultes, as the Court of Appeals held. The City ignored ***Nist*** in its Brief of Appellant, even though it was key to the trial court's reasoning. And here, the City minimizes ***Joyce***,[7] which reaffirmed that gross negligence is for a jury, and ignores ***Roberts***, which shows the fate of a gross negligence standard that obstructs access to a jury. The ***Schulte*** decision is consistent with this Court's precedents.

Any discussion of this Court's relevant precedents in this area should begin with ***Taggart*** and ***Hertog***, which the City minimizes and attempts to undermine. The supervisory relationship between parole officers and parolees creates a "take charge" relationship to control the parolee and protect anyone who might reasonably be endangered by the parolee's dangerous propensities. ***Taggart***, 118 Wn.2d at 219-224. This constitutes a "special relationship" under the

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[7] ***Joyce v. State***, 155 Wn.2d 306, 318, 119 P.3d 825 (2005).

RESTATEMENT (SECOND) OF TORTS § 315 (1965). *Id.* at 219. It gives rise to a duty to protect the public from foreseeable harms. *Id.* at 224. The judgment and sentence or other court order establish a "take charge" relationship between parole officer and parolee. ***Joyce v. State***, 155 Wn.2d at 318; ***Bishop v. Miche***, 137 Wn.2d 518, 526, 973 P.2d 465 (1999); ***Bordon***, 122 Wn. App. at 236; *see also*, ***Hertog***, 138 Wn.2d at 277 n.3.

Our Supreme Court has directly imposed upon the City of Seattle and its probation counselors this duty to control municipal court probationers in order to protect others from reasonably foreseeable harms resulting from probationers' dangerous propensities. ***Hertog***, 138 Wn.2d at 281. There, an offender on Seattle Municipal Court probation supervision for lewd conduct raped a child. *Id.* at 268. Finding a duty, the Court rejected the City's repeated attempts to evade ***Taggart*** (which continue here):

> The City maintains that ***Taggart*** and ***Savage*** were wrongly decided and should be overruled because parole officers do not have any real control over the day to day lives and actions of parolees. However, this same argument was carefully considered and rejected in ***Taggart***. Further, our decision in ***Taggart*** expressly stated that the Legislature could limit or eliminate the duty recognized there by passing legislation granting further immunity. ***Taggart***, 118 Wn.2d at 224 . . . . The Legislature has not enacted such legislation.

Hertog, 138 Wn.2d at 278 (some cites omitted). The Legislature still has not enacted such legislation.

The City nonetheless continues its decades-long effort to evade ***Taggart***, albeit in the guise of arguing that the Legislature's adoption of a "gross negligence" standard removes its ***Hertog*** duty to supervise probationers. But once a special relationship exists, the City owes a duty of care and may be liable when damages result. ***Joyce***, 155 Wn.2d at 310. It is for the jury to decide whether the injury was reasonably foreseeable, even under a gross-negligence regime. ***Joyce***, 155 Wn.2d at 316-17; ***Nist***, 67 Wn.2d at 332. This Court should not permit the City to evade its ***Hertog*** duties.[8]

Nist concerned the host-guest statute, since repealed, which adopted the common-law gross-negligence standard. 67 Wn.2d at 324-25. The "host" driver turned left in front of an oncoming truck, injuring her passenger, who sued, but had her case dismissed on a

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[8] This Court very recently reaffirmed the above analysis in ***Binschus v. Skagit Cty.***, Washington State Supreme Court No. 91655-6 (Sept. 22, 2016). While the Court (5-4) declined to expand ***Taggart*** to impose liability upon a jail that had lost control of the offender months before he reoffended, it nonetheless reemphasized that "*failure to adequately supervise the probationer,*' may result in liability" and that the duty to supervise and control the probationer extends "to anyone who might foreseeably suffer bodily harm resulting from *the failure to control*" the probationer. ***Binschus***, Slip Op. at 8 & n. 2 (quoting ***Joyce***, 155 Wn.2d at 319) (emphases added in ***Binschus***). ***Binschus*** is otherwise inapposite.

half-time motion. *Id.* at 324. The Court engaged in a lengthy discussion of the gross negligence standard, noting that after at least 50 years, it has "universally escaped definition," every "qualifying word added to sharpen the phrase seems to obscure in about the same degree as it clarifies," and it "remains extremely difficult for the trial courts to apply in specific situations." *Id.* at 324-25.

The ***Nist*** Court distinguished an older line of cases granting summary judgment where negligence might be clear, but gross negligence was not, from the newer line of cases holding that gross negligence is for the jury. *Id.* at 325-29. The newer cases involved driver errors like passing unsuccessfully, failing to negotiate turns, and running stop signs. *Id.* at 327-28. The Court noted that in many of these cases, the drivers displayed some element of reasonable care (*e.g.*, signaling, slowing, driving in the proper lane for some period) but the courts nonetheless left the question of gross negligence to the jury. *Id.* at 328-29.

Nist reaffirmed the proposition that gross negligence is the failure to exercise slight care under the circumstances, but added that it is not tantamount to the total absence of care, requiring only "substantial evidence of serious negligence." *Id.* at 330, 332. The inquiry thus does not focus on whether the tortfeasor exercised some

care as to actions that did not cause an injury, but rather focuses on the tortious behavior. *Id.* at 327-28. For example, it is for the jury to determine whether a person was grossly negligent in turning left in front of an oncoming truck, missing a turn, or running a stop sign, even where they slowed, signaled, or looked both ways.

Although the City neither cited nor discussed ***Nist*** in its Brief of Appellant, it now mischaracterizes the Unpublished Opinion as focusing on what the probation officer might have done better, rather on what she utterly failed to do. This misreading is irrelevant. ***Nist*** says that *the jury* must decide gross negligence: the City's failure to supervise and control a known dangerous drunk driver is substantial evidence of serious negligence. Review is unwarranted.

Indeed, the fate of using the "gross negligence" standard to prevent jury trials is exemplified in the demise of the host-guest line of cases: the Legislature ultimately repealed the statute, and this Court subsequently overruled the older line of cases mentioned above, in which the gross-negligence standard was misused to deprive injured victims of their day in court. ***Roberts***, 91 Wn.2d at 188. ***Roberts*** rejected that irrational, unjust, and unequal standard of liability. *Id.* at 186-88. Particularly notable here, it fails the test of consistency, where all citizens except auto guests were protected

from negligence, not just gross negligence. *Id.* at 186-87. The Schultes have a right to a jury trial, as ***Taggart***, ***Hertog***, ***Joyce***, ***Nist*** and ***Roberts*** provide. The Court should deny review.

B. *Kelley* and *Whitehall* are simply distinguishable.

The City seems to argue that because other plaintiffs failed to present sufficient evidence in two cases that are factually nothing like this case, the trial court should have granted summary judgment here. This is incorrect. The appellate court properly distinguished Division Two's ***Kelley v. State***, 104 Wn. App. 328, 17 P.3d 1189 (2000), *review granted*, 144 Wn.2d 1021 (2001) (*voluntary withdraw of review granted* Jan. 10, 2002), and its decision following ***Kelley***, ***Whitehall v. King Cty.***, 140 Wn. App. 761, 167 P.3d 1184 (2007).

In ***Kelley***, the plaintiff claimed that she was assaulted due to DOC's failure to supervise an offender under its supervisory control. 104 Wn. App. at 329-31. That probation officer regularly met with the offender twice a month, made 14 out of 27 required field contacts, and did not fail to inquire about two suspicious incidents. ***Kelley***, 104 Wn. App. at 335-37. Thus, insufficient evidence of serious negligence required summary judgment on gross negligence.

In ***Whitehall***, the offender being supervised for third-degree theft regularly reported to his probation officer and did nothing wrong;

because he was a low-level offender, nothing further was required. 140 Wn. App. at 763-64. He then unexpectedly placed an explosive on a trailer door, negligently injuring Whitehall. *Id.* at 764-65. As Judge Ramsdell noted, there was simply no relationship between the adequate County supervision and the unforeseeable hazard, and thus, no substantial evidence of serious negligence. RP 30.

The appellate court correctly distinguished both ***Kelley*** and ***Whitehall***. Unlike in those cases, here the probation officer did nothing to enforce – or even to confirm – the ordered ignition interlock and suspended license, or the no-drinking-or-driving conditions, including failing to make any inquiry regarding the known pending DUI in another county. Each of these violations is directly related to the conditions she had a duty to supervise in order to control her parolee. ***Kelley*** and ***Whitehall*** are simply nothing like this case. Interlocutory review of the summary judgment denial is unnecessary.

C. The City's final argument has never been raised before, and it is incorrect in any event.

The City's final argument (about "legislative intent") raises a new argument that the City did not raise in the trial court, or in its Brief of Appellant. *Compare, e.g.*, BA 6 *with* Petition at 3-4. The City is not permitted to first raise new arguments in this Court. *See, e.g.*,

Clam Shacks of Am., Inc. v. Skagit County, 109 Wn.2d 91, 98, 743 P.2d 265 (1987) ("RAP 13.4(c)(5) requires a concise statement of the issues presented for review"; RAP 13.7(b) limits review to issues properly raised in the petition as directed in RAP 13.4(c)(5)).

In any event, the argument is incorrect for several reasons. First, the appellate decision is unpublished, so it is not precedential and cannot "disrupt" any alleged "expectations" of those not party to this action. *See* GR 14.1. Second, it does not *impose* any liability on the City: it merely permits the Schultes to go before a jury in the usual course, just as ***Nist***, ***Taggart***, ***Hertog***, ***Joyce***, and many other decisions require. Only a jury can impose liability here.

Third, testimony supporting a bill is not relevant, as it is not a legislative finding, but mere rhetoric, presumably from government employees (perhaps even those defending this action?). Their self-interest – which apparently has nothing to do with protecting the public from offenders like this one – has no bearing on the legal issues the appellate court addressed.

Fourth, as discussed in detail *supra*, the Unpublished Opinion nowhere purports to impose a mere negligence standard, and says nothing that would increase the burden of proof. The City apparently forgets that the burden is on the plaintiffs here. That burden is to

establish gross negligence by a preponderance of the evidence. The Unpublished Opinion acknowledges that burden, but does not even come close to changing it.

Fifth, it is apparent that the City views ***Kelley*** and ***Whitehall*** as "get out of liability free" precedents. They never were, as the Unpublished Opinion makes clear. But even if they had been, an unpublished opinion cannot affect them. And as explained *supra*, they are easily distinguishable from this case.

CONCLUSION

This Court should deny review of the Court of Appeals' unpublished opinion refusing to intervene in the trial court's well reasoned and legally sound summary judgment denial. The Schultes have a right to bring their cause before a jury without further delay arising from this lengthy and unnecessary interlocutory appellate process. Discretionary review is unwarranted here.

RESPECTFULLY SUBMITTED this 17th day of October, 2016.

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CERTIFICATE OF SERVICE

I certify that I caused to be mailed via U.S. mail, postage prepaid, and/or emailed, a copy of the foregoing ANSWER TO PETITION FOR REVIEW on the 14th day of March 2016 to the following counsel of record at the following addresses:

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APPENDIX A

MISDEMEANANT PROBATION DEPARTMENT

RULE 11. PROBATION DEPARTMENT

RULE 11.1 DEFINITION

A misdemeanant probation department, if a court elects to establish one, is an entity that provides services designed to assist the court in the management of criminal justice and thereby aid in the preservation of public order and safety. This entity may consist of probation officers and probation clerks. The method of providing these services shall be established by the presiding judge of the local court to meet the specific needs of the court.

RULE 11.2 QUALIFICATIONS AND CORE SERVICES OF PROBATION DEPARTMENT PERSONNEL

(a) Probation Officer Qualifications.

(1) A minimum of a bachelor of arts or bachelor of science degree that provides the necessary education and skills in dealing with complex legal and human issues, as well as competence in making decisions and using discretionary judgment. A course of study in sociology, psychology, or criminal justice is preferred.

(2) Counseling skills necessary to evaluate and act on offender crisis, assess offender needs, motivate offenders, and make recommendations to the court.

(3) Education and training necessary to communicate effectively, both orally and in writing, to interview and counsel offenders with a wide variety of offender problems, including but not limited to alcoholism, domestic violence, mental illness, sexual deviancy; to testify in court, to communicate with referral resources, and to prepare legal documents and reports.

(4) Anyone not meeting the above qualifications and having competently held the position of probation officer for the past two years shall be deemed to have met the qualifications.

(b) Probation Officer—Core Services.

(1) Conduct pre/post-sentence investigations with face to face interviews and extensive research that includes but is not limited to criminal history, contact with victims, personal history, social and economic needs, community resource needs, counseling/treatment needs, work history, family and employer support, and complete written pre/post-sentence reports, which includes sentencing recommendations to the court.

(2) For offenders referred to the misdemeanant probation department, determine their risk to the community using a standardized classification system with a minimum of monthly face to face interviews for offenders classified at the highest level.

(3) Evaluate offenders' social problems, amenability to different types of treatment programs, and determine appropriate referral.

(4) Supervise offenders with face to face interviews depending on risk classification system.

(5) Oversee community agencies providing services required of offenders with input to the judicial officer (e.g. alcohol/drug, domestic violence, sexual deviancy, and mental illness):

(6) *Other Duties.* The core services listed under both probation officer and probation clerk are not meant to exclude other duties that may be performed by either classification of employee or other court clerical staff, such as record checks, calendaring court proceedings, and accounting of fees.

(c) Probation Clerk Qualifications.

(1) High school or equivalent diploma.

(2) Efficient in all facets of basic clerical skills including but not limited to keyboarding, computer familiarity and competence, filing, and positive public interaction.

(3) Above average ability in dealing with stress and difficult clients.

(4) Ability to complete and perform multi-task assignments.

(d) Probation Clerk—Core Services.

(1) Monitor compliance of treatment obligations with professional treatment providers.

(2) Report offender non-compliance with conditions of sentence to the court.

(3) Coordinate treatment referral information, and monitor community agencies for statutory reporting compliance.

(4) Anyone not meeting the above qualifications and having held the position of probation clerk for the past two years shall be deemed to have met the qualifications.

(5) *Other Duties.* The core services listed under both probation officer and probation clerk are not meant to exclude other duties that may be performed by either classification of employee or other court clerical staff, such as record checks, calendaring court proceedings, and accounting of fees.

RULE 11.3 STATUTORY PROBATION SERVICE FEES TO BE USED FOR PROBATION SERVICES

All positions, which are funded by statutory probation service fees, shall be limited to working with individuals or cases who are on probation. Any additional funds raised from statutory probation services fees beyond what is necessary to fund the positions in the probation department shall be used to provide additional levels of probation services.

[Adopted effective September 1, 2001.]

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DANIEL SCHULTE and KARINA ULRIKSEN-SCHULTE, husband and wife; DANIEL SCHULTE as Guardian ad Litem of ELIAS ULRIKSEN-SCHULTE, a minor; MARILYN SCHULTE, individually, and as Personal Representative of the Estate of DENNIS SCHULTE, deceased, and as Personal Representative of the Estate of JUDITH SCHULTE, deceased,	)	No. 72821-1-I
	)	DIVISION ONE
Respondents,	)	UNPUBLISHED OPINION
v.	)	FILED: July 18, 2016
MARK W. MULLAN and JANE DOE MULLAN, husband and wife,	)	
Defendants,	)	
CITY OF SEATTLE, a municipal corporation,	)	
Appellant.	)	

BECKER, J. — The City of Seattle is a defendant in a suit for wrongful death and personal injury caused by a drunk driver who was on probation for a previous drunk driving conviction. The plaintiffs allege the probation officer was grossly negligent for failing to supervise the driver more closely. Because the

record contains evidence from which a jury could find the contested elements of breach of duty and causation, the trial court correctly denied the city's motion for summary judgment.

FACTS

The plaintiffs seek damages on behalf of four members of the Schulte family. Dennis and Judy Schulte were killed, and their daughter-in-law Karina Ulriksen-Schulte and her newborn son were seriously injured, when a drunk driver hit them as they were crossing a street on March 25, 2013. The driver was Mark Mullan. At the time, he was on probation in Seattle for driving under the influence on December 25, 2012. Charges were pending against him in Snohomish County for driving under the influence on October 8, 2012.

The plaintiffs filed this lawsuit in October 2013 against the city and Mullan, alleging a breach of the duty to supervise probationers. They contend that with proper supervision, Mullan would not have been behind the wheel on March 25, 2013, because he would have been in custody or under close alcohol monitoring for probation violations that should have been discovered. The city moved for summary judgment. The trial court's order denying the city's motion for summary judgment is before us on discretionary review.

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). We make the same inquiry as the trial court. Hertog, 138 Wn.2d at 275. The facts and

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FACTS

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The plaintiffs filed this lawsuit in October 2013 against the city and Mullan, alleging a breach of the duty to supervise probationers. They contend that with proper supervision, Mullan would not have been behind the wheel on March 25, 2013, because he would have been in custody or under close alcohol monitoring for probation violations that should have been discovered. The city moved for summary judgment. The trial court's order denying the city's motion for summary judgment is before us on discretionary review.

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). We make the same inquiry as the trial court. Hertog, 138 Wn.2d at 275. The facts and

reasonable inferences are considered in the light most favorable to the nonmoving party. Hertog, 138 Wn.2d at 275.

The elements of a negligence cause of action are (1) the existence of a duty to the plaintiff, (2) breach of the duty, and (3) injury to plaintiff proximately caused by the breach. Hertog, 138 Wn.2d at 275. Existence of duty is a question of law. Hertog, 138 Wn.2d at 275. Breach and proximate cause are generally fact questions for the trier of fact. But if reasonable minds could not differ, these factual questions may be determined as a matter of law. Hertog, 138 Wn.2d at 275.

DUTY AND BREACH

To determine whether genuine issues of material fact preclude summary judgment on the issue of duty, it is helpful to contemplate in broad strokes how the jury will be instructed on duty if the case goes to trial. Here, the applicable duty is articulated in Hertog: "the City and its probation counselors have a duty to control municipal court probationers to protect others from reasonably foreseeable harm resulting from the probationers' dangerous propensities." Hertog, 138 Wn.2d at 281.

The plaintiffs allege that the probation officer who supervised Mullan breached the city's duty under Hertog in several ways. First, plaintiffs allege the probation officer was negligent in failing to track the pending charge against Mullan for driving under the influence in Snohomish County in October 2012. If she had done so, they contend, she would have discovered that the Snohomish County court issued a warrant when Mullan failed to appear for a court date on

January 4, 2013, that Mullan was drunk when he came to court on January 14 to quash the warrant, and that he was held in custody there for more than two weeks until he bailed out. Second, the plaintiffs allege that the probation officer was negligent in failing to contact collateral sources to verify what Mullan was telling her. Arguably, through such inquiry, she would have discovered that Mullan was missing treatment appointments and was continuing to drink and drive.

The city responds that a jury cannot find that Mullan's probation officer breached the duty stated in Hertog because the evidence shows she fully complied with policies and procedures promulgated by the Seattle Municipal Court to guide the intake, risk assignment, and supervision of misdemeanor defendants. The city phrases its argument on appeal as a request for this court to elucidate the "nature and scope" of the duty imposed by Hertog. But in effect, the city is arguing that a Hertog instruction on duty must be accompanied by an instruction informing the jury that the city's duty is limited by policies and procedures decided at the municipal court level and that the duty is fulfilled by compliance with such policies and procedures. The plaintiffs do not agree that the administrative policies and procedures of the municipal court are legal limitations on the city's duty. In the plaintiffs' view, the duty as stated in Hertog is complete and sufficient for a duty instruction, without limitation, embellishment or elaboration.

The city relies on Whitehall v. King County, 140 Wn. App. 761, 167 P.3d 1184 (2007). The offender in Whitehall, while on probation in King County for

theft, maliciously exploded an illegal firework near a residence. The explosion injured an occupant, who then sued the county for negligent supervision. This court upheld a grant of summary judgment to the county, holding that the probation officers had complied with applicable court policies and under the facts of the case, the county was not obligated to monitor the offender more closely than it did. Whitehall, 140 Wn. App. at 770. The plaintiffs contend that Whitehall was wrongly decided.

Even if the duty of supervision is limited as the city asserts, a trial would still be necessary to determine whether the city breached its duty. For example, one of the administrative policies and procedures of the Seattle Municipal Court provides, "Probation staff will follow up as appropriate on new information that requires action." MCS-210-3.06.020(IV)(D). It is a disputed issue whether, as alleged by expert witnesses for the plaintiffs, the pending charge against Mullan in Snohomish County qualified as "new information that requires action." It is also a disputed issue whether an obligation to contact collateral sources for information about Mullan beyond what he himself supplied was imposed by local policy requiring "assessment of offender risk, needs and compliance with court ordered probation conditions." MCS-210-3.06.020. Thus, even if Whitehall is controlling, the trial court did not err in denying the city's motion for summary judgment. In Whitehall, it was undisputed that the probation officers complied with local policies and procedures. Here, it is disputed. Expert testimony on both sides creates a genuine issue of material fact.

Accordingly, we decline to revisit Whitehall. Nor do we attempt to draw from Whitehall a conclusion about how the jury should be instructed on duty. We are dealing here with a denial, not a grant, of summary judgment. We are mindful of the pitfalls of interlocutory review of an order denying summary judgment. See Maybury v. City of Seattle, 53 Wn.2d 716, 720-21, 336 P.2d 878 (1959). The trial court has yet to decide, under the facts of the present case that differ significantly from the facts of Whitehall, whether it will be appropriate to instruct the jury that the city's duty is confined to the policies and procedures the municipal court has generated for probation officers. A related question is whether the local policies and procedures exclusively define the standard of care or whether the trial court will permit expert witnesses to opine that more is required under a generalized standard of care for probation officers. The law will be better served if these issues are first decided concretely in the trial court rather than abstractly in this court.

GROSS NEGLIGENCE

The city is liable for the inadequate supervision or monitoring of its misdemeanant probationers only if its conduct constitutes gross negligence. RCW 4.24.760(1). Presumably, at trial the jury will be instructed that negligence is the failure to exercise ordinary care and that gross negligence is the failure to exercise slight care. See 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 10.01, at 124 (6th ed. 2012) (WPI) (negligence); WPI 10.07, at 132 (gross negligence).

The city contends there is insufficient evidence of gross negligence to send the issue to the jury.

The Washington Supreme Court has lamented both the elusive meaning of gross negligence and the persistent problem of whether to send the issue of gross negligence to the jury. Nist v. Tudor, 67 Wn.2d 322, 325, 407 P.2d 798 (1965). The general inclination is to leave the question to the jury when there is "substantial evidence of acts or omissions seriously negligent in character." Nist, 67 Wn.2d at 326.

Nist states that "gross negligence, being a form of negligence on a larger scale, must also, like ordinary negligence, derive from foreseeability of the hazards out of which the injury arises." Nist, 67 Wn.2d at 331. "In determining the degree of negligence, the law must necessarily look to the hazards of the situation confronting the actor." Nist, 67 Wn.2d at 331. In Nist, the hazard confronting the driver as she was trying to turn left was an oncoming truck. The court held the fact that the driver turned "suddenly into so obvious a danger" supplied sufficient evidence for the jury to find gross negligence. Nist, 67 Wn.2d at 332.

The city relies on Kelley v. Department of Corrections, 104 Wn. App. 328, 17 P.3d 1189 (2000), review granted, 144 Wn.2d 1021 (2001) (motion for voluntary withdrawal of review granted January 10, 2002). In Kelley, a man committed a sexual assault while out on community custody after pleading guilty to attempted rape. Kelley, 104 Wn. App. at 330-31. The victim sued the State for negligent supervision. Kelley, 104 Wn. App. at 329. This court affirmed the

grant of summary judgment to the State, concluding that the evidence fell short of showing gross negligence. Kelley, 104 Wn. App. at 338; see also Whitehall, 140 Wn. App. at 770.

Here, the city contends a jury could not rationally find gross negligence because the probation officer's level of supervision satisfied or exceeded the standard of care set by local court policies and procedures. As discussed above, that is a matter of factual dispute. Also, the trial court persuasively distinguished Whitehall and Kelley when noting that unlike in those cases, here there was a "direct correlation" between the allegedly inadequate supervision of Mullan and the danger reflected in his recent criminal activities. The probation officer was confronted with the arguably foreseeable hazard that Mullan would continue to drink and continue to drive under the influence. Because a jury could find that the probation officer breached her duty by failing to track the Snohomish County case and contact collateral sources, a jury could also find that the breach was a failure to use even slight care. Following Nist, we conclude the trial court did not err in allowing the issue of gross negligence to go to a jury.

CAUSATION

The city contends that even if the evidence supports gross negligence, the plaintiffs' claims must fail for lack of proximate cause. Proximate cause consists of cause in fact and legal causation. Hertog, 138 Wn.2d at 282. Cause in fact concerns "but for" causation, events the acts produced in a direct unbroken sequence which would not have resulted had the act not occurred. Hertog, 138

Wn.2d at 282. Proximate cause is generally a fact question for the trier of fact if reasonable minds could differ. See Hertog, 138 Wn.2d at 275.

The city contends a jury would have to engage in speculation to find: (1) that the probation officer would have learned from collateral sources enough information about Mullan's continued drinking and driving to justify asking the court to revoke his probation, (2) that the court would have held a contested hearing on allegations that Mullan was violating his conditions of probation, and (3) that the court would have found Mullan in violation and would have incarcerated him for a period including the day when he drove drunk and crashed into the Schulte family. For its analysis of causation, the city relies on Estate of Bordon v. Department of Corrections, 122 Wn. App. 227, 95 P.3d 764 (2004), review denied, 154 Wn.2d 1003 (2005).

In Bordon, the plaintiff, suing the State for negligently supervising a convict, did not submit evidence about when a violation report would have been filed, when it would have been heard, whether the violation would have been pursued or proven, whether the violation would have resulted in additional jail time, or whether that jail time would have encompassed the date of the plaintiff's injury. Bordon, 122 Wn. App. at 241. This court held that because the plaintiff did not present any evidence establishing a direct causal connection between the alleged negligence and the harm she suffered, the trial court erred when it denied the State's motion for judgment as a matter of law at the conclusion of the plaintiff's case. Bordon, 122 Wn. App. at 244.

In this case, the plaintiffs have presented evidence of the kind that was missing in Bordon. The Snohomish County court docket showing Mullan's drunken court appearance in that court on January 14, 2013, was there to discover if the probation officer had been tracking the case. Expert witnesses with experience in probation counseling testified that discovery of that incident would have resulted in an immediate violation report, a recommendation of significant jail time for Mullan and more intensive monitoring of his movements. With that information, a retired judge testified, the court would most likely have set additional review dates and additional monitoring conditions such as day reporting, daily portable breath test monitoring, or electronic home monitoring to make sure Mullan was compliant with his treatment program.

The evidence submitted by plaintiffs is adequate to support a rational jury in making a nonspeculative finding that, but for the city's failures in supervision, Mullan would not have been able to drive drunk on March 25, 2013. A jury could find that Mullan either would have been incarcerated on that date or at least would have been on an alcohol monitoring system. Because reasonable minds could differ, the question of cause in fact is for the jury.

The city also argues that the question of legal causation should be decided in its favor. Legal causation, an issue for the court to decide as a matter of policy, may be found lacking even if cause in fact is present when "the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998). "Legal causation is, among other

things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise." Schooley, 134 Wn.2d at 479. The city argues that making municipal probation departments liable for roadway tragedies caused by repeat drunk drivers will unduly strain municipal budgets and encourage courts to disband probation services altogether.

The city's argument on the lack of legal causation is foreclosed by Hertog, where the court rejected a similar argument. "Where a special relation exists based upon taking charge of the third party, the ability and duty to control the third party indicate that defendant's actions in failing to meet that duty are not too remote to impose liability." Hertog, 138 Wn.2d at 284. The Hertog court perceived that it was being asked to overrule Taggart v. State, 118 Wn.2d 195, 822 P.2d 243 (1992), and it declined to do so. Hertog, 138 Wn.2d at 284. See Taggart, 118 Wn.2d at 228 ("We do not believe recognizing that a parole officer's negligent supervision may be the legal cause of the injuries suffered by the victims of parolees' violent crimes will have an undue chilling effect upon parole officers' performance of their duties.")

IGNITION INTERLOCK DEVICE

One of the conditions of Mullan's sentence was to comply with "mandatory ignition interlock device requirements as imposed by the Department of Licensing." The probation officer gave Mullan information about contacting the Department of Licensing but did not verify that the device had been installed on Mullan's truck. Plaintiffs moved for partial summary judgment, requesting the

court to rule as a matter of law that the city's failure to verify installation was a breach of its duty to exercise slight care. The trial court denied the motion.

The plaintiffs ask this court to review and reverse this ruling as an error likely to be repeated on remand. RAP 2.4(a)(1). Because the plaintiffs, respondents on appeal, did not seek review of the decision denying their motion for summary judgment, we may reverse the trial court's decision only "if demanded by the necessities of the case." RAP 2.4(a)(2). Plaintiffs have not persuasively demonstrated necessity. The ruling is merely a denial of summary judgment and thus it remains subject to revision in the trial court as the case proceeds.

In summary, having reviewed the pretrial rulings the city has placed before us, and having considered the issues of duty, gross negligence, and causation, we conclude intervention by this court is not warranted. The denial of summary judgment is affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Ian, J.pt.

MASTERS LAW GROUP

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