No. 72821-1

King County Superior Court No. 13-2-35695-3SEA

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

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,

Plaintiffs/Appellees,

vs.

CITY OF SEATTLE,
Defendant/Appellant

REPLY BRIEF OF APPELLANT CITY OF SEATTLE

PETER S. HOLMES
Seattle City Attorney

REBECCA BOATRIGHT,
WSBA #32767
Special Assistant City Attorney
JOSEPH G. GROSHONG,
WSBA #41593
Assistant City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

Attorneys for Defendant/Petitioner,
City of Seattle

CHRISTIE LAW GROUP, PLLC

ROBERT L. CHRISTIE,
WSBA #10895
2100 Westlake Avenue N.
Suite 206
Seattle, WA 98109
(206) 957-9669

Attorneys for Defendant/Petitioner,
City of Seattle

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Page

Statutes

Rules

Other Authorities

I. INTRODUCTION

The City's motion below, and its opening brief here, focused on two legal questions: (1) the nature and scope of the duty owed by the Seattle Municipal Court's probation department with respect to monitoring Mullan's activities; and (2) whether the speculation and conjecture of plaintiffs' experts that Mullan would have been in jail at the time of this collision but for Ms. Lamond's failure to further investigate Mullan's activities over the ten weeks she supervised him is evidence sufficient under CR 56(e) to carry this case past summary judgment.

Conflating the existence of a duty with the nature and scope of that duty, plaintiffs' Response sidesteps the latter inquiry; as the City has consistently stated, it does not deny, under *Taggart*[1] and *Hertog*,[2] that – having elected pursuant to ARLJ 11 to operate a probation department – it owed a duty to supervise Mullan. It is not enough, however, to simplistically conclude "there is a special relationship and therefore a duty." The nature and scope of that duty are equally requisite inquiries in the legal analysis, and the conclusory musings of plaintiffs' experts (none of whom have experience with Seattle Municipal Court and the policies and guidelines for its probation department that the court alone has the

[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).

authority to determine) as to what more they think Ms. Lamond could have done that might have cut through Mullan's lies are not enough to carry a case to trial.

Such opinions, as courts have repeatedly noted (and with respect to Mr. Stough particularly), are not only lacking in foundation, they are contrary to the law. "Legal opinions on the ultimate legal issue are not properly considered under the guise of expert testimony and a trial court errs if it consideres those opinions expressed in affidavits."[3]

It is this straw man that the trial court set up by shifting the inquiry from what Ms. Lamond did to the hypothetical investigations she could have done – an analytical error that effectively imposes on the City a potentially unbounded duty to investigate that is not otherwise found in law and which the City calls on this court to correct. The issue is not factual, but legal. A probation officer like Ms. Lamond can always do more – make more phone calls, interview more individuals, actively monitor an individual under supervision, etc. – and plaintiff's experts have so opined. But whether Ms. Lamond had a legal duty to do more is a legal question for this Court to decide.

Nor does plaintiffs' Response meet the City's arguments on

---

[3] *Terrell v. State Dept. of Social and Health Services,* 120 Wn. App. 20, 29 (2004) (affirming trial court's striking testimony of Dr. Jon Conte, who opined in his declaration that "DSHS social workers had a duty to warn Terrell of the risks posed by the neighbor children.")

proximate cause. As has been affirmed yet again, in a decision published just days after the City filed its opening brief, the speculation of experts (again, Mr. Stough) as to how a court might rule on hypothetical facts before it cannot suffice under CR 56(e) to create a jury question in a failure-to-supervise case. This rule applies with particular force here, where – in contrast to all the case law on which plaintiffs rely – the allegations of probation violations on which plaintiffs now rely were never brought to Ms. Lamond's attention and, critically, would not have been discoverable through the records checks (DOL, criminal databases, and treatment records) she was tasked to perform even had she prematurely undertaken to do so at some indeterminate point prior to the close of the first 90-day review period. Even if she did have an affirmative duty to otherwise investigate Mullan's day-to-day activities, it remains pure conjecture to conclude that, even had she discovered and reached out to the collateral contacts who have now come forward, she (1) would have learned of their (unproven) allegations and (2) would have had opportunity to bring them before the court prior to the collision at issue here, let alone (3) that the court would have then found Mullan to be in violation and reincarcerated him for a period to include the date of this crash.

Indeed, both the tone and substance of plaintiffs' Response convey a concession that their case is not well-founded. Effectively

acknowledging that to maintain their case this court would need to not only overrule its own precedent but fundamentally change the law that governs the gross negligence inquiry, they begin their argument by first urging the court to reject this appellate review outright as "improvidently granted," notwithstanding the trial court's certification of its order and the Commissioner's ruling that such certification was "well taken." They follow by asking the court to overrule the post-*Hertog* appellate decisions that analyze, consistent with the City's point on summary judgment, not merely the existence of a duty but the separate inquiries regarding the nature and scope of the duty owed and the degree of proof required under CR 56 to defeat summary judgment. They then suggest that the court use this case as an opportunity to judicially repeal the statutory standard that, post-*Hertog*, amended the degree of care in a failure-to-supervise case from simple negligence to the gross negligence standard addressed in the appellate decisions they ask this court to reject.

As it emphasized below, the City appreciates the magnitude of the loss plaintiffs have sustained and is deeply sympathetic to the Schulte family. The unquestionable tragedy of this case, however, should not overwhelm the court's neutrality, nor serve to mitigate the analytical errors of the trial court's ruling or create a duty that is otherwise rejected in law. The City assumes that plaintiffs' call for judicial activism with

respect to the statutory gross negligence standard, their pleas to overrule the case law that applies that standard, and their suggestion that the court set aside both the trial court's certification of this matter for review and the Commissioner's ruling accepting the same, will garner little or no traction here, and accordingly will not address these points (other than to generally object for the sake of the record). The City instead focuses its Reply on the substantive law that controls, and which, when applied to the facts of record in this case, demonstrates the court's error in denying the City's summary judgment motion below.

II. PLAINTIFFS' THEORY CONFLATES THE EXISTENCE OF A DUTY WITH THE NATURE AND EXTENT OF THAT DUTY – LEGAL INQUIRIES THAT ARE SEPARATE AND DISTINCT.

"'It is an elementary principle that an indispensable factor to liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured.'" *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 194-95, 15 P.3d 1283 (2001) (*quoting Routh v. Quinn*, 20 Cal.2d 488, 491, 127 P.2d 1, 3 (1942)) (emphasis supplied). Duty, as an element of a negligence action, has three independent facets, each of which must be separately proven: *by whom* is the duty owed, *to whom* is the duty owed, and *what* standard of care is owed. *Nivens v. 7-11 Hoagy's Corner*, 83 Wn. App. 33, 41, 920 P.2d 241

(1996).

Plaintiffs' emphasis on *Taggart*, *Hertog*, and *Bishop*[4] misses the point; each of these cases speaks only to the existence of a duty (the "by whom" and "to whom" facets of the analysis) owed by either Department of Corrections officers (*Taggart*) or City and County probation departments (*Hertog* and *Bishop*). None of these cases speak to the issue at bar here: Did the nature and scope of the duty owed by Ms. Lamond in her monitoring of Mullan require that she undertake the affirmative investigative acts that plaintiffs urge, such that her failure to do so (her "naïve acceptance of [Mullan's] false claims"[5] in a meeting she need not have called in the first place) can be the basis for a finding on gross negligence? It is on this facet of the duty analysis (its nature and scope) that the City based its motion below.

It is also this facet of the duty analysis that this court addressed head-on in *Whitehall*,[6] against the backdrop of the evidentiary burden under the gross negligence standard that the court addressed as a matter of law in *Kelley*.[7] While both plaintiffs and the trial court suggest an irreconcilable disconnect between the Supreme Court's decisions in *Taggart* and *Hertog* and the Court of Appeals' post-*Hertog* decisions in

---

[4] *Bishop v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999).
[5] Plaintiffs' Response at p. 48.
[6] *Whitehall v. King County*, 140 Wn. App. 761, 167 P.3d 1184 (2007).
[7] *Kelley v. State*, 104 Wn. App. 328, 333, 17 P.3d 1189 (2000).

Kelley and *Whitehall* (Plaintiffs Response at p. 23), this concern can be easily waylaid. There is no conflict between these two lines of cases because they address fundamentally different facets of the duty analysis.

Kelley, which the trial court found particularly troubling,[8] does not focus on the existence of a duty; indeed, citing *Taggart*, *Hertog*, and *Bishop*, *Kelley* expressly acknowledges the existence of a duty. *Kelley*, 104 Wn. App. at 332 ("A parole officer has a duty to take reasonable precautions to protect anyone who might foreseeably be endangered."). Rather, following the Legislature's move, post-*Hertog* (and arguably at the *Hertog* Court's instigation[9]) to bar such claims absent a showing of gross negligence,[10] *Kelley* holds that the record of omissions by the

---

[8] Plaintiffs emphasize Judge Ramsdell's observation that the Supreme Court accepted review in *Kelley*, but that review was apparently withdrawn before the matter was decided. Judge Ramsdell speculated from this procedural history that *Kelley* may no longer be good law. To the extent that the trial court chose to disregard *Kelley* on this speculation, that was clear error under rules of *stare decisis.* Moreover, *Kelley* was not so tainted so as to deter this court from relying on it in deciding *Whitehall.*

[9] The Court emphasized in *Hertog* that although it had noted in *Taggart* that the Legislature could limit or eliminate the duty recognized [in *Taggart*] by passing legislation granting further immunity", the Legislature had not done so. *Hertog*, 138 Wn.2d at 278 (*citing Taggart*, 118 Wn.2d at 224). As *Kelley* recognizes, the Legislature has since so acted by removing the potential for liability based on simple negligence. Instead, a plaintiff must now prove gross negligence. RCW 4.24.760(1).

[10] Plaintiffs mistakenly state that that the this statute should be rejected as "violating basic principles of equality and consistency" in that it "require[s] victims of the City's probationers to show gross negligence, while victims of DOC offenders need show only negligence." *Plaintiffs' Response* at p. 41. This is incorrect. As this Court observed in *Whitehall*, the statute that applies the gross negligence standard to misdemeanor offenders actually followed the statute (RCW 72.09.320) that applies the gross negligence standard in cases involving DOC supervision. It is in part for this reason that plaintiffs' entire argument seeking to dismiss *Kelley* and *Whitehall* under the reasoning in *Nist v. Tudor*, 67 Wn.2d 322, 407 P.2d 798 (1965), and *Roberts v. Johnson*, 91 Wn.2d 182, 588 P.2d 201 (1978), is misplaced.

community corrections officer in that case, over an eight-month period of supervision, was insufficient as a matter of law to meet that statutory standard. In *Whitehall*, this court, following *Kelley*, likewise found the record at issue insufficient to proceed past summary judgment, rejecting the plaintiff's effort to expand the scope of the duty to include collateral outreach or additional investigation – the same argument that plaintiffs advance here.

Plaintiffs note that the trial court predicated its denial of summary judgment in part on its finding *Kelley* to be "troubling" in that "excises half of the [reasonable care] standard articulated in *Taggart* and *Hertog*." *Plaintiffs' Response* at p. 44. Respectfully, Judge Ramsdell overlooked that it was not *Kelley* that obviated the reasonable care standard articulated in *Taggart* and recognized in *Hertog*; that change was codified by the Legislature after *Hertog* through RCW 4.24.760(1). Indeed, in *Whitehall* this court specifically noted this point. 140 Wn. App. 761, 765-66, 167 P.3d 1184, 1186 (2007).

Simply put, read together but including in the analysis, as this court did in *Whitehall*, the Legislature's intervening move, *Taggart* and *Hertog* remain controlling law as to the existence of a duty; *Kelley* and *Whitehall* clarify the nature and scope of that duty following the legislation enacted in the interim. Since the issue of whether the City

owed a duty is not before this court, *Taggart*, *Hertog*, and *Bishop* are inconsequential to the analysis, and *Kelley* and *Whitehall* control the inquiry.

III. AS A MATTER OF LAW, THE NATURE AND SCOPE OF MS. LAMOND'S DUTY IN MONITORING MULLAN DID NOT INCLUDE UNDERTAKING THE INVESTIGATIVE ACTS OR OUTREACH TO COLLATERAL SOURCES THAT PLAINTIFFS' EXPERTS URGE.

In *Taggart*, the Court held that the scope of the duty owed by DOC officers derives from the statutory and administrative procedures that direct DOC officers in their performance. *Taggart*, 118 Wn.2d at 224 (question of duty arises only once it is shown "that the officer failed to perform a statutory duty according to procedures dictated by statue and superiors"). Similarly, in *Whitehall*, this court recognized that the the nature and scope of King County's duty was defined by the administrative policies established by the King County District Court. *Whitehall*, 140 Wn. App. at 770 ("The officers were under no statutory or administrative obligation (a/k/a legal duty) to conduct home visits or contact third parties, as Whitehall asserts."). In this case, unlike in *Taggart* but like in *Whitehall*, plaintiffs do not contend that Ms. Lamond failed to meet her obligations under Seattle Municipal Court's administrative policies and directions from her superiors; rather, they base their claim of gross negligence solely on the considerations of their experts – none of whom

have experience with the Seattle Municipal Court's probation department – as to what more Ms. Lamond could have done to investigate Mullan's activities during the ten weeks he was under her supervision.

These opinions completely lack foundation (as the City pointed out in its objection and motion to strike such testimony, CP 3462-3531), and are contrary to law. Under *Whitehall*, the duty to supervise requires a probation counselor to monitor according to the policies and procedures established for their agency and report any violations she learns of to the court, but it does not include a generalized duty to investigate. This reasoning is consistent with Washington law; as a general rule, there is no actionable duty to investigate.[11] Cloaking a failure-to-investigate claim in the guise, via "expert" testimony, of an obligation to conduct "heightened monitoring" or supervision generally does not somehow transform such a claim into a viable cause of action. It is for the court to define whether there was a duty to engage in "heightened monitoring," not plaintiffs' proffered experts.

Here, each of plaintiffs' experts' criticisms center not on what Ms. Lamond should have done in the context of the court policies and

[11] Absent statutory exception (e.g., RCW 26.44.0500), Washington "does not recognize the tort of negligent investigation." *Fondren v. Klickitat Cy.*, 79 Wn. App. 850, 862, 905 P.2d 928 (1995) ("a claim for negligent investigation is not cognizable under Washington law") (*citing Donaldson v. Seattle*, 65 Wn. App. 661, 671, 831 P.2d 1098 (1992), *rev. dismissed*, 120 Wn.2d 1031, 847 P.2d 481 (1993).

guidelines that govern her agency, but on what more Ms. Lamond might have discovered if only she had chosen to investigate further, at some indeterminate point midway through his first 90-day review period, and how that might have affected his Seattle probation. *See*, e.g., plaintiffs' Response at p. 9 ("If the City had followed up on the Snohomish DUI, then Mullan would have been incarcerated..."); [12] p. 10 ("If she had better 'known the offender,' including his criminal background and pending charges," she would have recognized he required closer supervision); [13] p. 14-15 (if she had better scrutinized his treatment records, she would have discovered "red flags" to bring before the court); [14] p. 14 (if she had followed up with all the [heretofore unknown] witnesses [15] who have now

---

[12] Mullen was incarcerated in Snohomish County for three weeks following that incident and reported to treatment immediately upon release, removing all foundation for this statement.

[13] As a matter of law, neither Mullan's pending DUI charge in Snohomish County nor his charges from nearly 30 years ago could factor into the adjudication of his December 25, 2012 charge. Probation thus cannot be found grossly negligent for failing to factor into his risk assessment charges that could not factor into his sentence. *See* fn. 3 of the City's Motion; RCW 46.61.5055(14)(a); CrRLJ 4.2 at fn. 1; *State v. Castle*, 156 Wn. App. 539, 234 P.3d 260 (2010) (pending DUI charges that have not been reduced to final judgment are not "prior offenses" within the meaning of the statute). Plaintiffs' argument effectively submits that a probation officer abandon an objective, validated risk-assessment tool in favor of a more subjective, inherently biased, instinct; particularly where DOC is required by statute (RCW 9.94A.729) to classify offenders pursuant to such a tool, it is nonsensical to suggest tht a probation counselor could be grossly negligent by utilizing that same process.

[14] The treatment records speak for themselves and are clear that as of February 21, when Ms. Lamond called Mullan back in for meeting she need not have called, Mullan was current and compliant with his treatment. CP 2154-2239. It is patently absurd to suggest that a probation counselor's duty to monitor requires her to second-guess or distrust the assessments of chemical dependency professionals.

[15] The City objected below, as part of its Reply briefing on summary judgment, to the testimony of lay witnesses that plaintiffs offered as evidence as to Mullan's conduct

come forward, she would have known that Mullan was being untruthful). Proximate cause and conjecture aside, these opinions would require a rewrite of Seattle Municipal Court policies and procedures to included such an affirmative investigation duty, not present now.

Plaintiffs ignore what the trial court conceded to be a "valid point" (that it did not consider in making its ruling)--that under the policies and guidelines that direct Seattle probation counselors in their duties, nothing was required of Ms. Lamond in the course of supervising Mullan after her initial intake on January 8, 2013, until a records check on April 7, 2013 – 90 days later. This was true even had Mullan been assessed as a higher level offender.

By calling him back 45 days into his first review period, confirming that he was in treatment (as supported by the Lakeside Milam records), and confirming he was on schedule to meet other court-imposed obligations, Ms. Lamond exceeded her department's policies and procedures. Applying *Kelley*, *Whitehall*, and basic principles of tort law to this record, the City's lack of culpability is beyond question.

---

while on probation. The trial court acknowledged (as it did with respect to the conclusory opinons of plaintiffs' experts, VRP, p. 103-104) that such testimony may ultimately be inadmissible at trial, but – contrary to CR 56(e) – deferred that inquiry on summary judgment. This was material error in that it is this body of "evidence" that underlies plaintiffs' theory of the case and from which the court, following a series of analytical errors and omissions, rendered its ultimate conclusion.

Perhaps conceding this point, plaintiffs shift their focus to the adequacy of the Municipal Court's policies and guidelines set forth by the Seattle Municipal Court, claiming through experts that they were insufficient to insure against the risk that Mullan posed, apparently seeking, alternatively, to base City liability the Court's failure to meet expectations of the Administrative Office of the Courts with respect to implementing ARLJ 11. *See* plaintiffs' Response at pp. 31-33.

Setting aside judicial immunity, plaintiffs have no evidence to support their theory that AOC intended that the services it describes generally be delivered in any particular manner. Under ARLJ 11, the Seattle Municipal Court alone, through its presiding judge, has the authority and discretion to set rules and expectations for its department. Nothing in 10.64.120, ARLJ 11, or *Tegland* speaks to the particular policies, schedules, or procedures for probation counselors that are left to individual courts to determine, let alone subject the court to liability based upon an alleged deficiency of its policies, schedules or procedures. This court should decline plaintiffs' invitation to reframe the discretion granted under ARLJ 11 into a statutory directive to meet some unstated standard for delivery of probation services.

IV. THE STOUGH, HALL, AND JUDGE SHELTON OPINIONS REMAIN INSUFFICIENT UNDER CR 56(e) TO CREATE A QUESTION OF FACT ON PROXIMATE CAUSE.

In its reply on summary judgment, the City moved to strike the declarations of plaintiffs' experts Stough, Hall, and Shelton, noting the experts lack foundation and have no qualifications to opine about probation supervision under Seattle Municipal Court policies, lack "scientific, technical, or other specials knowledge" under ER 702, and seek to re-characterize documents and speculate about what Mullan might have done, speculate about what might have been learned had certain "collateral contacts" been made or other actions taken, speculate on causation, and emote their feelings about what more they think, in hindsight, Ms. Lamond should have done. CP 3462-3531. The City then detailed the specific bases, for each, on which these individuals' testimony fails under CR 56(e). *Id.* Such speculation and conjecture, even from a purported expert, cannot establish a prima facie case as to proximate cause in a negligent supervision case was again affirmed, with citation to *Bordon*,[16] just days after the City filed its opening brief in this matter.

In *Smith v. State*, --- Wn.App. ---, --- P.3d. --- (2015 WL 5042152, August 26, 2015), plaintiffs sued the Washington State Department of Corrections (DOC), alleging that the DOC had been negligent in its

[16] *Bordon v. State*, 122 Wn. App. 227, 95 P.3d 764 (2004).

supervision of Antwane Goolsby, who after absconding from community custody shot and killed plaintiffs' decedent. Relying on their expert (again, as here, William Stough), plaintiffs argued that the DOC's failure to enforce the terms of Goolsby's community custody directly led him to abscond, and that had DOC done more to enforce his conditions, Goolsby would have been under control or in custody at the time of the murder.

Division II affirmed summary judgment for DOC, holding that (1) DOC owed no duty to supervise Goolsby after he had absconded, and (2) even when viewed in the light most favorable to plaintiffs, Stough's opinion was insufficient to meet the burden under CR 56. The Court explained that " . . . : ***Stough is not qualified to give an opinion on what a hearing's officer might have done at a specific SRA (Sentencing Reform Act of 1981) violation hearing***. *See Estate of Bordon ex rel. Anderson v. Dep't of Corr.*, 122 Wn. App. 227, 246-47, 95 P.3d 764 (2004) (affirming determination that Stough is not qualified to testify about what a judge would do in a SRA violation hearing, where he is not a judge, has never supervised an SRA offender, and has never attended an SRA violation hearing)." *Id. at* _____.

The underlying facts of both *Smith* and the present matter involve relatively short periods of supervision – 85 (January 21 - April 16 2009) and 75 (January 8 - March 25 2013) days, respectively. That, however, is

where the similarities end. Goolsby had known gang affiliations, an extensive criminal history, and untreated mental health issues. 2015 WL 5042152 at pp. 1-2. Mullan, despite plaintiffs' efforts to recharacterize him as a chronic offender, was at the time of his Seattle conviction and probation a non-violent, first-time misdemeanant offender (*see* fn. 12). Goolsby's community custody officer knew he was a "high risk offender" and she was "skeptical about [his] motivation for change." *Id.* Mullan, in contrast, was classified as a low-risk (Level III) offender who was deemed, both by his probation counselor and his chemical dependency provider, to be compliant, motivated, and willing to take responsibility for his actions. CP 243-305. The terms of Goolsby's custody required his community custody officer to have three face-to-face contacts with Goolsby and one collateral contact per month; two of the three face-to-face visits were required to be outside of the DOC office. 2015 WL 5042152 at pp. 1-2. The terms of Mullan's supervision required no further action by his probation counselor until April 8 2013 – 90 days from his intake. CP 243-305.

Despite their factual distictions, both involve matters in which Richard Stough sought to offer his "expert" opinion that but for alleged lapses in supervision, the offender would have been in custody at the time of the subsequent crime. In this case, perhaps recognizing Stough's shaky

track record before the courts, plaintiffs seek to bolster Stough's conclusions by calling upon Mr. Hall and Judge Shelton to repeat the same mantra. Echoing one witness's speculation with the speculation of two others – even if one formerly wore a robe in another court – is not a cure.

Even if Ms. Lamond had a duty to investigate (a legal question), even if at some point midway through Mullan's first review period Ms. Lamond should have done even more to ensure Mullan's compliance (again, a legal question), it is pure speculation to conclude that (1) Ms. Lamond would have discovered evidence contrary to Mullan's statements and his treatment records, (2) Ms. Lamond would have been able to get such information set for hearing before Judge Rosen at some point prior to this collision, (3) at which point Judge Rosen would have found Mullan to be in violation of his probation and (4) would have reincarcerated him for a period that would have included this collision. This theory is made even more specious since following his intoxicated appearance in Snohomish County District Court (an unadjudicated matter that by law could not factor into Mullan's Seattle Municipal Court sentence or probation, see fn. 12), Mullan was incarcerated for three weeks and then immediately reported to the treatment and remained compliant. Neither Stough, Hall, nor Shelton have any basis on which to conclude that one possible scenario is any more probable than any other possible scenario; nor could

a jury reach a finding on the same.

V. PLAINTIFFS DID NOT PRESERVE FOR REVIEW THE TRIAL COURT'S CORRECT DECISION THAT MS. LAMOND HAD NO DUTY TO VERIFY WHETHER MULLAN COMPLY WITH RULES OF DOL WITH RESPECT TO IGNITION INTERLOCK.

A. Plaintiffs did not cross appeal and have not preserved an assignment of error to the trial court's ruling against them on this issue.

As noted in the opening brief, plaintiffs did not file a notice seeking discretionary review – even on a conditional basis – of the trial court's dismissal of this legal theory of negligence. In their Response Brief they cite to RAP 2.4(a) in an effort to resurrect that issue now. But the rule does not save them. Plaintiffs cannot demonstrate that the "necessities of the case" demand a review of this narrow issue. (RAP 2.4 (a)(2).) As the rule explains, the appellate court will "review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent." *Id.* The trial court, having dismissed as a matter of law plaintiffs' theory that the City had no independent duty to verify that Mullan comply with the rules and regulations for ignition interlock devices, has elimainated the risk that, on remand (should that occur) there would be a repeat of a prejudicial error.

Plaintiffs' highly experienced appellate counsel did not miss this issue, but simply chose not to seek conditional discretionary review of that

aspect of the trial court's ruling on summary judgment. They cannot raise that issue now, and this Court should decline to address it as part of this review. It is not a proper part of the issues on review under RAP 2.4 (a).

B. Subtantively, if the Court reaches the issue, summary judgment should be affirmed.

Judge Ramsdell's correctly ruled that Ms. Lamond did not owe a duty to verify that Mullan install an ignition interlock device on his vehicle. Judgment and Sentence (J&S) contained no such requirement and Ms. Lamond accordingly owed no such duty to verify that he install an IID. This is a clear issue of law that was thoroughly briefed below (e.g. CP 24-61, 3622-3644,3862-3878) and is easily resolved through a review of the J&S and the statutes on which they are based.

The J&S entered on December 25, 2012 utilized a form order promulgated by the Administrative Office of the Courts that is intended to track the statutes that the order references. CP 306-321. It provided direct citation to RCW 46.20.720(2), 46.20.385, and RCW 46.61.5055(5), (6). These statutes thus direct the analysis.

RCW 46.61.5055 sets forth the penalty schedule for a DUI conviction and directs the court to require a convicted person "to comply with the rules and requirements of the department [of licensing][17]

[17] *See* RCW 46.04.162 ("the term 'department' shall mean the department of licensing unless a different department is specified").

regarding the installation and use of a functioning IID installed on all motor vehicles operated by the person." RCW 46.61.5055(5)(a) (emphasis supplied). This directive to the court is duplicated in RCW 46.20.720(2) (Drivers convicted of alcohol offenses).

Importantly, the requirement "to comply with the rules and requirements of the department" replaced prior statutory language that provided that "the court shall require any person convicted of [DUI] to apply for an ignition interlock driver's license and to have a functioning ignition interlock device installed [...]").[18] *See* Laws 2012, SSHB 2443, ch. 183, § 9 (amending RCW 46.20.720(2)), § 12 (amending RCW 46.61.5055). This change makes clear that a person has no obligation to obtain a driver's license if that person does not intend to drive. *See* Laws 1998 c 201 § 7 ("The legislature finds that driving is a privilege and that the state may restrict that privilege in the interests of public safety. One such reasonable restriction is requiring certain individuals, if they choose to drive, to drive only vehicles equipped with ignition interlock devices.")

[18] This statutory change may explain the ambiguity created by the grammatical structure of the J&S, which contains a section providing that "the court ... *has required* the defendant to apply for an ignition interlock driver's license" (emphasis supplied) but does not contain a preceding indicative order in the present tense to which the latter, in the present perfect tense, would relate. Judge Rosen explained this in detail in his declaration. CP 79.

(Emphasis supplied.)[19]

RCW 46.20.720(3) directs DOL to impose mandatory ignition interlock restrictions following a DUI conviction. RCW 46.20.385(7) requires the DOL to adopt rules to implement ignition interlock restrictions. DOL's "rules and requirements" are in RCW Title 46 and Chapter 308 WAC. Rules and requirements specific to ignition interlock licensing restrictions are codified in RCW 46.20.380 (ignition interlock, temporary restricted, occupation licenses) and WAC 308-107 (ignition interlock driver's license).

RCW 46.20.001 prohibits persons from operating motor vehicles on public roads without a valid license.[20] RCW 46.20.285(3) and RCW 5055(9) mandate that DOL suspend the license of any person convicted of DUI. RCW 46.20.385 allows (but does not require) a person whose license has been suspended following a DUI conviction to apply for an ignition interlock license (IIL).[21] Under RCW 46.30.385(1)(b), a person

---

[19] *See also* 32 Wash.Prac., Wash DUI Practical Manual § 1:12 (2013-14 ed.) ("The court is no longer required to order persons conviction of DUI, physical control, or an equivalent local ordinance to apply for an ignition interlock driver's license (IIL) or to have an ignition interlock device installed on any vehicle they drive. Instead, the court must order the person "to comply with the rules and regulations of the department regarding the installation and use of a functioning ignition interlock device on all motor vehicles operated by the person."

[20] It is a gross misdemeanor to operate a motor vehicle while the offender's license is suspended. RCW 46.20.345.

[21] An IIL is "a permit issued to a person by the department that allows the person to operate a noncommercial motor vehicle with an ignition interlock device while the person's regular driver's license is suspended, revoked, or denied." RCW 46.04.217.

seeking an IIL may apply for such a license "anytime," whether after conviction or upon receiving notice of an administrative suspension under RCW 46.20.308.[22] RCW 46.20.385(1)(c) and WAC 308-107-020 require the driver seeking an IIL to furnish proof to the DOL that a functioning IID has been installed on all vehicles operated by that person.

RCW 43.43.396 requires the State Patrol to establish the standards for the monitoring of IID restrictions, including installation, maintenance, inspection and removal of IIDs. "Guidelines for the certification, installation, repair, maintenance, monitoring, inspection, and removal of ignition interlock devices" are codified in WAC 204-50-020 *et seq*. When the State Patrol becomes aware, through field inspection, of an IID violation, it must report the violation to the court, but may not be subject to liability for a failure to do so absent a showing of gross negligence or willful or wanton misconduct. RCW 43.43.3952.

Abandoning their earlier arguments on summary judgment, which focused on RCW 46.20.755 and 46.61.5055(11)(a) (neither of which apply in this case), plaintiffs now cite exclusively to Seattle Municipal Code § 11.20.230(B), which at the time of this incident or the proceedings below had not yet been amended to to track the changes in the statute it is

[22] RCW 46.20.308(6) requires the DOL to suspend the license of any person arrested for DUI pending an administrative hearing.

intended to mirror.[23] Mullan's January 2013 J&S, however, was based on the mandatory ignition interlock conditions required under RCW 46.20.720(2), 46.20.385, and RCW 46.61.5055(5). CP 315-317. These statutes task DOL alone with responsibility for verifying and monitoring compliance with ignition interlock requirements. There is no language in these statutes, in statutes relating to the State Patrol, or in WAC provisions that set forth the DOL's rules and requirements that impose upon municipal probation departments a duty to supervise mandatory ignition interlock licensing restrictions. This is particularly true where the legislature both reserved exclusively to the State the authority to regulate matters concerning licensing and has removed from the court's jurisdiction discretion regarding such conditions. RCW 46.08.010 ("State preempts registration and licensing fields"); RCW 3.66.068 (court's jurisdiction to suspend or defer sentence does not extend to enforcement

[23] Plaintiffs' reliance on SMC § 11.20.230(B) is misplaced as a matter of law. Even if it were the City's intent to materially deviate in an ordinance from the statute on which it is based and to which it cites, the primacy of state law over municipal ordinance is firmly established in law. *See, e.g., Town of Republic v. Brown*, 97 Wn.2d 915, 919, 952 P.2d 955 (1982) (when a local ordinance conflicts with state law, the ordinance is void); *Employco. Personnel Servs., Inc. v. City of Seattle*, 117 Wn.2d 606, 617, 817 P.2d 1373 (1991) ("[a]ttached to 'every ordinance or resolution affected, or adopted by, a municipality, is the implied condition that the same must yield to the predominant power of the state, when that power has been exercised....'") (quoting 6 E. McQuillin, *Municipal Corporations* Sec. 21.32, at 315 (3rd Ed. 1988)). *See also* Wash. Const. art. XI, sec. 11. Thus, state law (RCW 46.61.5055 and RCW 46.20.720) controls in DUI convictions regardless of whether the charge is brought pursuant to state law (RCW 46.61.502 or .504) "or an equivalent local ordinance" (as here). Further, even if the primacy of state law did not control, any failure to order Mullan to comply with an old version of the statute the ordinance is intended to mirror would rest with the sentencing judge, not Probation, and judicial immunity would bar the claims.

of orders issued under RCW 46.20.720).

Consistent with the State's sole responsibility over such conditions, there are no Seattle Municipal Court probation policies or procedures that direct probation officers to monitor potential IID violations. Following state law and its own policies, the Seattle Municipal Court did not task its probation department with supervising Mullan's compliance with DOL's ignition interlock rules and regulations. ARLJ 11; CP 73-74; 239-242. Because the trial court correctly ruled that Ms. Lamond had no duty to supervise Mullan's compliance with mandatory ignition interlock conditions, the trial court correctly ruled that plaintiffs' claim fails outright as a matter of law.

VI. CONCLUSION

Mullan's actions are reprehensible. But nothing in the speculative "expert" opinions creates a genuine question of material fact as to what Ms. Lamond knew, should have known, or should have done differently under the Seattle Municipal Court probation policies that control the inquiry into the nature and scope of her duty.

Nor does plaintiffs' record provide competent evidence of a causal connection between what Ms. Lamond could have done, could have learned, and could have reported, and what a judge, assuming a hearing, would have done had something been reported such that a jury could conclude, without

speculating, that Mullen would have been in jail on the date of this collision.

The trial court's order denying summary judgment was clear error, and this court should reverse that order and remand for dismissal of all claims against the City.

Plaintiffs have failed to preserve for review the trial court's order granting summary judgment dismissal of their claim that the City had an independent duty to verify that Mullan install an ignition interlock device on his vehicle. However, if reviewed on the merits, the trial court's dismissal of that theory should be affirmed.

Respectfully submitted this 7th day of December, 2015.

PETER S. HOLMES
Seattle City Attorney

By _____
REBECCA BOATRIGHT, WSBA #32767
Special Assistant City Attorney
JOSEPH G. GROSHONG, WSBA #41593
Assistant City Attorney
Attorneys for Defendant/Petitioner City of Seattle

CHRISTIE LAW GROUP, PLLC

By _____
ROBERT L. CHRISTIE, WSBA #10895
Attorneys for Defendant/Petitioner City of Seattle

CERTIFICATE OF SERVICE

This certifies that true and correct copies of this Reply Brief of Appellant City of Seattle was served on all counsel/parties of record in the manner indicated below:

Stephen L. Bulzomi, WSBA #15187
John R. Christensen, WSBA #18860
Jeremy A. Johnston, WSBA #34149
EVERGREEN PERSONAL INJURY COUNSEL
1124 Broadway Plaza
Tacoma, WA 98402
Via E-Mail and U.S. Mail

Ken Masters, WSBA #22278
Masters Law Group, PLLC
241 Madison Ave. N.
Bainbridge Island, WA 98110
Via E-Mail and U.S. Mail

Defendant Mark W. Mullan
DOC # 370396
Clallam Bay Correction Center
1830 Eagle Crest Way
Clallam Bay, WA 98326
Via U.S. Mail

DATED this 7th day of December, 2015.

Maureen Pattsner
MAUREEN PATTSNER