NO. 72821-1-I

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,

Respondents,

v.

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

Defendant,

CITY OF SEATTLE, a municipal corporation,

Petitioner.

BRIEF OF RESPONDENTS

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INTRODUCTION

Mark Mullan, a veteran drunk driver, drove his truck into the Schulte family, seriously injuring a mother and her child, and killing his grandparents. Mullan was on probation from a drunk driving conviction, on condition that he not drive without an ignition interlock device, a proper license and insurance, and not drink. The City admits that it did nothing to supervise these conditions.

This Court has improvidently granted review. Judge Ramsdell properly found a genuine issue of material fact: whether City Probation was grossly negligent in not supervising Mullan after he ran into a building – twice – and blew over four times the legal limit. Negligence – even gross negligence – is a jury question under controlling authority that the City fails to mention. The Court should reverse its decision accepting review, and summarily remand for trial.

Judge Ramsdell applied the controlling law correctly. The appellate court opinions and administrative court rule (ARLJ 11) the City relies upon have not overruled binding Supreme Court precedent. The rule supports the Schultes, and the opinions are inapposite and incorrectly decided. As a retired Municipal Court Judge opined in this case, the City's willful failure to supervise is gross negligence – at best. The Court should remand for trial.

RESTATEMENT OF THE ISSUES

1. Did this Court improvidently accept discretionary review, where the trial court found that ample evidence in the record creates genuine issues of material fact precluding summary judgment and that the City is not entitled to judgment as a matter of law? If so, should this Court summarily remand this case for trial?

2. Do ***Taggart***, ***Hertog***, and their prodigious progeny, impose a "take charge" duty on the City of Seattle to supervise known dangerous drunk drivers, where a Seattle Municipal Court Judgment and Sentence requires the probation department to supervise them?

3. 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?

4. Are those experts' opinions soundly based on substantial evidence of serious negligence, where the City admits that it failed to supervise the offender 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 installed on the vehicle, and all of the evidence in the record supports the City's admissions?

5. Do the Supreme Court's decisions in ***Nist*** and ***Roberts*** forbid granting summary judgment in the face of such evidence, where ***Nist*** said gross negligence goes to the jury, and ***Roberts*** struck down all Washington cases keeping gross negligence from the jury?

6. Can an administrative court rule strike down all of the above legal authority, particularly where ARLJ 11 does not purport to strike down any legal authority, and in fact specifies the "core services" the City's probation officers are required to provide in order to protect public safety, services the City failed to provide?

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

8. Under RAP 2.4(a), if the Court hears this appeal at this juncture, should it correct a legal error likely to be repeated on remand, where the trial court incorrectly ruled that the City was not required to supervise Mullan regarding the conditions that he obtain an ignition interlock device and a corresponding driver's license?

STATEMENT OF THE CASE

Much of the City's Statement of the Case is an argument about the scope of its duty, particularly the duty to supervise "active" versus "passive" conditions. BA 9-13. The City later argues that its standard of care is dictated only by its own internal policies. BA 16-22. The City's duty is not factual, nor is it "undisputed." BA 9.

The City also ignores that the facts and all reasonable inferences therefrom must be taken in the light most favorable to the Schultes. ***Hertog v. City of Seattle***, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Below is a fair recitation of the facts.

A. On October 8, 2012, Mark Mullan was arrested for DUI in Snohomish County with a blood alcohol content over twice the legal limit.

On October 8, 2012, Mark Mullan was seen driving erratically on Interstate 5, traveling over 80 miles per hour. CP 1905, 1947. After exiting the freeway, Mullan continued to speed through neighborhood streets until he was pulled over and arrested. *Id.* His blood alcohol content was .172 and .160, twice the legal limit. *Id.* This was Mullan's third DUI – the first two occurred in the 1990s. CP 1969.

The Snohomish District Court released Mullan with conditions, including abstaining from possessing and consuming

alcohol. CP 1968. Mullan was scheduled to appear in Snohomish Country District Court on January 4, 2013. CP 1452.

B. December 25, 2012, Mullan was arrested for DUI in Seattle, this time with a blood alcohol content over four-times the legal limit.

Less than three months later, Mullan was arrested for another DUI – his fourth – this time with a blood alcohol content over four-times the legal limit. CP 65, 1905, 1946, 1969. On Christmas Day, 2012, Seattle Police received a call reporting that a driver had run into the Seals Motel on Aurora Avenue – twice – before attempting to flee. CP 65. When an officer asked his name a few times, Mullan identified himself at Mike – not Mark – though his speech was slurred and difficult to understand. *Id.* Mullan was unable to step out of his truck, and two officers assisted to keep him from falling. *Id.* He could not stand or even keep his legs underneath him. *Id.* He was in no condition to do a field sobriety test. *Id.*

Police arrested Mullan, helping him into the patrol car. *Id.* At the precinct, Mullan's blood alcohol was .322 and .328, four-times the legal limit. CP 65, 1905, 1946, 1969. The police called the Fire Department to evaluate Mullan, who was then transported to Harborview. CP 65.

Experts William Stough, Dan Hall, and retired Judge Stephen Shelton,[1] all agreed that Mullan's extreme intoxication "should have been a huge red flag." CP 1905, 1946, 1969. The arrest report is just one of many documents showing that Mullan was "an extremely dangerous and deceptive career alcoholic who presented an extreme danger to the community." CP 1946; *see also* 1905, 1969. He required heightened supervision. CP 1905, 1946, 1969-70.

C. January 7, 2013, Mullan pled guilty to the Seattle DUI and was sentenced.

Mullan appeared in Seattle Municipal Court and pled guilty to DUI on January 7, 2013. CP 1892-94. Days earlier, Mullan had failed to appear for his Snohomish DUI hearing. CP 1451-52. The Seattle court sentenced Mullan to 24 months supervised probation, including: (1) abstaining from alcohol and marijuana; (2) obtaining an alcohol evaluation and treatment; (3) applying for an ignition interlock license, and installing an ignition interlock device on his truck; and (4) driving only with a valid license and insurance. CP 1911, 1952.

Sentencing Judge Steven Rosen ordered supervision for a number of reasons, including that Mullan was ordered to obtain treatment and had another DUI pending in Snohomish. CP 77.

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[1] Their qualifications are discussed *infra*, in the Procedural History.

Rosen was also concerned about the proximity of the Seattle and Snohomish DUIs and about Mullan's physical appearance, opining that he looked like a habitual drinker. CP 77-78. And while Mullan's blood alcohol content was not the highest Rosen had seen, it was higher than most. CP 78. These things all predict risk. CP 77.

D. From the day he was sentenced to the day he killed two people and seriously injured two others, friends and neighbors witnessed Mullan driving daily, drinking, and driving while intoxicated.

Immediately after being sentenced, Mullan began driving his truck daily, often under the influence, without a license or an ignition interlock device. CP 2145, 2146, 2148, 2150, 2151, 2152, 2153. Mullan's close friend, Frank Todaro, testified that Mullan drove his truck daily, including to treatment and probation appointments. CP 2148. After treatment, Mullan drove to a bar for a couple drinks before driving home. *Id.* He often drove intoxicated. *Id.* Mullan "joked" that he was not being tested for alcohol use, was not being forced to have an IID, and was forging his treatment slips. *Id.*

Shannon Riley-Caseman, who is close friends with Mullan's girlfriend, Theresa Schmetzer, witnessed Mullan "often" driving drunk, including when he was "extremely drunk" on Valentine's Day, 2013. CP 2150. Amy Tracey, who works at the restaurant Schmetzer

co-owns, regularly saw Mullan driving, including when he was intoxicated. CP 2151-52. Ginger Crowly, Schmetzer's co-owner, saw Mullan driving often, and his "norm" was intoxication. CP 2152. And Schmetzer's sister, Shawn Lane, saw Mullan drive three-or-four times a week, often smelling like alcohol. CP 2153.

E. At his January 8 intake with Seattle probation, the City did little more than ask Mullan whether he was in treatment.

When Mullan first met with Probation Officer Stacey Lamond on January 8, 2013, he told her that he was currently in treatment at Milam, though he had only done an intake. CP 146, 293-95. Lamond knew that Mullan had previously been in treatment four times. CP 169. Yet she never followed up with Milam. CP 148-49, 1972.

Lamond knew that Mullan consumed "a considerable amount" of alcohol and that he had used cocaine in November 2012. CP 169. Yet her intake notes do not reflect that she asked Mullan about his driving, or about obtaining an IID. CP 146, 150, 164, 1973. Nor do they reflect that she asked Mullan about sentencing conditions other than treatment. CP 1973.

Lamond nonetheless claimed that Mullan told her his son was driving him around. CP 143-45. Lamond never attempted to follow up with Mullan's son. *Id.* She never called any other collateral

contact, including the many friends and acquaintances who witnesses him driving drunk. CP 1972-73, 2148-53. Although Lamond knew that Mullan had the Snohomish DUI pending, she did not ask him about it. CP 154. She made no effort to track the Snohomish DUI, though she could have done so without leaving her desk. CP 154, 165, 1916.

F. Less than one week later, Mullan appeared in Snohomish County court so drunk that he was arrested.

On January 14, 2013, Mullan appeared in Snohomish County District Court to quash the warrant issued when he failed to appear on the 4th. CP 1452. Mullan drove to court intoxicated, violating many conditions of his Seattle parole. CP 1952, 2148, 2150, 2153. Prosecutor Dana Little smelled alcohol when she neared Mullan, and brought it to the court's attention, intending to seek a high bail out of concern for public safety. CP 1454. The court instructed an officer to administer a portable breath test. *Id.* Mullan's blood alcohol content was again above the legal limit. CP 1455.

Mullan was taken into custody, and the court set bail at $10,000. CP 1968. He was incarcerated for more than two weeks, until bail was posted on February 1, 2013. *Id.* Lamond could have easily viewed this information on a statewide computer database. *Id.*

G. If the City had followed up the Snohomish DUI, then Mullan would have been incarcerated the night he killed two, and seriously injured two others.

It is undisputed that Lamond failed to even ask Mullan about the pending Snohomish DUI charge, much less contact the Snohomish court, or access Snohomish court records. CP 154, 1906-07, 1948, 1957. The City asserts that it had no obligation to track Mullan's pending charge, arguing that it is "unrelated" to Seattle supervision and that "a Seattle probation counselor would not be expected to review that docket." BA 22. The City ignores expert testimony from Stough, Hall, and Judge Shelton that the City was required to track Mullan's pending DUI charge under its own policies requiring probation officers to follow up on new information that requires action. CP 1907, 1957, 1976. As Stough put it: "There is no excuse for not contacting Snohomish County about Mr. Mullan's pending charge before the Schulte incident occurred." CP 1907.

Lamond also had a duty to "know the offender," including knowing his criminal background and pending charges. CP 1907-08, 1948-49, 1976. Tracking pending charges is particularly important when, as here, they are "identical" to the crime for which the offender is being supervised. *Id.* Judge Shelton expects that probation officers

follow pending charges, looking for events like Mullan's drunken court appearance. CP 1976.

Tracking pending charges is easy. CP 1975. With only a few minutes and little effort, a parole officer can access the court's database from her desk. CP 1912-13, 1916, 1975. Judge Shelton, who routinely checked the court database for all defendants appearing before him, opined that parole officers should check the database every time they meet with the offender. CP 1975. Failing to do so is a clear violation of the standard of care and is a failure to exercise even slight care. *Id.*; *see also* CP 1913.

If Lamond had followed up, then she would have learned that Mullan was intoxicated at his July 14 hearing, that he had driven there while intoxicated, and that he had been incarcerated, plainly violating numerous conditions of his Seattle parole. CP 1906-08, 1913, 1947, 1949. These violations were "very serious," where they went to the heart of Mullan's risk to the public – drinking and driving. CP 1909-10, 1949-50. Lamond should have discovered these violations and notified the court. *Id.*

If Lamond had notified the sentencing court, then the court more probably than not would have incarcerated Mullan for at least 30 days, and imposed additional alcohol supervision, including

setting a firm date for installing an IID. CP 1907-10, 1947-50, 1957. Lamond's failure to track the Snohomish DUI was "a gross and inexcusable dereliction of her duties and evidence of the complete lack of any care, let alone slight care." CP 1957; *also* CP 1906-07, 1976-77. Her inaction is a "direct and proximate cause of the March 25, 2013 fatalities" and injuries. CP 1908, 1949-50, 1957, 1977.

H. At Mullan's February 22 meeting, Lamond asked only whether he was driving, and trusted that he was not, without any verification.

Mullan was released from Snohomish jail on February 1, and started treatment at Milam on February 8. CP 298, 1968. Less than one week later, Mullan was "extremely drunk," but still drove. CP 2150. The next day – one week into treatment – Mullan missed an intensive outpatient session, claiming he had to work. CP 301. He was unemployed. CP 3235-36.

When Lamond met with Mullan for the second and last time on February 22, Mullan reported that treatment was going well. CP 1973. Aside from that, they "[b]asically discuss[ed] if he was driving and he said he still was not driving." CP 150. The entire meeting lasted five-to-fifteen minutes. CP 157. Lamond did nothing to verify Mullan's reports, simply taking Mullan "at his word." CP 150, 165. Lamond did not ask Mullan whether he had an IID installed. *Id.* She

did not ask Mullan whether he had been in court, or been tested for alcohol and drugs. CP 154.

On February 25, Mullan missed a second intensive outpatient session, again claiming that he had to work, despite being unemployed. CP 301, 3235-36. Mullan missed two more treatment sessions in March. CP 301.

I. Here too, supervision would have revealed numerous parole violations that if properly reported to the sentencing judge, would have resulted in incarceration, preventing Mullan from killing two and seriously injury two others on March 25, 2013.

The City claims that Lamond's February 22 meeting with Mullan went beyond her duty to supervise. BA 18. They ignore copious evidence plainly creating a question of fact on this point.

Just as Mullan's pending DUI charge required follow up, his treatment required follow up. CP 1920, 1973. Yet when she met with Mullan on February 22, Lamond had not received Mullan's evaluation or a treatment report, and she did not ask for these records, even though they could have been faxed to her. CP 1973. Lamond never called Milam or obtained the treatment records until after the Schulte incident. *Id.*

If Lamond had followed up, she would have learned that Mullan lied about when he started treatment. CP 1955. She would

have discovered that Mullan was missing appointments and lying about being at work when he was unemployed. CP 1921, 1955, 1974. In short, she would have discovered Mullan's sporadic and inconsistent attendance, "a significant red flag." CP 1955; *see also* CP 1921. Lamond's failure to follow up on treatment constitutes failure to use any care, however slight. CP 1955, 1959, 1973.

Lamond also failed to document anything about Mullan's driving, including whether he had insurance, a valid license, or an IID. CP 1914, 1974. Relying on, without verifying, Mullan's claims that he was not driving, fell below the standard of care. CP 1915-17.

Lamond also made no collateral contacts, again choosing to believe everything Mullan said. CP 1917, 1919, 1954-55, 1973. This too "constitutes a failure to use any, let alone slight, care." CP 1919; *also* CP 1987. Numerous witnesses confirmed that Mullan continued to drink and drive under City "supervision." CP 1914, 2145-53.

Seattle Probation appears to have been acting with a "don't ask don't tell" mindset. CP 1959. But given Mullan's extensive alcohol and drug abuse, the City could not allow Mullan to slide by with minimal compliance. CP 1955, 1974-75. Indeed, that was "an invitation for relapse." CP 1955.

By the February 22 meeting, Mullan had violated nearly every condition of his probation. CP 1916. Lamond was "required" to report those violations. CP 1916, 1977. Had she done so, the sentencing court likely would have revoked Mullan's probation and incarcerated him. *Id.*

Left unsupervised, Mullan drove intoxicated on March 25, 2013, killing Dennis and Judy Schulte, and seriously injuring their daughter and grandson, Karina and E. Ulriksen-Schulte. CP 5. Mullan's blood alcohol content was nearly three-times the legal limit. CP 7. He drove the same truck he drove in the Snohomish and Seattle DUIs, without an IID or a valid license. CP 5-7. Lamond's inaction proximately caused this tragedy. CP 1916, 1957, 1977.

Procedural History

1. Both parties moved for summary judgment.

The Schultes filed their Complaint on October 14, 2013, and the City Answered on December 9, 2013. CP 1, 15. On October 3, 2014, the City moved for summary judgment on the Schultes' failure to supervise claims, arguing: (1) that the City has no duty to ensure that Mullan complied with the sentencing condition requiring an ignition interlock device; (2) that the City was not grossly negligent as a matter of law; (3) that Lamond's inaction was not a proximate

cause of the crash as a matter of law; and (4) that the City should not be liable as a matter of policy, since probation is discretionary. CP 26, 41-42. The Schultes responded three weeks later, and the City replied in late October. CP 322-59, 3462-78.

The Schultes moved for partial summary judgment that the City breached its duty to ensure that Mullan had an ignition interlock device installed. CP 3622-23. The City responded on October 20, and the Schultes replied a week later. CP 3862-78, 3911-16.

2. The Schultes provided copious expert testimony that the City fell woefully below the standard of care.

Both sides filed numerous declarations supporting their summary judgment motions and responses. The Schultes filed eight declarations from Mullan's neighbors and friends, two who saw him driving daily, and five who saw him driving while intoxicated. CP 2145-53. In its Statement of the Case, the City argues that these declarations are irrelevant, where none of the declarants notified Lamond. BA 25. That argument begs the very issue on appeal: whether Lamond had a duty to do anything more than accept Mullan's lies.

The Schultes also filed three expert declarations, explaining that the City fell woefully below the standard of care. CP 1900-22,

1941-60, 1964-1990. Expert William Stough has 22-years of experience as a corrections officer and supervisor in probation supervision. CP 1901. He supervised hundreds of offenders, and supervised probation officers. *Id.* He has an additional 22-years of experience as an expert consultant and witness in cases involving State and local probation departments, including Seattle. *Id.* He has been retained in over 100 cases, and testified numerous times. *Id.*

Expert Hall had nearly 30-years of experience working for the Washington State Department of Corrections as a corrections officer, probation officer, and supervisor. CP 1942. In these roles, Hall served in a capacity "very similar if not identical" to Lamond. *Id.* Hall also has 11-years of experience as an expert in the corrections field. CP 1941-42. He has been retained as an expert in over 40 cases involving State and local corrections agencies and probation departments. CP 1943.

Expert Shelton retired from the bench in 2012, after serving as the City of Puyallup Municipal Court Judge for nearly 19 years. CP 1965. Judge Shelton established the municipal court probation department, which (like Seattle's probation department) managed gross misdemeanor and misdemeanor offenders like Mullan. *Id.* Shelton personally presided over hundreds of probation reviews and

revocation hearings for offenders like Mullan. *Id.* He has signed hundreds of orders similar if not identical to the judgment and sentence signed by Judge Rosen. *Id.*

Succinctly put, Stough opined that Lamond "did nothing to enforce the court order," evidencing a "lack of even slight care." CP 1912-13. Put another way, Hall stated (CP 1953-54):

> [T]he Seattle Municipal Probation Department's supervision of Mr. Mullan [is] very disturbing and wanting on many levels. Overall, the handling of Mr. Mullan's case by the City's probation department was in my opinion, grossly below the standard of care and evidenced the complete lack of care, let alone slight care, in the supervision of a known and dangerous offender. . . . The City did nothing to control or manage the risk that Mullan presented to the community.

And put yet another way, Judge Shelton stated (CP 1986-87):

> [T]he City of Seattle Probation Department as a whole failed to use even slight care in supervising this known dangerous offender. . . . The City's failure prevented the sentencing court from doing its job.

All three experts provided significant testimony on the scope of the City's duty to supervise Mullan. CP 1907-10, 1948-52, 1982-86. Stough and Hall opined that the City's own policies required Lamond to follow up on Mullan's pending Snohomish DUI charge, his treatment at Milam, and his claims that he was not driving. CP 1907-10, 1948-52. City policies also required Lamond to report

Mullan's many violations. CP 1910, 1951. Doing so would have prevented this tragedy. CP 1910, 1951-52.

Judge Shelton explained that the City cannot shirk its duty to enforce the entire judgment and sentence by unilaterally labeling sentencing conditions "active" versus "passive." CP 1985-86; *see also* CP 1956-57 (Hall). Without even acknowledging this expert testimony, the City claims that the sentencing court "expected" Lamond to supervise on Mullan's "active" conditions and did not "task" her with supervising "passive" conditions. BA 13. This distinction is found nowhere in City policy or procedure, Seattle Municipal Code, the RCWs, or the Judgment and Sentence. CP 1985. Defining substantive conditions of Mullan's sentence as "passive," and failing to supervise those conditions, "is a complete and unjustified abdication of the City's responsibility to the public." CP 1986.

Judge Shelton further explained that the City was obligated to verify that Mullan had an IID installed on his truck and applied for an IIL. CP 1982-83. Stough and Hall agreed. CP 1917-18, 1950. The City cannot abdicate this duty to the Department of Licensing – it is solely responsible for monitoring Mullan's compliance. CP 1984.

Policies and procedures aside, a basic tenet of probation supervision is to "know your offender." CP 1913, 1949, 1959. Knowing the offender is the only way to ascertain the foreseeable dangers they present and protect the public accordingly. CP 1913. The level of supervision required depends on the risk the offender poses. CP 1913. "As the risk to the public increases, so should the degree of care." *Id.*

Neither Lamond nor anyone else in the parole department appreciated the "extreme risk . . . Mullan posed to the public." CP 1915. Mullan is a chronic alcoholic and habitual DUI offender, who posed a serious risk of reoffending. *Id.* His records showed a lengthy history of severe and chromic substance abuse, including binge drinking, consuming up to a fifth of alcohol per day, and cocaine use. CP 1913. His exceptionally high blood alcohol content after the Seattle DUI should have been a "huge red flag." CP 1905. 1946, 1969. He had repeatedly failed past treatment attempts and had another very recent DUI. CP 1969-70. Mullan did not stop presenting an "extreme danger to the public" just by being placed on probation – he required active supervision. *Id.*

Yet the City stood idly by while Mullan was spiraling out of control. CP 1908, 1915, 1917, 1949, 1953-54, 1957, 1972-73. All

three experts opined that the City's failure to supervise Mullan was a direct and proximate cause of this fatal collision. CP 1916, 1917, 1957, 1977, 1984, 1986.

The City moved to strike these declarations. CP 3464-68, 3479-3531. The trial court denied the City's motions, ruling that the declarations were appropriate on summary judgment. RP 103-04. The court acknowledged that a later judge might rule differently, but did not, as the City claims, state that the expert declarations would likely be inadmissible at trial. *Compare* RP 103-04 *with* BA 25. The City does not challenge these rulings.

3. The trial court found genuine issues of material fact.

The trial court denied both summary judgment motions. CP 3536-37. Taking all reasonable inferences in the light most favorable to the Schultes, the honorable Jeffrey Ramsdell ruled that there are material issues of fact as to whether Lamond "exercised even slight care to protect the public from Mr. Mullan's dangerous propensity by simply relying upon Mr. Mullan's own assurances that he was not driving." RP 112. Judge Ramsdell explained:

- Lamond knew: (1) that Mullan's Seattle DUI involved BAC readings of .322 and.328 – four times the legal limit; (2) that Mullan pled guilty to the Seattle DUI; (3) that Mullan had a DUI pending in Snohomish County, giving her probable cause to believe that a crime had been

committed there involving drunk driving; and (4) that Mullan could not legally drive as the result of his Seattle DUI conviction (CP 153-54, 157, 158, 159, 160, 161, 165, 172);

- Mullan falsely claimed that he was working full time, but Lamond never asked him how he was getting there (CP 119, 122, 123, 126, 128, 146, 148, 157);

- Mullan falsely claimed that he was regularly attending treatment in Edmonds, yet Lamond never asked him how he was getting there (CP 144, 146);

- Mullan falsely told Lamond that his son was driving him around, including to the probation meetings with Lamond, but Lamond never saw the alleged son, never asked his name or anything about him, and "never confirmed in any way, shape, or form even the existence of his son" (CP 119, 121, 122, 123, 126, 128);

- Lamond just assumed that Mullan was telling the truth without making any inquiries and despite knowing Mullan's obvious willingness to break the law (CP 119, 121, 122-23, 125, 128, 129, 131, 132, 169);

- While Lamond was "logical" in failing to confirm that Mullan has an IID installed because his license was suspended, that made her *assumption* that Mullan was truthful even more significant, where the IID was the only way to ensure that he was not driving drunk (CP 121, 125, 128, 129, 131, 164); and

- Lamond knew that she was charged with protecting the public from Mullan *driving* while intoxicated (CP 122, 124, 125, 163).

4. The trial court also ruled that the City was not entitled to judgment as a matter of law.

Before the trial court, the City conceded that it had a duty to supervise Mullan, but argued that the "standard of care" for its

supervision is set by ARLJ 11, and two Court of Appeals decisions, Division Two's ***Kelley v. State***, 104 Wn. App. 328, 17 P.3d 1189 (2000), and this Court's decision following ***Kelley***, ***Whitehall v. King Cnty.***, 140 Wn. App. 761, 167 P.3d 1184 (2007). BA 2-3. The trial court rejected these claims.

As addressed below, Judge Ramsdell noted that review was accepted but withdrawn in ***Kelley***, and that this Court's decision in ***Whitehall*** relies exclusively on ***Kelley***. RP 18-19. The court found both "extremely troubling," where ***Kelley*** "excises half of the standard articulated in ***Taggart*** and ***Hertog***." RP 116; ***Taggart*** *infra*, ***Hertog*** *supra*. The court distinguished both, where Mullan had a proclivity to drink and drive, and was being supervised for DUI while he committed another DUI that is the subject of the underlying suit. RP 105-06. And the court found ***Kelley*** "confusing," stating "[i]t's an amorphous pile. It cites ***Taggart*** for one proposition, and then it seems to ignore it in part." RP 105.

5. This Court accepted discretionary review.

The City obtained a certification under RAP 2.3(b)(4). CP 3587-93. The City then sought interlocutory review, and the Schultes objected. CP 3612-21. The Court accepted review.

ARGUMENT

A. The standard of review is *de novo.*

In reviewing a summary judgment order in a negligent-supervision case, this Court makes the same inquiries as the trial court, whether there are genuine issues of material fact and whether the moving party (the City) is entitled to judgment as a matter of law. ***Hertog***, 138 Wn.2d at 275 (citing CR 56(c) and ***Taggart v. State***, 118 Wn.2d 195, 199, 822 P.2d 243 (1992)). The Court considers the facts and reasonable inferences in the light most favorable to the nonmoving party (the Schultes) and reviews questions of law *de novo*. ***Hertog***, 138 Wn.2d at 275.

B. The Court has improvidently granted review of a denial of summary judgment, and should summarily reverse its acceptance of review and remand for trial.

"Parties generally may not appeal a denial of a motion for summary judgment" unless they both stipulate to do so. ***Tapps Brewing, Inc. v. City of Sumner***, 106 Wn. App. 79, 82, 22 P.3d 280 (2001). There is no such stipulation here. As the above Statement of the Case and the following arguments make clear, there are numerous genuine issues of material fact in this case. The Court has improvidently granted review. *See generally* Dwyer, et al., *The Confusing Standards for Discretionary Review in Washington and a*

Proposed Framework for Clarity, 38 SEATTLE UNIV. L. REV. 91, 101 & n.64 (2014) ("courts have frequently lamented that discretionary review has been improvidently granted").

This Court should deny review and remand for trial. Any legal issues lurking here should be addressed on a full record after trial, not on summary judgment. It is unwise to make fine distinctions between the facts necessary to prove negligence, on the one hand, and those necessary to prove gross negligence, on the other, on a paper record. Juries commonly make fine factual distinctions. Review should await a full record and a jury's decision.

C. Although the City conceded its duty to supervise Mullan in the trial court, it now attempts to argue a lack of a duty, ignoring the ramifications of controlling law.

In the trial court, the City conceded that it had a duty to supervise Mullan. RP 16 ("We do not dispute that we had a duty with respect to our supervision of Mark Mullan"). Yet it here argues for the first time that "claims against Ms. Lamond [*sic*][2] arising out of her supervision of a first-time, [*sic*][3] misdemeanor DUI defendant necessarily fail for lack of a duty." BA 2. The Court should not consider this new argument first (cursorily) raised on appeal. *See,*

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[2] Ms. Lamond is not a defendant: the City is.

[3] Mullan had many prior drunk-driving offenses. CP 1969-70.

e.g., RAP 2.5(a). And while the City belittles controlling law regarding the nature and scope of its duty, that Supreme Court precedent (discussed *infra*) remains controlling.

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 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 306, 318, 119 P.3d 825 (2005); ***Bishop v. Miche***, 137 Wn.2d 518, 526, 973 P.2d 465 (1999); ***Estate of Bordon v. State***, 122 Wn. App. 227, 236, 95 P.3d 764 (2004); *see also*, ***Hertog***, 138 Wn.2d 277 n.3. Statutes that authorize and empower supervision also create that relationship. *Id.* at 219-220; ***Joyce***, 155 Wn.2d at 317; ***Couch v. State***, 113 Wn. App. 556, 565, 54 P.3d 197 (2002). And the supervising agency's own rules and regulations governing supervision may also create a take-charge relationship. ***Bishop***, 137 Wn.2d at 528.

Our Supreme Court has directly imposed upon the City of Seattle and its probation counselors this duty to control municipal court probationers and 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 six-year old. *Id.* at 268. Finding a duty, the Court rejected the City's repeated attempts – which continue here – to evade ***Taggart***:

> 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 actually supervise its probationers. As further discussed below, once the special relationship exists, the City owes a duty of care and may be liable when damages result. ***Joyce***, 155 Wn.2d at 310. And

once the duty exists, 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 v. Tudor***, 67 Wn.2d 322, 332, 407 P.2d 798 (1965). Thus, contrary to one of the City's inconsistent contentions, it had a duty to supervise Mullan's compliance with all conditions Judge Rosen imposed, as he expected the City to do. Nothing the City cites permits it to evade its ***Hertog*** duties.

D. The trial court correctly found a triable issue of fact.

The City first claims that it will argue that Judge Ramsdell erred in finding a genuine issue of material fact. BA 28 (heading B). Yet it actually argues that (1) ***Taggart*** and ***Hertog*** have somehow been narrowed (or perhaps overruled) by an administrative rule for courts of limited jurisdiction (ARLJ 11) (BA 28-30); and (2) ***Taggart*** and ***Hertog*** have somehow been obviated (or overruled) by two Court of Appeals decisions, ***Kelley***, 104 Wn. App. 328, and ***Whitehall***, 140 Wn. App. 761. BA 30-41. Neither of these sub-arguments has merit. The trial court correctly found genuine issues of material fact for trial.

1. The trial court correctly found that whether the City exercised even slight care is a triable issue of fact in light of the expert testimony.

Probation experts Dan Hall and William Stough identified numerous critical areas where PO Lamond failed to use any care, let alone slight care, in supervising Mullan (*supra*, Proc. Hist. § 2):

(a) Ignoring Mullan's drinking and driving;

(b) failing to make any contact with Lakeside Milam;

(c) ignoring the IIL and IID requirements;

(d) failing to do any follow up on Mullan's pending Snohomish County charges; and

(e) making no collateral contacts.

Both experts thus concluded that Lamond failed to exercise any care, let alone slight care. This is ample evidence on which to base a triable issue of fact. The City's tactical decision simply to ignore this evidence is unavailing.

Indeed, the City admits that ***Taggart*** and ***Hertog*** place a duty of supervision directly upon the City of Seattle's probation department. BA 29. And despite its assertion (noted above) that the Schultes' claims "fail for lack of a duty" (BA 2), the City nonetheless "does not dispute that the general rule articulated in ***Taggart*** and ***Hertog*** continues to apply." BA 30. The latter point is correct.

The City then claims that ARLJ 11 and RCW 4.24.760(1) have "changed the inquiry as to the scope of duty and the standard of care

that is owed, from simple negligence (reasonable care) to gross negligence (slight care)." BA 30. But as discussed *infra*, ARLJ 11 does not alleviate the City's duty to monitor probationers – it reinforces that duty. And while the statute does set the standard at gross negligence, it does not transform negligence from a fact question into a legal question. The City's claims lack merit.

2. ARLJ 11 neither overrules/displaces *Taggart* and *Hertog*, nor says what the City claims.

The City presents an argumentative version of ARLJ 11 in its Statement of the Case. BA 9-13. But it fails to present any legal argument as to how an administrative court rule like ARLJ 11 could possibly overrule or displace the substantive law established in ***Taggart***, ***Hertog***, ***Joyce,*** or in any other case. No authority supports the City's topsy-turvy legal regime. ***Taggart***, *et al.*, are controlling.

Moreover, court rules do not overrule binding precedent *sub silentio*, but rather a rule's authors state when they intend to do so. *Cf., e.g.*, ***State v. Olmos***, 129 Wn. App. 750, 756, 120 P.3d 139 (2005) (authors stated intent to displace existing precedent). The City proffers no authors' comments or legislative history (from RCW 10.64.120, which required the Office of the Administrator of Courts (OAC) to define "probation department" and to adopt rules for

probation officers). The Schultes have found nothing suggesting that the Legislature or the rules' authors intended to overrule or otherwise displace ***Taggart*** and its progeny, which remain controlling.

Nor does ARLJ 11 say what the City claims, or function (or fail to function) as the City asserts. BA 9-12. As noted, the Legislature mandated ARLJ 11. RCW 10.64.120(2) (OAC "shall define a probation department and adopt rules for the qualifications of probation officers"). It also created an oversight committee to specify probation-officer training and services, requiring them (among other things) to conduct investigations, to recommend release conditions, and to "provide ongoing supervision and assessment of the offenders' needs and the risk they pose to the community" (*id.*; paragraphing altered):

> The oversight committee shall consider qualifications that provide the training and education necessary to
>
> > (a) conduct presentencing and postsentencing background investigations, including sentencing recommendations to the court regarding jail terms, alternatives to incarceration, and conditions of release; and
> >
> > (b) provide ongoing supervision and assessment of offenders' needs and the risk they pose to the community.

The rules that RCW 10.64.120 requires were adopted in ARLJ 11 in 2001, with the following salient authors' comments:

> The 1996 Washington State Legislature mandated that the OAC adopt rules relating to the operation of local misdemeanant probation departments. . . .
>
> ...
>
> In summary, the rule defines what constitutes a misdemeanant probation department under the statute. In addition, the rule establishes the types of services that may only be performed by professional probation officers, as opposed to clerical staff, and it establishes the education and training requirements for both probation officers and probation clerks.

See 4B Karl B. Tegland, WASHINGTON PRACTICE: RULES PRACTICE, ARLJ 11.3, Author's Comments at 202-04 (7th ed. 2008). Thus, "misdemeanant probation department" is defined in ARLJ 11.1:

> A misdemeanant probation department, if a court elects to establish one,[4] 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.

This last sentence (which the City also underlines) must be viewed in light of the following Author's Comment:

> Misdemeanant probation departments vary tremendously in the types of services offered and the method of delivering those services. ***In recognition of this fact***, the presiding judge of the local court is granted authority under the rule to determine what services will be offered and how they will be delivered. ***Nevertheless, a department is still required to***

[4] The City underlines this phrase, but it never explains the significance of its emphasis. BA 9. The City undisputedly has a probation department.

> ***structure its services so that it will assist the court in the management of criminal justice with the intent of aiding in the preservation of public order and safety.***

Tegland, *supra*, at 203 (emphases added). In other words, while the presiding judge is given some administrative leeway due to the variability of probation services, ***a department*** is still required to provide services that will actually protect the public. *Id.*

For instance, ARLJ 11.2 specifies both a probation officer's qualifications and her "core services" (underlines added):

> (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. . . .
>
> (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.
>
> ...
>
> (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).
>
> . . .

In light of the detailed requirements imposed under ARLJ 11.2, it is quite remarkable for the City to assert that "there are no statutes or administrative code provisions that authorize or direct municipal court probation counselors in their duties." BA 29. This is narrowly accurate, but irrelevant, where ARLJ 11 provides ample authorization and direction. But the City's apparent assertion that a local judge may simply dispense with supervision not only lacks legal support, it lacks candor.

3. The City's "active/passive" supervision distinction appears nowhere in any of the controlling rules or authorities, and proves the City's gross negligence.

The clearest example of the City's troubling assertions is its baseless claim that a local judge may make a distinction between "active" and "passive" supervision in order to evade ARLJ 11.2's detailed and specific requirements, and those of ***Taggart*** and its progeny. BA 11-13. This Court will note that this is a "fact" argument, citing no legal authority. *Id.* It is also false.

Under the City's ersatz construct, it may disclaim all responsibility for monitoring or supervising any condition in Mullan's Judgment and Sentence that required City oversight for his drinking, driving, valid driver's license, insurance, and ignition-interlock device. Yet the court imposed those precise conditions specifically to minimize and control the severe risk that Mullan posed to the public based on his known dangerous propensities. CP 77-78. Indeed, before the City's "active v. passive" construct surfaced, the sentencing Judge, Steven Rosen, explained that he had ordered active monitored probation for Mullan based the overall risk he posed to the public, including Mullan's alcoholic appearance, age, extremely high BACs (.322 and .328), and the pending charge in Snohomish County. *Id.* He ordered Mullan to be monitored. *Id.*

Rather than follow this express order, the City's Probation Department Supervisor, Richard Hume, preferred an alleged "active v. passive" distinction: an "edict" in an undisclosed memo from an unspecified judge. CP 2067.[5] Under this dubious edict, Mullan's probation counselor would open activities for Mullan's IID and IIL conditions, but then would perform no follow up because they are somehow "passive" conditions. CP 2069-70. Hume agreed that Mullan had a serious drinking problem and that he presented a risk of reoffending by continuing to drink and drive. CP 2070. Despite this, he disclaimed any responsibility to monitor Mullan for any condition dealing with his drinking or driving or the requirements that he obtain a valid interlock device, license, and insurance. CP 2071-72.

Judge Kondo also disclaimed any City responsibility for monitoring Mullan's compliance with the Judgment and Sentence conditions addressing drinking, driving, licensing, or installing an interlock device. CP 3247-49. Judge Kondo went further, stating that she would not expect PO Lamond even to ask Mullan about his pending Snohomish County case, or to inquire about any other condition of the Judgment and Sentence. CP 3248-49. Judge Kondo

[5] Neither Hume nor the City has ever identified or produced the so-called "edict" memo. CP 2069.

also would not expect probation to inform the court about Mullan's Snohomish County intoxicated court appearance. CP 3248-49.

According to Judge Kondo, the only conditions City's probation actually monitors are the referral to treatment, the victim panel, and signing a release form. CP 3243. Judge Kondo did not know who was responsible for monitoring the other conditions. CP 3242-43. Judge Kondo could not identify any policy, procedure, code, rule, or statute, supporting her assumptions. CP 3243.

As a matter of logic, the City's apocryphal active/passive "edict" makes no sense. There is no reason why its ***Taggart/Hertog/*** ARLJ 11.2 duties could be dispensed with when, as here, the Judgment and Sentence requires active monitoring not only of treatment and other so-called "active" conditions, but also of the prohibitions against drinking and driving, driving without a license or insurance, and driving without an ignition interlock. Indeed, ***these are active conditions***: he must drive sober, obtain an IID, and obtain a proper license and insurance. It is simply irrational to suggest that these are somehow "passive" conditions.

Retired Municipal Court Judge Stephen Shelton called the City's alleged "active v. passive" distinction "a complete and unjustified abdication of the City's responsibility to the public." CP

1986. It is a complete "failure to use even slight care in supervising this dangerous offender and was a direct and proximate cause of Mr. Mullan being able to drink and drive his truck into the Schulte family on March 25, 2013." CP 1986. At a minimum, this is a genuine issue of material fact.

It is also a travesty of justice. If the City really wants to avoid liability for these tragic cases, it must stop trying to evade ***Hertog***, and start trying to protect the public. Any reasonable effort to do so would be sufficient under a gross negligence standard. It is very difficult to understand why the City still resists making that effort.

4. Our Supreme Court has held that questions of gross negligence are for the jury, and *Kelly* and *Whitehall* are thus inapposite, not controlling, and in error.

The City also contends that because the "standard of care" is gross negligence, summary judgment is appropriate. It relies on two Court of Appeals decisions, Division Two's ***Kelley***, 104 Wn. App. 328, and this Court's decision following ***Kelley***, ***Whitehall***, 140 Wn. App. 761. Essentially, the City argues that PO Lamond did not have to do anything to meet the duties imposed by our Supreme Court and our Legislature (through OAC) because the standard of care is different. Yet the City fails to address controlling law (cited to the trial

court) holding that gross negligence is just "a form of negligence on a larger scale," determined by a jury, ***Nist***, 67 Wn.2d 331-32.

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 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.

Nist directly contradicts the City's argument that because it allegedly supervises some "active" conditions, it is not grossly negligent for utterly failing to supervise any so-called "passive" conditions – like no drinking and driving – whose violations killed and maimed members of the Schulte family. Supervising conditions that did not stop the offender from killing and injuring the victims cannot absolve the City from its failure to supervise conditions that could have saved them. Yet the City fails even to cite ***Nist***. The trial court

correctly ruled that gross negligence is for the jury, as ***Nist*** requires. This Court should reverse and remand for trial.

The fate of "gross negligence" in the host-guest line of cases is also worth noting: the Legislature ultimately repealed the statute, and the Supreme Court subsequently overruled the older line of cases mentioned above, in which gross negligence was used to deprive injured victims of their day in court. ***Roberts v. Johnson***, 91 Wn.2d 182, 188, 588 P.2d 201 (1978). ***Roberts*** held that this standard did not pass the test as a rational, just, and equal standard of liability. *Id.* at 186-88. Particularly notable here, it failed the test of consistency, where citizens other than auto guests were protected from negligence, not just so-called gross negligence. *Id.* at 186-87.

The gross negligence standard in this statute frankly should meet the same fate. It is simply unworkable, violating basic principles of equality and consistency. *Id.* It fails equality because all citizens should be equally protected from dangerous offenders. And it fails consistency in requiring victims of the City's probationers to show gross negligence, while victims of DOC offenders need show only negligence. Both groups of victims are equally harmed by the same failures to supervise.

Ultimately, this statutory scheme thus flies in the face of ***Hertog***, which rejected false distinctions between State and City supervision. The City's duty is no different than the State's duty. Any other holding runs head-on into ***Hertog*** – and ***Roberts***.

Kelley and ***Whitehall*** cannot and do not change this analysis. Rather, they misapply the gross negligence standard from RCW 4.24.760(1), which instead must be applied consistently with ***Nist***, as the trial court correctly ruled in sending this case to the jury. And in any event, neither case is apposite or controlling here.

In ***Kelley***, Division Two misstated the duty established by ***Taggart*** and ***Hertog***, as Judge Ramsdell noted at RP 29-30:

> [***Kelley***] is really the linchpin of this, I think it is fair to say. . . . But the interesting thing in [***Kelley***] is they cite the duty and they quote ***Taggart*** and ***Hertog***, and what they do is they say on page 322, a parole officer has "a duty to take reasonable precautions to protect anyone who might foreseeably be endangered," period . . . end of story.
>
> Which isn't the whole quote from ***Taggart*** or ***Hertog***, because in [those cases] they talk about foreseeability [*sic*; foreseeably?] being endangered by a defendant's dangerous propensities, which seems to link: What kind of defendant is this? What have they done in the past that we need to fret about? What's the foreseeable danger that this particular person with these particular propensities presents? [Emphases added; quote-marks altered; paragraphs altered.]

This omission is very significant because in ***Kelley***, the 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 incidents. ***Kelley***, 104 Wn. App. at 335-37. But here, Lamond did nothing regarding the ignition interlock, the suspended license, or the no-drinking-or-driving conditions, including failing to make any inquiry regarding the pending DUI in another county, each of which is directly related to the offense as to which she had a duty to supervise Mullan. ***Kelley*** is inapposite.

Kelley is also in consistent with ***Nist*** on several grounds. First, ***Kelley*** also misstated the ***Nist*** standard when it said that if the CCO "made ***no attempt*** to learn the circumstances of the crime, a jury could find gross negligence." 104 Wn.2d at 336 (emphasis added). Slight care means "not the total absence of care," but appreciably more than mere negligence. ***Nist***, 67 Wn.2d at 331.

Second, ***Kelley*** says the following:

> Kelley's expert opined that these deficiencies [in supervising the offender] constituted negligence. We agree that a jury could so find. But we hold that this was not "substantial evidence of serious negligence" and, thus, fell short of showing gross negligence. ***Nist***, 67 Wn.2d at 332.

Kelley, 104 Wn. App. at 338. This holding defies at least the spirit of ***Nist***, where when clear negligence is present, it is for the jury to decide gross negligence. 67 Wn.2d at 332. These errors may well be

why the Supreme Court granted review of ***Kelley***, at 144 Wn.2d 1021, 34 P.3d 1232 (2001). *See* RP 111.[6]

This Court's ***Whitehall*** is an even further stretch. There, the offender being supervised for third-degree theft regularly reported to his probation officer and did nothing wrong, and (because he was a low-level offender) nothing further was required. ***Whitehall***, 140 Wn. App. at 763-64. He then unexpectedly placed an explosive on a trailer door, which wound up blowing-off Whitehall's hand. *Id.* at 764-65. As Judge Ramsdell noted, there was simply no relationship between the adequate supervision given and the crime committed. RP 30. Like ***Kelley***, ***Whitehall*** is inapposite.

In the last analysis, ***Kelley*** was wrongly decided, and ***Whitehall*** simply follows ***Kelley***. *See* RP 116 (Judge Ramsdell finds both cases "extremely troubling," particularly where ***Kelley*** excises half the ***Taggart*** standard, and ***Whitehall*** just follows ***Kelley***). If the Court will not distinguish those cases, then it should disagree with them and follow ***Nist*** and ***Roberts***. But they are distinguishable.

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[6] Counsel are aware that review was later dismissed due to a settlement.

5. The City's mischaracterizations of the trial court's rulings and fact arguments are futile.

Toward the end of its ***Kelley/Whitehall*** argument, the City devolves into mischaracterizing the trial court's oral statements (by taking them out of context) and making all sorts of factual arguments more properly directed to a jury. BA 33-41. As the above analysis shows, the facts are for the jury. It will only waste this Court's time contradicting them (once again) tit for tat.

Suffice it to reiterate here that the trial court explicitly stated what he believed PO Lamond knew, and why that knowledge made it foreseeable to her that Mullan was at serious risk of reoffending. *Supra*, Proc. Hist. § 3. The court properly found a genuine issue of material fact. Rearguing the facts is futile.

E. Proximate cause is also for the jury.

The City makes a lengthy argument about proximate cause. BA 41-49. Despite two additional pages on the relevant standards, it fails to recall (as it said at BR 28) that proximate cause is for the jury where reasonable minds might differ. *Compare* BR 41-42 *with* ***Hartley v. State***, 103 Wn.2d 768, 775, 698 P.2d 77 (1985). Reasonable minds, like Judge Ramsdell's, can certainly differ here.

For instance, a retired Municipal Court Judge opined that the City's gross negligence proximately caused the Schultes' deaths and

injuries. If Lamond had done minimal follow up, then she would have learned that Mullan was intoxicated at his July 14 hearing, that he had driven there while intoxicated, and that he had been incarcerated, plainly violating numerous conditions of his Seattle parole. CP 1906-08, 1913, 1947, 1949. These "very serious" violations went to the heart of Mullan's risk to the public. CP 1910, 1949-50. Lamond should have discovered these violations and notified the court. *Id.* If she had, the court more probably than not would have incarcerated Mullan for at least 30 days, and imposed additional alcohol supervision, including setting a firm date for installing an IID. CP 1906-10, 1947-50, 1957. Lamond's failure to track the Snohomish DUI was "a gross and inexcusable dereliction of her duties and evidence of the complete lack of any care, let alone slight care." CP 1957; *also* CP 1907, 1976-77. Her inaction is a "direct and proximate cause of the March 25, 2013 fatalities" and injuries. CP 1907, 1949-50, 1957, 1977.

Judge Shelton further explained that the City was obligated to verify that Mullan had an IID installed on his truck and applied for an IIL. CP 1982-83. Stough and Hall agreed. CP 1917-18, 1950. The City cannot abdicate this duty to the Department of Licensing – it is solely responsible for monitoring Mullan's compliance. CP 1984.

This evidence and these opinions are more than sufficient to carry the proximate cause issue to a jury. *See, e.g.*, ***Joyce***, 155 Wn.2d at 310 (upholding State's duty to take reasonable precautions to protect community members from reasonably foreseeable dangers that a parolee poses); ***Bell v. State***, 147 Wn.2d 166, 179, 52 P.3d 503 (2002) (whether State's negligent supervision proximately caused a parolee sex offender to abduct and rape his victim is a jury question); ***Taggart***, 118 Wn.2d at 227-28 (whether failure of parole officials to respond to a teletype from Montana authorities informing them that Montana police were standing by to arrest parolee was cause of injuries suffered by girl raped by parolee is a jury question). Viewing the facts appropriately – in the light most favorable to the Schultes – proximate cause is proven.

F. The Court should correct an error that is likely to be repeated on remand, where the trial court erroneously ruled that the City had no duty to supervise the IID and IIL conditions in the Judgment and Sentence.

At the behest of a respondent, this Court will review and reverse errors that are likely to be repeated on remand where, as here, the necessities of the case so require. RAP 2.4(a). The trial court erroneously ruled that the City had no duty to supervise the IID and IIL conditions in the Judgment and Sentence. RP 112. Accepting

the City's argument was a legal error because the Judgment and Sentence expressly required the City to supervise these conditions, and the Seattle Municipal Code (SMC) authorized those conditions.

The trial court considered Lamond's allegedly "reasonable" assumptions about Mullan not driving to be an aggravator regarding her other failures to supervise, finding a genuine issue of material fact. *Id.* That is, since Lamond just assumed that there was no need to check on the IID and ILL requirements because Mullan was not driving, a jury could reasonably find that her failures to verify that he was not driving were grossly negligent. RP 112-13. As a result, *as to the denial of summary judgment*, the Schultes were not aggrieved by this ruling and they could not appeal from it. *See* RAP 3.1. Moreover, the Schultes strongly believe that accepting review here is improvident, so they could not seek cross-review.

But on remand, a subsequent judge might feel bound by this mistaken ruling. Following this determination would be highly prejudicial to the Schultes, where a jury could reasonably find – as the Schultes' expert witnesses have – that not only was Lamond's naïve acceptance of a known DUI offender's false claims not to be driving grossly negligent, but so were her failures to *ensure* that he

could not drive drunk by following up on the IID/IIL. The sentencing judge put those conditions in place to protect the public.

The parties argued (at great length) about the legal basis for these sentencing conditions. *See, e.g.*, CP 27-39, 42-48, 327-28, 338-45, 3468-70, 3628-32, 3914-15, 3862-78, 3911-15. In the last analysis, the Judgment and Sentence unequivocally ordered an IID and IIL, stating as "mandatory conditions" that Mullan shall (CP 316):

> Comply with mandatory ignition interlock device requirements as imposed by the Department of Licensing;
>
> Comply with the requirement to apply for an ignition interlock driver's license and to install an ignition interlock device on all vehicles operated by the defendant as required by the Department of Licensing. (RCW 46.20.720(2), 46.20.385, and RCW 46.61.5055(5)(6).);
>
> The court has ordered the defendant to refrain from consuming any alcohol and has required the defendant to apply for an ignition interlock driver's license;
>
> Unless otherwise stated, the calibration level for any ignition interlock requirement imposed under this order shall be .025%.

Seattle Municipal Code § 11.20.230(B) expressly required the court to order a person (like Mullan) convicted under SMC 11.56.020(A) to have a functioning IID installed. CP 3912. The legal basis for ordering the IID and IIL is clear. The court erred.

Under ***Hertog***, the City had a duty to supervise Mullan for ***all*** express conditions. Ample legal basis exists for these conditions.

This Court should reverse this error and instruct the court on remand not to make the same error again.

CONCLUSION

This Court should reverse its decision to accept discretionary review as improvidently granted, and remand for trial. If not, it should affirm Judge Ramsdell's correct ruling that genuine issues of material fact preclude summary judgment, and remand for trial.

RESPECTFULLY SUBMITTED this 5th day of November 2015.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed or caused to be mailed a copy of the foregoing **BRIEF OF RESPONDENTS** this 5th day of November 2015, to the following counsel of record at the following addresses:

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