NO. 339921

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Ahmet Hopovac,

Appellant,

v.

State of Washington Department of Corrections and Kimberley Allen,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Appellant Ahmet Hopovac insists that the Restatement (Second) of Torts § 314A and *Shea v. City of Spokane,* 17 Wn. App. 236, 562 P.2d 264 (1977), provide a cause of action against the Department of Corrections ("Department") for failing to protect an offender on community supervision from an assault. But § 314A and *Shea* apply only to offenders within the physical custody of the Department. No part of § 314A or *Shea* supports a duty to protect offenders who have left the physical custody of the Department.

The limited duty to protect an offender committed to the Department's physical custody from an assault exists because the Department is in complete control of the offender. An offender on community supervision presents an entirely different reality, as illustrated by the facts of this case. Here Hopovac created his own dangerous circumstance by repeatedly violating his conditions of community supervision, which prohibited drug use and possession of weapons. Specifically, he spent time with members of a street gang who used and dealt drugs, he handled a murder weapon while his friend negotiated a deal to hold a gun in exchange for drugs, and he spent hours listening to a police scanner with a self-confessed killer while smoking crystal meth. These dangerous associations were the product of Hopovac's ability to

disregard the Department's authority over him once he left the Department's physical custody. This Court should affirm the trial court and Washington law, which limits the Department's legal duty to protect an offender to circumstances where the Department has actual physical custody / complete control of the offender.

II. ASSIGNMENTS OF ERROR AND COUNTERSTATEMENT OF THE ISSUES

A. Assignments of Error

The Honorable David Estudillo of the Grant County Superior Court properly granted the Department's motion for summary judgment, dismissing Ahmet Hopovac's claim in its entirety. Therefore, the Department makes no assignment of error.

B. Counterstatement of Issue Pertaining to Hopovac's Assignment of Error

Whether the Department of Corrections has a duty, for purposes of tort law, to protect an offender on community supervision from an assault by other members of the community, where the offender is not in the physical custody of the Department? (Plaintiff's Assignment of Error 1)

III. STATEMENT OF THE CASE

On January 19, 2011, Plaintiff Ahmet Hopovac reported to Community Corrections Officer Peter Markovics to begin his community supervision by the Washington State Department of Corrections. CP at

53. The next day Hopovac failed to report for a scheduled supervision appointment. CP at 52-53. Community Correction Officer (CCO) Markovics issued a Secretary's Warrant for Hopovac's arrest. CP at 52. Hopovac was eventually arrested seven weeks later on March 10, 2011. CP at 52.

Hopovac remained in the Grant County Jail until approximately April 14, 2011, when Hopovac again reported to Markovics. CP at 51. During this contact, Hopovac admitted to using methadone, methamphetamine and marijuana in jail before his release. CP at 50. Hopovac and Markovics executed a Stipulated Agreement regarding Hopovac's admitted drug use. CP at 50. Markovics increased Hopovac's reporting requirements to three times weekly and required Hopovac to, among other things, complete a chemical dependency evaluation. CP at 50.

Over the course of the next twelve days, Hopovac failed to report in-person on two occasions (although he did call into the Department on both days) and Hopovac provided a urine sample that was presumptively positive for methamphetamine (although he denied using meth). CP at 49. Markovics increased Hopovac's reporting requirement to daily reporting pending the final results of the urine sample that tested presumptively

positive. CP at 49. Hopovac reported on April 27-28 and May 3, but failed to report on April 29 or May 2. CP at 48-49.

When Hopovac reported on May 3, 2011 he met with Community Corrections Supervisor (CCS) Kim Allen in the Moses Lake office. CP at 47. Hopovac told CCS Allen he believed his life was in danger because he had witnessed another person try to pass off a gun that had been used in a recent shooting. CP at 47.

More specifically, on April 17, 2011, Hopovac spent an evening drinking at a bar with Christopher Jones and Kristin Clark until about 3:00 a.m. CP at 88-89. When the trio returned to Jones' home, they were joined by Gilberto Valdovinos Medina ("Diablo"), a Poco Locos[1] gang member and his girlfriend Stephanie Ziegler. CP at 88-89. Diablo told the trio he just shot someone who had been undercutting his price for heroin. CP at 88-89. Clark and Ziegler attempted to conceal Ziegler's vehicle. CP at 88-89. Hopovac and Jones both handled the gun that had been used in the shooting. CP at 157. Diablo asked Jones to hold the gun for him, which Jones did in exchange for a quarter ounce of crystal meth. CP at 89. The entire group retreated to a house on the property, monitored a police scanner and smoked crystal meth together. CP at 89.

[1] The Poco Locos are a sect of the Surenos gang. CP at 86. Hopovac was familiar with Poco Locos gang members from the parties he attended at Chris Jones' home where he used crystal meth, opiates and heroin. CP at 78-79, 84-85.

Returning to the May 3, 2011 meeting between Hopovac and CCS Allen, Hopovac asked CCS Allen to have his community supervision transferred to Idaho[2] where his parents lived. CP at 47-48. Allen instructed Hopovac to report what he had witnessed to law enforcement officers, who could generate an official report that would be used to support an emergent transfer request. CP at 47-48. Hopovac indicated he would think about the issue and report back with a statement. CP at 47-48. Hopovac did not return. CP at 47-48. The Department issued a Secretary's Warrant for Hopovac's arrest on May 9, 2011 after: (1) Hopovac failed to report daily as previously directed; and (2) a May 4, 2011 UA report confirmed Hopovac's April 26, 2011 presumptive positive finding for meth. CP at 47. Hopovac was apprehended on May 30, 2011, nearly one week after the May 24, 2011 assault of which he now complains. CP at 47.

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[2] Hopovac had previously requested to have his supervision transferred to Idaho when he first reported for supervision in January 2011. CP at 53. CCO Markovics told Hopovac that the issue would be discussed at a supervision meeting the next day, but Hopovac failed to report for that meeting and a warrant was eventually issued for his arrest. CP at 52-53. Markovics did make a supervision transfer request on April 22, 2011. CP at 60. The request was rejected by Idaho. CP at 66. Idaho rejected the request on May 2, 2011, stating, "This Transfer Request does not include a PSI or police report. Also, the information in the supervision history clearly states the offender has been in violation status for drug use and failing to report, both within the past 30 days. Although Washington feels this offender is in sufficient compliance for transfer, we can not [sic] conduct an investigation without either a police report or PSI." CP at 66. Markovics submitted a second transfer request on May 2, 2011 with the requested police report. CP at 48, 67. However, Markovics withdrew the transfer request on May 9, 2011 following the issuance of a Secretary's Warrant after: (1) Hopovac failed to report daily as previously directed; and (2) a May 4, 2011 UA report confirmed Hopovac's April 26, 2011 presumptive positive finding for meth. CP at 48.

Hopovac acknowledges that when he spoke with CCS Allen on May 3, 2011, Poco Locos gang members had not actually threatened him. CP at 74-76, 80-81. Rather, Hopovac explains that on May 4, 2011 an article ran in the local paper that detailed the shooting and described how the suspect had attempted to pass the gun off. CP at 77. Approximately five to seven days after the press report, Hopovac was briefly assaulted by Poco Locos gang members who interrogated him for the first time. CP at 79-80. A day or two after this first assault, Hopovac noticed for the first time that gang members were following him. CP at 81-82. A second assault and interrogation by the gang happened within a few more days, followed by the May 24, 2011 assault of which he now complains. CP at 81-83. Hopovac did not contact the Department at any point following May 3, 2011 to report these incidents. CP at 46-48.

IV. ARGUMENT

A. Standard of Review

Appellate courts review summary judgment orders *de novo*. *Kim v. Lakeside Adult Family Home*, 2016 WL 2756026, at *5 (Wash. May 12, 2016). In other words, an appellate court will consider "all of the evidence presented to the trial court and 'engages in the same inquiry as the trial court.'" *Id.* (citing *Folsom v. Burger King,* 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). Here the issue presented to the trial court and to

this Court is whether a legal duty exists. *See* Appellant's Opening Brief (Opening Br.) at 4. Generally, the existence of a legal duty is a question of law to be decided by the Court. *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 762-63, 344 P.3d 661 (2015). When the issue of the existence of a legal duty depends upon certain, disputed facts, summary judgment is inappropriate. *Binschus v. State*, 186 Wn. App. 77, 92, 345 P.3d 818 (2015). Here Hopovac does not contend that any disputed material facts prevent the Court from reaching a decision regarding the existence of a legal duty. *See* Opening Br. at 5.

Hopovac's standard of review has the potential to create confusion. For example, Hopovac recognizes in his standard of review that questions of material fact can preclude summary judgment. Opening Br. at 10. He does this after having already conceded that, "The facts of the case are largely irrelevant to this appeal, which centers simply on the existence of a legal duty." Opening Br. at 5. Hopovac also blurs the standard of review by claiming that the jury "decides the scope and application of any duty owed." Opening Br. at 11. This argument lacks relevance, since the issue presented for review is the existence of a legal duty. Opening Br. at 4. But the argument is also inexact. The scope of a duty owed, insofar as it describes the extent of a duty, is a question of law for the Court. *See Wuthrich v. King Cty.*, 185 Wn.2d 19, 25, 366 P.3d 926 (2016). The scope

of a duty owed is a jury question where the trier of fact must determine if the harmful conduct falls within an existing duty. *See McKown*, 182 Wn.2d at 762-63. In any event, Hopovac's misstatements regarding of the standard of review do not preclude this Court from determining the existence (or non-existence) of a legal duty as a matter of law.

B. The Department Owes No Duty To Protect An Offender From An Assault When The Offender Is Beyond The Physical Custody / Complete Control Of The Department.

For more than 100 years, the duty to keep an offender in health and safety has been applied to cases only where an offender is within the physical custody of a jailor. *See Gregoire v. Oak Harbor*, 170 Wn.2d 628, 630, 244 P.3d 924 (2010); *Kusah v. McCorkle*, 100 Wash. 318, 319, 323, 170 P. 1023 (1918); *Riggs v. German*, 81 Wash. 128, 131-32, 142 P. 479 (1914); *Winston v. State,* 130 Wn. App. 61, 62, 64, 121 P.3d 1201 (2005); *Shea*, 17 Wn. App. at 241-42. As explained by the Washington State Supreme Court in *Gregoire*, "The duty owed 'is a positive duty arising out of the special relationship *that results when a custodian has complete control over a prisoner deprived of liberty.*'" 170 Wn.2d at 636 (emphasis added) (citing *Shea*, 17 Wn. App. at 242). The duty to keep an offender in health and safety is not absolute. In the case of protecting an inmate from assaults by other inmates, the duty is limited:

> In order to hold the State liable for injury to one inmate inflicted by another inmate, there must be proof of knowledge on the part of the prison officials that such an injury will be inflicted, or good reason to anticipate such, and then there must be a showing of negligence on the part of these officials in failing to prevent the injury.

See Winston, 130 Wn. App. at 64; *see also Garrott v. Vail*, 549 Fed. Appx. 669 (9th Cir. 2013).

The special relationship that gives rise to a custodian's duty to protect an incarcerated offender does not exist in this case. When Hopovac was assaulted on May 24, 2011, he was not in the complete control of the Department. In fact, the Department had no special relationship with Hopovac at all on May 24, 2011. *See Husted v. State*, 187 Wn. App. 579, 348 P.3d 776 (2015), *review denied,* 184 Wn.2d 1011, 360 P.3d 817 (2015) (holding that the duty to control an offender on community supervision ends when the offender absconds from supervision and a Secretary's Warrant is issued); *see also Smith v. Washington State Dep't of Corr.*, 189 Wn. App. 839, 359 P.3d 867 (2015), *review denied,* 185 Wn.2d 1004, 366 P.3d 1244 (2016). Hopovac absconded from supervision and a warrant issued for his arrest on May 9, 2011, weeks before the May 24, 2011 assault of which he complains. CP at 47. Thus, Hopovac's claim fails as a matter of law for at least two independent reasons. First, there is no tort duty to protect him because he was not in the Department's

physical custody / complete control while on community supervision. Second, even if a duty to protect an offender outside of the physical custody / complete control of the Department arguably existed, Hopovac had no special relationship with the Department whatsoever. He absconded from community supervision before he was assaulted on May 24, 2011. These circumstances preclude his claim as a matter of law.

Hopovac's rationale for extending Restatement § 314A and *Shea* outside of the realm of physical custody is ill-founded. For example, Hopovac claims that nothing in the language of § 314A or *Shea* precludes extending the duty beyond cases of physical custody. Opening Br, at 13. Hopovac is wrong; both sources contain language restricting their application to physical custody cases. The plain language of § 314A limits its application: "One who is required by law to take or who voluntarily takes the custody of another . . . ." Restatement (Second) of Torts § 314A (1965) (emphasis added). Similarly, the Washington State Supreme Court, while discussing *Shea*, expressly stated that the duty to protect an offender is premised on "the special relationship that results *when a custodian has complete control over a prisoner denied of liberty.*" *Gregoire*, 170 Wn.2d at 635 (emphasis added); *see also Shea*, 17 Wn. App. at 242. Thus, the plain language of § 314A and *Shea* restrict the duty owed to cases where physical custody / complete control is exerted.

Hopovac's public policy argument is also flawed. Hopovac makes sweeping generalizations about policy without grounding those statements in any recognized source of public policy. *See* Opening Br. at 14. As a general rule, public policy is best determined by reference to legislative enactments. *See American Home Assur. Co. v. Cohen*, 124 Wn.2d 865, 874, 881 P.2d 1001 (1994). Courts rely on constitutional, statutory or regulatory schemes to determine public policy and are cautious when asked to declare public policy without the benefit of legislative or prior judicial expressions on the same subject. *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 207-08, 193 P.3d 128 (2008). So, when Hopovac writes, "This policy requires that the DOC have a duty to protect all in its custody, community supervisees as well as those in physical custody, unless and until the legislature or the courts decree otherwise" (Opening Br. at 14), Hopovac turns the proper analysis of public policy on its head. Rather than citing to legislative enactments that affirmatively support his so-called public policy concerns, he simply argues that the existing duty should be extended until the legislature or courts act to restrict it. This erroneous analysis of public policy does not justify the creation of a duty to protect an offender who is beyond the Department's physical custody / complete control.

Moreover, creating a duty to protect offenders who are beyond the Department's physical custody / complete control is inconsistent with the rationale that supports the current duty owed to incarcerated offenders. The status quo is understandable because a custodian has the ability to timely dictate housing assignments, impose protective custody or use other penological strategies while an offender is under the actual physical control of the custodian. In stark contrast, the Department enjoys a far less realistic chance of exercising any meaningful, immediate control over an offender once physical control is relinquished, as illustrated by the underlying facts of this case. Hopovac's community supervision initially began in January 2011. CP at 53. One day later, he absconded from supervision. CP at 52-53. He was not apprehended until March 10, 2011, at which point, he was incarcerated until April 14, 2011. CP at 51-52. Upon his second release to community supervision on April 14, 2011, Hopovac's community supervision lasted less than three weeks before he again absconded on May 4, 2011, resulting in the issuance of a Secretary's Warrant on May 9, 2011. CP at 48-51. Hopovac then remained at-large until May 30, 2011. But even during the three weeks of community supervision before Hopovac absconded, he disregarded the Department's authority over him. Hopovac's conditions of supervision prohibited him from going to bars, consuming alcohol, using controlled substances or

possessing firearms. CP at 222. Yet, on the night Hopovac witnessed the gun-for-meth exchange, Hopovac was out drinking (*see* CP at 88), handled the gun that was used in the murder (CP at 157), and smoked crystal meth with the perpetrator of the murder. CP at 88. These undisputed facts illustrate just how impractical it would be to expect the Department to protect an offender from an assault after the offender has left the Department's physical control.

Hopovac's logic and common sense arguments also fail him. Hopovac hypothesizes that because a duty to protect an incarcerated offender exists, some lesser, undefined duty must also exist for community supervision offenders because of unspecified restrictions on the offender's liberty. *See* Opening Br. at 15. To reach this conclusion, Hopovac continues to ignore that it is the complete control exerted by a jailor over an inmate that justifies imposing any duty at all; this complete control does not exist in the community corrections context. *Gregoire*, 170 Wn.2d at 635 (emphasis added); *see also Shea*, 17 Wn. App. at 242. Once physical control is relinquished, the basis for imposing the duty disappears.

Finally, Hopovac makes too much of the trial court's oral ruling. *See* Opening Br. at 15-18. Specifically, Hopovac complains that the trial court too narrowly construed § 314A's meaning of "normal opportunities

for protection." *Id.* There are several reasons why this argument is without value for this Court. First, this Court is conducting a *de novo* review on a purely legal issue – meaning this Court reviews the entire record and gives no deference to the findings or conclusions of the trial court. Second, a trial court's oral opinion has no final or binding effect unless it is incorporated into the findings, conclusion and judgment. *Pearson v. State*, 164 Wn. App. 426, 441, 262 P.3d 837 (2011). Here the trial court reduced its oral ruling to a written order that does not recite the alleged errors in rationale argued by Hopovac. Third, this Court can affirm the trial court on any grounds supported by the record. *Id.* Since neither § 314A nor *Shea* impose a duty to protect an offender from an assault once the offender has left the physical custody of the Department, the trial court reached the correct conclusion. Fourth, the trial court's decision did not rest solely on whether the term "normal opportunities for protection" is defined by reference to an offender subject to conditions of supervision or to the average citizen. The trial court also opined that the lack of any authority imposing a duty to protect outside of the complete control context was a basis for the ruling. *See* RP at 28:20-29:2. Finally, the trial court correctly observed that Hopovac still enjoyed basic, normal opportunities for his own protection. RP at 28:12-19. Hopovac could have gone to the police. RP at 28:12-19. Instead, Hopovac elected to

abscond from supervision. CP at 47-48. For these reasons, Hopovac's criticisms of the trial court's oral ruling do not justify an order reversing summary judgment.

V. CONCLUSION

This Court should affirm the Order Granting Defendants' Motion For Summary Judgment Re: Duty. Creating a duty to protect offenders who are no longer within the Department's physical control is contrary to existing case law, the Restatement (Second) of Torts § 314A, and common sense, as discussed above.

RESPECTFULLY SUBMITTED this 20 day of July, 2016.

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

DATED this 20 day of July, 2016, at Spokane, Washington.

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