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No. 71147-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JANET RAE TIBBITS, individually
and as guardian for JOSEPH TIBBITS,
her minor son, and as attorney in fact for
her daughter, MYCHELLE LEIGH
MILES-TIBBITS, Appellant

v.

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS, Respondent

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APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	2
ISSUES ON APPEAL.....	2
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT	8
Quasi-Judicial Function.....	11
Genuine Issue as to Material Fact	21
V. CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

Bishop v. Miche, 137 Wn.2d 518, 973 P.2d 465 (1999) 21

Estate of Jones v. State of Washington, et al., 107 Wn.App. 510,
15 P.3d 180 (Div. One 2000), *rev. denied*, 145 Wn.2d 1025,
41 P.3d 484 (2002)..... 20

Hertog v. City of Seattle, 138 Wn.2d 265, 979 P.2d 400
(1999)..... 8, 14, 15

Joyce v. Department of Corrections, et al., 155 Wn.2d 306,
119 P.3d 825 (2005)..... 13, 14, 15

Kelley v. Pierce County, et al., 2014 Wash. App. LEXIS 402 16

Lallas v. Skagit County, 167 Wn.2d 861, 225 P.3d 910 (2009).... 12, 13, 16

Lutheran Day Care v. Snohomish County, 119 Wn.2d 91,
829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079 (1993) 16

Savage v. State, 127 Wn.2d 434, 899 P.2d 1270 (1995)..... 16, 21

Taggart v. State of Washington, 118 Wn.2d 195,
822 P.2d 243 (1992)..... 11, 12, 13, 14, 15, 16

Statutes

RCW 9.94A.704..... passim

Other Authorities

RESTATEMENT (SECOND) OF TORTS §§ 315, 319 (1965) 15

Rules

CR 56(c).....8

I. INTRODUCTION

Plaintiff-Appellant Janet Tibbits, for herself, her son Joseph Tibbits, and her daughter Mychelle Leigh Miles-Tibbits (hereinafter “Tibbits” or “Janet”), appeals the decision of the Honorable Bill Bowman granting the motion for summary judgment filed by defendant-respondent State of Washington Department of Corrections (hereinafter “DOC”). Judge Bowman’s decision was confirmed by Order dated October 21, 2013, and Amended Order dated October 31, 2013. The Orders state that the decision of a DOC Community Corrections Supervisor allowing a community custody supervisee to travel unescorted and unsupervised from Spokane to King County to enroll in an alcohol rehab facility amounted to “modifying” or “setting” conditions of community custody under RCW 9.94A.704(11) and thus shall be deemed to have been a quasi-judicial function conferring immunity on the DOC. Tibbits argues that allowing the supervisee to travel unescorted and unsupervised, which resulted in his violating a no-contact order issued in Tibbits’s favor and terrifying her and her son, cannot be considered a quasi-judicial function in the absence of evidence that the supervisor considered the options for travel and made a conscious choice in light of known relevant facts and risks to approve such travel.

II. ASSIGNMENTS OF ERROR

1. Tibbits contends that Judge Bowman erred in concluding as a matter of law that Todd Wiggs, DOC's Community Corrections Supervisor for Spokane County, had acted in a quasi-judicial capacity in allowing supervisee Kevin Miles to travel from Spokane by bus, unescorted, to an inpatient treatment facility in King County on June 12, 2009. As more fully explained below, Mr. Miles failed to report on that day to the inpatient facility and instead violated an outstanding no contact order issued in favor of Janet Tibbits by going to her home in King County, and forcing entry when she opened the door.

2. As the issue before the Court is arguably a mixed question of fact and law, Tibbits contends Judge Bowman improperly granted the motion because the issue whether Mr. Wiggs had modified and set conditions of community custody regarding Mr. Miles's travel should be considered a question of material fact, on which the evidence raises a genuine issue requiring resolution by the jury at trial.

ISSUES ON APPEAL

1. Whether Mr. Wiggs's decision to allow Miles to travel to King County on June 12, 2009, without escort or supervision, even assuming he made a conscious choice not to set conditions or limitations

on the travel, can be deemed the exercise of a quasi-judicial function per RCW 9.94A.704(11), conferring immunity on DOC?

2. Whether the trial judge impermissibly decided a genuine issue of material fact that requires resolution by the jury after a full trial on the merits, namely, whether Todd Wiggs made a conscious choice not to set conditions or limitations on Mr. Miles's travel?

III. STATEMENT OF THE CASE

Tibbits's claims against DOC in this case involve a complicated, long-term abusive relationship between Janet Tibbits and her former boyfriend, Kevin Miles. Kevin was obsessed with Janet. She tolerated much of Kevin's behavior, but when their child Mychelle was born, Janet realized she needed to get away from Kevin and his addictive and abusive behavior. CP 268, L. 21-25; 269, L. 1-6. A restraining no-contact order ("NCO") was first issued against Kevin in 1991 or 1992. On multiple occasions afterward, he violated the NCO, was arrested, incarcerated, and then released, and the same cycle then repeated itself on several occasions. CP 112. In September 2005, in violation of the existing NCO, Kevin appeared at Janet's home in Des Moines (King County) late at night and tried to hang himself from a tree in her front yard with an orange extension cord. When she saw what was happening, she called 911 immediately and then ran outside with her daughter and tried to save him. She

managed to cut the extension cord and get him down alive (CP 269, L. 7-12), then called the police. The experience was very traumatic for her and both children, Mychelle, their daughter, and Joseph, Janet's son by another man. CP 269, L. 12-13. A new NCO was issued as a result of this incident.

Mr. Miles was supervised in King County from September 2006 through February 2008. CP 97, L. 3-4. During that period he was arrested and sanctioned on several occasions for violating conditions of his supervision, including an arrest for violating the NCO on November 17, 2007. CP 97, L. 4-8. On January 3, 2008, he entered Thunderbird Treatment Center in Renton for a 30-day in-patient substance abuse treatment program. Thunderbird reported upon his completion of the program that he had shown an "excellent" response to the program, but Miles's suspended Drug Offender Sentencing Alternative sentence was revoked for alcohol abuse shortly after he left Thunderbird. CP 139, bottom; 141, middle; 142, middle; 269, L. 18-20. He was returned to prison to serve the remainder of a 19-month sentence with an additional 18 months of community custody to be served on his release from prison. In connection with his release he requested he be allowed to live with his mother in Pierce County. CP 97, L. 9-13. Janet made it very clear to state authorities that she opposed his release to Pierce County, as it was too

close to where she and her children lived. She was in communication with Angella Coker, a Victim Liaison assigned to her case by DOC (CP 269, L. 20-25), and Mr. Miles's request was eventually denied. CP 97, L. 11-13. DOC staff placed Miles in a category of offenders subject to "enhanced" supervision and reporting requirements. CP 97, L. 13-15. On his release from jail, he was assigned to Spokane County, his county of origin, where he had first committed a crime in this state. He was ordered into community custody and placed under the supervision of Laura Burgor-Glass, a DOC community corrections officer in the Spokane office. CP 96, L. 20-22.

Mr. Miles was in community custody for about nine months, during which he had several relapses into heavy drinking, and DOC decided to place him in alcohol rehabilitation, allegedly for the purpose of dealing with his alcohol addiction as well as mental health issues. CP 118-132. On learning that the one facility in Spokane that DOC deemed capable of meeting Mr. Miles's needs declined to accept him (CP 58, L. 8-21), DOC approved treatment at the Thunderbird treatment facility in Renton, Washington, in King County. During Ms. Burgor-Glass's absence from the office on a pre-planned leave, her supervisor, Todd Wiggs, authorized Spokane "Detox" (the name used by Mr. Wiggs to describe an agency that helped arrange rehabilitation for supervisees

receiving treatment at the detox facility) to arrange for Miles's enrollment at Thunderbird. Mr. Wiggs left it to Detox to arrange Miles's transportation. CP 101, L. 20-25; 102, L. 1-2. Although Miles had been transported to Spokane for community custody by authorities from King County and Spokane DOC personnel when he was released from jail (CP 97, L. 16-19; 131-132), no arrangements were made for supervised transportation back to King County for treatment. Mr. Miles apparently caught a Greyhound bus (CP 55, L. 2; 63, L. 4-9) and traveled to Seattle. Shortly after his arrival there, on June 12, 2009 (CP 54, L. 20-23), he showed up on Janet's doorstep, highly intoxicated, and when she opened the door to see who was there, he forced his way in. CP 271, L. 1-3. While he was in the house, Janet packed some clothes for herself and her son (her daughter was away at the time) and managed to get away with the help of a friend she called, who drove them to a nearby motel. Mr. Miles remained at the house for several days, leaving three suicide notes, before leaving. CP 271, L. 1-9. After Janet called the police, Mr. Miles was eventually located and arrested (CP 271, L. 18-19) and ultimately returned to prison for about three years.

After the June 2009 incident, Janet went into counseling for the ongoing stress and trauma caused by Mr. Miles. Both children also went into counseling thereafter, and Janet sought and obtained an award of

Social Security disability. CP 271, L. 20-25. She still has insufficient funds to make a move from her home feasible, and she continues to fear to this day that Mr. Miles will reappear on her doorstep or jump out from behind a bush and attack her. CP 272, L. 1-2. She believes that he is both suicidal and homicidal, and she fears for her children's safety as well as her own. CP 247, middle; 249, middle. She normally sleeps with her shoes and coat on in case she has to flee the house on short notice. CP 272, L. 3-4.

Janet's claim against the State DOC is based on allegations of gross negligence in allowing Kevin to return unaccompanied to King County for alcohol treatment. Given his history of repeated violations of NCO's, and his obsession with Janet, all of which was known to DOC, it was reasonably foreseeable that he would use the opportunity afforded him by being allowed to travel to King County alone, to show up on Janet's doorstep and continue his emotional abuse of her and her children. It was also foreseeable that he would become intoxicated, in which condition he often had harassed Janet in the past, if he were left alone.

On October 18, 2013, defendant's motion for summary judgment was argued. Judge Bill Bowman took the case under advisement but then issued an Order granting the motion on October 21, 2013 (CP 336-338), and an amended Order granting the motion with findings and conclusions

on October 31, 2013 (CP 339-342). He found that RCW 9.94A.704(11) “provides that the setting, modifying and enforcing of conditions of community custody are quasi-judicial functions.” CP 340, L. 28-29. He further found that Mr. Wiggs’s decision “to modify Mr. Miles’ conditions of community custody to permit out of county travel to an inpatient treatment facility and his decision not to impose restrictions or conditions on that travel constitute modifying and setting (or making a decision not to set) conditions of community custody” (CP 341, L. 1-4), holding that he was therefore acting in a quasi-judicial capacity “at the time he made those decisions and is protected by judicial immunity from the consequences that flow therefrom.” CP 341, L. 5-7.

IV. ARGUMENT

This court makes the same inquiry as the trial court in assessing motions for summary judgment. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400, 406 (1999). Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hertog, supra*. The court must consider all facts in the light most favorable to the nonmoving party but will not weigh the evidence or resolve factual disputes.

Tibbits respectfully submits that Todd Wiggs cannot reasonably be held to have acted in a quasi-judicial capacity under the circumstances of this case and that the evidence raises a genuine issue as to a material fact, namely, whether he made a conscious “decision” or “choice” not to set conditions of community custody when he allowed Miles not to be escorted or supervised on his travel to King County. There is no evidence before the court that Wiggs weighed the pro’s and con’s of the decision he made to allow such travel. There is no evidence that Spokane Detox asked him whether there were any conditions of travel. In fact, the evidence is that he did not give it much thought at all, as he claims to have assumed, but did not verify, that Thunderbird personnel would meet Mr. Miles at the Seattle Greyhound bus station and escort him to their facility. CP 66, L. 6-12. For other reasons set forth below, it is apparent that Mr. Wiggs failed to familiarize himself adequately with the file to approve unescorted and unsupervised travel for Mr. Miles, particularly in light of Miles’s history with the victim, Janet Tibbits, and the fact he was well-known as a supervisee of the highest risk (CP 60, L. 20-23), who posed a serious challenge to DOC and was capable of committing just about any kind of criminal act, including burglary, robbery, or assault. CP 60, L. 17-19. To put him on a Greyhound bus without supervision and expect him to report

directly to the Thunderbird rehab facility without attempting to visit Janet Tibbits was not only foolish but, tragically, grossly negligent.

RCW 9.94A.704 provides guidance for DOC supervision of persons sentenced to a period of community custody, like Mr. Miles here. The key provision is the last clause: “In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.” RCW 9.94A.704(11). Tibbits does not challenge Mr. Wiggs’s decision to allow Kevin Miles to obtain treatment in King County. Although unwise in Tibbits’s opinion, the decision that Mr. Miles needed additional treatment in an alcohol rehabilitation program is the kind of decision that probably qualifies as a quasi-judicial function. Mr. Wiggs apparently weighed the needs of the public and the supervisee and determined that treatment was needed and that the only viable option at the time was Thunderbird in King County. Once he made that decision, however, he failed to address the means of transporting Mr. Miles to King County in any meaningful, responsible way. He certainly never set any conditions of community custody related to transportation to the facility, despite Judge Bowman’s suggestion that he set or modified conditions of community custody by his decision not to set any conditions, nor did he enforce any conditions of community custody in that regard. Judge Bowman’s Amended Order indicates Mr.

Wiggs had decided to “modify” Mr. Miles’s conditions to “permit out of county travel to an inpatient treatment facility and his decision not to impose restrictions or conditions on that travel constitute modifying and setting (or making a decision not to set) conditions of community custody.” CP 341, L. 1-4. Judge Bowman gives Mr. Wiggs too much credit in this regard. The record, including the deposition testimony of Mr. Wiggs, does not suggest that any consideration was given by him to whether allowing unescorted and unsupervised travel was wise. In fact, it was reckless. Modifying conditions of community custody implies that conditions had been previously set and considered by Mr. Wiggs, but there is no evidence that any consideration was given to that issue.

Quasi-Judicial Function

This appeal necessitates analysis of the meaning of “quasi-judicial function” as used in RCW 9.94A.704(11). Tibbits’s research reveals only two cases involving interpretation of RCW 9.94A.704 and none involving RCW 9.94A.704(11). It is therefore necessary to look elsewhere for guidance for the meaning of “quasi-judicial function” and the purpose of section 11.

Many cases in Washington have tried to define “quasi-judicial functions,” but there is not much clarity about the term’s meaning. In the leading case of *Taggart v. State of Washington*, 118 Wn.2d 195, 822 P.2d

243 (1992), the Washington Supreme Court examined the essential features of the phrase and tried to define in general terms what it encompassed:

Washington courts have formulated various tests for determining whether administrative action is functionally comparable to judicial action and therefore quasi-judicial...In order to determine whether an administrative action is functionally comparable to judicial action, however, one must first define judicial action, a precise definition of which is probably neither possible nor desirable. Although the proceedings properly called "judicial" share similarities, no one attribute is essential to qualify an action as judicial, provided the action has enough other relevant attributes...Therefore whether a challenged administrative action is functionally comparable to judicial action depends on various factors, such as whether a hearing was held to resolve an issue or controversy, whether objective standards were applied, whether a binding determination of individual rights was made, whether the action is one that historically the courts have performed, and whether safeguards exist to protect against errors.

118 Wn.2d at 205.

In *Lallas v. Skagit County*, 167 Wn.2d 861, 225 P.3d 910 (2009), the Supreme Court, citing *Taggart*, held that escorting a prisoner to jail is not a judicial or quasi-judicial function. Similarly, if escorting a prisoner to jail is not a quasi-judicial function, the decision not to escort Mr. Miles to rehab would also seem not to be a quasi-judicial function. Even if the decision to allow Mr. Miles to attend rehabilitation treatment in King County was a quasi-judicial function, it would be a perversion of that

doctrine to confer immunity for the decision to allow him to travel to King County unsupervised, particularly in light of his history. No credible evidence has been offered to date to suggest that Mr. Wiggs even thought twice about how Mr. Miles should travel. *Taggart* and *Lallas* stand for the principle that if a function is purely ministerial and does not implicate any of the concerns for preserving independent decision-making that would normally justify immunity, it does not confer such immunity.

A quasi-judicial function in the context of the instant claim would be a reasoned discretionary decision requiring a careful analysis of the available options, legal restraints, and public policy, but the decision to allow Miles to travel without limitations or supervision of any kind did not involve a careful analysis of options, public policy, or the history of the supervisee.

Taggart is still the law in this state, despite numerous challenges. It has been repeatedly defended by our appellate courts, notably in an *en banc* opinion written by Justice Chambers in *Joyce v. Department of Corrections, et al.*, 155 Wn.2d 306, 119 P.3d 825 (2005). That opinion emphasized the State's waiver of sovereign immunity more than 40 years before and stated that the "waiver functions as a promise that the State and its agents will use reasonable care while performing its duties at the risk of incurring liability." 155 Wn.2d at 309, 119 P.3d at 827. The Court further

noted that once the State has taken charge of an offender, as it had done in the instant case, it has a “duty to take reasonable precautions to protect against *reasonably foreseeable dangers posed by the dangerous propensities of parolees.*” 155 Wn.2d at 310, 119 P.3d at 827, citing *Taggart*, 118 Wn.2d 195, 217, 822 P.2d 243 (1992).

In *Joyce*, the victim of the offender’s wrongdoing was a member of the general public unfortunate enough to be driving in an area where the offender was driving recklessly. In the instant case, of course, the victim of the offender’s foreseeable wrongdoing was a previously identified victim, albeit one who was essentially ignored by the DOC community corrections supervisor making the critical decision. Citing *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999), the Court said that the existence of the duty is derived from “the special relationship between the offender and the State,” further stating that “[o]nce that special relationship is created, the State has a duty of reasonable care and may be liable for lapses of reasonable care when damages result.” *Joyce, supra*, 155 Wn.2d at 310, 119 P.3d at 827. The special relationship doctrine makes clear that the State also has a special relationship with a previously identified victim of unlawful activity at the hands of the supervisee, imposing a duty on the State to exercise heightened care to protect the victim from further wrongdoing at his hands. *Hertog*, 138 Wn.2d at 275-

276, 979 P.2d at 406-407, citing RESTATEMENT (SECOND) OF TORTS §§ 315, 319 (1965). Citing *Taggart*, the *Hertog* Court stated that “when the officer takes purely supervisory or administrative actions,” he is not protected by quasi-judicial immunity. 138 Wn.2d at 289, 979 P.2d at 413. Specifically, the Court held that “monitoring compliance with probation conditions is not protected by quasi-judicial immunity” (138 Wn.2d at 291, 979 P.2d at 414) because such activity constitutes supervisory or administrative action. Todd Wiggs’s failure to consider and specify conditions of transportation for Kevin Miles should be considered supervisory or administrative action as well.

Joyce also stated that while a community corrections officer “arguably has less power than a parole officer, this does not change the bedrock fact that the State still has a duty to use reasonable care once it takes charge of an offender.” 155 Wn.2d at 315, 119 P.3d at 830. The Court held that there was no reason to distinguish community corrections officers from others actively supervising offenders, stating that such officers have the duty of reasonable care in executing the State’s obligations. A failure to adequately supervise the offender may result in liability. 155 Wn.2d at 319, 119 P.3d at 832.

A very recent decision of the Court of Appeals, Division Two, suggests the relevant considerations in assessing claims of quasi-judicial

immunity. In *Kelley v. Pierce County, et al.*, 2014 Wash. App. LEXIS 402, the court stated that quasi-judicial immunity “attaches to persons or entities who perform functions that are so comparable to those performed by judges that it is felt they should share the judge’s absolute immunity while carrying out those functions,” citing *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 99, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079 (1993), and *Savage v. State*, 127 Wn.2d 434, 441, 899 P.2d 1270 (1995). The opinion continued: “quasi-judicial immunity protects those who perform judicial-like functions to ensure they can also do so without fear of personal consequences.” *Kelley, supra*, citing *Lutheran Day Care, supra*, 119 Wn.2d at 99, and *Taggart, supra*, 118 Wn.2d at 203. Because application of the doctrine of immunity is an absolute bar to civil liability and deprives a wronged claimant of any remedy, the court stated that caution should accompany any such application. *Kelley, supra*, citing *Lallas*, 167 Wn.2d at 864.

The *Taggart* decision, *supra*, suggested criteria for determining whether an administrative action should be considered functionally equivalent to a judicial action, or quasi-judicial, including “whether a hearing was held to resolve an issue or controversy, whether objective standards were applied, whether a binding determination of individual rights was made, whether the action is one that historically the courts have

performed, and whether safeguards exist to protect against errors.” 118 Wn.2d at 205. It is difficult to see how any of those tests were met by Mr. Wiggs in allowing Mr. Miles to travel from Spokane to King County without escort or supervision. There certainly was no hearing, no evidence of the application of any standards to the issue of transporting Miles to King County, much less objective ones, and no determination of individual rights, either the rights of Mr. Miles or Ms. Tibbits. In effect, Mr. Wiggs abdicated his responsibility to the victim, by his unthinking delegation to Detox to decide how Miles should get to King County.

Mr. Wiggs testified at deposition that in approving Mr. Miles’s travel to King County for treatment, he reviewed Mr. Miles’s record. He emphasized that the record reflected there had been no participation by the victim in a victim wraparound or safety plan, which he suggested influenced his decision to allow unescorted travel. CP 53, L. 2-5. To the extent he actually looked at the record, which is questionable, deciding whether to allow unescorted travel to King County even partially on the ground of Janet Tibbits’s declining to participate in a victim wraparound is indefensible. As Janet’s declaration explains, she had a history of calling the police when Mr. Miles repeatedly violated the no-contact orders, with the result he was arrested on multiple occasions, and yet he kept on violating the orders. CP 269, L. 3-6. Ms. Tibbits did speak with Ms.

Coker, the assigned victim liaison, and clearly communicated her ongoing fears regarding Mr. Miles, including her belief he might try to kill her and her children, perhaps as part of a suicide plan. She had also joined DAWN (Domestic Abuse Women's Network) and felt more comfortable developing a safety plan as a part of that group. CP 270, L. 2-10. In short, there is no reason to blame Ms. Tibbits's decision not to participate in a victim wraparound program as justifying Mr. Wiggs's decision to allow Mr. Miles unescorted travel to the county where Ms. Tibbits lived, and where she had been traumatized by Mr. Miles before, notably when he tried to kill himself by hanging, in her yard. CP 269, L. 7-13. By making known her concerns in no uncertain terms to the DOC victim liaison, she had reason to believe that those concerns would be reflected in Mr. Miles's file.

Todd Wiggs also acknowledged at his deposition that whenever there is an identified potential victim, DOC needs to be aware of the needs of the victim whenever making decisions about the supervision of offenders. CP 50, L. 14-21. He implied that if he had thought Mr. Miles was obsessed with Ms. Tibbits, or posed a current threat to her, he might have decided not to approve unescorted travel for him. CP 68, L. 20-25; 69, L. 1-21. But there was ample evidence, certainly by virtue of his repeated violations of NCO's, that Mr. Miles was obsessed with Janet.

Ms. Coker's DOC Offender Management Network Information chronological records indicate that in July 2006 Mr. Miles had declared he wanted the NCO lifted, insisted that he was not violent, stated he intended to get custody of his daughter, and said he eventually wanted Janet back, admitting he intended to pursue contact. CP 251, bottom; 252, top. The records indicate that on August 29, 2008, Janet told Ms. Coker that she had been "a long time victim" of Mr. Miles and had "experienced a high level of violence by him." She also told Ms. Coker she was sure Mr. Miles would get in contact with her again and that he always contacted her about a month after release whenever he had been jailed or imprisoned. CP 249, middle. According to these chronological records, Ms. Coker communicated Janet's concerns to other DOC officials on September 3, 2008. CP 249, top. There is no reason to believe that Mr. Wiggs reviewed the record carefully before making his fateful decision, but if he had, the decision he made flew in the face of reason in view of the evidence reflected in the DOC records that Miles was obsessed with Janet and had repeatedly violated NCO's to see her when released from custody.

Perhaps as damaging to DOC's position as anything in the record was Mr. Wiggs's admission during his deposition that at the time he approved Miles's travel to King County, Wiggs was not aware of the identity of the victim, whose non-participation in a victim wraparound

program he claimed to have considered important. CP 52, L. 11-14; 53, L. 2-20. He also seems to have been unaware of where she lived on the “west side,” but the records indicate other DOC personnel knew precisely where she lived in September 2008 and considered the exact distance between Janet’s home and the home of Mr. Miles’s mother in evaluating Miles’s request that he be allowed to live with his mother in Pierce County following his release from prison. CP 52, 15-20; 133, bottom. And Wiggs admitted that he had not provided any specific instructions to Miles, or advised him of any limitations on his travel, before authorizing him to travel to King County. CP 63, L. 18-25.

Under the doctrine of discretionary immunity, so-called discretionary governmental acts are immune from liability, but it is clear that “operational or ministerial acts are not.” *Estate of Jones v. State of Washington, et al.*, 107 Wn.App. 510, 522, 15 P.3d 180, 187 (Div. One 2000), *rev. denied*, 145 Wn.2d 1025, 41 P.3d 484 (2002). The *Jones* court further stated that “discretionary immunity is narrow and applies only to basic policy decisions made by a high level executive.” *Id.* Thus, not only do Todd Wiggs’s actions, or failure to act, not qualify for quasi-judicial immunity, they cannot qualify for discretionary immunity either. Whether they would qualify to protect Mr. Wiggs from suit under the doctrine of qualified personal immunity is irrelevant in this case because

only the DOC has been sued, not Mr. Wiggs, and qualified personal immunity does not insulate the State or its departments from liability. *Savage v. State*, 127 Wn.2d 434, 899 P.2d 1270 (1995); *Bishop v. Miche*, 137 Wn.2d 518, 525, 973 P.2d 465, 468 (1999). The *Bishop* decision specifically held that “quasi-judicial immunity does not preclude liability for negligent supervision,” which Tibbits respectfully submits is what was involved in this case. 137 Wn.2d at 526, 973 P.2d at 469.

Genuine Issue as to Material Fact

For Todd Wiggs to have “set” conditions or “modified” them by not setting any conditions or limitations, he must have at least considered conditions in some fashion. He admitted that he had not provided any specific instructions to Miles, or advised him of any limitations on his travel, before authorizing his travel to King County. CP 63, L. 18-25. Similarly, there is no clear evidence in the record that he engaged in any discussion with Spokane Detox about the specific means of transportation that would be utilized, although he somehow assumed Miles would be traveling by public transportation, namely, by Greyhound bus. And there is no evidence in the record that he considered whether there needed to be an escort, or some kind of monitoring or supervision, during the transport.

Judge Bowman’s Amended Order granting DOC’s motion for summary judgment stated that Wiggs not only “approved the out of county

travel” (CP 340, L. 25) necessitated by the fact the only treatment facility found for Mr. Miles was in King County but also made a finding of fact that Wiggs “chose not impose [sic] any conditions or restrictions on the travel.” CP 340, L. 25-26. He then “finds” that Wiggs’s “decision to modify Mr. Miles’ conditions of community custody to permit out of county travel...and his decision not to impose restrictions or conditions on that travel constitute modifying and setting (or making a decision not to set) conditions of community custody.” CP 341, L. 1-4. Judge Bowman thus engaged in fact-finding as to issues on which there is a genuine dispute as to material facts, as Tibbits disputes on this record that anything that could be called a decision was made regarding the conditions of Miles’s travel or that any choice was ever made (which assumes options were considered) whether to impose conditions or restrictions. If a choice was, in fact, made, the decision not to impose restrictions or conditions would still not be comparable to the conduct required of judges for which they are insulated from liability, as judges don’t routinely make decisions about the details of custody, transportation of prisoners, parolees, or supervisees, or similar administrative or ministerial actions. And for Judge Bowman to engage in fact-finding on an issue that is not only material but that was also contested was impermissible as such factual determinations are the province of the jury. The law requires, of course,

that this court in reviewing a grant of summary judgment make the same inquiry as the trial court, and such grant should be upheld only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Here there are genuine issues of material fact as to what factors Todd Wiggs considered, if any, in connection with the conditions of travel to which his supervisee would be subject, and because the facts and reasonable inferences from the facts must be considered in the light most favorable to the nonmoving party, Tibbits respectfully submits that the trial court's ruling was improper for invading the province of the jury and in reaching inferences from Todd Wiggs's testimony that are not justified.

V. CONCLUSION

For the foregoing reasons, Tibbits respectfully requests that the trial judge's grant of DOC's motion for summary judgment be reversed and the case be remanded for further proceedings and trial. There is a genuine issue as to whether Todd Wiggs consciously evaluated the consequences of any decision regarding the conditions of transporting Kevin Miles from Spokane to King County for treatment, and there is insufficient evidence in the record to conclude that he made a conscious choice not to impose conditions. The trial judge made factual findings that Wiggs had consciously made a decision regarding conditions of travel

to justify the court's conclusion that Wiggs had acted in a quasi-judicial capacity and that DOC was accordingly entitled to immunity. The fact-finding improperly invaded the province of the jury, requiring that summary judgment be reversed, but, regardless, the decisions or choices the trial court has attributed to Mr. Wiggs do not justify the conclusion they constituted quasi-judicial conduct, and DOC can still be held liable on a showing that Mr. Wiggs breached the applicable standard of care in allowing unescorted and unsupervised travel and that such breach was a proximate cause of injury to Tibbits, which must be resolved by the jury.

Dated this 31st day March, 2014.

LAW OFFICE OF JAMES F. WHITEHEAD

A handwritten signature in black ink, appearing to read "James F. Whitehead", written over a horizontal line.

James F. Whitehead, WSBA#6319
Attorney for Tibbits

