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DIVISION II

No. 35801-8

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

BY JW  
DEPUTY

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TERRY BUTLER, as Personal Representative of the Estate of MARVIN  
HENRY SR., as Personal Representative of the Estate of KAREN  
HENRY, and as Guardian of WILLIAM HENRY, a minor; and MARVIN  
HENRY JR.,

Appellant,

vs.

THURSTON COUNTY; THURSTON COUNTY SHERIFF'S  
DEPARTMENT; CRAIG J. EAGEN and JANE DOE EAGEN, husband  
and wife,

Respondents.

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BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

### Assignment of Error

The trial court erred in granting the motion for summary judgment of Defendants/Respondents on the theory of negligence and respondeat superior.

### Issues Pertaining to Assignment of Error

Whether for summary judgment purposes and viewing the facts in the light most favorable to Plaintiffs as the non-moving party:

a) Defendants' had a duty that was created by statute, common law, or self-imposed to prevent Marvin Henry from access and use of his department issued service weapon;

b) Defendants' breached that duty by retrieving, relinquishing custody of, and hand-delivering the department issued service weapon to Marvin Henry against the express directive of Chief Karen Daniels;

c) Whether Defendants knew or should have known that Marvin Henry was or had become incompetent such that to give him a dangerous instrumentality would cause the injuries to Plaintiffs.

## II. STATEMENT OF THE CASE

On December 4, 2001, Marvin Henry, Jr., 17, and William Henry, 10, lost both of their parents, Marvin and Karen Henry to a preventable tragedy. The negligence of Defendants that forms the bases of this lawsuit resulted in the tragic murder-suicide of Marvin and Karen Henry.

This case represents the unfortunate tragedy that occurred because of a lack of policies and procedures, and because of the adjectives used to describe Mr. Henry's service weapon—"personally owned." In a matter of days from the time the allegations of inappropriate sexual contact were made against him, Mr. Henry spiraled down a path for which he believed there was only one way out. The sections below outline this preventable tragedy.

### A. **Marvin Henry is Placed on "Administrative Leave with Pay" and Suspended from Duty Because of Sexual Offense Allegations.**

On December 1, 2001, between 3:00–4:00 a.m., Chief Karen Daniels received a telephone call from Ellen Goodman, drug court coordinator, telling her that a female inmate called Judge Strophy about sexual contact with an officer. CP 449. Later that morning, at approximately 9:00 a.m., Chief Daniels telephoned Ray Hansen, chief deputy of operations, to relay her conversation with Ms. Goodman and alert him of the criminal action.<sup>1</sup> CP 450. Mr. Hansen indicated to Chief

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<sup>1</sup> Sexual contact between a custodial officer and an inmate is a Class C felony whether or not the sexual contact is consensual. CP 450.

Daniels that he would assign a detective to investigate, and that they should place Mr. Henry on administrative leave with pay. CP 452. Chief Daniels alerted the staff that day, through an email sent by on-duty jail supervisor Stephanie Klein on behalf of Chief Daniels, that Mr. Henry was not to have access to the facility without permission from administration. CP 452. Chief Daniels' email stated the following:

Per Chief Daniels, Effective this date CO Marvin Henry has been placed on administrative leave with pay pending investigation on allegations of sexual assault on an inmate. CO Henry will not be allowed access to the facility until further notice. Any further questions may be directed to Chief Daniels, who is available on pager.

CP 246. The suspension effectively relieved Mr. Henry from duty.<sup>2</sup> CP 238–44. Chief Daniels clearly and explicitly requested that any questions regarding the directive should be forwarded to her attention. CP 246. This suspension was to remain effective during the pendency of the criminal investigation. CP 452.

**B. A Criminal Investigation is Commenced Against Marvin Henry.**

On December 2, 2001, the TCSO received a complaint from a female inmate, Bobbi Hurley, incarcerated within the Thurston County Jail. At about 11:00 a.m., Detective Cheryl A. Stines was contacted at

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<sup>2</sup> Although Defendants may object to the use of the word “suspended,” it is the correct and accurate term taken from their own policies and procedures at 16.2.2. According to Undersheriff McClanahan, “I think you could, in this instance, take ‘suspended’ and put in ‘administrative leave with pay.’ That’s what it means.” CP 44.

home by her supervisor, Lieutenant Watkins, to perform a criminal investigation of Marvin Henry because of the allegation. CP 426–27. At about 11:29 a.m., Detective Stines arrived at the courthouse to interview the alleged victim Ms. Hurley. CP 427. Detective Stines proceeded to record the interview with Ms. Hurley, collected evidence Ms. Hurley preserved in an orange juice container that she had placed in the trash receptacle, sent the collected evidence to the lab for evaluation, and forwarded Ms. Hurley to St. Peter’s Hospital for rape kit processing. CP 428–29.

Detective Stines continued her criminal investigation on December 3, 2001. At approximately 7:15 a.m., Detective Stines interviewed another female inmate, Kim Parley, who did not witness the incident and could not corroborate Ms. Hurley’s allegations. CP 430. Soon thereafter, Detective Stines received a telephone call from Mr. Henry stating that Chief Daniels requested that he speak with Detective Stines and schedule an interview. CP 431. At approximately 9:15 a.m., Mr. Henry presented for his tape recorded interview of Detective Stines criminal investigation. CP 431. Detective Stines Mirandized Mr. Henry, conducted the interview, obtained his consent for a blood draw, and took possession of the blood from West Care Clinic Lab. CP 432. During that day, Detective Stines also interviewed June Bull, Kathy Meyers, Mary Chappell, Ms. Hurley again briefly, and Kathy Austin. CP 432.

On December 4, 2001, Detective Stines believed that she had enough evidence and intended to arrest Mr. Henry for sexual assault. CP 433. Detective Stines was informed by the lab that the orange juice container provided to her by Ms. Hurley contained semen consistent with her story that Mr. Henry ejaculated into her mouth. CP 433. Mr. Henry was scheduled to have a polygraph test at 1:00 p.m., at which time Detective Stines intended to take him into custody, but he called to reschedule for 2:00 p.m. because he wanted to just come in and talk with Chief Daniels there. CP 435. Detective Stines telephoned Mr. Henry at 2:15 p.m., when Mr. Henry failed to present at 2:00 p.m., whereupon Mr. Henry stated that he was just waiting for his wife to come home and would present ten (10) minutes after that. CP 435. When Mr. Henry failed to present within that time, and Detective Stines and Chief Daniels overheard a 911 call placed by Mr. Henry stating that he had just killed his wife and would likely take his own—they would also soon learn that he did this with his service weapon. CP 435, 460.

**C. Chief Daniels Prohibited Marvin Henry from Any and All Types of Access to the Facility.**

On December 2, 2001, Chief Daniels, Mr. Henry's supervisor, sent an email disseminating information regarding Mr. Henry's suspension and provided a very specific directive—Marvin Henry was not permitted access to the TCSO facility. CP 246. Although there are some who may

have interpreted Chief Daniels' directive to mean the prohibition of Mr. Henry's **physical** ingress and egress from the facility, that is clearly not what Chief Daniels ordered.

For example, during the deposition of Undersheriff Neil McClanahan, both defense counsel and Undersheriff McClanahan interpreted Chief Daniels' directive to mean that Mr. Henry could not physically enter the facility when they stated the following in relevant part:

Q: If an officer after receiving this email, allowed Marvin Henry access to the facility, and did not contact Chief Daniels, is it your opinion that that was acceptable and consistent with protocol?

MS. KINERK: I'm going to object to the form of the question, in part, Counsel, because there's no definition of allowing access. **I've been interpreting that to letting him physically come in.** I don't know if that's what you mean.

A: Is that what you're saying as far as --

Q: Well, again, you're being coached now, and I don't want to start getting into definitions.

What I'm asking you is, was it appropriate for an officer to allow Marvin Henry to have any access into that facility, with this email?

MS. KINERK: Object to the form of the question. Argumentative.

A: If it means, was Marvin Henry allowed to walk inside the facility and interact with inmates, yeah, I think

that would be a problem, yes, because that's in violation of what the directive from the chief was.

Q: And if Marvin Henry was attempting to get access to contents within the facility, would that be consistent with the protocol and directive?

A: Define "contents," please.

Q: Personal effects, items within the office while an investigation is going on?

A: I don't think that would be a problem with that.

Q: Okay. So if Marvin Henry had requested his jumpsuit and his underwear and items from his personal contents within the facility, it would have been okay for someone to give it to him?

A: I believe so, yeah.

Q: They would not have had to contact Chief Daniels or Cheryl Stines?

A: No.

CP 42-43 (emphasis added). But, clearly, that is not what Chief Daniels communicated in her email regarding Mr. Henry's employment status, limitations, and restrictions. Chief Daniels clearly explained Mr. Henry's status as an employee, Mr. Henry's limitations of being available by phone during business hours, and Mr. Henry's restriction of any and all means of access to the facility when she testified in relevant part the following:

Q: Tell us what placing him on administrative leave meant in terms of his status as employee.

A: Well, I know when I called him, it was pretty clear he was administrative leave with pay. It's kind of a -- as far as I'm concerned, it's a standard kind of protocol. You're on administrative leave with pay. You are to be available by phone Monday through Friday from 8:00 to 5:00. Doesn't mean you're on house arrest, but it does mean that, you know, if you leave for a doctor's appointment or whatever, that you -- if you don't have a -- you know, you give us your cell phone number, just so if we need you, we can get in touch with you, because basically you're being paid. So administrative leave with pay.

And that he wasn't to come into the facility without permission. So in other words, if he needed to come in **or get something, he had to have permission**. So it was kind of a -- and by "facility," I mean the whole operations, our correctional options annex. We have one door into the reception area and one door into booking. So it's just the facility. Kind of a blanket access to the facility, without permission.

CP 452–53 (emphasis added).

**D. Craig Eagen Failed to Consult with or Obtain Permission from Chief Daniels and Returned the Service Weapon to Marvin Henry Against the Directive.**

TCSO policy requires that a suspended officer shall not act in the capacity of, or represent themselves as a member of the TCSO. CP 240. Accordingly, through the email directive of Chief Daniels and TCSO policy, as a suspended officer, Mr. Henry had no authorization to access the facility in any manner without prior permission, participate in any TCSO activities, or attempt to act or represent himself as a member of the TCSO. However, on December 3, 2001, at approximately 1:00 p.m., Mr. Henry contacted Officer Craig Eagen and made an unusual request—Mr.

Henry wanted his service weapon located in his locker within the TCSO facility. CP 260. At the time of Mr. Henry's suspension, the TCSO had exclusive custody and possession of his service weapon. The weapon was secured within a locker at the TCSO. Due to the suspension and Chief Daniels' directive, Mr. Henry was unable to obtain things within the facility without permission. CP 246, 452-53. Without hesitation, Officer Eagen represented to Mr. Henry that he would remove the service weapon from the TCSO, place it in his trunk, and deliver it to him on December 3, 2001. CP 260.

It is undisputed that all TCSO corrections staff, including Officer Eagen, timely received Chief Daniels' email informing them of Mr. Henry's suspension and the directive that he was not allowed access to the facility in any manner on December 2, 2001. CP 454, 260. If anyone had any questions about the scope of Chief Daniels' directive contained within her email, all they had to do was contact her and ask. CP 246.

Q: Did you discuss with Chief Daniels about providing her as a contact for any employee that would have a question with regard to what the directive was?

A: No. But as a matter of protocol, each of my bureaus, in essence -- in this instance, the Corrections Bureau -- the chief, you know, heads up that bureau, and they are the ones that have the authority over that bureau.

Q: Is it office protocol that if an officer or a member of the Thurston County Sheriff's Office had a question with

regards to this administrative leave, they would contact Chief Daniels?

A: The would -- yeah. They would contact whatever bureau is affected by this.

Q: So that would be Chief Daniels?

A: Correct.

CP 42. No one ever did that. Officer Eagen never contacted Chief Daniels to obtain permission to retrieve and deliver the service weapon to Mr. Henry. Chief Daniels never received a request for permission to “get something”<sup>3</sup> for Mr. Henry as she testified in relevant part the following:

Q: Did Officer Craig Eagen at any time check with you to see if it was all right to remove Marvin Henry’s weapon from the Thurston County Sheriff’s locker and return it to him?

A: No.

Q: Did Marvin Henry at any time call you and discuss with you whether he could go to a shooting range and qualify in the course and scope of his duty?

A: No.

Q: Did Craig Eagen call you and say, “Is it appropriate for Marvin Henry to be going to the shooting range and qualifying, given you administrative leave with pay order”?

A: No.

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<sup>3</sup> See discussion *supra* II.C and CP 452–53 (“And that he wasn’t to come into the facility without permission. So in other words, if he needed to come in **or get something, he had to have permission.**”).

Q: Did anyone contact you about getting permission for Craig Eagen to remove Marvin Henry's weapon from his Thurston County Sheriff's locker and return it to him while he was on this administrative leave with pay status?

A: No.

CP 472–73.

**E. For Marvin Henry, Options were Running Tight and Time was Running Short—There was Only One Way Out.**

On December 4, 2001, at 11:55 a.m., Chief Daniels returned a telephone call from Mr. Henry where he admitted to her that he had consensual sexual misconduct with a female inmate. CP 277. The TCSO had elected to arrest Mr. Henry for custodial sexual misconduct in the first degree—a class C felony. Although, the TCSO was prepared to arrest him, they elected to allow him to turn himself in that afternoon. At that time, Chief Daniels advised Mr. Henry to come in and surrender himself. CP 277. It was determined that Mr. Henry would be arrested and charged with a class C felony.

Mr. Henry knew that his life would soon change dramatically. Earlier that day Marvin had made an appointment with Charles Williams, a criminal defense attorney, to discuss his options. CP 264, 277. After that meeting, Mr. Henry realized that he would be charged with a felony; he would lose his job; he would lose any opportunity to ever work in law enforcement; he most likely would be incarcerated at his current place of employment; be classified as a sexual offender; and in very real danger of

losing his wife and breaking up his family—Mr. Williams portrayed a bleak predicament. CP 284. Indeed, at the time Officer Eagen arrived at the Henry home, Mr. Henry had been consuming Crown Royale Canadian Whisky. CP 254, 279–80, 863. Mr. Henry came to the unfortunate conclusion that suicide was the only way out.

A review of Mr. Henry's suicide note indicates that after consulting with an attorney he knew that suicide was the only recourse due to the shame that he had brought to himself and his family. In his suicide note, he begged his family and children for forgiveness. CP 851–57.

**F. Craig Eagen Delivered the Service Weapon to a Noticeably Uncharacteristic Marvin Henry Against Chief Daniels' Directive.**

On the evening of December 2, 2001, ashamed and embarrassed, Mr. Henry advised Karen Daniels, his wife of 19 years,<sup>4</sup> of his terrible betrayal. Understandably, Mrs. Henry was distraught and furious with her husband. The mood in the Henry home was charged and serious. CP 260. At approximately 4:00 p.m., Officer Eagen arrived at the Henry home to offer encouragement and support. CP 260. Officer Eagan stayed for approximately forty-five (45) minutes and spoke with Marvin and Karen Henry. CP 260. Officer Eagen recalled the mood between the Henrys was serious and that Mr. Henry would not look him in the eye. CP 260.

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<sup>4</sup> CP 236 (the Henrys were married on Sept. 10, 1982).

At that time, Mr. Henry admitted to Officer Eagen that he knew he would lose his job. CP 260.

On December 3, 2001, Mr. Henry called Officer Eagen at work at about 1:00 p.m. CP 260. Mr. Henry asked Officer Eagen to retrieve his service weapon from their shared locker at the TCSO facility allegedly so that Mr. Henry could go to the range and qualify. CP 260. Officer Eagen failed to deliver the service weapon to Mr. Henry that day as he had promised because of back pain, but planned to deliver the service weapon on December 4, 2001. CP 261.

On December 4, 2001, at approximately 10:00 a.m., Mr. Henry again contacted the TCSO looking for Officer Eagen and his service weapon. CP 261. Officer Eagen was absent from work due to the back pain he had been experiencing the other day and had an appointment to see the doctor that afternoon. CP 261. Mr. Henry tracked down and contacted Officer Eagen at home anxiously stating, “hey where is my weapon I need my weapon.” CP 261. At about 1:15 p.m., Officer Eagen arrived at the Henry home and observed a number of unusual events: Mrs. Henry, a full-time employee was home (CP 261, 267, 402); Mr. Henry came from the home and approached his vehicle immediately upon pulling up to his house (CP 261, 267, 401); Mr. Henry was acting “very

uncharacteristically, fidgeting and appearing very uptight” (CP 267);<sup>5</sup> Mr. Henry denied Officer Eagen’s request to go inside the Henry home to talk (CP 267, 402); and Mr. Henry conveyed to Officer Eagen that Mrs. Henry was very upset with him and that they intended to present to the TCSO to accept responsibility for his actions and provide a statement. CP 402. Despite the serious indications of emotional instability, a volatile domestic relationship, ensuing arrest for a felony sexual act, and depression, Officer Eagen hand delivered to Mr. Henry a loaded handgun and drove away. CP 402.

Sadly, Officer Eagen has admitted to many different individuals that moments after handing Mr. Henry the loaded weapon, he knew something was gravely wrong. For example, Officer Eagen admitted to Eddie Sims, a friend and fellow TCSO corrections officer,<sup>6</sup> the following:

Q: Did he ever admit to you that after leaving the home, he knew he shouldn’t have given Marvin Henry the weapon?

A: He said that he wished he hadn’t taken the stuff out of his locker.

CP 61. At another time, Officer Eagen admitted to Terry Butler, Plaintiff and sister to Mr. Henry, the following:

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<sup>5</sup> Cf. CP 402. Officer Eagen, shortly after the events unfolded in December 2001, gave his most accurate and recent recollections to Detective C. A. Wenschhof of his interactions with and his impressions of Mr. Henry. Yet, Officer Eagen testified four years after the murder-suicide, under sworn oath, that “[he] never thought there was something wrong with Marvin, never.”).

<sup>6</sup> CP 56.

Q: In fact, you don't know if there were any warning signs, do you?

A: Just the fact that he told me that he felt that he was uneasy when he went to visit him. That would be the only warning sign that came out of his own mouth, Officer Eagen's mouth.

Q: When did Officer Eagen say that he was uneasy?

A: In a conversation with him he said he felt like he wasn't himself. That's the only knowledge I would have of that.

Q: This is something that Craig Eagen told you at your home two or three days after the incident?

A. That's correct.

CP 274.

**G. This Tragedy Could Have Been Prevented and Defendants Continue to Do Nothing to Investigate or Correct Its Actions, Policies, and Procedures.**

After Officer Eagen provided Mr. Henry with his loaded service weapon at approximately 1:15 p.m. on December 4, 2001, Mr. Henry went inside his home, shot his wife twice in the head, and turned the gun on himself at approximately one hour later. CP 249, 801, 859–82.

As a result of this tragedy many in the TCSO questioned how Marvin Henry, a suspended officer received a loaded firearm. CP 300–01. Generally, officers placed upon suspension had their duty weapons confiscated—that did not happen here. CP 299–300. To date, the TCSO

has never conducted an internal investigation regarding the deaths of Marvin and Karen Henry.

**H. Procedural History.**

On September 7, 2004, Terry Butler, as Guardian of William Henry and personal representative of the estate of Marvin Henry, filed a tort claim form pursuant to RCW 4.96. CP 687–88. On October 1, 2004, Terry Butler, as Guardian of William Henry and personal representative of the estate of Karen Henry, filed a tort claim form pursuant to RCW 4.96. CP 690–91. Terry Butler filed suit in Pierce County Superior Court against Thurston County, Thurston County Sheriff’s Department, and Craig J. Eagen for negligence, negligent hiring, training, and supervision, negligent infliction of emotional distress, and under a theory of respondeat superior. CP 1040–48. All Defendants eventually moved for summary judgment on several bases. CP 723–73, 571–95, 692–700, 665–82.

On December 18, 2006, the trial court held oral argument on the pending motions for summary judgment. Verbatim Report of Proceedings at 1. The Court went on to state that “Based on its consideration of the written materials and oral argument, the Court finds that there are no material issues of fact, and that defendants are entitled to summary judgment as a matter of law . . . .” CP 27.

This appeal follows. CP 1–9.

### III. ARGUMENT

The court below erred in multiple regards. Each of these issues is discussed in detail below.

#### A. Standard of Review.

This Court reviews the decision to enter summary judgment *de novo*. *Grundy v. Thurston County*, 155 Wn.2d 1, 6–7, 117 P.3d 1089 (2005) (stating “[w]hen reviewing a grant of summary judgment, an appellate court undertakes the same inquiry as the trial court.”). “A summary judgment motion can be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The court must consider the facts in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 123, 839 P.2d 314 (1992); *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1261 (1996).

#### B. Defendants had a Duty Not to Deliver the Service Weapon to Marvin Henry.

The trial court committed reversible error when it determined that Defendants neither had a duty nor breached that duty. Specifically, after reviewing the briefing, documents, and oral argument on this issue, the trial court found the following in relevant part:

In this particular case, the Court, looking at the evidence produced by the parties in their respective aspects of this motion, conclude that the plaintiff has not—and I presume in that they have not—cannot present that the Thurston County Sheriff's Office or Deputy Eagen, in the capacity that existed at the time of this event, had a duty or breached that duty in such a fashion as to create causation on the very, very tragic and bad-fact situation in which two children were orphaned by the cowardly acts of their father.

Verbatim Report of Proceedings at 38:15–23.

A cause of action founded in negligence requires that a plaintiff establish that: (1) there is a statutory or common-law rule that imposes a duty upon defendant to refrain from the complained-of conduct and that is designed to protect the plaintiff against harm of the general type; (2) the defendant's conduct violated the duty; and (3) there was a sufficiently close, actual, causal connection between defendant's conduct and the actual damage suffered by plaintiff. *Hansen v. Washington Natural Gas Co.*, 95 Wn.2d 773, 776, 632 P.2d 504 (1981); *Rikstad v. Holmberg*, 76 Wn.2d 265, 268, 456 P.2d 355 (1969).

The threshold determination of whether a defendant owes a duty to the plaintiff is a question of law. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 236, 677 P.2d 166 (1984). However, once this initial determination of legal duty is made, it is the jury's function to decide the foreseeable range of danger thus limiting the scope of that duty. *See Wells v. Vancouver*, 77 Wn.2d 800, 467 P.2d 292 (1970); *Rikstad*, 76 Wn.2d at 268.

In this case, not only are there common-law rules that impose a duty upon Defendant to refrain from giving Mr. Henry his service weapon, but there is an express directive from Chief Daniels that prohibit Mr. Henry from any and all means of access to the TCSO facility.

**1. Under Chief Daniels' Directive, Defendants Had a Duty to Prohibit Any and All Forms of Access to the TCSO Facility, Including Retrieving and Delivering to Marvin Henry His Service Weapon.**

On December 2, 2001, Chief Daniels' disseminated an email to all TCSO staff, including Officer Eagen, that stated the following:

Per Chief Daniels, Effective this date CO Marvin Henry has been placed on administrative leave with pay pending investigation on allegations of sexual assault on an inmate. **CO Henry will not be allowed access to the facility until further notice.** Any further questions may be directed to Chief Daniels, who is available on pager.

CP 246 (emphasis added). What did "access" mean? According to Chief Daniels, "So in other words, if he needed to come in **or get something, he had to have permission.**" CP 453. Thus, not only was Mr. Henry prohibited from physical ingress and egress of the TCSO facility, he was also prohibited from getting something unless he had permission. If anyone had any questions about the scope of Chief Daniels' directive contained within her email, all they had to do was contact her and ask. CP 246, 42. No one—not Mr. Henry or Officer Eagen—asked Chief Daniels' permission. No one ever asked Chief

Daniels (1) if Mr. Henry's loaded service weapon could be retrieved from his locker located within the TCSO facility, (2) if Mr. Henry's loaded service weapon could be taken out of the TCSO facility, (3) if Mr. Henry could in fact qualify while suspended from duty, or (4) if Mr. Henry's loaded service weapon could be delivered to Mr. Henry while he was suspended from duty. CP 472-73. Chief Daniels was in charge of the TCSO correctional facility, Chief Daniels suspended Mr. Henry, and Chief Daniels directed everyone that Mr. Henry was expressly prohibited from access to the TCSO facility. Officer Eagen received Chief Daniels' email, read it, failed to ask any clarifying questions if in fact he misunderstood, failed to get Chief Daniels' permission, and hand-delivered the loaded service weapon used in the murder-suicide of Marvin and Karen Henry. There is a clear duty and an unquestionable breach of that duty that led to the deaths of the Henrys and injuries to the Plaintiffs. On this basis alone, the trial court committed reversible error and the case should be remanded for trial.

**2. Under RESTATEMENT (SECOND) OF TORTS, Defendants Had a Duty to Refrain from Relinquishing Control of and Delivering to Marvin Henry His Service Weapon.**

Negligent entrustment is a "well-established" common law doctrine in Washington. *Christen v. Lee*, 113 Wn.2d 479, 499, 780 P.2d 1307 (1989). It is based on the foreseeability of harm when one knew or should have known that the person to whom materials were entrusted was

unable to safely handle the materials. See RESTATEMENT (SECOND) OF TORTS § 390 (1965); *Mejia v. Erwin*, 45 Wn. App. 700, 704–05, 726 P.2d 1032 (1986); *Bernethy v. Walt Failor’s*, 97 Wn.2d 929, 933–34, 653 P.2d 280 (1982). In this case, this Court should find that Defendants are liable under a theory of negligent entrustment pursuant to RESTATEMENT (SECOND) OF TORTS §§ 308 and 390.

Here, again, the trial court committed reversible error when it sided with Defendants by (1) placing undue emphasis on the fact that Mr. Henry “personally owned” his service weapon and (2) used a subjective test to determine whether or not Mr. Henry was actually incompetent rather than an objective standard to be determined by from a reasonable man’s point of view. Specifically, after reviewing the briefing, documents, and oral argument on this issue, the trial court found the following in relevant part:

In this circumstance, I think that there is another interesting and important differentiation between the *Bernethy* case and this, and that is that in this instance, **Marvin Henry owned that firearm**. He wasn’t going in to purchase a firearm; he was calling a friend. All of the indication is, if you read through, are that the people who were closest to this gentleman on the date in question had no clue that he was incompetent in any way, shape or form.

...

But, even had that occurred with respect to the custodial sexual misconduct, and had Mr. Henry been released—which, of course, there is a presumption that he would be released pending any legal proceeding—he still would not have necessarily had an incompetency with respect to the

right to own or possess that firearm, **a firearm that he did, in fact, own.**

Verbatim Report of Proceedings at 38:24—39:5; 41:16–21 (emphasis added).

**a) RESTATEMENT (SECOND) OF TORTS § 308—  
Control.**

Under RESTATEMENT (SECOND) OF TORTS § 308, right to control the chattel is the essential element of a negligent entrustment claim, rather than ownership as Defendants have consistently attempted to emphasize. First, the plain language of § 308 does not make ownership a material element. Section 308 provides as follows:

It is negligence to permit a third person to use a thing or to engage in an activity which is **under the control** of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

RESTATEMENT (SECOND) OF TORTS § 308 (emphasis added). In defining control, the Restatement states the following:

[T]he words “under the control of the actor” are used to indicate that the third person is entitled to possess or use the thing or engage in the activity only by the consent of the actor, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity.

RESTATEMENT (SECOND) OF TORTS § 308 cmt. a. Here, drawing all reasonable inferences in the light most favorable to Plaintiffs, a trier of fact may conclude that Defendants had control of Marvin Henry’s service

weapon and the County issued bullets such that by withholding the service weapon and the ammunition, Defendants could have prevented him from using them to kill Karen Henry and then himself.

Second, a majority of other jurisdictions have suggested that ownership of chattel is not a prerequisite to liability for negligent entrustment. *See, e.g., State Farm Auto Ins. Co. v. Dressler*, 738 P.2d 1134, 1136–37 (Ariz. Ct. App. 1987) (“Negligent entrustment liability is theoretically possible in a case where the defendant neither owned, maintained nor used the vehicle in question . . . .”); *Lumbermens Mut. Cas. Co. v. Kosies*, 602 P.2d 517, 519 (Ariz. Ct. App. 1979) (“In order to prove negligent entrustment it is necessary for the plaintiff to show . . . that the defendant owned or controlled the motor vehicle concerned . . . .”); *Mills v. Crone*, 973 S.W.2d 828, 831 (Ark. Ct. App. 1998) (“According to the Restatement, one is not liable for negligent entrustment of a thing if he has no right to control its use.”); *Zedella v. Gibson*, 650 N.E.2d 1000, 1003, 209 Ill. Dec. 27 (Ill. 1995) (defining entrustment under the restatement ‘with reference to the right of control of the subject property’); *Green v. Harris*, 70 P.3d 866, 871 (Okla. 2003) (acknowledging that, although negligent entrustment usually involves ownership, possession and control is actual requirement).

The case of *Weeks v. City of New York*, 693 N.Y.S.2d 797, 181 Misc. 2d 39 (N.Y. Sup. Ct. 1999) is instructive. In that case, patrol

officers responded to a call regarding a naked man in the street standing next to his car acting erratically. *Id.* at 798. Eventually, the police got the naked man in his car, the naked man drove off, and was involved in a fatal motor vehicle accident with plaintiffs' decedent that resulted in the deaths of both drivers. *Id.* at 799. The court, under RESTATEMENT (SECOND) OF TORTS § 308, considered the nature of the alleged actions as claims to be treated as negligent entrustment for which the defendant City may be liable. *Id.* at 801. The court succinctly stated,

Before these police officers intervened, a naked man in the roadway was acting erratically; after their intervention, allegedly as a result of their negligence, an incapacitated driver caused a fatal accident.

...

[T]he incapacitated person was placed in the position of operating his own car and no one is alleging that they heard the officers orally direct him to operate it. These, however, are not distinctions that would necessarily negate a claim of negligent entrustment. As long as an actor has the necessary control, entrustment can be inferred from the actor's conduct (arguably, in the instant case, from actions like repeatedly placing Weeks in the driver's seat of his car, and/or returning his keys or failing to check for them in the car or in the belongings returned to him, and/or by enabling or directing him to drive away).

*Id.* at 801–02 (emphasis in original). Similarly, in this case, before Officer Eagen intervened, Mr. Henry was emotionally unstable; after Defendants intervention, allegedly as a result of their negligence, an incompetent man shot and killed his wife and then himself. Although Defendants highlight

that Mr. Henry was given his own personal firearm and no one is alleging that Defendants directed him to use it, these distinctions do not negate a claim of negligent entrustment.

Third, the trial court's granting of summary judgment should be reversed because one of its focus was on Mr. Henry's use of his "personally owned" service weapon outside the course of his employment. Clearly, the issue of whether or not Marvin Henry used his service weapon within or without the scope of his employment is irrelevant to the inquiry of whether Defendants were negligent in the first place by giving up control and delivering the loaded service weapon to Marvin Henry.

**b) RESTATEMENT (SECOND) OF TORTS § 390—  
Incompetency.**

In deciding questions of duty, courts evaluate public policy considerations. Duty may be predicated on violation of a statute or common law principles of negligence. Under Washington law, it is illegal to deliver a firearm to certain incompetent persons.

No person shall deliver a pistol to any person under the age of twenty-one or to one who he has reasonable cause to believe has been convicted of a crime of violence, or is a drug addict, an habitual drunkard, or of unsound mind.

RCW 9.41.080. "This statute, at a minimum, reflects a strong public policy in our state that certain people should not be provided with dangerous weapons." *Bernethy*, 97 Wn.2d at 932-33.

Section 390 is “a special application of the rule stated in RESTATEMENT (SECOND) OF TORTS § 308 (1965).” RESTATEMENT (SECOND) OF TORTS § 390 cmt. b. Washington law has, as a public policy concern, imposed a general duty upon defendants: one should not furnish a dangerous instrumentality such as a gun to an incompetent. As such, Washington has adopted RESTATEMENT (SECOND) OF TORTS § 390 (1965) which states the following:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

*Bernethy*, 97 Wn.2d at 933 (adopting §390). Section 390 specifically requires the entrustor of chattel to consider the characteristics of the trustee, such as “youth, inexperience, or otherwise” in evaluating whether the latter might use the chattel in a manner that would pose “an unreasonable risk of physical harm to himself and others.” See *Martin v. Schroeder*, 105 P.3d 577, 579 n.1 (Ariz. Ct. App. 2005).

Case law, including Washington, is definitive in imposing a duty on defendants involving negligent entrustment of a firearm to a person who later harms others. For example, in *Bernethy*, the Washington Supreme Court held that the trial court erred when it dismissed plaintiff’s

claims by granting summary judgment to defendant who furnished a firearm to an incompetent person who then shot and killed plaintiff's decedent. 97 Wn.2d at 284. In that case, a gun shop owner agreed to sell a drunk man a rifle he said was for his son. *Id.* at 282. The gun shop owner laid the gun and ammunition on the counter, the man took the gun and left the shop, and the man entered a nearby tavern where he shot his estranged wife, plaintiff's decedent. *Id.* The Court reasoned that the evidence, viewed in the light most favorable to the plaintiff, indicated that defendant placed a gun and ammunition in the hands of an intoxicated person. *Id.* at 284. Similarly, in this case, the evidence indicates that Defendants placed a loaded service weapon into the hands of Marvin Henry who was known or should have been known to be incompetent. The evidence strongly supports that a reasonable person should have known that Mr. Henry was incompetent to regain possession of his firearm because of the following:<sup>7</sup>

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<sup>7</sup> It is important to note that the trial court determined that had Defendants known that Mr. Henry would be taken into custody at the time he was to come in for his interview on December 4, 2001, that this likely would have been sufficient to find Mr. Henry incompetent.

But, even had they arrested—let's assume that he had gone to his appointment that afternoon, that when he gets in there, the detective says, you know the exercise where we're taking you into custody on the custodial sexual misconduct first—which is essentially what the detective indicates that she was investigating at the time—and perhaps they would have found that they had additional information that would have elevated it based on forcible compulsion.

Verbatim Report of Proceedings at 41:8–15. In fact, that is exactly what the situation was in this case: Early on December 4, 2001, Detective Stines received the lab report that the evidence produced by Ms. Hurley was in fact semen from Mr. Henry and was going to arrest him upon presentation (CP 433); Mr. Henry called Chief Daniels to admit to the

- Mr. Henry was under a criminal investigation for the felony of custodial sexual misconduct;
- Mr. Henry and his wife were visibly having marital distress as a result of the situation;
- Mr. Henry would likely lose his job and would likely not be able to regain employment as a public officer;
- Mr. Henry was going to be arrested and taken into custody for the felony;
- Mr. Henry was actually intoxicated;
- Mr. Henry appeared very uncharacteristic and fidgety just moments before being given his service weapon; and
- Officer Eagen felt uneasy when he gave Mr. Henry the service weapon and wished he did not take it out of the locker.

In *Tissicino v. Peterson*, 121 P.3d 1286, 1291 (Ariz. Ct. App. 2005), the court reversed the trial court's granting of defendant's motion for summary judgment on the issue of negligent entrustment, remanding the case for proceedings. In that case, defendants' son Timothy shot Zachary, plaintiffs' son, accidentally when Timothy erroneously believed the gun was unloaded and pulled the trigger while pointing the gun at

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allegations at 10:55 a.m. (CP 277); Mr. Henry called Detective Stines to reschedule his appointment to 2:00 p.m. (CP 435); Officer Eagen relinquishes control and hand-delivers the service weapon to a visibly distraught Mr. Henry at 1:15 p.m. (CP 261, 401).

Zachary. *Id.* at 1288. The court reasoned that Defendant Juanita Peterson, Timothy's mother, knew of facts and circumstances that created a genuine issue of material fact on the question of whether she should have known that an unreasonable risk of physical harm would be created if she gave her son the gun, such as alcohol abuse, mental impairment including cognitive dysfunction, a prior accident with a gun, and her undisputed awareness of them. *Id.* at 1291. Similarly, in this case, Defendants knew of the facts and circumstances that would create a genuine issue of material fact on the question of whether they would have known that an unreasonable risk of physical harm would be created if they surrendered control and delivered to Mr. Henry his fully loaded service weapon: the sexual misconduct allegations by an inmate, being placed on administrative leave pending an internal investigation, his subsequent confession to Chief Deputy Karen Daniels, the multiple phone calls to Officer Eagen requesting his service weapon, and the fact that he could not fulfill his firing range requirements while on administrative leave.

In *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200 (Fla. 1997), the Florida Supreme Court reversed the trial court's dismissal of plaintiff's claims holding that under the doctrine of negligent entrustment, the risk of harm posed by an incompetent gun purchaser to third parties was foreseeable as well as great. In that case, although the facts and direct evidence of the purchaser's intoxication were absent, the court found that

defendant knew or should have known of the purchaser's incompetence and imposed liability. The court relied on the following: plaintiff's expert testified that if purchaser consumed as much alcohol as he indicated that it would have been apparent to the retail clerk that purchaser was intoxicated; retail clerk helped fill out federal firearms form after asking purchaser to do so but was unable because his handwriting was ineligible; and the clerk filled out another form and simply had purchaser initial each of the "yes/no" answers and sign his name at the bottom. *Id.* Similarly, in this case, although Defendants will likely allege that direct evidence of Mr. Henry's incompetence was absent, a reasonable person could conclude that Mr. Henry was in mental, emotional, and psychological crises considering the circumstances; that Marvin Henry was not allowed to enter his place of employment to personally retrieve his service weapon; that Marvin Henry called Officer Eagen multiple times within a short period in order to ensure that he could secure his service weapon; that Marvin Henry's reason for obtaining his service weapon was pretextual when Edward Thompson stated that Marvin Henry would not have been allowed on the firing range to fulfill his requirement after being placed on administrative leave; that Officer Eagen felt that there was something not right with Mr. Henry; and that Officer Eagen felt like he should not have given up control of the service weapon to Mr. Henry as soon as he delivered it.

Defendants knew or should have known that Marvin Henry posed an unreasonable risk of physical harm to himself and others. A party's actual knowledge is a question of fact for the trier because knowledge most often must be inferred from the surrounding circumstances. The circumstances relating to Mr. Henry being put on administrative leave pending investigation of allegations by an inmate of sexual misconduct, and the subsequent actions and behaviors exhibited by Mr. Henry were sufficient such that Defendants knew or should have known of the unreasonable risk.

One specific example makes it clear that the trial court committed reversible error by stating that there were no issues of material fact, when in fact there were. The trial court stated in relevant part the following:

All of the indication is, if you read through, are that the people closest to this gentleman on the date in question had no clue that he was incompetent in any way, shape or form.

Verbatim Report of Proceedings at 39. This is plainly an incorrect and inaccurate reading of the evidence. Just days after this tragic event, Officer Eagen gave his most recent recollection of his impression of Mr. Henry the fateful day that he hand-delivered Mr. Henry's service weapon when he stated the following to the coroner:

He though Mr. Henry was acting very uncharacteristically, fidgeting and appearing very uptight.

CP 267. For purposes of summary judgment, the evidence and all inferences therefrom must be viewed in the light most favorable to the non-moving party. Behind this backdrop, reasonable minds may differ as to whether or not Defendants knew or should have known that Mr. Henry may have been incompetent to handle a loaded handgun. In this case, Plaintiffs did not receive this benefit when the trial court granted Defendants' motion for summary judgment and dismissed their claims with prejudice.

**3. Under RESTATEMENT (SECOND) OF TORTS, Defendants Had a Duty to Prevent this Tragedy Because of Its Relationship to Marvin Henry and the Plaintiffs.**

As a general rule, Washington common law imposes no duty to prevent a third person from causing physical injury to another. *See Folsom v. Burger King*, 135 Wn.2d 658, 674, 958 P.2d 301 (1998) (citing *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 223, 802 P.2d 1360 (1991)). It also provides no general duty to protect others from self-inflicted harm. *See, e.g., Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995). Washington does, however, recognize exceptions to these general no-duty rules, including where there is a "special relationship" or a "take charge" relationship. *See* Restatement (Second) of Torts §§ 315, 319 (1965).

a)       **RESTATEMENT (SECOND) OF TORTS § 315—  
Special Relationship.**

Washington recognizes an exception to the general no duty rule when a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct. *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 438, 874 P.2d 861 (1994). Washington has adopted the description of the "special relationship" that triggers a duty from the Restatement:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

RESTATEMENT (SECOND) OF TORTS § 315 (1965); *Nivens v. 7- 11 Hoagy's Corner*, 133 Wn.2d 192, 200–01, 943 P.2d 286 (1997) (citing § 315; *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983)); *Folsom*, 135 Wn.2d at 674–75 (citing *Hutchins*, 116 Wn.2d at 227–28). When a special relationship exists, a person may have a duty to foresee that the risk of harm exists as to the other. *Bartlett v. Hantover*, 9 Wn. App. 614, 621, 513 P.2d 844 (1973) (special relationship existed between **employer and employee**). A special relationship duty arises when the relationship has a direct **supervisory** component, but does not always require the presence of

a custodial relationship. See *Taggart v. State*, 118 Wn.2d 195, 219, 223, 822 P.2d 243 (1992). Even when no special relationship existed, a duty may arise when a defendant interjects himself into a situation and creates a special relationship of control. *Webstad v. Stortini*, 83 Wn. App. 857, 870, 924 P.2d 940 (1996) (citing Prosser and Keeton § 56, at 357–77). In general, courts will find a duty where reasonable persons would recognize it and agree that it exists. *Tallariti v. Kildare*, 63 Wn. App. 453, 456, 820 P.2d 952 (1991) (citing Prosser and Keeton § 53, at 359). Washington has applied the general tort concept that changing social conditions lead constantly to the recognition of new duties. *Webstad*, 83 Wn. App. at 872 (citing Prosser and Keeton § 53, at 359). Thus, Washington will liberally find that a special relationship exists where the facts and circumstances suggest that one exists.

The Washington Supreme Court first created this duty defined by § 315 in *Peterson*. *Peterson* involved a negligence claim brought by a plaintiff who had been injured in an automobile accident where the other driver was a recently released state hospital psychiatric patient under the influence of drugs. The court held that a special relationship exists between a mental health therapist—in *Peterson* a psychiatrist—and his patient such that when the therapist determines, or should determine, that the patient presents a reasonably foreseeable risk of serious harm to others, the therapist has a duty to take reasonable precautions to protect anyone

who might foreseeably be endangered. *Peterson*, 100 Wn.2d at 428. The psychiatrist in *Peterson* knew that his patient was a potentially dangerous person whose behavior was unpredictable and who was likely to have delusions and hallucinations as a result of ingesting the illegal drug angel dust. *Id.* The psychiatrist also knew it was likely that the patient would reoffend with angel dust. *Id.* Under those circumstances, the *Peterson* court determined that the psychiatrist had a duty to do something, either to petition the court for a commitment or “to take other reasonable precautions to protect those who might be foreseeably endangered by the patient’s drug-related mental problems. *Id.* at 428–29.

Here, in this case, Defendants had a special relationship with Mr. Henry such that they had a duty to take reasonable precaution to protect those who might be foreseeably endangered by his unstable mental and emotional state. First, Defendants and Mr. Henry had a special relationship defined as an employer-employee relationship. Second, Defendants had direct supervisory control over Mr. Henry and his loaded service weapon because they suspended him, and had possession and control of his loaded service weapon. Third, like the psychiatrist in *Peterson*, Defendants in this case “had a duty to do something” and “to take other reasonable precautions” to protect others, including the withholding and continued securing of Mr. Henry’s loaded service weapon. Finally, even if no special relationship existed initially, a duty

arose when Officer Eagen interjected himself into a situation and created a special relationship by retrieving and delivering to Mr. Henry, an emotionally and mentally incompetent person, a loaded service weapon.

**b) RESTATEMENT (SECOND) OF TORTS § 319—Take Charge Relationship.**

In the RESTATEMENT (SECOND) OF TORTS, sections 316 through 320 define various “special relations” that, in accordance with the general principle stated in § 315, give rise to a duty to control a third person. Through *Taggart* and its progeny, Washington has adopted one class of these “special relation” cases as described in § 319:

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

RESTATEMENT (SECOND) OF TORTS § 319 (1965). The *Taggart* court announced that “parole officers have a duty to protect others from reasonably foreseeable dangers engendered by parolees’ dangerous propensities.” *Id.* at 224. In reaching this conclusion, the court began to delineate the meaning of a “take charge” relationship, stating that there must be a “definite, established and continuing relationship between the defendant and the third party.” *Taggart*, 118 Wn.2d at 219 (quoting *Honcoop v. State*, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988)). The court also considered other factors that demonstrated authority, control,

monitoring, or supervision over a third party. *Id.* at 219–20. Since *Taggart*, Washington courts have continued to define the class of cases in which a take charge duty exists. For example, in *Hertog v. City of Seattle*, 138 Wn.2d 265, 281, 292, 979 P.2d 400 (1999), the court held that a take charge special relationship extends to probation counselors and pretrial release counselors. The *Hertog* court noted that “[a] probation counselor is clearly in charge of monitoring the probationer to ensure that conditions of probation are being followed, and has a duty to report violations to the court.” *Id.* at 279. Additionally, in *Bishop v. Miche*, 137 Wn.2d 518, 524–31, 973 P.2d 465 (1999), the court held that a county probation officer had a take charge relationship with a probationer who killed a child while driving intoxicated. At the time of the incident, the county probation officer was monitoring Miche for alcohol use and Miche was under an order to obey the law for 24 months pursuant to a suspended sentence for driving while intoxicated. *Id.* at 522–23. In this case, as in *Taggart* and its progeny, there is a degree of control that Defendants had over Mr. Henry and his loaded service weapon that constitutes a take charge relationship. After all, Defendants were his employer, Defendants had the discretion to arrest Mr. Henry for sexual misconduct which is a felony, Defendants placed Mr. Henry on administrative leave while conducting an investigation, and Defendants had possession and control of Mr. Henry’s loaded service weapon. Defendants failed to take the

necessary precautions by failing to arrest him and failing to maintain control of Mr. Henry's service weapon.

The issue of the degree of control is the central issue in finding that this case falls squarely within the zone of take charge cases—not the fact that Defendants had the discretion to arrest Mr. Henry and elected not to as Defendants argue. For example, the Washington Supreme Court clarified an important point about *Peterson*:

The psychiatrist in *Peterson* had no authority to confine the patient without seeking a court order. Similar to the circumstances in *Petersen*, the fact that a probation counselor cannot act on his or her own to arrest a probationer or to revoke probation is **not dispositive** on the issue of duty.

*Hertog*, 138 Wn.2d at 280 (emphasis added). The *Taggart* court made this same point earlier. Applying *Petersen*, the *Taggart* court ruled that liability could be imposed upon the State for negligent supervision of the parolees:

The State seeks to distinguish *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) on the basis that there the patient who caused the plaintiff's injuries was released from the hospital, where the psychiatrist **had a high degree of control over him**, whereas in the present case the parolees were living on their own, under circumstances in which the parole officers had very little control over them. The State argues that nothing less than a full custodial relationship justifies holding parole officers to a duty to protect against parolees.

...

We reject this approach and hold that a parole officer takes charge of the parolees he or she supervises *despite the lack of a custodial or continuous relationship.* The duty we announced in *Petersen* is not limited to taking precautions to protect against mental patients' dangerous propensities only when those patients are being released from the hospital . . . . *The duty requires that whenever a psychiatrist determines . . . that a patient presents a foreseeable danger to others, the psychiatrist must take reasonable precautions to protect against harm. Whether the patient is a hospital patient or an outpatient is not important.*

*Taggart*, 118 Wn.2d at 222–23 (emphasis added). Here, in this case, Defendants had a take charge relationship at the moment they discovered the felonious allegations against Mr. Henry for sexual misconduct—they were, after all, allegedly conducting an investigation. Moreover, Defendants had a take charge relationship when Mr. Henry literally confessed to the allegations to his direct supervisor Chief Daniels—yet again, Defendants failed to arrest Mr. Henry after he confessed that he did in fact commit the felony. For arguments' sake, even if Defendants exercised their discretion not to arrest Mr. Henry for a felony, as *Petersen* and *Taggart* hold, Defendants “must take reasonable precautions against harm”—this includes not only arresting Mr. Henry, but maintaining possession and control of his loaded service weapon.

**C. The Harm to the Plaintiffs Fell Within the Field of Danger that Should Have Been Reasonably Anticipated by Defendants.**

The trial court held, as a matter of law, that a reasonable man would not have foreseen that Mr. Henry was incompetent such that

delivering his personally owned service weapon would have posed a danger to Karen Henry, himself, or any other person; hence, defendant's conduct was not the proximate cause of the accident. CP 27. This is plain error.

The better considered authorities do not regard foreseeability as the handmaiden of proximate cause. To connect them leads to too many false premises and confusing conclusions. Foreseeability is, rather, one of the elements of negligence; it is more appropriately attached to the issues whether defendant owed plaintiff a duty, and, if so, whether the duty imposed by the risk embraces that conduct which resulted in injury to plaintiff. The hazard that brought about or assisted in bringing about the result must be among the hazards to be perceived reasonably and with respect to which defendant's conduct was negligent. *See* RESTATEMENT (SECOND) OF TORTS § 435 cmt. c (1965).

It is the misuse of foreseeability—that is, discussion of the improbable nature of the accident in relation to proximate cause—that led the trial judge, in the instant case, to conclude that Mr. Henry's actions were not foreseeable.

It is not, however, the unusualness of the act that resulted in injury to plaintiff that is the test of foreseeability, but whether the result of the act is within the ambit of the hazards covered by the duty imposed upon defendant.

The Washington Supreme Court approved this theory in *McLeod v. Grant County School Dist.*, 42 Wn.2d 316, 255 P.2d 360 (1953), in which the court said:

Whether foreseeability is being considered from the standpoint of negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated. *Berglund v. Spokane County, supra*; Harper, Law of Torts, 14, § 7; 2 Restatement, Torts, 1173, § 435. This thought is further developed in the following statement by Professor Harper, which we quoted with approval in the *Berglund* case:

The courts are perfectly accurate in declaring that there can be no liability where the harm is unforeseeable, if “foreseeability” refers to the general type of harm sustained. It is literally true that there is no liability for damage that falls entirely outside the general threat of harm which made the conduct of the actor negligent. The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are present.

In other words, the trial court and Defendants allege “that negligence can be predicated only upon ability to foresee the exact manner in which injury may be sustained. That is not the correct test. The formula applicable to a finding of negligence is whether or not the *general* type of

danger involved was foreseeable.” *Berglund v. Spokane County*, 4 Wn.2d 309, 319, 103 P.2d 355 (1940).

Defendants were subject to the duty of prohibiting Mr. Henry from any and all means of access to the TCSO such that it would not result in injury to others. Under the facts of the instant case, reasonable minds can well differ on the question of whether the deaths of Marvin and Karen Henry were within the foreseeable scope of the risks arising from this duty. The jury may decide that the Henrys were within the apparent scope of danger from Defendants’ conduct, and so within the scope of the hazards arising from the duty imposed upon Defendants. On the other hand, the jury may decide that the Henrys were beyond the foreseeable scope of the risks arising from this duty. In *McLeod*, the Washington Supreme Court said: “We have held that it is for the jury to decide whether the general field of danger should have been anticipated . . . [by defendant].” 42 Wn.2d at 324.

**D. Defendants Breached Their Duty and Caused the Injuries and Damages to Plaintiffs.**

In Washington the causation analysis in negligence cases breaks down into two components: (1) the “cause-in-fact” or “but for” causation and (2) legal or proximate causation. Under Washington law, courts have determined the scope of causation as the following:

The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result

and the act of the defendant is too remote or insubstantial to impose liability. A determination of legal liability will depend upon “mixed considerations of logic, common sense, justice, policy, and precedent.”

*Schooley v. Pinch’s Deli Mart*, 134 Wn.2d 468, 478–79, 951 P.2d 749 (1998); *see also*, *Taggart* 118 Wn.2d at 1295; *Hertog* at 284; *McLeod*, 42 Wn.2d at 321. In this case, viewing the evidence in the light most favorable to Plaintiffs, there is sufficient evidence to demonstrate that Defendants’ negligence of relinquishing control of Mr. Henry’s loaded service weapon and delivering it to him was the cause of both Marvin and Karen Henry’s deaths.

**1. The Finding of a Duty Establishes Legal Causation as a Matter of Law.**

As a threshold matter, Defendants briefly argue that there is no legal causation between its negligence and Plaintiffs’ injuries. However, Washington courts repeatedly have emphasized that a direct connection exists between the concepts of duty and legal causation, and that often the existence of the duty compels the finding of legal causation. Consistent with this approach, the court in *Taggart* concluded: “The question of legal causation is so intertwined with the question of duty that the former [legal causation] can be answered by addressing the latter [duty].” 118 Wn.2d at 226. This rule makes sense because the existence of a duty, like the question of legal causation, also is a question of law that depends on mixed considerations of “logic, common sense, justice, policy and

precedent.” *See, e.g., Caulfield v. Kitsap County*, 108 Wn. App. 242, 248, 29 P.3d 738 (2001).

The court in *Hertog* confirmed that although *in general* the existence of duty does not automatically satisfy the legal causation requirement, **a finding of legal causation is automatic when a special relationship duty exists.**

Where a special relationship exists based upon taking charge of a third party, the ability and duty to control the third party indicate that defendant’s actions in failing to meet that duty are not too remote to impose liability.

138 Wn.2d at 284. *Taggart* and *Hertog* indicate that because Defendants’ duty is based on a special relationship, legal causation must be found as a matter of law. And clearly, Defendants’ actions with regard to relinquishing control and delivering Mr. Henry’s loaded service weapon were not “remote or insubstantial” in relation to Marvin or Karen Henry’s deaths. Their deaths were the direct result of Defendants’ negligent entrustment of Mr. Henry’s loaded service weapon.

**2. The Trial Court’s Finding that Defendants’ Actions were Not the Proximate Cause of Plaintiffs’ Injuries is Reversible Error.**

It is beyond dispute that only in very rare circumstances is summary judgment appropriate on the issue of proximate causation. The Supreme Court of Washington has repeatedly held that the questions of causation and foreseeability are for the jury. *See, e.g., Bell v. State*, 147

Wn.2d 166, 179, 52 P.3d 503 (2002); *Tyner v. Dep't of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000); *Taggart*, 118 Wn.2d at 224–25. The general rule in Washington holds that the determination of proximate cause is a matter of fact, inappropriate for summary judgment.

The question of proximate cause is for the jury, and it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.

*Peterson*, 100 Wn. 2d at 436. “There may, of course, be more than one proximate cause of an injury, and the concurring negligence of a third party does not necessarily break the causal chain from original negligence to final injury.” *Doyle v. Nor-West Pac. Co.*, 23 Wash. App. 1, 6, 594 P.2d 938, *review denied*, 92 Wn.2d 1025 (1979).

In special relationship cases, the Supreme Court has acknowledged that a plaintiff must establish cause in fact to prevail, but has also emphasized that causation “is a fact question properly presented to the jury.” *Bell*, 147 Wn.2d at 179. The court in *Taggart* indicated that deference must be given to the jury’s proximate cause decision, upholding the jury’s finding of cause in fact because “a reasonable jury ***might*** conclude” that the injury would have been avoided but for the negligent conduct. 118 Wn.2d at 227 (emphasis added).

In *Taggart*, the court pointed out that the question of whether one who has responsibility for a person with known dangerous tendencies has taken appropriate action to protect foreseeable victims is a question of fact. The court refused to dismiss the action on Defendant's motion asserting that no proximate cause existed. *Id.* at 226–27.

In *Peterson*, the defendants attempted to argue that proximate cause did not exist in a case where a psychiatrist who had knowledge of a patient's dangerous tendencies failed to act to protect foreseeable victims from those dangerous tendencies. The psychiatrist argued that no proximate cause could exist because he had no ability to release information about his patient. The court denied summary judgment and pointed out that steps could have been taken to protect others such as seeking an additional 90-day commitment. The court noted that a question of fact existed as to whether the psychiatrist had acted to protect foreseeable victims:

We conclude that the psychiatrist breached the duty owed by failing to petition the Court for a 90-day commitment or to take other reasonable precautions to protect those who might be foreseeably endangered by the patient's drug related mental problems.

*Id.* at 428–29.

Washington law is clear that the question of proximate cause is one for the jury, not for summary judgment. *Hertog*, 138 Wn.2d at 275; *Bishop*, 137 Wn.2d at 525–28; *Taggart*, 118 Wn.2d at 224–25; *Bailey v.*

*Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987); *Peterson*, 100 Wn.2d at 436; *Jones v. State*, 107 Wn. App. 510, 15 P.3d 180 (2000). Thus, the trial court's ruling as a matter of law that there was no proximate cause is reversible error.

**3. Determining as a Matter of Law that There are No Material Issues of Fact with Respect to Cause-in-Fact Constitutes Reversible Error.**

Cause-in-fact concerns the “but for” consequences of an act: those events the act produced in a direct, unbroken sequence, and which would not have resulted had the act not occurred.” *Taggart*, 118 Wn.2d at 226. As discussed thoroughly in the Factual Section, Defendants placed Mr. Henry on administrative leave on December 2, 2001, pending a criminal investigation into allegations made against him concerning sexual misconduct with an inmate. On December 4, 2001, Mr. Henry called Officer Eagen at work to ask him if he would retrieve and deliver Mr. Henry's loaded service weapon. On December 4, 2001, Mr. Henry called Officer Eagen again requesting the retrieval and delivery of his loaded service weapon. According to Officer Eagen, Mr. Henry stated, “hey where is my weapon I need my weapon.” Mr. Henry made another telephone call to confess to Chief Daniels that he did in fact commit the felony. Later that afternoon, Officer Eagen delivered Mr. Henry's loaded service weapon to him at his home. One hour after Officer Eagen delivered the loaded service weapon to Mr. Henry, Mr. Henry killed his

wife and then himself. The chain of events, viewed in the light most favorable to Plaintiffs with all reasonable inferences therefrom, demonstrates that but for Defendants' negligence, Marvin Henry and Karen Henry would not have been shot and killed by the loaded service weapon.

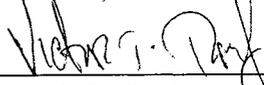
#### IV. CONCLUSION

Summary judgment was not appropriate in this case. Appellants respectfully request that this Court reverse the trial court and remand this case for trial.

Dated this 9<sup>th</sup> day of July, 2007.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Kim Snyder, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

A. I am a United States Citizen, over the age of 18 years, not a party to this cause, and competent to testify to the matters set forth herein.

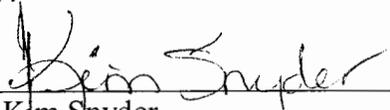
B. I am employed by the law firm of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP, 1201 Pacific Avenue, Suite 2100, Tacoma, Washington 98401, attorneys for plaintiff/appellant.

C. On July 2, 2007, I caused a copy of the *Brief of Appellant* to be served upon the following:

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\_\_\_\_\_  
Kim Snyder

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