

NO. 44841-6
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON
JW

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JANET G. HUSTED as Personal Representative of the ESTATE OF
KURT HUSTED; WILBERT R. PINA, an individual; and JOEL
FLORES, guardian ad litem for minor EMMETT PINA;

Plaintiffs/Appellants,

vs.

STATE OF WASHINGTON,

Defendant/Respondent.

APPELLANTS' REPLY BRIEF

STEPHEN L. BULZOMI, WSBA #15187
JEREMY A. JOHNSTON, WSBA #34149
Attorneys for Appellants
MESSINA BULZOMI CHRISTENSEN
5316 Orchard Street West
Tacoma, WA 98467-3633
Tel: (253) 472-6000

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I. ARGUMENT

A. THE STATE'S "TAKE CHARGE" RELATIONSHIP WITH FINLEY AROSE FROM THE JUDGMENT AND SENTENCE, THE STATUTES EMPOWERING AND DIRECTING SUPERVISION AND DOC POLICIES AND PROCEDURES. FINLEY'S ABSCONDING DID NOT END THE RELATIONSHIP

The State argues from pp. 13-17 that DOC did not have a "take charge" relationship with Finley because he absconded. This argument doggedly ignores longstanding, controlling Supreme Court precedent. As explained in Appellants' Opening Brief at pp. 24-27, the "take charge" relationship that gives rise to a duty to supervise results from the Judgment and Sentence, the Department of Corrections' Conditions, Requirements and Instructions based upon its own administrative policies, and the statutes requiring and empowering the State to supervise Finley. *Taggart v. State*, 118 Wn.2d 195, 219-222, 822 P.2d 243 (1992); *Joyce v. State*, 155 Wn.2d 306, 317, 318, 119 P.3d 825 (2005); *Bishop v. Miche*, 137 Wn.2d 518, 526, 528, 973 P.2d 465 (1999).

The State complains that once Finley absconded, the "take charge" relationship evaporated. This proposition evidences a disregard for the factors that created the relationship in the first instance, as explained above. These gave rise to the "take charge" relationship, and their effect upon the duty to supervise does not depend upon Finley's willingness to cooperate.¹

¹ DOC understandably avoids the logical fallacy inherent in its concept of the "switch on, switch off" "take charge" relationship. After Finley's arrest for the murder of Kurt Husted, DOC conducted a violation hearing and sanctioned Finley for absconding. CP 423-426. If in fact Finley had terminated the "take charge" relationship by absconding,

Nonetheless, the State protests, at p. 15, that after an offender absconds, “the parole officer no longer has the ability to control the offender’s behavior through the actions authorized by the legislature and recognized by the court, and therefore no special relationship exists.” This argument is simply yet another rehash of DOC’s long-rejected argument that it should have no duty in the absence of a custodial relationship. Our Supreme Court has repeatedly rejected this argument (*e.g.*, *Taggart*, 118 Wn.2d at 224; *Bishop*, 137 Wn.2d at 528)² and this court should do so also.

Our Supreme Court in *Joyce*, held firm against the State’s efforts to throw out *Taggart* and its progeny (155 Wn.2d at 317-318):

Since *Taggart*, State agencies have continued to argue in a variety of venues (judicial, legislative and otherwise) that *Taggart* should be reversed. Alternatively, they have argued that, as a matter of law, there is no causal link between their failure to use reasonable care to monitor and supervise offenders, and the foreseeable injuries caused by offenders. Illustratively, in *Bishop*, King County argued that a breach of the duty of reasonable care simply could not be a proximate cause of injury when an intoxicated probationer with a history of substance abuse caused a motor vehicle collision that killed a child. *Bishop*, 137 Wash.2d at 531, 973 P.2d 465. We explicitly rejected the County’s contention and found that a duty to use reasonable care did exist.

Again, in *Hertog*, the City argued that *Taggart* was wrongly decided and should be overruled because parole officers do not have any real control over the day to day lives of parolees, and, it contended, a failure to supervise could not be the proximate cause of injuries intentionally

DOC would have had no authority to sanction him for his behavior once it regained custody of him.

² In fact, the duty to supervise exists even in the absence of power to arrest. *Hertog v. City of Seattle*, 138 Wn.2d 265, 279, 979 P.2d 400 (1999).

inflicted by supervised parolees. *Hertog*, 138 Wash.2d at 283-84, 979 P.2d 400. Again, we rejected the argument. We held that “[w]here a special relation exists based upon taking charge of [an offender], the ability and duty to control [the offender] indicate that the defendant’s actions in failing to meet that duty are not too remote to impose liability.” *Hertog*, 138 Wash.2d at 284, 979 P.2d 400.

Simply put, the State’s formulation of the “take charge” relationship has lacked merit for over 20 years. It still lacks merit.

Moreover, the State’s suggestion that absconding terminates the “take charge” relationship and duty to supervise directly contradicts DOC’s Field Policy No. DOC 350.750. CP 192-199. The policy directs the CCO to take affirmative acts when an offender absconds or escapes, including attempts to locate the offender. For example, it requires that (CP 194, emphasis added):

- “the CCO **will** make reasonable attempts to locate” the offender;
- the “CCO **must** conduct a field contact at the last known residence” of the offender.
- the “CCO **will** document all attempts to locate the offender in the offender’s electronic file
- if the CCO cannot locate the offender within the 72 hours, “s/he **will** issue or request the issuance of a warrant...”

Thus, DOC requires that CCOs actively assist in attempting to apprehend an absconded offender.

Lastly, the legislature intended that all terms of and conditions of an offender’s supervision should not become curtailed “by an offender’s absence from supervision for any reason...” *In the Matter of the Personal Restraint of Amel W. Dalluge, Petitioner*, 162 Wn.2d 814, 819, 177 P.3d

675 (2008). The State's power and duty to supervise Calvin Finley's remained in effect while he absconded. This court should reverse the trial court and permit the jury to determine if State acted negligently.

B. A CCO'S POTENTIAL QUALIFIED IMMUNITY DOES NOT EXCULPATE THE STATE

The State argues, at pp. 22-26, that its CCOs' supposed qualified immunity precludes the liability of the State. This argument, however, rests upon a faulty interpretation of controlling Supreme Court precedent.

A master may be responsible for the servant's acts under the doctrine of respondeat superior. *Kuehn v. White*, 24 Wn. App. 274, 277, 600 P.2d 679 (1979); *Titus v. Tacoma Smeltermen's Union Local No. 25*, 62 Wn.2d 461, 469, 383 P.2d 504 (1963), WPI 50.03. DOC attempts to argue that *Taggart* holds that its servant's/agent's qualified immunity precludes liability against DOC.

Taggart held that the State has a duty to take reasonable precautions to protect against reasonable foreseeable dangers posed by the dangerous propensities of parolees. *Taggart*, 118 Wn.2d at 217. The Court in *Taggart*, however, did not address whether the State may assert its agent's personal qualified immunity when sued for negligence under a respondeat superior theory. The Court did address that issue in *Savage v. State*, 127 Wn.2d 434, 438, 899 P.2d 1270 (1996), which followed *Taggart*.

The Court stated (*Savage*, 127 Wn.2d at 438)³:

[I]n *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), we held that parole officers have qualified immunity for allegedly negligent supervision of parolees who harm third parties. An officer is entitled to such immunity if this or her actions are in furtherance of a statutory duty, are in substantial compliance with the directives of superiors, and respect relevant regulatory guidelines. *Taggart*, 118 Wn.2d at 216, 822 P.2d 243. The case did not address the question presented here, whether the personal qualified immunity may be asserted by the State when suit is brought against it for negligence under a respondeat superior theory of liability.

DOC's reliance on *Taggart* is mistaken. Actually, the case directly resolving the issue is *Savage*.

In *Savage*, our Supreme Court reversed a Court of Appeals opinion that held that the personal immunity granted to agents of the State extended to the State, making it immune from suit brought under a respondeat superior theory. The Court explained that the Court of Appeals mistakenly decided that under agency law the State could claim the protection of an employee's immunity to defeat respondeat superior liability. The Supreme Court disagreed, and adhered to the contrary view it had expressed in *Babcock v. State*, 116 Wn.2d 596, 620, 809 P.2d 143 (1991). *Savage*, 127 Wn.2d at 438.

Citing the Restatement (Second) of Agency § 217 (1958), the Court stated that “[a]n agent’s immunity from civil liability generally does

³ It should be noted, as it was by the Court in *Savage* at FN2, that the State may be sued for its own independent acts of negligence rather than for the acts of its agents. The question presented to the Court in *Savage* concerned only the issue of a claim brought against the State for negligence under a respondeat superior theory of liability and not a theory of liability based on the State's independent acts of negligence.

not establish a defense for the principal.” The Court further stated that “the immunities of governmental officials do *not* shield the governments which employ them from tort liability, *even when liability is predicated upon respondeat superior.*” *Savage*, 127 Wn.2d at 438 (emphasis in original).

The *Savage* court noted that “[t]he proper starting point for a discussion of whether the State is immune for the qualified immune acts of its officers must begin with the legislative abrogation of sovereign immunity.” *Id.* at 445. The Court reviewed Washington’s sovereign immunity statute as well as the policy and underlying reasoning of personal and governmental immunity. The court explained (*Savage*, 127 Wn.2d at 447, citations omitted):

In sum, given the legislative mandate abrogating sovereign immunity, the different purposes personal and government immunity are designed to serve, and the policy concerns just discussed, extending the qualified personal immunity of parole officers to the State would be not only judicially unwarranted but normatively unwise. Government liability, combined with qualified personal immunity for officers, is better suited to accommodate the concerns with which tort law is ultimately concerned. The benefits of maintaining this dichotomy in the liability structure have been identified by one commentator:

Exclusive governmental liability may have advantages from a deterrence point of view. By encouraging higher standards of care in the selection, training, equipment, and supervision of personnel, such a system can have at least as positive an effect on governmental performance as one based upon liability of the individual official. It would also protect the official from any paralyzing threat of direct personal liability, thus presumably improving morale and effectiveness.

For the reasons just stated, the Court of Appeals' holding that the personal qualified immunity of parole officers runs to the State is reversed.

Savage leaves no doubt that the State does not receive immunity flowing from the qualified immune acts of its employees. While employees of the State may not be liable for their own actions while acting in furtherance of a statutory duty and in substantial compliance with directives of superiors and relevant regulatory guidelines, the State nonetheless may be liable for the exact same conduct under a respondeat superior theory.⁴

Despite the clear holding in *Savage*, DOC cherry picks language from *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999) to argue that when personal qualified immunity exists for a DOC employee, the sole basis of possible liability against the State would be the State's

⁴ In fact, if there is any doubt, one need look no further than the Dissent authored by Justice Madsen recognizing that the result of the Majority opinion is that the State will be liable on a respondeat superior theory for a parole officer's negligence regardless of whether he or she substantially complied with directives and regulations. In particular, Justice Madsen wrote (*Savage*, 127 Wn. 2d at 456 (Madsen, J., dissenting)) :

[W]ithout an extension of immunity the State will be liable on a respondeat superior theory for a parole officer's negligence regardless of whether he or she substantially complied with directives and regulations. What difference would it make whether the State drafted the guidelines with reasonable care, if liability for the employee's negligence exists in any event?

More importantly, the State may be sued for its own independent acts of negligence. See *Babcock*, at 621, 809 P.2d 143. Although I will not attempt to list all the actions which might give rise to liability for the State's own negligence, there could, for example, be negligence in training and supervising parole officers or in establishing guidelines and procedures, depending on the circumstances.

failure to use reasonable care in its directives and regulations, an independent act of negligence by the State.

DOC pronounces that the court in *Hertog* found an independent basis for a governmental duty, not the *Taggart* duty. This claim is clearly wrong given that in *Hertog* the Court specifically stated that *Taggart* controlled the case and that “the City and its probation counselors have a duty to control municipal court probationers to protect others from the probationer’s dangerous propensities.” *Hertog*, 138 Wn.2d at 281.

The fact that the State may face responsibility for both its own independent acts of negligence, and acts of its employees even when the employee enjoys immunity from liability is explained not only in the majority opinion in *Savage*, but also in the dissenting opinion authored by Justice Madsen. *See Savage*, 127 Wn. 2d at 456 (Madsen, J., dissenting).⁵

Unlike *Savage*, *Hertog* involved whether the duty recognized in *Taggart* applied to a City probation counselor and a County pretrial release coordinator. *Hertog*, 138 Wn.2d at 268. The Supreme Court in *Hertog* was not asked to overrule or modify its holding in *Savage*. In fact, the court in *Hertog* recognized its prior holding in *Savage* as the existing law. The Court stated (*Hertog*, 138 Wn.2d at 278):

Following *Taggart*, we held in *Savage v. State*, 127 Wn.2d 434, 899 P.2d 1270 (1995), that the qualified personal immunity for parole officers recognized in *Taggart* does not extend to the State. Thus, if the individual parole officer fails to take reasonable care to control his or her parolee, but nevertheless does so while acting in furtherance of a statutory duty and in substantial

⁵ It should be noted that Justice Madsen also authored the majority opinion in *Hertog*.

compliance with the directives of superiors and relevant regulatory guidelines, the parole officer enjoys qualified immunity, but the immunity does not run to the State.

DOC's proposal not only conflicts with *Savage*, but would nullify *Savage*. This court should reject any attempt by DOC to distort *Hertog* to render it inconsistent with *Savage*. Finally, any language in the *Hertog* opinion that could arguably be construed as inconsistent to *Savage* is *dicta*, as the issue in *Hertog* did not concern respondeat superior and qualified immunity. Our Supreme Court resolved that issue in *Savage*.

C. THE COURT NEED NOT ANALYZE IF DISCRETIONARY IMMUNITY BARS CLAIMS THE APPELLANTS HAVE NEVER MADE

Appellants focus upon on the conduct, or lack thereof, of DOC employees involved in supervising Finley. Appellants have never argued that DOC generated inadequate policies regarding supervision or that the State provided DOC with provided inadequate resources to apprehend fugitives. The State, however, at pp. 26-33, indulges in an unneeded discussion of *Evangelical United Brethren Church of Adana v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965) to prove that discretionary immunity precludes claims the appellants have never made. In addition, the State argues that the separation of powers doctrine would also preclude tort liability from claims never made. *Id.* at 32-33.⁶ The court should disregard the State's gratuitous arguments.

⁶ Defendant specifically refers to testimony of Mr. Stough and states that "Mr. Stough's questioning of the Department's allocation of resources is also precluded by the separation of powers doctrine." Brief of Respondent, at 32. Respondent mischaracterizes Mr. Stough's testimony. Mr. Stough did not question the funding provided to DOC. Instead, Mr. Stough simply testified and explained that given Finley's history and his

D. CCOs HAVE A “TAKE CHARGE” RELATIONSHIP WITH OFFENDERS, WHICH CREATES THE DUTY TO SUPERVISE. POLICE OFFICERS LACK THAT RELATIONSHIP WITH PERSONS SUBJECT TO ARREST WARRANTS

The State argues that DOC should have no duty to apprehend felons who abscond, citing *Dore v. City of Fairbanks*, 31 P.3d 788 (Alaska 2001) and *Wongittilin v. State*, 36 P.3d 678 (Alaska 2001). These cases involve claims against police officers for failing to apprehend persons subject to an arrest warrant. Even the most causal perusal of the cases reveals that the rationale of the Alaska Supreme Court in dismissing the cases involved the absence of a special relationship between the police agencies and the offenders.

With respect to the duty to arrest, the *Dore* court ruled as follows, at 31 P.3d 793-794:

The issue in this case is whether, after the issuance of an arrest warrant, the police have a duty to arrest the subject of that warrant in order to protect a potential victim from possible harm caused by the criminal acts of a third party (the subject of the arrest warrant). This case is in the class of cases involving the relationship between the police and the person injured by allegedly negligent police failure to arrest a third party with dangerous propensities.

We have previously relied upon the Restatement (Second) of Torts to assist our determination of whether a defendant has a duty to protect a victim from third party harm. Under the Restatement, the general tort duty rule is that a person has no duty to protect a victim from even foreseeable harm caused by a third person. Restatement § 315 recognizes two exceptions: (a) when a special

threat to the community, which DOC acknowledged; DOC should have devoted more significant resources to supervising Finley. CP 969. Mr. Stough’s testimony is consistent with the legislative mandate placed upon DOC under RCW 9.94A.715(6) (2009), which required DOC to supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court.

relationship exists between the defendant and third person, and (b) when a special relationship exists between the defendant and the victim. A special relationship between the defendant and a third person can exist between a third person having dangerous propensities and a defendant who takes charge of him (§ 319)....

Under the Restatement framework, we perceive no special relationship between the police and the victims...

But is there a special relationship between the police and Jack Dore as a person with dangerous propensities? Restatement § 319 imposes a duty on those in charge of a person having dangerous propensities in certain situations:

One who takes charge of a third person whom he knows or should know to be likely to cause 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.

The questions are whether the police “took charge” of Jack Dore and whether the police knew or should have known he was likely to cause bodily harm if not controlled.

After analyzing out-of-state authority, the Alaska Supreme Court found no duty because of the absence of a “take charge” relationship, at 794-795, as follows:

In the instant case ..., the police did not take charge of Jack Dore. The police did not take him into custody, and the Dore children failed to allege that the police took charge of him in any other manner. (Indeed the entire lawsuit is grounded on the police’s failure to take him into custody.) The Dore children did allege that the state negligently “releas[ed] Jack J. Dore from mental confinement, at Fairbanks Memorial Hospital,” but they subsequently dismissed all claims against the State. Because the police did not take charge of Jack Dore, the police had no tort duty to control him under Restatement § 319.

In *Wongittilin*, the court ruled, at 36 P.3d 683, as follows:

Similarly, [to *Dore*] in the instant case, no special relationship under § 319 exists because the police never took charge of Jackson. Restatement § 319 states that “[o]ne 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.” While the police did question Jackson at the city hall, Trooper Johnston did not execute the outstanding arrest warrant on Jackson for logistical reasons. Therefore, Johnston never took charge of Jackson, and no special relationship existed under Restatement § 319.

Dore and *Wongittilin* simply do not apply, because the plaintiffs in those cases neither alleged nor proved the existence of a special relationship under the Restatement § 315 and § 319. In the absence of that special relationship, the Alaska Supreme Court found no duty to apprehend.

Nonetheless, the State decrees, at pp. 21-22:

There simply is no basis to distinguish between the police and parole officers when it comes to their relationship with the offender because the reason the duty is not imposed does not turn on the relationship between fugitive and law enforcement.

Actually, the duty “turns” **specifically** on the relationship between the fugitive and law enforcement. CCOs have “take charge” relationships with the offenders they supervise, including “fugitives.” Police officers have no such relationship to persons subject to an arrest warrant, and therefore no duty to apprehend. DOC’s special relationship with Finley created a duty to supervise Finley even though he had absconded. Pursuant

to DOC's own policies, that duty included efforts to apprehend Finley after he absconded. CP 192-199.

E. DOC 350.750 CONSTITUTES EVIDENCE OF DOC'S STANDARD OF CARE WITH RESPECT TO OFFENDERS SUBJECT TO WARRANTS AND DETAINERS

The State asserts at p. 20 that DOC's internal policies do not create a duty to apprehend fugitive felons, and that agencies' policies do not give rise to a duty in tort. Appellants agree that such policies do not create a legal duty. However, appellants do not cite to DOC 350.750 in order to support the creation of a duty.

Our Supreme Court in *Joyce v. State, supra*, clarified that DOC's policy directives provide admissible evidence of the standard of care (*Joyce*, 155 Wn.2d at 324):

Internal directives, department policies, and the like may provide evidence of the standard of care and therefore be evidence of negligence.

Hence, DOC Policy 350.750 constitutes evidence of DOC's standard of care for its CCOs dealing with an "escaped or absconded" offender. CP 194. The policy shows that DOC demands that its employees take certain steps to apprehend offenders who abscond. The jury should determine whether DOC acted reasonably in its efforts to apprehend Calvin Finley.

E. THE EVIDENCE SUPPORTS INFERENCES THAT THE STATE COULD HAVE APPREHENDED FINLEY AFTER FEBRUARY 15, 2009 AND CAUSED HIM TO BE INCARCERATED ON JUNE 2, 2009

To establish cause in fact, a plaintiff must establish that the harm

suffered would not have occurred but for an act or omission of the defendant. “Cause in fact is usually a question for the jury; it may be determined as a matter of law only when reasonable minds cannot differ.” *Joyce*, 155 Wn.2d at 322. The law also requires that the court consider the facts and reasonable inferences therefrom in the light most favorable to the non-moving party when reviewing a grant of summary judgment. *Taggart*, 118 Wn.2d at 199; *Hertog*, 138 Wn.2d at 275.⁷

DOC employee Evan Brady’s duties require him to apprehend offenders on warrant status with DOC. The DOC assigned him to Calvin Finley’s case on February 18, 2009. When he received the warrant for Finley’s arrest, he understood that it was his job “try to go out and find him and arrest him.” CP 907, p. 11.

The undisputed evidence in the record reveals that Finley began living with Odies Walker and Toni Williams-Irby at their home in University Place, Washington after his release from jail. CP 570-571, 589, 720, 841, 879, 929-930, 936. Finley indicated to DOC on September 23, 2008 that his emergency contact was “Odtis Walker,” who was his cousin. It also listed a phone number for Walker. CP 398. While Finley lived with

⁷ The State argues at length that *Estate of Bordon v Dep’t of Corrections*, 122 Wn. App. 227, 95 P.3d 764 (2004) and *Hungerford v Dep’t of Corrections*, 135 Wn. App.240, 139 P.3d 1131 (2006) require that in every supervision case, the plaintiff must establish that “the offender would have been incarcerated on the date of the plaintiff’s injury” to prove cause in fact. Brief of Respondent, pp.41-46. This truncated view of causation conflicts with our Supreme Court’s decisions in *Taggart*, *Hertog* and *Joyce*, as explained in the Appellants’ Opening Brief at pp. 37-44, and below in subsection E .

Walker and Williams-Irby, Finley used Walker's cell phone. CP 589, 591.⁸

Brady had access to numerous government databases. However, he viewed the Department of Corrections' database as the most valuable (CP 907, p. 13):

The Department of Corrections' database is the one I use first and foremost because obviously that's going to have all their history in it. So when this guy's on probation, you know, you might list, you know, his past addresses or things like that or like his mom's addresses or -- you know, a lot of times if you have a competent CCO, they'll put in there, you know, so-and-so's girlfriend is this and then -- or while they're in prison, the probation -- or the counselor will put in, you know, so-and-so wants to release to these multiple addresses. So you might only get one address he stays at, but they put valuable information that you could use.

So, you know, this system, you know, you can go back all the way back to the very beginning of -- in the -- while he's been in the Department of Corrections. So it's -- you know, it's useful.

Brady had access to Finley's physical file of records. CP 907-908, p. 13-14. DOC's file revealed that Walker testified on behalf of Finley at a violation hearing held in the Kitsap County Jail on October 15, 2008. It listed Walker by name, and provided two phone numbers for him, one of which was (253) 905-7897. CP 177. Walker gave Finley the cell phone registered to that number to use. CP 589, 591. Brady claims that he tried to do a cell phone trace of Finley, but Finley did not own one at the time. CP 204.

⁸ Finley's arrest after the robbery and murder occurred because of tracking of a phone associated with him or an associate. CP 917, p.50.

This evidence supports the obvious inference that if DOC had looked into its own file, it would have seen information that linked Finley to Walker, a lead which could have steered DOC to find Finley living at Walker's house. CP 939, 944-945.

Beyond this, Diamond Oliver told Brady in February 2009 where he could find Finley, and offered to take him to the home of Odies Walker. In April 2009, she called Brady again after Finley called her, and again told Brady about Walker. CP 927-928.

Brady himself described staking out a Target store to which he and Diamond Oliver tried to lure Finley. Brady followed through with the attempt until Oliver called and told him it was off because Finley would not be there. CP 908-909, pp17-21.

On another occasion, Oliver told DOC that Finley might be staying at 1430 East 30th Street in Tacoma. Brady mobilized the South Sound Gang Task Force and staked out the residence for several hours, but did not find Finley. CP 909, pp. 18-20.

One can easily infer that, if DOC and Brady followed up the leads linking Finley to Walker, Brady would have employed at least as much energy and resources as he did on the two occasions mentioned above. The trier of fact could also conclude that, like before, Brady would not have abandoned his efforts until he had good reason to conclude that he would not find Finley. Since Finley lived at Walker's house, the jury could easily conclude that a stakeout of the premises would have succeeded. The

State acknowledges at p. 37 that officers such as Brady “use surveillance to locate an offender at a location he is known to frequent.” Given that Finley lived openly with Walker from February to June 2009, that Diamond Oliver had twice tipped Brady about Finley living with Walker by April 2009, and that Finley received sanctions including 120 days’ confinement after his arrest in June, one could easily determine that surveillance in April of the Walker home would have led to Finley’s arrest, sanctions and incarceration on June 2, 2009.

In several passages, the State declares that if DOC called the cell phone that Finley used as part of their efforts to locate him, such action would tip Finley off that the DOC was looking for him. This argument only makes sense if one concludes that Finley was not actively trying to conceal himself, an inference favorable to the appellants.⁹ However, DOC argues the opposite inference – that Finley was hiding and concealing himself. Respondent’s Brief, p. 39. If this were true, then calling Finley on the cell phone would not have made any difference, because he had already decided to conceal himself.

Nonetheless, the State persists in trying the facts, and disparaging as “speculative” any inference that does not favor it. For example, at p. 38 the State urges that if officers contacted Walker or Finley at Walker’s home that it is “speculative” to conclude that Finley “would give himself up.” It does not take a great deal of contemplation to infer that law enforcement officers, in preparing to execute an arrest warrant, would

⁹ This inference is supported by the testimony of Allen Garber. CP 943-944.

prepare themselves to compel the arrest if the subject resists. The State's tactic of labeling unfavorable inferences as "speculative" only highlights the numerous issues of fact that the trial court erroneously ignored.

The State also complains at p. 40 that appellants "assume" that Finley would have been arrested at such a time and given such a sanction that would not have allowed him freedom to commit the robbery. This argument misses the point for at least two reasons.

First, Allen Garber testified that if Finley had been arrested prior to June 2, 2009 and sanctioned by DOC, he would not have had the opportunity to help plan and carry out the crime. CP 946.

Second, William Stough testified that if Finley had been apprehended, he would have been subject to sanction for at least seven violations (including two no contact order violations) of the terms of his Community Custody Supervision. The law permitted a hearing officer to sentence up to 60 days' confinement per violation. CP 976. In October 2008, a hearing officer imposed 60 days each for two violations of a no-contact order. In June 2009, the hearing officer levied 120 days for four violations that occurred between February and June. CP 977.

In addition, on March 24, 2009, bench warrants were issued in two Tacoma Municipal Court cases for failure to appear for arraignment. Each of these constituted a violation of the terms of supervision, and would have justified an additional 120 days of confinement as a sanction. CP 978.

From this evidence Stough concluded that if Finley had been apprehended prior to June 2, 2009 and the seven violations brought before the hearing officer, the sanction would have landed him in jail on June 2, 2009. CP 977-979.

Similar evidence from William Stough took cause in fact to the jury in *Joyce*. As that court stated, at 322-323:

It is undisputed that Stewart committed numerous violations of his supervision that were not reported to the court or diligently pursued by community corrections officials. A court had previously sentenced Stewart to jail time for reported violations. Joyce's expert, William Stough, testified that **834 if the Department had obtained a bench warrant for Stewart prior to the accident, he "would have been in jail, either awaiting a hearing or doing time on the violations" without bail on August 8, 1997. 5 Report of Proceedings (RP) at 792. While we recognize that a reasonable jury could have decided against the plaintiffs on this issue, especially if properly instructed, the trial court did *323 not err in denying the Department's motion to dismiss as a matter of law.

In a like manner, the jury should resolve the numerous conflicting factual inferences regarding cause in fact.¹⁰ The trial court erred when it took the case from the jury. This court should reverse.

F. IN *HUNGERFORD*, THE COURT'S CAUSATION RULING RESULTED FROM THE PLAINTIFF'S THEORY OF LIABILITY AND THE EVIDENCE BEFORE IT

The State relies heavily on *Hungerford v. Department of Corrections*, 135 Wn. App. 240, 139 P.3d 1131 (2006) as support for its

¹⁰ Adhering to its practice of recycling arguments the appellate courts have already rejected, the State, at pp. 35-36, cites to *Walters v Hampton*, 14 Wn. App. 458, 543 P.2d 648 (1975) to support its arguments regarding cause in fact. The State urges the same arguments about this case that our Supreme Court rejected in *Taggart* over 20 years ago. *Taggart*, 118 Wn.2d 226. This court should do the same.

claim that causation requires proof of imprisonment. In *Hungerford*, DOC supervised Cecil Davis following his release from prison. 135 Wn. App. at 245. In March 1990, Davis was convicted of second degree assault with a deadly weapon and first degree criminal trespass for attacking a Tacoma couple. The trial court sentenced him to serve 26 months in prison, spend one year in community placement, and pay fines, costs, and restitution, also called legal financial obligations (LFOs). *Couch v. Dep't of Corr.*, 113 Wn. App. 556, 559, 54 P.3d 197 (2002).

Davis served his sentence and completed probation but did not pay his LFOs. Then, in December 1992, Davis pleaded guilty to third degree theft; the trial court sentenced him to one year in jail but suspended this punishment so long as Davis successfully completed two years of probation and paid his LFOs. *Hungerford*. 135 Wn. App. at 247.

In February 1995, DOC informed the trial court that Davis had fallen behind on paying his 1992 LFOs. *Hungerford*, 135 Wn. App. at 248, 139 P.3d 1131. When he failed to attend a scheduled hearing, the trial court issued a bench warrant and police arrested Davis in early June. *Hungerford*, 135 Wn. App. at 248. At the June 5, 1995 bench warrant hearing, instead of ordering jail time, the trial court found his “failure to pay was not willful,” reduced the level of supervision by DOC from active status to only LFO monitoring, and ordered a review hearing of his LFO payments on December 8, 1995. *Hungerford*, 135 Wn. App. at 248.

Davis did not appear for the December 8, 1995 review hearing, and the trial court issued a bench warrant. On February 13, 1996, the trial court issued a second bench warrant for failure to pay LFOs arising from a 1990 felony. Davis murdered Hungerford–Trapp on April 14, 1996, before either warrant was served. *Hungerford*, 135 Wn. App. at 248.

In the ensuing civil suit, Hungerford–Trapp's family claimed that DOC's failure to supervise Davis led to her murder. This court characterized the argument as whether “Davis would have been rehabilitated,” arguably because the plaintiffs relied solely on their expert's opinion that DOC's lack of supervision directly caused Davis to reoffend, which the court determined was not based on studies or demonstrable facts. *Hungerford*, 135 Wn. App. at 255. The court instead labeled the expert's assertion as vague, “without any source material to support it,” based on merely correlative evidence, and “speculative at best.” *Hungerford*, 135 Wn. App. at 255.

Thus, the *Hungerford* court's causation ruling simply addressed the evidence and arguments presented in the case. It does not stand for the proposition that a claimant must always prove that an offender would have been incarcerated to establish cause in fact in a supervision case.

In *Joyce*, our Supreme Court rejected an argument similar to the State's about the need to show that a court would have imposed incarceration for violating probation conditions. *See* 155 Wn.2d at 321, 119 P.3d 825. The *Joyce* court held that evidence of proximate causation

was sufficient where the estate of a motorist killed in an automobile crash sued DOC for negligent supervision of an offender who was driving the other vehicle. 155 Wn.2d at 309-10, 322-23. While on community supervision for an assault conviction, Stewart was arrested and charged with “first degree possession of stolen property, third degree driving with a suspended sentence, and failure to sign a notice of infraction.” *Joyce*, 155 Wn.2d at 312. He had been admitted to psychiatric institutions and was using illicit drugs. He routinely violated the conditions of his release, but his CCO waited months before reporting them to the court. And considerable evidence showed that DOC knew of his violent tendencies. *Joyce*, 155 Wn.2d at 311-313. Eventually, Stewart's second CCO filed two violation notices recommending 20 days in jail. But roughly a week later, Stewart, while under the influence of marijuana, stole an outsized sport utility vehicle and struck the decedent's small truck, killing her. *Joyce*, 155 Wn.2d at 313-314.

The *Joyce* court rejected the State's proximate cause argument that “even if it had properly monitored Stewart and reported violations to the court, it is unknown what action, if any, the court could have taken.” 155 Wn.2d at 321. The court explained:

It is true that *if* the Department had properly supervised the offender and reported his violations, and *if* a judge had nonetheless decided to leave Stewart at large in the community, the causal chain may have been broken as a matter of law. That is what we held in *Bishop [v. Miche*, 137 Wash.2d 518, 973 P.2d 465 (1999)]. Even though the judge in *Bishop* was aware that the supervised offender had violated conditions of probation, that he had a severe

alcohol problem, and that he had willfully '[driven] after his license had been suspended, the judge did not revoke probation.' 137 Wash.2d at 532, 973 P.2d 465. 'As a matter of law, the judge's decision not to revoke probation under these circumstances broke any causal connection between any negligence and the accident.' *Bishop*, 137 Wash.2d at 532, 973 P.2d 465. If the Department had properly monitored Stewart and reported his violations to either of the two sentencing judges, and if the Department had unsuccessfully asked for judicial action, the causal chain would have been broken.^[9]

Joyce. 155 Wn.2d at 321 (some alterations in original). The causal chain was not broken in *Joyce* and the State could not avoid the plaintiff's proximate cause showing or liability with that argument. 155 Wn.2d at 321-22.

It is clear that proof that an offender would have been incarcerated on the day of the incident presents one way to establish cause in fact in a negligent supervision case. *Joyce* establishes that it is a very different, and incorrect, proposition to assert that such proof constitutes the **only** way to prove causation in such a case. This court, like our Supreme Court in *Joyce*, should treat such claims from the State with a healthy measure of skepticism.

G. THE STATE'S FAILURE TO SUPERVISE FINLEY BEARS A SUFFICIENTLY CLOSE CONNECTION TO THE HARM THE APPELLANTS SUFFERED TO JUSTIFY IMPOSING LIABILITY. THE COURT SHOULD RULE THAT LEGAL CAUSATION EXISTS

Legal causation rests on considerations of policy and common sense as to how far the State's responsibility for the consequences of its actions should extend. *Taggart*, at 226. Legal causation involves a determination of whether liability should attach given cause in fact and is

a question of law for the court based on policy considerations as to how far the consequences of the defendant's act should go. *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 51, 176 P.3d 497 (2008).

While ignoring the line of Washington State Supreme Court opinions finding legal causation in government supervision cases, DOC instead cites *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985). *Hartley* involved the failure of the State to revoke a driver's license of a person subject to the Habitual Traffic Offender's Act. The driver, while intoxicated, struck and killed Janet Hartley. Our Supreme Court declined to recognize the State's conduct as a legal cause of Janet Hartley's death. The court explained (103 Wn.2d at 784-785, emphasis added):

Johnson clearly was subject to license revocation under the HTOA. Nothing, however, sets Johnson apart from the thousands of other offenders subject to license revocation under the act. **No special relationship or privity existed between the government agents and either Johnson or the victim of his negligence which would impose liability.** Johnson was not under the control of the government agents who should have known of his dangerous proclivities, as was the case in *Peterson v. State, supra*.

The *Hartley* court recognized that a special relationship bears relevance to legal causation. The court in *Hertog* explained it further, (138 Wn.2d at 284):

Here the City maintains that cases in which legal causation was found lacking are irreconcilable with the duty accounted in *Taggart*. However, in none of the cases was the third party released to supervision of a probation or parole officer, and in none was a special relationship found by the court. *Johnson v. State*, 68 Wn. App. 294, 841 P.2d 1254 (1992); *Baumgart v. Grant County*, 50 Wn. App. 671,

750 P.2d 271 (1988); *Hartley*, 103 Wn.2d 768, 698 P.2d 77. Keeping in mind that establishment of a duty does not resolve the proximate cause issue, there is nevertheless a distinction between circumstances where a special relationship is found and where none is found. Policy considerations involved in imposing the duty, such as the parole officer's taking charge of the parolee with the ability and responsibility to supervise the parolee, and the knowledge of the one taking charge of dangerous propensities posing a harm to others, also suggest that where such a relationship is not found, proximate causation may not be so readily found either. Where a special relation exists based upon taking charge of a third party, the ability and duty to control the third party indicate the defendant's action in failing to meet that duty are not too remote to impose liability. *See generally McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 360, 961 P.2d 952 (1998).

In this case, DOC's duty resulted from its special relationship with Finley. DOC's inaction with respect to Finley permitted him to plan and participate in the robbery that killed Kurt Husted and wounded Wilbert Pina. The failure to control Finley involves a close enough relationship the harm that occurred to justify imposing liability upon the State. The court should reverse and remand for trial.

II. CONCLUSION

The trial court erred in dismissing this case. This court should reverse and remand for a full trial on all issues.

DATED this 31st day of January, 2014.

MESSINA BULZOMI CHRISTENSEN

By 
STEPHEN L. BULZOMI 15187
JEREMY A. JOHNSTON 34149
Attorneys for Appellants

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NO. 41451-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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Plaintiffs/Appellants,

vs.

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Defendant/Respondent.

AFFIDAVIT OF FILING OF APPELLANTS' REPLY BRIEF

STEPHEN L. BULZOMI, WSBA #15187
JEREMY A. JOHNSTON, WSBA #34149
Attorneys for Appellants
MESSINA BULZOMI CHRISTENSEN
5316 Orchard Street West
Tacoma, WA 98467-3633
Tel: (253) 472-6000

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AFFIDAVIT OF SERVICE OF APPELLANTS' REPLY BRIEF

STEPHEN L. BULZOMI, WSBA #15187
JEREMY A. JOHNSTON, WSBA #34149
Attorneys for Appellants
MESSINA BULZOMI CHRISTENSEN
5316 Orchard Street West
Tacoma, WA 98467-3633
Tel: (253) 472-6000

STATE OF WASHINGTON)

: ss.

County of Pierce)

Vickie LoFranco, being first duly sworn, on oath deposes and says:

JAN. 31

That on ~~February 3~~, 2014, I delivered, via Legal Messengers, a

copy of Appellants' Reply Brief for service upon:

Garth Ahearn, Esq.
Torts Division
1250 Pacific Ave Ste 105
Tacoma, WA 98401

Vickie Lo Franco

VICKIE LOFRANCO

SIGNED AND SWORN to before me on the 3rd day of February,
2014, by Vickie LoFranco.

Heather Stamper

Notary Public in and for the State of
Washington, residing at Tacoma.
My appointment expires 10-16-14

