

NO. 45648-6-II

THE COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY,

BEVERLY A. GORDON  
Appellant  
vs.

KITSAP COUNTY, KITSAP COUNTY CHIEF OF CORRECTIONS  
NED NEWLIN, JOHN AND JANE DOES 1-20, BRAXTON NEAL, and  
JANE DOE NEAL, and the marital community comprised thereof,  
Respondent,

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APPELLANT'S OPENING BRIEF

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## I. ASSIGNMENTS OF ERROR

### Assignments of Error

1. The trial court erred by granting Summary Judgment of Dismissal to defendant Kitsap County by order entered on November 1, 2013, and by denial of Plaintiffs Motion for Reconsideration by order entered November 22, 2013.
2. The trial court erred by denying Plaintiffs Motion for Partial Summary Judgment by order entered October 11, 2013.

### Issues Pertaining to Assignments of Error

- No. 1 If Kitsap County accepts custody of a prisoner whom Kitsap County knows or should know is likely to cause bodily harm to others if not controlled, is Kitsap County under a **duty to exercise reasonable care to control the prisoner** in order to prevent him from doing such harm? (Assignments of Error 1 and 2).
- No. 2 If Kitsap County accepts custody of a prisoner whom Kitsap County knows or should know is likely to cause bodily harm to others, is Kitsap County under a **duty to protect** those who are foreseeably at risk? (Assignments of Error 1 and 2).
- No. 3 Plaintiff was working as a nurse for subcontractor "Conmed" at the Kitsap County jail. She was assaulted by a paranoid schizophrenic inmate known to be violent. Does Kitsap County have a duty to provide a safe workplace and protect employees of a subcontractor from inmates with known violent tendencies under circumstances where Kitsap County has control of safety and security in the jail? (Assignments of Error 1 and 2).
- No. 4 Can Kitsap County assert contributory negligence as an affirmative defense to an allegation that Kitsap County breached a duty to protect based on a special relationship with plaintiff? (Assignment of Error 2).
- No. 5 Can Kitsap County assert assumption of risk as an affirmative defense to an allegation that Kitsap County breached a non-delegable duty to provide a safe workplace? (Assignment of Error 2).

No. 6 Can Kitsap County assert an affirmative defense of superseding cause based on foreseeable violence by an inmate when it was the duty of Kitsap County to prevent that very act? (Assignment of Error 2).

## I. STATEMENT OF THE CASE

### A. *Statement of Facts*

On January 25, 2010, an inmate named Braxton Neal was booked into the Kitsap County jail in Port Orchard, Washington. Mr. Neal was in custody for assaulting a designated mental health provider (DMHP), a nurse working in the emergency room and a security officer at Harrison Memorial Hospital located in Bremerton Washington.<sup>1</sup>

Corrections officers at the Kitsap County jail and appropriate supervisors were notified of concerns of mental health providers that Mr. Neal was evasive, disorganized, latent and flat affect, and paranoid decompensated with an edge to his presentation.<sup>2</sup> Kitsap County jail officials were notified that Mr. Neal is a very strong young man and a safety risk when decompensated.<sup>3</sup>

Kitsap County jail officials were also notified that Mr. Neal's

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<sup>1</sup> CP 0037

<sup>2</sup> Id.

<sup>3</sup> Id.

mother felt that although Mr. Neal wanted to come home, it was not safe for him or the household.<sup>4</sup>

Mr. Neal had previously been incarcerated in the Kitsap County jail and had a history of assaultive behavior.<sup>5</sup> His history was known to corrections officers who were working in the jail at the time Mr. Neal was taken into custody in January of 2010.<sup>6</sup>

On January 25, 2010, Sgt. Sauni Holt of the Kitsap County corrections division designated Braxton Neal as a "two officer detail" due to his history of assaultive behavior and not taking his medications consistently.<sup>7</sup> A "two officer detail", at the time of the events leading to this lawsuit, was defined by the Kitsap County sheriff's office as:

- Two officers must be present when the inmate is out of cell conducting business,
- Placement of belly chain restraints,
  - leg irons if the supervisors annotate it is necessary.<sup>8</sup>

Warnings concerning Mr. Neal's assaultive history and the fact that the inmate may pose a risk to officers or other inmates because of his

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<sup>4</sup> CP 0034

<sup>5</sup> CP 0035

<sup>6</sup> CP 0038

<sup>7</sup> CP 0035

<sup>8</sup> CP 0054, 0055

assaultive history were placed in the mental medical classification behavior plan book available outside the pod where Mr. Neal was housed.<sup>9</sup>

At the time of the events giving rise to this lawsuit, plaintiff Beverly Gordon was employed as an LPN for “Conmed”.<sup>10</sup> Conmed was an independent contractor hired by Kitsap County to provide medical services for inmates at the Kitsap County jail. Conmed was in charge of medical services.<sup>11</sup> The Kitsap County sheriff’s office, corrections division, was in charge of security.<sup>12</sup> Nurses who worked for Conmed relied on Kitsap County jailers to provide safety and security from potentially dangerous inmates while the nurses performed their duties.<sup>13</sup>

On February 5, 2010, plaintiff Beverly Gordon was escorted by Officer Davenport to South Pod to draw blood from Braxton Neal.<sup>14</sup> Plaintiff Gordon was assaulted by Mr. Neal during the blood draw procedure.<sup>15</sup>

Despite the restriction identifying Braxton Neal as a two-man

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<sup>9</sup> CP 0059, 0060, 0061; CP 0102, 0103

<sup>10</sup> CP 0106, 0107

<sup>11</sup> CP 0082

<sup>12</sup> Id.

<sup>13</sup> CP 366

<sup>14</sup> CP 0079, 0080

<sup>15</sup> Id.

detail, Officer Davenport was not required to place Braxton Neal in belly chains and or leg irons prior to allowing Beverly Gordon to attempt to draw blood from the inmate.<sup>16</sup> It was the practice of Kitsap County to post restrictions on a “writer board” outside the South Pod unit where Mr Neal was housed, and on the inmate’s cell window.<sup>17</sup> On February 5<sup>th</sup> 2010, however, restrictions which would have required belly chains or leg irons on Mr. Neal before he interacted with non-correctional personnel were not posted on the writer board outside the South Pod unit.<sup>18</sup> Restrictions were not posted on his cell door.<sup>19</sup> Restrictions were not written in the Behavior Plan Book.<sup>20</sup>

Mr. Neal was not in belly chains or leg irons on February 5, 2010 when Beverly Gordon attempted to draw blood from the inmate. There were no restraints on him whatsoever.<sup>21</sup> Furthermore, there was only one officer present inside the South pod standing by Mr. Neal as Beverly Gordon attempted to draw blood.<sup>22</sup> Two other officers were standing by

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<sup>16</sup> CP 0042

<sup>17</sup> CP 0048, 0049, 0050

<sup>18</sup> CP 0041

<sup>19</sup> CP 0041

<sup>20</sup> CP 0042

<sup>21</sup> CP 0084

<sup>22</sup> CP 0097

the door to the pod, talking to each other.<sup>23</sup>

**B. Procedural History**

Beverly Gordon filed a Complaint for Personal Injuries in Pierce County Superior Court on January 23, 2012.<sup>24</sup> Defendant Kitsap County filed an Answer February 22, 2012.<sup>25</sup> Plaintiff brought a Motion for Partial Summary Judgment which was heard by the Court, October 11th 2013. Plaintiff's motion was denied by an order entered the same date.<sup>26</sup> Plaintiff's subsequent motion for reconsideration was denied.

Defendant brought a Motion for Summary Judgment November 1, 2013. Defendant's motion was granted, and plaintiff's case was dismissed by an order entered on the same date,<sup>27</sup> but was subsequently amended to correct a clerical error on November 12, 2013.<sup>28</sup>

Plaintiff then brought a motion for reconsideration of the order dismissing plaintiff's case on November 22, 2013. Plaintiff's motion for reconsideration was denied by the court by an order entered the same

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<sup>23</sup> CP 0110, 0111

<sup>24</sup> CP 1-3

<sup>25</sup> CP 4-8

<sup>26</sup> CP 343-345

<sup>27</sup> CP 453

<sup>28</sup> CP 438-440

date.<sup>29</sup>

## II. SUMMARY OF ARGUMENT

This lawsuit arises out of an assault on a Kitsap County jail nurse by an inmate with a known history of assaultive behavior. The inmate was Braxton Neal. Mr. Neal was arrested January 25, 2010 for assaulting a mental health care provider, a nurse at Harrison hospital, and a security guard at the hospital. Mr. Neal was kept in a high-security unit of the jail. On February 4, 2010, pursuant to her duties as a nurse, plaintiff was required to draw blood from Mr. Neal. Before the blood could be drawn, Mr. Neal assaulted Ms. Gordon.

Mr. Neal was not restrained in any way in the moments prior to the assault, and there was only one jail guard standing by. There was nothing preventing Mr. Neal from striking out at the nurse, and that's exactly what happened.

Kitsap County denies responsibility for the injuries to Ms. Gordon. A review of the law, however, leads to the conclusion that Kitsap County had a duty to restrain Mr. Neal because it was foreseeable that he might harm another person. In addition to Kitsap County's duty to restrain Mr.

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<sup>29</sup> CP 453

Neal, the county had a separate duty to protect Beverly Gordon. Both of these duties arise from what the law describes as “special relationships” that Kitsap County had in regards to Mr. Neal because he was a prisoner under the counties control, and separately, in regards to Beverly Gordon because she was an employee working in the jail.

In addition to the duties imposed by the common law, there is a statutory duty placed on Kitsap County by the Washington Industrial Health and Safety Act, commonly known as “WISHA”. The legislature has expressed a strong policy favoring safety in the workplace. The statutory policy is reflected in the regulatory system under the Washington Administrative Code sections adopted to implement the wishes of the legislature.

Case law interpreting WISHA makes it clear that the duty to provide a safe workplace falls on the entity in the best position to provide that safety. In the Kitsap County jail, not only are the jailers in the best position to provide that safety, they are in fact the only entity authorized to control inmates and protect other persons from violent behavior by those inmates. Beverly Gordon had the right to expect protection from assault by inmates as she went about her job. It was obvious that an inmate such as

Braxton Neal might assault people in the jail. The Kitsap County jailers knew Mr. Neal was violent when he was mentally decompensated due to his diagnosed mental illness. He had previously been incarcerated in the Kitsap County jail, and there was discussion among the jail guards about his past violent behavior. Kitsap County had him locked down in a high-security unit, and a local mental health professional had written out a warning to the jailers about Mr. Neal's dangerous condition.

In spite of all these danger signals, Kitsap County claims they had no clue that Mr. Neal might be violent and assault a nurse who was trying to stick a needle in his arm. In spite of the fact that Mr. Neal was designated a "two-man detail" when out of his cell, Kitsap County did not deem it necessary to require two jailers be present when Beverly Gordon tried to take blood.

The law requires that when the County takes charge of a third person whom the County knows or should know to be likely to cause bodily harm to others if not controlled, the county has a duty to exercise reasonable care to control the third person and prevent him from doing harm.

Whether or not the County had reason to know Mr. Neal was likely to cause bodily harm if not controlled, and whether Kitsap County fulfilled its duty to exercise reasonable care to control him and prevent him from doing the harm, are jury questions.

Plaintiff brought the first motion for summary judgment. Plaintiff asked the court to find as a matter of law:

1. that Kitsap County had a duty to prevent Braxton Neal from harming others;
2. that Kitsap County negligently allowed Braxton Neal to assault plaintiff;
3. that plaintiff was not contributorily negligent; and
4. that plaintiff did not voluntarily “assume the risk” by performing her job.

The court denied all of plaintiff's motions.

The defendant then brought a motion for summary judgment, which was granted by the court. Plaintiff's case was dismissed.

### **III. ARGUMENT**

#### **A. *The Standard of Review for Summary Judgment is De Novo***

The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary

judgment motion.<sup>30</sup> An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment.<sup>31</sup> This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party,<sup>32</sup> and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.<sup>33</sup>

Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>34</sup> The moving party bears the burden of demonstrating there is no genuine dispute as to any material fact.<sup>35</sup> "A material fact is one upon which the outcome of the litigation depends, in whole or in part."<sup>36</sup>

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<sup>30</sup> *Lamon v. McDonnell Douglas Corp.*, 91 Wash.2d 345, 349, 588 P.2d 1346 (1979).

<sup>31</sup> *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994).

<sup>32</sup> *Lamon*, 91 Wash.2d at 349, 588 P.2d 1346 (citing *Morris*, 83 Wash.2d at 494-95, 519 P.2d 7).

<sup>33</sup> *Mountain Park Homeowners Ass'n*, 125 Wash.2d at 341.

<sup>34</sup> CR 56(c).

<sup>35</sup> *Green v. Am. Pharm. Co.*, 136 Wash.2d 87, 100, 960 P.2d 912 (1998).

<sup>36</sup> *Barrie v. Hosts of Am., Inc.*, 94 Wash.2d 640, 642, 618 P.2d 96 (1980).

When reasonable minds could reach but one conclusion on the evidence the court should grant summary judgment.<sup>37</sup>

In conducting this inquiry, the court must view all facts and reasonable inferences in the light most favorable to the nonmoving party.<sup>38</sup>

Where different competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact.<sup>39</sup>

**B. Defendant Kitsap County Had a Common Law Duty to Prevent Harm to Plaintiff Based on “Special Relationships”**

The law imposes a duty on Kitsap County to prevent harm to the plaintiff if there is a special relationship which imposes such a duty.

The Restatement (Second) of Torts § 315 (1965)<sup>40</sup> states:

**§ 315. General Principle**

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

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<sup>37</sup> *Smith v. Safeco Ins. Co.*, 150 Wash.2d 478, 485, 78 P.3d 1274 (2003).

<sup>38</sup> *City of Lakewood v. Pierce County*, 144 Wash.2d 118, 125, 30 P.3d 446 (2001).

<sup>39</sup> *Kuyper v. State Dept. of Wildlife*, 79 Wash.App. 732, 739, 904 P.2d 793 (1995).

<sup>40</sup> Section 315 of the Restatement has been recognized as valid law in the state of Washington. *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (Wash. 1992); *Petersen v. State*, 100 Wash.2d 421, 671 P.2d 230 (1983).

(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.

Where a special relationship exists, §315 creates the duty described in that section. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (Wash. 1999).

There are two different special relationships described by §315, and each one gives rise to a different duty:

1. The duty imposed by § 315(a) arises because Kitsap County has a special relationship with Braxton Neal which imposes a duty to control Braxton Neal's conduct.
2. The duty imposed by § 315(b) arises because Kitsap County has a special relationship with Beverly Gordon which gives Beverly Gordon a right to protection.

*Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997), citing Restatement (Second) of Torts § 315(a) & (b).

Examples of special relationships that give rise to the duty created by subparagraph (a) are described by the Restatement (Second) of Torts § 316 through § 320 (1965). *Taggart v. State*, 118 Wn.2d 195 at 219, 822 P.2d 243 (Wash. 1992).

Examples of special relationships that give rise to the duty created by subparagraph (b) are described by Restatement (Second) of Torts §314 A and §320 (1965),<sup>41</sup> and §314 B.<sup>42</sup>

**1. Kitsap County's "Special Relationship" with Braxton Neal Imposed a Duty to Prevent Mr. Neal from Harming Others**

Kitsap County's special relationship with Braxton Neal is that of a governmental authority which has taken custody of Mr. Neal. The reason Kitsap County took charge of Mr. Neal and placed him into custody was because he assaulted a Designated Mental Health Provider (DMHP), a nurse working in the emergency room and a security officer at Harrison Memorial Hospital.

Mr. Neal committed these crimes because he has a history of mental illness (paranoid schizophrenia) and has known violent tendencies when decompensated.

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<sup>41</sup> comment *c* to §315 states: comment on clauses (a) and (b): the relations between the actor and the third person which require the actor to control the third person's conduct are stated in §§316 – 319. The relations between the actor and the other which require the actor to control the conduct of third persons for the protection of the other are stated in §§314 and 320.

<sup>42</sup> comment *a* to §314 B states: this section duplicates §512 of the Restatement of Agency, Second. For comments, see that restatement. This section is inserted in this Restatement in order to supplement and complete what is said in § 314 A.

The Restatement (Second) of Torts § 319 (1965)<sup>43</sup> describes the relevant special relationship between Kitsap County and Braxton Neal as follows:

**§ 319. Duty of Those in Charge of Persons Having Dangerous Propensities**

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.

The scope of the duty is not limited only to readily identifiable victims, but includes anyone foreseeably endangered by the person in question. *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992).

In the court below, defendant Kitsap County argued strenuously that Kitsap County could not foresee that Braxton Neal might commit an assault on another person while Mr. Neal was incarcerated. This bold assertion flies in the face of facts to the contrary:

1. Mr. Neal was paranoid schizophrenic with a history of assaultive behavior when decompensated;
2. Mr. Neal was decompensated when he was placed in the Kitsap County jail 10 days prior to this assault;

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<sup>43</sup> The Restatement (Second) of Torts § 319 (1965) has been recognized in Washington state as a valid statement of the law. *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (Wash. 1992); *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (Wash. 1999).

3. the reason Mr. Neal was in jail was because he assaulted a mental health care professional, a nurse, and a guard at Harrison Memorial hospital;
4. Kitsap County jailers were aware of violent behavior when Mr. Neal was in custody on prior occasions;
5. Kitsap County corrections placed Mr. Neal in a high-security unit prior to the assault on Beverly Gordon;
6. Kitsap County corrections designated Mr. Neal a "two-man detail" when out of his cell because of his history of violent behavior and the fact that he was mentally decompensated;

With this history and facts known to Kitsap County, it is readily apparent that Mr. Neal might again commit an assault, this time on Beverly Gordon, if not restrained and if Beverly Gordon were not protected.

Foreseeability is a question for the jury unless the circumstances of the injury are "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (Wash. 1997); *N.K. v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn.App. 517, 307 P.3d 730 (2013).

Kitsap County cannot credibly argue that the assault by Braxton Neal on Beverly Gordon was so highly extraordinary or improbable that it

was beyond the range of expectability, given the facts known to Kitsap County.

**2. Kitsap County's "Special Relationship" with Plaintiff Beverly Gordon Imposed a Duty to Protect Her from Harm**

The special relationship with plaintiff Beverly Gordon which gives rise to Kitsap County's common law duty to protect is that of an employer with exclusive control over safety and security of the jail, known to Kitsap County to be a dangerous place to work. Employees of Kitsap County and employees of subcontractors who work in the jail depend for their safety and security on Kitsap County exercising control over prisoners who might foreseeably cause harm to those who work in the jail. Washington courts have recognized the common law duty of an employer to protect employees from foreseeable criminal acts. *Bartlett v. Hantover*, 9 Wn.App. 614, 513 P.2d 844 (1973), *rev'd on other grounds*, 84 Wn.2d. 426, 526 P.2d. 1217 (1974) *cited with approval*, *Caulfield v. Kitsap County*, 108 Wn.App 242 at 254, 29 P.2d. 738 (2001).

The duty to protect employees is described by the Restatement (Second) of Torts § 314 B (1965):<sup>44</sup>

**§314 B. Duty to Protect Endangered or Hurt Employee**

If a servant, while acting within the scope of his employment, comes into a position of imminent danger of serious harm and this is known to the master or to a person who has duties of management, the master is subject to liability for any failure by himself or by such person to exercise reasonable care to avert the threatened harm.

The question of whether the employees of a subcontractor such as Beverly Gordon's employer, Conmed, are entitled to the same protection as the employees of Kitsap County, has been answered by the Washington Supreme Court. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (Wash. 2013). The court's opinion in *Afoa* stressed a strong policy of enforcing the duty to provide a safe place to work on the entity in the best

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<sup>44</sup> See, *Folsom v. Burger King*, 958 P.2d 301, 135 Wn.2d 658 (Wash. 1998), footnote 1: "Restatement (Second) of Torts §§ 314A and 314B (1965) identify five relationships that give rise to an affirmative duty to act: (1) common carrier to passengers; (2) innkeeper to guests; (3) possessor of land open to public to visitors; (4) individuals voluntarily controlling another such that opportunities for protection are removed; and (5) employers to employees acting within the scope of employment."

position to provide that safety.<sup>45</sup> That duty extends to employees of subcontractors.

In this case, Kitsap County is the only entity in a position to provide safety to persons who work within the confines of the jail. The corrections division has exclusive control over safety and security in the jail.

In deciding whether or not a special relationship exists such that a duty to protect should arise, Washington courts have looked to several factors which are present in this case. In one such case, the Supreme Court considered whether "the actor has brought into contact or association with the [victim] a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct..." *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d. 699, 985 P.2d 262 (1998):

This approach is consistent with our cases recognizing a duty to prevent intentionally inflicted harm where the defendant is in a special relationship with either the tortfeasor or the victim, and where the defendant is or should be aware of the risk. See,

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<sup>45</sup> The question in *Afoa* was whether the Port of Seattle, which owns and operates SeaTac International Airport, owes the same non-delegable duty to provide a safe workplace which Washington law places on all entities which control the common areas of a multiemployer workplace.

3. Beverly Gordon was dependent upon Kitsap County for her safety and security as she attended her duties as a nurse;
4. Kitsap County jailers had the training and the means to control foreseeably dangerous prisoners;
5. the association between Beverly Gordon and Braxton Neal was occasioned by her job;
6. there were no other supervisors or entities Beverly Gordon could rely on for her protection;

The duty to protect Beverly Gordon from harm is reaffirmed in Restatement (Second) of Torts § 302 B (1965):

**§ 302 B. Risk of Intentional or Criminal Conduct**

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

The Washington Supreme Court recognized that §302 B, comment *e*, creates a duty to protect in *Robb v. City of Seattle*, 176 Wn.2d. 427, 295 P.3d 212 (2013). In the presence of a special relationship, mere nonfeasance is sufficient to impose liability. *Robb v. City of Seattle*, 176 Wn.2d. at 436. Examples listed under comment *e* include the following:

B. Where the actor stands in such a relation to the other that he is under a duty to protect them against such misconduct. Among such relations are those of carrier and passenger,

innkeeper and guest, employer and employee, possessor of land and invitee, and bailee and bailor.

...

D. Where the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.

...

F. Where the actor has taken charge or assumed control of a person whom he knows to be peculiarly likely to inflict intentional harm upon others.

In this case, Kitsap County stands in a relation to Beverly Gordon such that it has a duty to protect Beverly Gordon: it is self-evident that the purpose of having trained and armed guards in a correctional facility is to protect others from harm by potentially dangerous inmates.

Additionally, as part of her job duties, Beverly Gordon was required to stand in close proximity to Braxton Neal while she jabbed a needle in his arm, relying on the Kitsap County jail to protect her as she did so. Kitsap County certainly knew that Braxton Neal was peculiarly likely to inflict harm, based on his history of assaultive behavior while mentally decompensated and the fact that he was in custody for assaulting healthcare workers. For these reasons the Restatement (Second) of Torts § 302 B (1965) states a duty. Kitsap County breached that duty.

**3. Beverly Gordon Fell within the Scope of Protection Required by Kitsap County's Duty.**

The existence of a legal duty is a question of law considered on appeal *de novo*. *Hertog v. City of Seattle*, 138 Wash.2d 265, 275, 979 P.2d 400 (1999). Legal causation is intertwined with the question of duty. *Taggart v. State*, 118 Wash.2d 195, 822 P.2d 243 (1992); *Hartley v. State*, 103 Wash.2d 768, 777, 698 P.2d 77 (1985).

Legal causation rests on policy considerations as to how far the consequences of defendant's acts should extend. Determination of legal liability will be dependent on "mixed considerations of logic, common sense, justice, policy, and precedent." *King v. Seattle*, 84 Wash.2d 239, 250, 525 P.2d 228 (1974), (quoting 1 T. Street, *Foundations of Legal Liability* 100, 110 (1906)). *See also* W. Prosser, *Torts* 244-45 (4th ed. 1971)).

There are different policy considerations for the two special relationships described in the Restatement (Second) of Torts § 315(a) and (b) (1965). Accordingly, plaintiff's proof requirements differ depending upon which a special relationship is applied to the facts. *N.K. v. Corp of Presiding Bishop*, 175 Wn.App. 517, 307 P.3d 730 (2013).

The defendants contend none of them owed NK a duty of protection because they did not possess prior specific knowledge that Hall posed a threat to boys. The requirement for prior specific knowledge of the tortfeasor's dangerous propensities applies to the first type of special relationship identified in *Niece* but not to the second.

For example, in the relationship between parole officer and parolee, where the parole officer has information showing that the parolee is likely to cause bodily harm to others if not controlled, the parole officer is under a duty to control the parolee to prevent him or her from doing harm. *Taggart v. State*, 118Wn.2d195, 219-20, 822 P.2d 243 (1992). But the existence of a duty predicated on a protective relationship requires knowledge only of the "general field of danger" within which the harm occurred. *McLeod v. Grant County Sch. Dist. No. 128*. 42 Wn.2d 316, 321, 255 P.2d 360 (1953).

*N.K. v. Corp of Presiding Bishop*, 175 Wn.App. 517 at 525, 526 (2013).

Applied to this case, the scope of Kitsap County's duty to control the violent behavior of Braxton Neal under the Restatement (Second) of Torts § 315(a) (1965), is to prevent Braxton Neal from doing harm. Under this section plaintiff must show Kitsap County had information from which it knew or should have known that Mr. Neal was likely to cause bodily harm to others if not controlled.

In contrast, the scope of Kitsap County's duty under the Restatement (Second) of Torts § 315(b) (1965), is to protect Beverly Gordon. Under this section plaintiff was required only to prove

defendant's knowledge of the "general field of danger" within which the harm occurred. *N.K. v. Corp of Presiding Bishop, supra*.

Regardless of which standard of proof is applied, the facts in this case are so compelling that there can be no question that Beverly Gordon fell within the scope of protection required by Kitsap County's duty.

#### **4. *Kitsap County Breached Its Duty to Control the Violent Behavior of Braxton Neal***

In the court below, Kitsap County argued strongly that it had no idea Braxton Neal might have dangerous propensities, in spite of the fact that he had a violent history, that he was in jail for assaulting healthcare workers, that he was deemed a sufficient risk to be designated a "two-man detail", and that Kitsap County had placed him in the highest security setting of the jail.

Plaintiff is entitled to all reasonable inferences, if *any* rational jury could conclude that Braxton Neil was foreseeably dangerous. The law was stated by Division I of the Court of Appeals as follows:

A criminal act may be considered foreseeable if the actual harm fell within a general field of danger which should have been anticipated. The court may determine a criminal act is unforeseeable as a matter of law only if the occurrence is so highly extraordinary or improbable as to be wholly beyond the

range of expectability. Otherwise, the foreseeability of the criminal act is a question for the trier of fact.

*Johnson v. State*, 77 Wn.App. 934, 894 P.2d 1366 (1995).

**5. Kitsap County Breached Its Duty to Protect Beverly Gordon**

The common law duty to protect Beverly Gordon is broader than the common law duty to prevent Braxton Neal from harming others. In the context of a lawsuit against the church and Boy Scouts of America for failing to protect a child from sexual abuse, the Court of Appeals defined the duty to protect imposed by Restatement (Second) of Torts § 315(b) (1965):

The church had a protective relationship with NK. From this relationship, a duty arose to take reasonable precautions to protect children in the church's care from foreseeable hazards, a category that may include the risk of child sex abuse by scout leaders. This duty does not depend on the church having prior knowledge that its volunteer scout leader was a molester.

*N.K. v. Corp of Presiding Bishop*, 175 Wn.App. 517 at 522 (2013).

As applied to persons working at the Kitsap County jail, the question becomes whether it is foreseeable that an inmate of the Kitsap County jail might assault a nurse if she is not protected. Even though plaintiff is not required to show specific knowledge of dangerous

propensities under this subsection of the restatement, the record is replete with references to the dangerous nature of Braxton Neal's mental illness and his history of assaultive behavior.

The question specifically, however, is whether assault by an inmate while working in the Kitsap County jail is within the general field of danger. *Johnson v. State*, 77 Wn.App. 934, 894 P.2d 1366 (1995). That question has been answered by the defendant. The defendant has acknowledged the inherently dangerous nature of working in the Kitsap County jail.<sup>46</sup>

**C. *Kitsap County Has a Statutory Duty to Provide a Safe Workplace For Beverly Gordon***

Kitsap County has a statutory duty, completely independent of the common law duty to control Braxton Neal and protect Beverly Gordon. That duty is a duty to provide a safe workplace for all who work at the Kitsap County Jail. RCW 49.17 (WISHA)<sup>47</sup>.

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<sup>46</sup> CP 137, lines 6 through 12. (Defendants' Response in Opposition to Plaintiff's Motion for Partial Summary Judgment)

<sup>47</sup> Washington Industrial Safety and Health Act of 1973

It is the public policy in Washington state “to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590.)”. RCW 49.17.010. The statutory mandate is intended to implement the guarantees of the Washington State Constitution Article II, Section 35:

Article II, Section 35

**Protection of Employees.** The legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same.

WAC 296-800-11005 provides that an employer shall do the following:

**Provide a workplace free from recognized hazards.**

You must:

- Provide your employees a workplace free from recognized hazards that are causing, or are likely to cause, serious injury or death.

Note: A hazard is recognized if it is commonly known in the employer's industry, or if there is evidence that the employer knew or should have known of the existence of the hazard, or if it can be established that any reasonable person would have recognized the hazard.

**1. *Kitsap County's Duty to Provide a Safe Workplace Is a Non-delegable Duty***

The Washington Supreme Court has held that an employer's duty to provide a safe workplace is a non-delegable duty. *Kelley V. Great Northern Railway Company*, 59 Wn.2d 894, 371 P.2d 528 (1962).

In *Jones v. Bayley Constr. Co.*, 36 Wash.App. 357, 674 P.2d 679 (1984) *overruled on other grounds*, *Brown v. Prime Constr. Co.*, 102 Wash.2d 235, 240 n. 2, 684 P.2d 73 (1984), Division I of the Court of Appeals reversed the trial court for refusing to instruct the jury on the non-delegable duty of a general contractor to provide a safe workplace for all workers on the jobsite. The duty extended even to workers employed by subcontractors. The *Jones* case is still recognized as good law on the proposition that the general contractor's duty to provide a safe workplace is non-delegable. *Stute v. P.B.M.C., Inc.*, 114 Wn.2d. 454, 788 P.2d 545 (1990); *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn.App. 649, 240 P.3d 162 (2010).

The Supreme Court has recently reaffirmed a very strong policy enforcing the duty to provide workplace safety by the entity in the best position to provide for safety. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (Wash. 2013):

Instead, *Kelley* and *Kamla* stand for the proposition that when an entity (whether a general contractor or a jobsite owner)

retains control over the manner in which work is done on a work site, that entity has a duty to keep common work areas safe because it is best able to prevent harm to workers. See *id.* at 330-31, 582 P.2d 500; *Kamla*, 147 Wash.2d at 119-21, 52 P.3d 472. Calling the relationship a license does not change reality.

If a jury accepts Afoa's allegations, the Port controls the manner in which work is performed at Sea-Tac Airport, controls the instrumentalities of work, and controls workplace safety. **The Port is the only entity with sufficient supervisory and coordinating authority to ensure safety** in this complex multi-employer work site. If the Port does not keep Sea-Tac Airport safe for workers, it is difficult to imagine who will. The Port cannot absolve itself of its responsibility under the law simply by declining to "hire" contractors and instead issuing them licenses.

Indeed, as *Kelley* makes abundantly clear, the safety of workers does not depend on the formalities of contract language. Instead, **our doctrine seeks to place the safety burden on the entity in the best position to ensure a safe working environment.** *Kelley*, 90 Wash.2d at 331, 582 P.2d 500.

Where there are multiple employers performing a variety of tasks in a complex working environment, it is essential that a safe workplace duty be placed on a landlord who retains the right to control the movements of all workers on the site to ensure safety. *Id.* The policy of encouraging a safe workplace is even more urgent in a complex, modern, multiemployer work site like Sea-Tac Airport than in a simpler, more traditional master-servant arrangement.

We should also encourage employers to implement safeguards against injury. See *Stute*, 114 Wash.2d at 461, 788 P.2d 545. We achieve this laudable goal by placing a safe workplace duty on the entity best able to protect workers. (emphasis added)

*Afoa v. Port of Seattle*, 176 Wn.2d 460 at 810, 811

In this case, Kitsap County is in charge of safety and security in the workplace. As previously referenced, Kitsap County has pointed out the inherently dangerous nature of working in the Kitsap County jail.<sup>48</sup> This very recognition emphasizes the rationale for the non-delegable nature of the duty to provide a safe workplace for Beverly Gordon.

**D. Kitsap County Cannot Assert the Defense of Contributory Negligence Because of Its Special Relationship to Beverly Gordon**

In *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (Wash. 2005), the Washington Supreme Court held the contributory negligence cannot be applied to defeat liability of a school district for failing to protect a student against the intentional act of a teacher.

The reasoning of the court is instructive to the issue in this case:

The District and Andersen argue, additionally, that Diaz's intentional conduct is not relevant on the issue of their own alleged negligence and that their fault, if any, should be compared with Leslie's fault. The flaw in this argument is that

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<sup>48</sup> CP 137, lines 6 through 12. (Defendants' Response in Opposition to Plaintiff's Motion for Partial Summary Judgment)

the District and Andersen's failure to supervise and control Diaz's intentional conduct is central to the District and Andersen's duty to protect Leslie.

In a similar case from another jurisdiction, a child victim of sexual abuse sued a church, its bishop, and the diocese. The plaintiff alleged that the defendants negligently hired, supervised, and retained a priest despite their knowledge of the priest's pedophilic disposition. The Pennsylvania Superior Court, an appellate court, held that the doctrine of contributory negligence did not have any application **because the acts of sexual molestation were intentional** and it was those acts which "must be compared." *Hutchison ex rel. Hutchison v. Luddy*, 763 A.2d 826, 848 (Pa.Super.2000) .

The Pennsylvania court went on to say that "comparative negligence [was] **only an appropriate consideration in matters where there is negligence on the part of both the plaintiff and the defendant involved in causing the harm that results, not where the conduct of one is willful.**" *Id.* (emphasis added by the court). The court reasoned that to hold otherwise would " 'be the equivalent of characterizing the sexual molestation of children as a negligent act caused by being in the wrong place at the wrong time instead of characterizing it as an intentional act resulting from the repugnant conduct of the molester.' " *Id.* (quoting *Erie Ins. Exch. v. Claypoole*, 449 Pa.Super. 142, 673 A.2d 348, 356 (1996)).

We agree with the reasoning of the Pennsylvania Superior Court that a defense of contributory fault should not be available to the perpetrator of sexual abuse or to a third party that is in a position to control the perpetrator.

*Christensen v. Royal School Dist. No. 160*, 156 Wn.2d at 69, 70. (emphasis added).

It is important to note that *Christiansen* was a lawsuit against the school district for failing to control the *intentional act* of the perpetrator. The ruling was based not upon a rule that children cannot be held contributorily negligent, but rather on the basis:

In sum, because we recognize the vulnerability of children in the school setting, we hold, as a matter of public policy, that children do not have a duty to protect themselves from sexual abuse by their teachers.

Moreover, we conclude that contributory fault may not be assessed against a 13-year-old child based on the failure to protect herself from being sexually abused when the defendant or defendants stand in a special relationship to the child and have a duty to protect the child. (emphasis added)

*Christensen v. Royal School Dist. No. 160*, 156 Wn.2d at 71.

Washington State also has a strong public policy of protecting its citizens from criminal acts and providing a safe workplace for all workers. Analogous to the *Christiansen* case, the negligence here is based on the failure of Kitsap County to control the intentional act of Braxton Neal in a setting where there is a special relationship with Ms. Gordon, and a duty to protect her from harm. Accordingly, to allow a defense of contributory negligence in this case would be the equivalent of holding Beverly Gordon negligent for being in the wrong place at the wrong time while trying to do her job.

The Restatement (Second) of Torts § 473 (1965) provides:

**§ 473. Danger Encountered in Exercise of Right or Privilege**

If the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless he exposes himself to a risk of bodily harm, the plaintiff is not guilty of contributory negligence in so doing unless he acts unreasonably.

In this case, Beverly Gordon has a right to a safe workplace guaranteed by the Washington State Constitution, by the Washington legislature and by case law.

Further authority is provided by the following provision of the Restatement (second) of Torts § 483 (1965):

**§ 483. Defense to Violation of Statute**

The plaintiff's contributory negligence bars his recovery for the negligence of the defendant consisting of the violation of a statute, unless the effect of the statute is to place the entire responsibility for such harm as has occurred upon the defendant.

**Comment:**

a. For the sake of brevity, the rule stated in this section is stated as to the defendant's violation of a statute. It is equally applicable to the violation of an ordinance, or an administrative regulation, where the enactment or regulation is held to afford a standard of conduct for the defendant.

...

c. There are, however, exceptional statutes which are intended to place the entire responsibility for the harm which has occurred upon the defendant. A statute may be found to have that purpose particularly where it is enacted in order to protect a certain class of persons against their own inability to protect themselves. Thus a statute which prohibits the sale of firearms to minors may be clearly intended, among other purposes, to protect them against their own inexperience, lack of judgment, and tendency toward negligence, and to make the seller solely responsible for any harm to them resulting from the sale. In such a case the purpose of the statute would be defeated if the contributory negligence of the minor were permitted to bar his recovery.

There is a strong public policy in Washington State as expressed by the legislature, the Washington State Constitution and case law that workers are entitled to a safe place to work. The duty to provide a safe workplace is a non-delegable duty. *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990); *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn.App. 649, 240 P.3d 162 (2010).

If contributory negligence in this case is permitted to bar recovery by Beverly Gordon, the purpose of the public policy considerations would be defeated.

The Washington State Supreme Court cited with approval to a Minnesota case<sup>49</sup> which reasoned that “the happening of the very event,

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<sup>49</sup> *Sandborg v. Blue Earth County*, 615 N.W.2d 61, 65 (Minn.2000).

the likelihood of which makes the actors conduct negligent and so subjects the actor to liability, cannot relieve him from liability”. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 641, 244 P.3d 924 (2010).

The context of the *Gregoire* decision was a lawsuit against the state for failing to prevent an inmate’s suicide. The rationale of the court was that there was a special relationship between the state and the inmate, which was non-delegable, and to allow a defense of contributory negligence went to the heart of the harm the duty was meant to protect against. In such a case, allowing contributory negligence as a defense would be to deprive the other party of all protection and make the duty a nullity.

**1. *Even If Contributory Negligence Could Be Asserted by Kitsap County, There Is an Insufficient Basis to Support the Defense***

In the court below Kitsap County asserted that Beverly Gordon was contributorily negligent because she allowed Braxton Neal to stand while she attempted to draw blood. The argument that Ms. Gordon negligently contributed to her own harm, was that the standard of care for nurses is to have a patient sit while drawing blood.

What the County overlooks is that nurses ask patients to sit while drawing blood in order to protect the patient from harm in the event the patient should faint from the procedure.<sup>50</sup> Medical care professionals do not ask patients to sit during the blood draw in order to protect themselves from assault. Assault by a patient is not within the scope of risk contemplated by a nurse's duty to have the patient sit while drawing blood.

In this case, Kitsap County had a duty to control Braxton Neal's behavior, and to also protect Beverly Gordon, so that she could safely do her job. To deny recovery because of Ms. Gordon's exposure to the very risk from which it was the purpose of the duty to protect, would be to deprive Ms. Gordon of all protection and make the duty a nullity.

**E. Kitsap County Cannot Assert a Defense of Assumption of the Risk in Lawsuits Brought by Persons Who Work at the Kitsap County Jail**

In determining whether or not a plaintiff has assumed a risk, the first step is for the court to define what duties the defendant owed. *Dorr v. Big Creek Wood Products, Inc.*, 84 Wn.App. 420, 927 P.2d 1148 (1996);

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<sup>50</sup> CP 341-342

*Scott v. Pacific West Mountain Resort*, 119 Wash.2d 484, 834 P.2d 6 (1992).

The reason, as explained by the court, is that assumption of the risk operates in advance to excuse the defendant from any duty to protect the plaintiff from being injured. In order to determine whether or not plaintiff excused the defendant from his duty, the duty must be defined.

As applied to this case, the duty of the defendant Kitsap County was to protect plaintiff Beverly Gordon from assault by Braxton Neal, known to Kitsap County to have violent and dangerous tendencies. Accordingly, in order for the defense to apply, the county must show that Beverly Gordon, in advance, knowingly agreed to excuse Kitsap County from the duty to protect her from violent assault by Braxton Neal.

In this case Plaintiff made it clear that she relied upon the jail for protection, and did not assume the risk that Kitsap County would act negligently.

Restatement (Second) of Torts Section 496 F (1965):

**§ 496 F. Violation of Statute**

The plaintiff's assumption of risk bars his recovery for the defendant's violation of a statute, unless such a result would defeat a policy of the statute to place the entire responsibility for such harm as has occurred upon the defendant.

**Comment:**

a. Although, for the sake of brevity, the rule stated in this section is in terms of violation of a statute, it is equally available to the violation of an ordinance, or an administrative regulation.

b. The rule stated in this section is analogous to that stated in section 483 as to the defense of contributory negligence. The comments to that section are applicable here, so far as they are pertinent.

c. Where the defendant's conduct consists of the violation of a statute, or an ordinance or administrative regulation, the plaintiff may assume the risk that harm will result from the violation, as in the case of any other negligent conduct on the part of the defendant. If so, his recovery is barred as in any other case of assumption of risk.

d. Such a conclusion is not, however, properly to be reached in any case where the court finds in the statute a policy of placing upon the defendant the entire responsibility for such harm as has occurred, and relieving the plaintiff of that responsibility. In such a case, to allow the defense of assumption of risk would be to defeat the purpose of the act. This is true particularly where the purpose of the statute is found to be to protect a particular class of persons, in which the plaintiff is included, against their own inability to protect themselves. Thus a child labor act will ordinarily be found to be intended to protect the child against his own inexperience or lack of judgment, and to place the whole responsibility upon the employer. Since this purpose would be defeated if the child were held to assume the risk, that defense is not available to the defendant. Likewise a factory act, requiring precautions to ensure safe working conditions, may be found to be intended to protect workmen against the economic pressure which might force them into unsafe employment; and if so, again the defense would not be permitted.

The Washington State Constitution and the statutes and regulations enacted by the legislature to protect workers on the job would be defeated if Beverly Gordon were held to assume the risk of working at the Kitsap County jail. Accordingly the defense of assumption of risk should not be available to the defendant.

The same Washington Supreme Court decision which held that contributory negligence does not apply to a jail suicide case, also held that assumption of risk does not apply. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010). The rationale behind the decision is important and should be applied to this case:

When a special relationship forms between a jailer and an inmate, sparking a duty for the jailer to protect the inmate from self-inflicted harm, the defense of assumption of risk and contributory negligence are inappropriate.

*Gregoire v. City of Oak Harbor*, 170 Wn.2d at 634.

In the case of Beverly Gordon, there was a special relationship between Kitsap County and Ms. Gordon sparking a duty on the part of Kitsap County to control the behavior of foreseeably violent inmates, to protect her from the risk of assault and to provide a safe place of work.

In explaining its reasoning, the majority in the *Gregoire* case stated:

In *Wagenblast* we recognized courts "are usually reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to rid themselves of that obligation by contract." 110 Wash.2d at 849, 758 P.2d 968. It flows logically that this court is even more reluctant to allow jailors charged with a public duty to shed it through a prisoner's purported implied consent to assume a risk, especially in a context where jailors exert complete control over inmates.

The trial court erred by allowing Oak Harbor, a municipality that was sued for failing to carry out its duty to provide for the health, welfare, and safety of an inmate, to raise the complete defense of implied primary assumption of risk. In the case of inmate suicide, we find the implied nature of the purported assumption of risk markedly inappropriate. Allowing Oak Harbor to invoke assumption of risk effectively eviscerated the city's duty to protect inmates in its custody. The jail cannot cast off the very duty with which it is charged through a violation of that duty.

*Gregoire v. City of Oak Harbor*, 170 Wn.2d at 638.

Important to the court was the fact that the duty is non-delegable. In Beverly Gordon's case, the duty to provide a safe workplace is also non-delegable. *Stute v. P.B.M.C., Inc.*, 114 Wn.2d. 454, 788 P.2d 545 (1990).

Imposition of a non-delegable duty is not the same as strict liability. The plaintiff still has to prove negligence and causation.

**F. *Kitsap County Cannot Assert a Defense That the Acts of Braxton Neal Were a Superseding Cause of Plaintiff's Injuries***

Kitsap County has asserted that the acts of Braxton Neal superseded the defendant's negligence and were the sole cause of plaintiff's injuries. Superseding cause does not apply in this case, because the risk of being assaulted was the precise hazard Kitsap County had a duty to prevent.

The Restatement (Second) of Torts Section 449 (1965) provides:

**§ 449. Tortious or Criminal Acts the Probability of Which Makes Actor's Conduct Negligent**

If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

**Comment:**

...

b. The happening of the very event the likelihood of which makes the actors conduct negligent and so subjects the actor to liability cannot relieve him from liability. The duty to refrain from the act committed or to do the act omitted is imposed to protect the other from this very danger. To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect and resulted in harm to him,

would be to deprive the other of all protection and to make the duty a nullity.

#### **IV. CONCLUSION**

Persons who work in the Kitsap County jail, or for that matter any correctional institution, are vulnerable to attack from inmates, some of whom have been convicted of violent offenses. The persons in the best position to control the behavior of violent inmates are the trained law enforcement personnel who work in the jail. The persons in the best position to protect individuals who work in the County jail to provide health care to inmates, again, are the trained law enforcement personnel who work in the jail.

The court below erred in granting summary judgment of dismissal to Kitsap County. The court also erred by failing to grant summary judgment to the plaintiff on the issues which were brought before the court. Plaintiff requests that the appellate court reverse the trial court's dismissal and remand to the Superior Court with an order directing that summary judgment be entered for plaintiff:

1. that, as a matter of law, on February 5, 2010, defendant Kitsap County had a duty of care to prevent Braxton Neal from harming others;
2. that, as a matter of law, defendant Kitsap County negligently allowed Braxton Neal to assault plaintiff, and that said negligence

was a proximate cause of injuries to plaintiff;

3. that plaintiff was not contributorily negligent and that plaintiff's conduct was not a proximate cause of the assault which is the subject matter of this lawsuit;
4. that, as a matter of law, that plaintiff did not voluntarily assume risk.

2014. RESPECTFULLY SUBMITTED this 7 day of April,

BECKER ROVANG, PLLC



W. DAVID ROVANG, WSBA #10928  
Attorney for Appellant

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

NO. 45648-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

BEVERLY A. GORDON  
Appellant,  
vs.  
KITSAP COUNTY, *et. al.*  
Respondent.

**DECLARATION OF  
SERVICE**

I, Linda Combs, certify that I caused a copy of Appellant's Opening Brief to be served on all parties or their counsel of record on the date below:

<u>Original and copy to</u> via U.S. Mail, Priority Mail, postage prepaid	Via U.S. Mail, Priority Mail, postage prepaid:
Clerk of the Court Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402	Ione S. George Kitsap County Prosecuting Attorney Civil Division 614 Division St. MS-35A Port Orchard, WA 98366

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

Dated this 7<sup>th</sup> day of April, 2014.

  
Linda Combs