

CASE NO. 45648-6-II

COURT OF APPEALS, DIVISION II OF THE STATE OF  
WASHINGTON

---

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,

Respondents,

---

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR PIERCE COUNTY  
Superior Court No. 12-2-05495-4

---

BRIEF OF RESPONDENTS KITSAP COUNTY and KITSAP COUNTY  
CHIEF OF CORRECTIONS NED NEWLIN

---

RUSSELL D. HAUGE  
Prosecuting Attorney

IONE S. GEORGE  
Chief Deputy Prosecuting Attorney  
614 Division Street  
Port Orchard, WA 98366  
(360) 337-4992

## TABLE OF CONTENTS

STATEMENT OF THE ISSUES .....	1
STATEMENT OF THE CASE.....	2
A. Braxton Neal Was Compliant Prior to Date Of Incident .....	2
B. Initial Restrictions on Neal .....	3
C. Conmed Is An Independent Contractor With Complete Control Over Medical Services.....	5
D. Plaintiff Was Experienced and Well Aware of Hazards Posed By Working With Inmates .....	5
E. The Incident .....	7
F. Restrictions on Neal Are Increased.....	8
ARGUMENT .....	8
A. Standard of Review.....	8
B. The Court Should Affirm Dismissal Because Ms. Gordon Failed to Establish Duty of Care From A Special Relationship	8
C. This Court Should Affirm Dismissal Because There Is No Evidence Kitsap County Breached A Standard of Conduct ...	22
D. This Court Should Affirm Dismissal Because Kitsap County Did Not Owe A Non-Delegable Duty To Ms. Gordon.....	29
E. This Court Should Affirm Dismissal Because There Is No Evidence Kitsap County Was The Proximate Cause .....	34
F. This Court Should Affirm Denial of Ms. Gordon’s Motion for Partial Summary Judgment Because There Is An Issue of Fact As To Whether She Was Contributorily Negligent .....	40
G. This Court Should Affirm Denial of Ms. Gordon’s Motion for Partial Summary Judgment Because There Is An Issue of Fact As To Whether She Assumed The Risk .....	45
CONCLUSION.....	50

## TABLE OF AUTHORITIES

### CASES

Affiliated FM Ins. Co. v. LTK Consulting Services, Inc., 170 Wn.2d 442, 243 P.3d 521 (2010) .....	23
Afoa v. Port of Seattle, 176 Wn.2d 460, 296 P.3d 800 (2013) .....	8, 32, 45
Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 260 P.3d 857 (2011).....	43, 46
Atkinson v. State, 337 S.W.3d 199 (Tenn. Ct. App. 2010) .....	28
Bennett v. Hardy, 113 Wn.2d 912, 784 P.2d 1258 (1990) .....	19
Bozung v. Condominium Builders, Inc., 42 Wn. App. 442, 711 P.2d 1090 (1985).....	33
Chhuth v. George, 43 Wn. App. 640, 719 P.2d 562 (1986) .....	35, 39
Christensen v. Royal School Dist. No. 160, 156 Wn.2d 62, 124 P.3d 283 (2005).....	40, 41, 42, 43
Clement v. Gomez, 298 F.3d 898 (9th Cir. 2002) .....	26
Craig v. Washington Trust Bank, 94 Wn. App. 820, 976 P.2d 126 (1999) .....	21
Cummins v. Default, 18 Wn.2d 274, 139 P.2d 308 (1943) .....	49
District of Columbia v. Carmichael, 577 A.2d 312 (D.C. 1990).....	23
Dorr v. Big Creek Wood Prod., Inc, 84 Wn. App. 420, 927 P.2s 1148 (1996).....	47
Duteau v. Seattle Elec. Co., 45 Wn. 418, 88 P. 755 (1907).....	19, 20
Eberhart v. Murphy, 113 Wn. 449, 194 P. 415 (1920) .....	12
Estate of Belden v. Brown County, 46 Kan.App.2d 247, 261 P.3d 943 (2011).....	29
Ferris v. Donnellfeld, 74 Wn.2d 283, 444 P.2d 701 (1968).....	34
Folsom v. Burger King, 135 Wn.2d 658, 958 P.2d 301 (1998).....	21, 22
Golding v. United Homes Corp., 6 Wn. App. 707, 495 P.2d 1040 (1972).....	49
Greer v. Tonnon, 137 Wn. App. 838, 155 P.3d 163 (2007) .....	25
Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 244 P.3d 924 (2010) .	40, 42, 45, 46, 47
Hansen v. Friend, 118 Wn.2d 476, 824 P.2d 483 (1992) .....	19
Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985).....	34
Hertog, ex rel. S.A.H., 138 Wn.2d 265, 979 P.2d 400 (1998).....	10, 12, 15, 16, 17
Hojem v. Kelly, 93 Wn.2d 143, 606 P.2d 275 (1980) .....	23
In re Marriage of Tang, 57 Wn. App. 648, 789 P.2d 118 (1990) .....	19
Jaeger v. Cleaver Const. Inc., 148 Wn. App. 698, 201 P.3d 1028 (2009) .....	43
Jarr v. Seeco Cont. Co., 35 Wn. App. 324, 666 P.2d 392 (1983).....	49

Jones v. Bayley Constr. Co., 36 Wn. App. 357, 674 P.2d 679 (1984)	30, 31
Jones v. Halverson-Berg, 69 Wn. App. 117, 847 P.2d 945 (1993)	33
Joyce v. State Department of Corrections, 116 Wn. App. 569, 75 P.3d 548 (2003)	35
Joyce v. State, Dept. of Corrections, 155 Wn.2d 306, 119 P.3d 825 (2005)	23
Kaye v. Lowe's HIW, Inc., 155 Wn. App., 320, 242 P.3d 27 (2010)	23
Kelley v. Great Northern Railway Company, 59 Wn.2d 894, 371 P.2d 528 (1962)	30
Kelley v. Howard S. Wright Const. Co., 90 Wn.2d 323, 582 P.2d 500 (1978)	30, 31
King v. City of Seattle, 84 Wn.2d 239, 525 P.2d 228 (1974)	36
Kusah v. McCorkle, 100 Wn. 318, 170 P. 1023 (1918)	12
Laschied v. City of Kennewick, 137 Wn. App. 633, 154 P.3d 307 (2007)	46
Levrie v. Department of Army, 810 F.2d 1311 (5th Cir. 1987)	22
Little v. Countrywood Homes, Inc., 132 Wn. App. 777, 133 P.3d 944 (2006)	35
Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 972 P.2d 475 (1999)	35
McNabb v. Department of Corrections, 163 Wn.2d 393, 180 P.3d 1257 (2008)	26, 27
Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 257 P.3d 532 (2011)	23
Peterson v. State, 100 Wn.2d 421, 671 P.2d 230 (1983)	10, 12, 13, 14, 15, 16, 17
Phillips v. District of Columbia, 714 A.2d 768 (D.C. 1998)	28
Pratt v. Thomas, 80 Wn.2d 117, 491 P.2d 1285 (1971)	34
Rasmussen v. Bendotti, 107 Wn. App. 947, 959, 29 P.3d 56 (2001)	35
Revised Code of Washington 28.225.010	42
Riggs v. German, 81 Wn. 128, 142 P.479 (1914)	12, 29
Robb v. City of Seattle, 176 Wn.2d 427, 295 P.3d 212 (2013)	19, 20, 21
Rosendahl v. Lesourd Methodist Church, 68 Wn.2d 180, 412 P.2d 109 (1966)	49
Ruff v. County of King, 125 Wn.2d 697, 887 P.2d 886 (1995)	25
Samuelson v. Community College Dist. No. 2, 75 Wn. App. 340, 877 P.2d 734 (1994)	23
Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 951 P.2d 749 (1998)	36, 38
Smith v. Shannon, 100 Wn.2d 26, 666 P.2d 351 (1983)	19
Stangland v. Brock, 109 Wn.2d 675, 747 P.2d 464 (1987)	23
State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981)	26

State v. Roggenkamp, 115 Wn. App. 927, 64 P.3d 92 (2003).....	38
State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988).....	19
Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 788 P.2d 545 (1990) ....	30, 31, 33
Taggart v. State, 118 Wn.2d 195, 822 P.2d 243 (1992) ....	9, 10, 12, 13, 15, 16, 17, 35
Tinder v. Nordstrom, Inc., 84 Wn. App. 787, 929 P.2d 1209 (1997).....	34
Villalobos v. Board of County Com'rs of Dona Ana County, 322 P.3d 439 (N.M.App. 2014) .....	28
Ward v. Ceco Corp., 40 Wn. App. 619, 699 P.2d 814 (1985).....	33
Washington Administrative Code 296-800-11005 .....	32
Washington v. Harper, 494 U.S. 210 (1990) .....	27
Wilkinson v. District of Columbia, 879 F.Supp.2d 35 (D.D.C. 2012) .....	29
Winston v. State, 130 Wn. App. 61, 121 P.3d 1201 (2005) .....	12, 29
Wirtz v. Gillogly, 152 Wn. App. 1, 216 P.3d 416 (2009).....	47, 48, 49
Wolff v. McDonnell, 418 U.S. 539 (1974).....	26

#### STATUTES

Revised Code of Washington 49.16.030.....	30
Revised Code of Washington 49.17.060.....	32
Revised Code of Washington 72.09.....	26
Revised Code of Washington 72.09.240.....	50
Revised Code of Washington 72.09.651.....	18
Revised Code of Washington 72.09.651(5).....	18
Washington Industrial Safety and Health Act .....	30, 31, 45

#### OTHER AUTHORITIES

Washington Pattern Instruction 15.01.....	34
---	----

#### RULES

Rules of Appellate Procedure 2.4(a).....	19
--	----

#### TREATISES

Restatement (Second) of Torts §302.....	20
Restatement (Second) of Torts §302B.....	18, 19, 20, 21
Restatement (Second) of Torts §314.....	18
Restatement (Second) of Torts §314A.....	22
Restatement (Second) of Torts §314B.....	21, 22
Restatement (Second) of Torts §315.....	9

Restatement (Second) of Torts §319. 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 31	
Restatement (Second) of Torts §449.....	38, 39
Restatement (Second) of Torts §496F .....	45

REGULATIONS

Kitsap County Code 2.21.210.....	26
Kitsap County Code 2.21.250(2) .....	33
Kitsap County Code 2.21.320(8) .....	33
Kitsap County Code Chapter 2.21 .....	26
Kitsap County Code Chapter 2.22 .....	26
Washington Administrative Code 137-78 .....	50
Washington Administrative Code 196-800-22025 .....	31
Washington Administrative Code 296-800-110 .....	32
Washington Administrative Code 296-800-16025 .....	31
Washington Administrative Code 296-800-17025 .....	31
Washington Administrative Code Title 137 .....	26

## I. STATEMENT OF THE ISSUES

1. Did the trial court properly grant Kitsap County's Motion for Summary Judgment because Kitsap County owed no duty of care to Ms. Gordon when she was an employee of an independent contractor with control over the performance of medical services, and where inmate Neal was in a fully controlled environment, was deprived of his liberties, and did not pose a danger to unwitting members of the public?
2. Did the trial court properly grant Kitsap County's Motion for Summary Judgment because Ms. Gordon presented no evidence of Kitsap County's breach of a duty as she failed to articulate the scope of any applicable standard of conduct?
3. Did the trial court properly grant Kitsap County's Motion for Summary Judgment because Kitsap County did not owe a non-delegable duty to provide a safe workplace to employees of an independent contractor when it did not maintain control over the performance of the independent contractor's duties (here, the provision of medical services)?
4. Did the trial court properly grant Kitsap County's Motion for Summary Judgment because there is no evidence that Kitsap County was the proximate cause of Ms. Gordon's injuries?
5. Did the trial court properly deny Ms. Gordon's Motion for Partial Summary Judgment because there remains an issue of fact as to whether Ms. Gordon was contributorily negligent by allowing inmate Neal to stand during his blood draw, contrary to best medical practices, and by leaning over the table against the recommendation of jail staff?
6. Did the trial court properly deny Ms. Gordon's Motion for Partial Summary Judgment because there was a question of fact as to whether Ms. Gordon may have assumed the risk of assault by inmate which is naturally inherent in her employment as a jail nurse?

## II. STATEMENT OF THE CASE

This incident arises out of a workplace injury which occurred on February 5, 2010 at the Kitsap County Jail when Ms. Gordon was struck in the face by inmate Braxton Neal, as she was attempting to perform a routine blood draw.

### A. Braxton Neal Was Compliant Prior to Date Of Incident

On January 23, 2010, Braxton Neal (“Neal”) was transferred into Kitsap County Jail. He was booked into the jail at 4:00 a.m. the next morning. CP 145-46; CP 186-92, 204. Though the correctional facility was clearly aware of Neal’s history (CP 148), the booking officer noted that at the time of his booking, Neal did not have any observable sign of mental health problems and that he did not show any signs of suicidal behavior or attempts. CP 145-46, 186-92, 204.

The next evening, Officer Michael Bezotte sent an e-mail correspondence to corrections staff stating that Neal had taken his meds that evening, that he “hasn’t been a problem,” and that the staff should “give his meds a chance to take affect.” CP 148.

On January 25, 2010, Mental Health Professional Tami Gannon sent an e-mail correspondence to several corrections staff stating that Braxton Neal was “med compliant.” CP 152.

On January 26, 2010, a mental health professional conducted a

mental health intake screening of Neal. While noting Neal's history of aggressive behavior (CP 157-58), the examiner documented that on the day of the examination, Neal was alert, responding appropriately, calm, cooperative, able to control his behavior, he appeared quiet and withdrawn, and he was not hearing voices or seeing things. CP 157-58.

On January 28, 2010, Officer Craig Dick sent an email in which he stated that, according to the mental health providers, Neal "had been compliant since he had been [in jail]." CP 160.

On February 1, 2010, it was noted in Neal's Behavioral Plan that he was "med compliant" and "managing his [behavior] at court and in the pod." CP 162.

The day before the incident, Conmed nurse Bobby Jacoby successfully conducted a blood draw on Neal without incident. CP 199. During this draw, Neal was calm, complied with all instructions, and did not show any aggressive behavior or tendencies. CP 199.

**B. Initial Restrictions on Neal**

On January 25, 2010, Sergeant Sauni Holt classified Neal as a "two officer detail" due to his assaultive history and instructed staff in an e-mail correspondence that he was to be in belly chains whenever he leaves his unit. CP 150. The configuration of the jail is such that it contains pods, which contain units, which contain cells. CP 90. (The

“cell” is the small room within a unit where the inmate can be locked down and where s/he sleeps; the “unit” is the area which contains several cells that share an open day-room area with tables, chairs, phones, and television.) CP 195. Per Sergeant Holt’s directive, belly chains were not required when Neal was removed from his cell but remained in his unit. CP 90.

At the time of the incident, a “two-officer detail” required that two officers be in proximity of an inmate when the inmate is out in the unit or interacting with anyone. CP 110-111. Ms. Gordon incorrectly asserts that a “two-officer detail” also required the placement of belly chains on an inmate. There is no support in the record for this factual assertion which Ms. Gordon interposes. The deposition transcript cited by Ms. Gordon indicates that a “two officer detail” only required two officers to be in proximity of the inmate. CP 54-55.

Appellant also asserts that a restriction of belly chains and leg-irons requires an inmate to be in belly chains and leg irons whenever he or she will be in the presence of non-correctional personnel. There is no support for this assertion in the record. To the contrary, correctional personnel testified that the purpose of belly chains and leg irons is to control the inmate during transportation throughout the jail and provide additional protection where the inmate is likely to come into contact with a

greater number of individuals. CP 398. Thus, the *type* of person an inmate is likely to interact with (correctional versus non-correctional) is not the primary factor in determining whether to impose belly chains or leg irons. CP 184-85. Rather, the primary factor is the *number* of people (regardless of whether or not they are correctional) that the inmate is likely to come into contact with as he is transported throughout the jail. CP 398.

C. **Conmed Is An Independent Contractor With Complete Control Over Medical Services**

Conmed is an independent contractor who has contracted with Kitsap County to provide medical services to inmates in the Kitsap County Jail. CP 164-68, 193-94. The relevant contract language provides that “the Contractor [“Conmed”] is an independent contractor and not an agent or employee of the County.” CP 164. The contract further provides that “CONMED will provide all healthcare services ... and assumes all legal, financial, and operational responsibility for the health care staff working under any contract.” CP 167. Finally, the contract provides that “[t]he Medical Director will have ultimate responsibility for the supervision of all medical and clinical staff; nursing personnel will be responsible for intermediate levels of supervision of such staff.” CP 168.

D. **Plaintiff Was Experienced and Well Aware of Hazards Posed By Working With Inmates**

As of February 2010, Beverly Gordon was a full time employee of

Conmed, assigned to work in the Kitsap County Jail. CP 2, 178. Prior to that time, she had been an employee of the Health Department. CP 178, 193-94. At the Health Department, she served as nurse providing medication and basic medical services to inmates in the Kitsap County Correctional Facility. CP 177-78. Between her employment with Conmed and the Health District, at the time of the incident, she had over seven years of experience providing medical services to inmates. CP 177-78. Additionally, she had several years earlier been employed by the Washington State Department of Corrections to provide medical services to inmates of the women's prison in Purdy. CP 250.

Ms. Gordon was present the day before the incident, on February 4, 2010, when Officer Frank Davenport briefed medical staff on security matters related to conducting a blood draw on Neal. CP 198-99. Officer Davenport instructed that he would bring Neal to the "day room." CP 199. This room is in the unit and contains a metal table that is bolted to the floor. He indicated that he would bring Neal to one side of the table and the nurse should stay on the other side, the side nearest the exit. CP 199. He instructed that nurses should not lean over the table towards Neal but have Neal extend his arm over the table. CP 199. He also instructed that they should immediately exit the room if anything went wrong. CP 199. Other than giving these instructions, corrections staff were not involved in

the planning or performance of the medical procedure. CP 194.

As a Conmed nurse, Ms. Gordon had complete access to Neal's medical records and file maintained in the jail which included health and mental health screenings. CP 140-141. In fact, medical staff are the only people with routine access to an inmate's medical records file. CP 194-95.

**E. The Incident**

On February 5, 2010, Conmed requested a second blood draw of Neal. CP 199. Per the discussed plan, Neal was escorted from his cell to the "day room." CP 200. Officer Davenport situated him along one side of the metal table and stood near Neal while a second officer stood nearby. CP 200. Ms. Gordon stood on the opposite side of the table from Neal, closest to the exit. CP 200. When Neal requested if he could remain standing for the blood draw, Ms. Gordon stated, "that's fine." CP 200. Ms. Gordon has admitted that performing a blood draw on a patient who is standing violates the accepted standard of care of a reasonable nurse. CP 171. After Ms. Gordon swabbed Neal's right arm, he struck her in the face with his left arm. CP 200. During her deposition, Ms. Gordon testified that Neal was cooperative and did not appear to present any type of immediate threat leading up to the incident. CP 140. Indeed, Ms. Gordon testified that Neal was smiling and that he gave no indication that anything was going to happen until the moment he struck her. CP 140.

**F. Restrictions on Neal Are Increased**

After the incident, Lt. Payne amended the restrictions on Neal and directed that he be belly chained and leg ironed whenever he was removed from his cell, excluding his “hour out.” CP 210-211, 216. On that same date, Lt. Payne sent an e-mail correspondence to all corrections staff, announcing the change in this restriction. CP 210-211, 216.

**III. ARGUMENT**

**A. Standard of Review**

The Court of Appeals reviews summary judgment motions de novo by engaging in the same inquiry as the trial court.<sup>1</sup> Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>2</sup> Summary judgment is improper in the face of disputed facts that are material to the outcome of the matters at issue.<sup>3</sup>

**B. The Court Should Affirm Dismissal Because Ms. Gordon Failed to Establish Duty of Care From A Special Relationship.**

**1. Restatement (Second) of Torts §319 Does Not Apply When Aggressor Is Incarcerated And Deprived of Liberties.**

The common law rule is that one has no duty to prevent a third

---

<sup>1</sup> *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

party from causing harm to another.<sup>4</sup> Restatement (Second) of Torts §315 provides a limited exception. §315 states that there is no duty to control the conduct of a third person unless there is a “special relationship” which “imposes a duty” or a “special relationship” which gives another a “right to protection.” Accordingly, the mere existence of a relationship between parties is not enough. There must be a “special relationship” which “imposes a duty.”

The provisions following §315 outline those special relationships that impose a duty of care.<sup>5</sup> Ms. Gordon contends that §319 imposes a duty of care on Kitsap County in this case. As outlined below, §319 does not apply and Ms. Gordon’s reliance on this provision is misplaced. Since §319 does not apply, there is no “special relationship” which “imposes a duty” to protect Ms. Gordon pursuant to §315.

*a. §319 Not Applied to Correctional Facilities*

§319 states as follows:

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.

Critically, this particular duty has never been applied by Washington courts to impose a duty on a correctional facility.

---

<sup>4</sup> *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992).

<sup>5</sup> Restatement of Torts (Second) §315, cmt c.

Additionally, though Washington Courts have applied this particular duty to probation officers,<sup>6</sup> to psychiatric counselors,<sup>7</sup> and to parole officers,<sup>8</sup> it has only been applied with respect to unwitting members of the public. It has never been applied to impose a duty of care to protect employees of an independent contractor or any other employee with equal access and knowledge of a third person's behavioral history and the authority to direct the provision of services at issue.

According to the very language of §319, this duty cannot apply to correctional facilities. The language of this provision explains that one who "takes charge" of another is under a duty to control that person when he knows or should know that person is likely to cause bodily harm to others. Correctional facilities do not simply take charge of inmates. They exert control over them in such a way that the inmate is deprived of significant liberties while in confinement. Thus the 'duty to control' has already been met, rendering §319 inapplicable. In the present case, Neal was not only booked into jail, he was placed in the high-security area of the jail, he was identified as a two-man detail, and he was under a directive requiring him to be placed in belly chains and leg irons when out of his unit. The only people that could come into contact with Neal within

---

<sup>6</sup> *Hertog, ex rel. S.A.H.*, 138 Wn.2d 265, 979 P.2d 400 (1998).

<sup>7</sup> *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983).

<sup>8</sup> *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992).

his unit were fully trained and experienced jail and medical staff. There was no risk Neal would interact with any unwitting member of the public. CP 398.

While §319 applies to the factual scenarios in which people with dangerous proclivities are released into public where they are “likely to cause harm to others if not controlled,”<sup>9</sup> this is not the law which applies to those people who are completely segregated from society and within a fully controlled environment; they have already been ‘controlled.’ The comments to §319 are instructive in this regard. The comments provide two “illustrations” of when §319 should be applied: (1) when a patient suffering from scarlet fever is permitted to leave a contagious disease hospital, and (2) when a “homicidal maniac” escapes from a insane asylum. CP 391-92. Both of these illustrations involve a dangerous person being released from a controlled environment into the public. These comments do not contemplate the circumstance when the aggressor remains in an asylum or hospital. Accordingly, as contemplated by the drafters of §319, the duty does not apply when a dangerous person is already in a controlled environment. The duty is only imposed when a dangerous person is released or escapes from a controlled environment, where they may cause harm to unaware members of the public.

---

<sup>9</sup> Restatement (Second) of Torts §319

Additionally instructive are the cases addressing the duty of a municipal jail in instances where one inmate assaults another. No Washington case involving inmate assaults has applied or even been discussed in §319.<sup>10</sup> In determining the duty owed by the correctional facility in these cases, Courts have focused solely on the jail's duty to the inmate as the victim.<sup>11</sup> These cases never address the jail's duty to control inmates to prevent their aggressive conduct to a third person. If the Court felt that §319 applied to cases involving assaults by imprisoned inmates, Washington courts would have considered §319 in these seminal cases.

c. *This Case Is Distinguishable From Hertog, Peterson, and Taggart*

Ms. Gordon's reliance upon the cases of *Hertog*, *Peterson*, and *Taggart* is misplaced as our case is factually and legally distinguishable.

i. The *Hertog* Case

In the case of *Hertog*, a man was on probation for a lewd conduct conviction when he raped a young girl.<sup>12</sup> While on probation, he repeatedly violated the conditions of his probation, committed a sexually motivated burglary, and was determined to be a "high risk offender." His

---

<sup>10</sup> See *Winston v. State*, 130 Wn. App. 61, 121 P.3d 1201 (2005)(no liability for correctional officials did not have any reason to believe Plaintiff would be attacked); *Kusah v. McCorkle*, 100 Wn. 318, 170 P. 1023 (1918); *Riggs v. German*, 81 Wn. 128, 142 P.479 (1914); *Eberhart v. Murphy*, 113 Wn. 449, 194 P. 415 (1920); *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010).

<sup>11</sup> *Id.*

<sup>12</sup> *Hertog, ex rel. S.A.H.*, 138 Wn.2d 265, 979 P.2d 400 (1998).

counselor recommended he be locked up for as long a possible. However, his probation was never revoked and his probation officer only met with him once during a six month period. Eventually, he fell behind in his counseling and raped a young girl. The Court held that the officer had a duty to protect the girl from foreseeable harm caused by the offender and that there was a question of fact as to whether that duty was breached.

ii. The *Taggart* Case

In the case of *Taggart*, a plaintiff brought a claim for personal injuries against the State after she was raped by a man on parole.<sup>13</sup> The parolee (Geyman), who was serving a sentence for second degree assault, was an alcoholic, and was usually intoxicated when he committed his crimes. Six days after completing an alcoholism recovery program, the parole officer received a report that the parolee was drinking against the conditions of his parole and threatening his ex-wife's husband. The parole officer did not investigate further. The parolee then moved out of state, in violation of his parole, and raped a young girl. The Court held that the defendant could be liable for failing to protect the plaintiff.

iii. The *Peterson* Case

The *Peterson* case involved a claim for personal injuries arising out of a motor vehicle collision with a mental health patient. The patient

---

<sup>13</sup> *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992).

was receiving treatment following an attempt to emasculate himself.<sup>14</sup> The patient was released from the hospital for one day. Upon his return, he drove his vehicle recklessly in the hospital parking lot and had a schizophrenic reaction as a result of taking illegal drugs in violation of parole. The state psychiatrist knew of the patient's reluctance to take medication and that it was likely that he would revert to taking drugs which would render him a potential danger.<sup>15</sup> Nonetheless, the patient was discharged from the hospital the next morning. Five days later, he struck the plaintiff's vehicle. The Court held that the defendant was liable for failing to prevent harm to the plaintiff.

#### iv. The Present Case

In the above cases upon which Ms. Gordon relies for the assertion that at duty of care existed, an offender had been released into society where he had substantial freedom to interact with the unwitting public, potentially putting the public at risk. In all of these cases, the offenders were acting aggressively, violating parole conditions, and being non-compliant immediately prior to the subject incidents.

By contrast, Neal was an inmate in a correctional facility. He had been removed from the public, had been deprived of significant liberties and placed in a high-security unit within the jail. He did not pose a threat

---

<sup>14</sup> *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983).

<sup>15</sup> *Peterson* at 428.

to the public because he was incarcerated and under strict watch. There was no risk that he would interact with an unwitting member of the public unsupervised. Even when visiting with guests, inmate Neal would be separated by a glass window. CP 398. Critically, there have been no recent acts of violence or non-compliance, as in the cases discussed above, to put Kitsap County on notice of potential imminent risk of harm. In fact, he had complied peacefully with a blood draw one day prior.

Moreover, unlike those plaintiffs in the cases cited above, Ms. Gordon did not interact with Neal as a member of the unwitting public. Ms. Gordon was an experienced nurse who had worked in correctional facilities for over seven years. She had access to Neal's medical records and records of his behavioral history. At the time of the incident she had control and authority over him for the purpose of rendering medical care. The cases cited by Ms. Gordon discuss a duty only to members of the public, not to parole officers or medical staff who are involved in the care and treatment of the offenders. Considering the substantial difference in facts, neither §319 nor the precedent established by the Court in the cases of *Taggart*, *Hertog*, and *Peterson* apply to the present case.

*c. Injury Was Not Reasonably Foreseeable*

The duty imposed under §319 only applies when injury to the

particular plaintiff is a reasonably foreseeable consequence.<sup>16</sup> In deciding whether parole officers owed a duty to individual plaintiffs who were injured by the actions of parolees, the court in *Taggart* held, “if injury to [plaintiffs] was a reasonably foreseeable consequence of paroling [the third parties], then this duty extended to [plaintiffs.]”<sup>17</sup> Utilizing the Court’s logic in *Taggart*, Kitsap County did not owe a duty of care to Ms. Gordon because injury to her was not a reasonably foreseeable consequence of Kitsap County’s actions.

The present case is unlike cases in which the Courts have determined there to be a reasonably foreseeable risk requiring the imposition of a duty of care under §319. For example, the mental health patient in *Peterson* posed a reasonably foreseeable risk where the day before his release he violated parole by driving recklessly under the influence of drugs and where he was determined to be dangerous while not taking his medications, a condition the psychiatrist felt was a likely result.<sup>18</sup> The parolee in *Taggart* posed a reasonably foreseeable risk when the parole officer received reports that he was violating parole, drinking, and beating his girl friend and her children.<sup>19</sup> In *Hertog*, the aggressor on probation had violated probation terms, used illegal drugs, committed a

---

<sup>16</sup> *Taggart* at 217.

<sup>17</sup> *Id.*

<sup>18</sup> *Peterson* at 428.

<sup>19</sup> *Taggart* at 201-02.

sexually motivated burglary, and was determined to be “as great a risk to reoffend” as he had been in the past.<sup>20</sup>

In our case, however, Neal did not pose a reasonably foreseeable risk to Ms. Gordon. Unlike the aggressors in *Peterson*, *Taggart*, and *Hertog*, Neal was compliant and acting appropriately. Leading up to the event, he had been compliant with his medications. He was docile. He had not exhibited aggressive or threatening behavior. He had taken no overt or aggressive actions since he was booked into jail and began taking his medication. He had cooperatively participated in a similar blood draw just one day prior to the incident without aggression. Moreover, at the time of the incident, Neal was in the presence of two corrections officers and was separated from Ms. Gordon by a steel table that was bolted to the floor. Considering Neal’s non-aggressive behavior in the jail to that date, and his compliance with medication, there is no evidence that injury to Ms. Gordon was reasonably foreseeable. Kitsap County did not owe a duty to protect Ms. Gordon against the unforeseeable act that occurred.

*d*      Neal Was Not Under Defendants’ Control

According to §319, a duty is only owed where the third party is under the control of the defendant. In our case, corrections officers had delivered Neal to Ms. Gordon so that she could render medical care.

---

<sup>20</sup> *Hertog* at 281-82.

Corrections officers are not licensed health care providers and are not qualified to interfere with or direct medical procedures.<sup>21</sup> While an inmate is under the care of a medical professional, corrections officers are not at liberty to instruct the medical provider as to how or if they should perform medical services. CP 194. There is no evidence to the contrary. Ms. Gordon exercised control over inmate Neal when she sought to perform a medical procedure and granted his request to stand during the blood draw.

Because Neal was under Ms. Gordon's control for the purposes of rendering medical care at the time of the incident, any duty imposed by §319 would be have been imposed on Ms. Gordon, not Kitsap County.

**2. This Court Should Not Consider Arguments and Theories of Liability Raised For First Time on Appeal**

For the first time on appeal, Ms. Gordon alleges that Restatement of Torts §302B and 314 imposed a duty of care on Kitsap County. In doing so, Ms. Gordon is not simply citing new authority to support a previous argument, she is asserting two entirely new theories of liability that were never considered or brought before the trial court. According to Washington law, a party who fails to present an argument or theory to the

---

<sup>21</sup> For example, Pursuant to RCW 72.09.651, the use of restraints on pregnant women or youth in custody is only allowed in extraordinary circumstances. However, if a health professional requests that the restraints be removed, corrections officers must comply. See, RCW 72.09.651(5).

trial court is precluded from raising it on appeal.<sup>22</sup> The purpose of this rule is to provide the trial court an opportunity to consider and rule on the relevant authority.<sup>23</sup> This rule also encourages the efficient use of judicial services by allowing the trial court an opportunity to correct any errors and avoid unnecessary appeals.<sup>24</sup> A party is also required to inform the trial court of the rules of law he or she wishes the court to apply.<sup>25</sup>

Ms. Gordon, having failed to establish liability under §319, now wants the court to consider two new legal theories of liability at the appellate level. The purpose of an appeal is not to provide losing parties with a second bite at the apple by allowing them to present new and alternative arguments. Rather, the purpose of an appeal is to review the rulings of the trial court and correct any errors made at that level.<sup>26</sup>

Not only should Court not consider the new legal theories presented by Ms. Gordon, these theories fail to establish a duty of care as outlined below.

*a. §302B Does Not Apply To Omissions*

Ms. Gordon misunderstands the holding in *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013) and misconstrues the parameters of

---

<sup>22</sup> *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992); *In re Marriage of Tang*, 57 Wn. App. 648, 655, 789 P.2d 118 (1990).

<sup>23</sup> *Bennett v. Hardy*, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990).

<sup>24</sup> *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

<sup>25</sup> *Id.*

<sup>26</sup> RAP 2.4(a); *Duteau v. Seattle Elec. Co.*, 45 Wn. 418, 421, 88 P. 755 (1907).

the duty imposed by §302B. While Restatement (Second) of Torts §302B provides that an act or an omission may be negligent, the comments of §302B require the court to apply comment “a” of §302 to this provision. Comment “a” to §302 states as follows (emphasis and underline added):

This Section is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk. In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. *The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation* between the actor and the other which gives rise to the duty. [...] If the actor is under no duty to the other to act, his failure to do so may be negligent conduct within the rule stated in this Section, but *it does not subject him to liability, because of the absence of duty.*

As this comment makes clear, absent a special relationship which imposes a duty to act, a mere omission will not give rise to liability, even though such conduct may be negligent. This is affirmed by the holding in *Robb*, in which the Washington Supreme Court held that liability for omissions is confined to situations where a special relationship exists.<sup>27</sup>

Here, Ms. Gordon does not allege that Kitsap County conducted an affirmative tortious act. She alleges that Kitsap County failed to act by failing to take proper steps to protect her. The failure to take steps to protect others from harm is the very definition of an omission, also

---

<sup>27</sup> *Id.*

referred to as nonfeasance.<sup>28</sup> Accordingly, in order for §302B to apply, Ms. Gordon must establish that she had a special relationship with Kitsap County which imposed a duty of care. As explained above, there is no such special relationship. Washington Courts have held the opposite—that employers have no special relationship with employees of independent contractors, and thus, have no duty to protect such employees.<sup>29</sup>

*a. §314B Does Not Apply To Independent Contractor Employees*

Ms. Gordon also argues, for the first time on appeal, that §314B imposes a duty of care on Kitsap County. §314B expressly provides that a “master” is subject to liability for a failure to protect a “servant” that comes into a position of imminent danger while “acting in the scope of employment.” The express language of this provision clearly dictates that it applies only in the context of an employer-employee relationship (“master-servant” relationship). Furthermore, it does not appear that this provision has been adopted by any Washington Court.

*Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998) is the only Washington case which addresses this provision. *Folsom*, which mentions §314B only in a passing footnote, fails to support Ms. Gordon’s

---

<sup>28</sup> *Robb* at 437.

<sup>29</sup> *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 976 P.2d 126 (1999)(holding that bank did not have a special relationship with janitor who was employed by independent contractor and, therefore, did not owe a duty to protect the janitor.)

position. In this case, the court refused to find a duty of care owed to employees of Burger King by an independent contractor providing security cameras. *Id.* at 674-75. The court noted that the plaintiff failed to identify a special relationship which created a duty of care. *Id.* This case does not support Ms. Gordon's claim that Kitsap County owes a duty of care to employees of an independent contractor providing medical services in a correctional facility.

Across other jurisdictions, there are only a handful of cases that directly address this provision. None of these cases have extended the duty of care outlined in §314B to employees of an independent contractor. The only case Kitsap County could find to address this issue is *Levrie v. Department of Army*, 810 F.2d 1311 (5th Cir. 1987) in which a court declined to impose a duty of care under §314A or §314B to employees of an independent contractor of the U.S. Army. *Id.* at 1315-16.

**C. This Court Should Affirm Dismissal Because There Is No Evidence Kitsap County Breached A Standard of Conduct**

Ms. Gordon has failed to articulate a standard of conduct defining the extent of any duty owed by Kitsap County and, therefore, no fact finder can determine that a standard was breached. Furthermore, there is no evidence that Kitsap County failed to protect Ms. Gordon from a foreseeable harm.

## 1. Absence of Evidence Regarding Standard of Conduct

A duty of care is made up of three aspects: existence, measure, and scope.<sup>30</sup> Even if a duty exists, the law will only recognize the duty as it is defined by a particular standard of conduct.<sup>31</sup> For this reason, in order to establish an actionable claim for negligence, a plaintiff must establish that a defendant had a duty to conform to a particular standard of conduct.<sup>32</sup> As one court has stated, “[i]f the standard itself is not proven, then a deviation from that standard is incapable of proof.”<sup>33</sup>

To determine if Kitsap County’s conduct fell below the required level of care, Ms. Gordon must articulate the degree of care, skill, and diligence required of a reasonable correctional facility in dealing with inmates similar to Neal.<sup>34</sup> A standard of care may be guided by internal directives or policies.<sup>35</sup> In some cases, it may be defined by statutory provisions.<sup>36</sup> It may be established by witness testimony.<sup>37</sup>

---

<sup>30</sup> *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 449, 243 P.3d 521 (2010).

<sup>31</sup> *Stangland v. Brock*, 109 Wn.2d 675, 681, 747 P.2d 464 (1987).

<sup>32</sup> *Kaye v. Lowe’s HIW, Inc.*, 155 Wn. App., 320, 332, 242 P.3d 27 (2010).

<sup>33</sup> *District of Columbia v. Carmichael*, 577 A.2d 312, 314 (D.C. 1990).

<sup>34</sup> *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 606 fn.9, 257 P.3d 532 (2011)(recognizing that professionals owe a duty of care to exercise the degree of skill, care, and learning possessed by members of their profession in the community).

<sup>35</sup> *Joyce v. State, Dept. of Corrections*, 155 Wn.2d 306, 324, 119 P.3d 825 (2005).

<sup>36</sup> *Samuelson v. Community College Dist. No. 2*, 75 Wn. App. 340, 349, 877 P.2d 734 (1994).

<sup>37</sup> *Hojem v. Kelly*, 93 Wn.2d 143, 147, 606 P.2d 275 (1980).

Ms. Gordon contends that Kitsap County had a duty to control inmate Neal but she has failed to identify (or present any evidence regarding) what that control should have been. There is no evidence regarding what a reasonable correctional facility would have done in the same situation. Ms. Gordon's appellate brief merely argues, without evidence or support, that more "restraint" should have been used. This is not only vague, it is speculative. Ms. Gordon has failed to articulate what Kitsap County failed to do or what Kitsap County should have done differently according to the standard operations of a correctional facility.

Ms. Gordon does not demonstrate any standard practice which would require the use of additional restraints. Because Ms. Gordon offered no evidence in this regard, aside from her own speculation, there is nothing to go before the jury as to what the standard of care of a reasonable correctional facility required in this particular case or how Kitsap County failed to meet such a standard.

Furthermore, the evidence presented to the trial court contradicts that additional restrictions were required. Corrections officers have testified that the purpose of belly chains and leg irons is not to provide additional security around non-corrections personnel, such as Ms. Gordon, but to provide additional security when the inmate is being exposed to a greater number of people as he is transported throughout the facility. CP

398. There is nothing to support the proposition that an inmate such as Neal is required to be in belly chains and leg irons every time he is to be in the presence of medical staff. Such a standard flies in the face of logic. If an inmate's hands are bound by belly chains at his waist, how is a nurse to conduct a blood draw from that inmate's bent and constrained arm?

## **2. Expert Testimony Is Required**

Expert testimony is required to establish the standard of care in situations involving subject matter that is beyond the knowledge and experience of an average fact-finder. For example, expert testimony is often required in a legal malpractice action because the law is a highly technical field which is beyond the knowledge of the ordinary person.<sup>38</sup> An average juror cannot speculate as to the standard of conduct of an attorney in defending or prosecuting a claim.<sup>39</sup> The Washington Supreme Court has similarly held that absent expert testimony, the contention that a roadway was inherently dangerous was merely speculation.<sup>40</sup>

The standard conduct of a reasonable corrections officer is a highly technical field that is far beyond the realm of the average juror. A correctional facility is regulated by a scheme of statutes, administrative

---

<sup>38</sup> *Greer v. Tonnon*, 137 Wn. App. 838, 850, 155 P.3d 163 (2007).

<sup>39</sup> *Id.*

<sup>40</sup> *Ruff v. County of King*, 125 Wn.2d 697, 706-07, 887 P.2d 886 (1995).

regulations, policies, and local codes.<sup>41</sup> These regulations are unfamiliar to the average, or even highly educated, juror.

Furthermore, correctional facilities must balance several competing interests and play many different roles in carrying out administrative duties. With respect to inmates, correctional facilities play a caretaking role.<sup>42</sup> Correctional facilities also have a compelling interest in maintaining security and orderly administration.<sup>43</sup> These two interests may conflict and compete in many situations of prison administration. In maintaining security, correctional facilities must be careful not to use excessive force or unnecessary restraints. As Washington courts have held, “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.”<sup>44</sup> Accordingly, inmates retain constitutional protection during incarceration.<sup>45</sup> Excessive force of correctional officers against inmates can lead to a violation of the Eight Amendment right to be free from cruel and unusual punishment and impose liability on a correctional facility.<sup>46</sup> Prison regulations that impinge on an inmate’s

---

<sup>41</sup> See generally Chapter 72.09 RCW, Title 137 of the Washington Administrative Code, Department of Corrections Policies, and Kitsap County Code Chapters 2.21 and 2.22 (and specifically KCC 2.21.210 which requires Kitsap County to establish a written statement of prisoner rights).

<sup>42</sup> *McNabb v. Department of Corrections*, 163 Wn.2d 393, 406, 180 P.3d 1257 (2008)

<sup>43</sup> *Id.*

<sup>44</sup> *State v. Hartzog*, 96 Wn.2d 383, 391, 635 P.2d 694 (1981), quoting *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

<sup>45</sup> *Id.*

<sup>46</sup> *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002).

constitutional rights must be carefully weighed against legitimate penological interests.<sup>47</sup> It is doubtful that this complex and weighty task can be left to a group of jurors of average experience and knowledge.

In addition, Washington courts have recognized that prison administration is best left in the hands of those with professional expertise.<sup>48</sup> Washington courts have specifically held that prison authorities are the best equipped to make difficult decisions regarding prison administration considering “their unique interest in maintain security and day-to-day order.”<sup>49</sup> For this reason, courts give much deference to prison officials and refuse to micromanage them, especially regarding issues relating to prison security.<sup>50</sup> Considering the high degree of deference given by the court and the importance of professional expertise regarding such matters, it would be inappropriate to allow average jurors to determine the legal standard of conduct to be applied to correctional facilities without guidance from any professional expert, especially where courts themselves are reluctant to do so.

While jurors might decide upon a standard of conduct that they determine to be reasonable—for example, a jury might decide that a reasonable correctional facility should belly chain and leg iron inmates at

---

<sup>47</sup> *Washington v. Harper*, 494 U.S. 210, 223-24, (1990).

<sup>48</sup> *McNabb* at 405-06.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

all times to prevent injuries—their conclusion may be impractical, unlawful, and may subject inmates to constitutional violations and correctional institutions to tort liability. Correctional facilities should not be legally bound by the unguided determinations of a group of unknowledgeable jurors. Due to the popularity of media and television shows depicting law enforcement and prison life,<sup>51</sup> the average juror likely has a very unrealistic and skewed perception of this subject.

While Washington courts have not addressed whether the standard of conduct of a correctional facility requires expert testimony, several jurisdictions outside Washington have held that expert testimony is required on the subject. These holdings are summarized as follows:

- *Phillips v. District of Columbia*, 714 A.2d 768, 773, (D.C. 1998): “the standard of care owed by the District to persons in its custody is a matter beyond the ken of the average juror. [...] the plaintiff was required to establish the applicable standard of care, as well as a breach thereof, by expert testimony.”
- *Atkinson v. State*, 337 S.W.3d 199, 205 (Tenn. Ct. App. 2010): “[i]f the conduct of prison staff is not clearly improper, expert proof delineating the precise scope of the staff’s duty and evaluating the adequacy of the staff’s conduct is essential; the claimant cannot recover without it.”
- *Villalobos v. Board of County Com’rs of Dona Ana County*, 322 P.3d 439, 442 (N.M.App. 2014): “in order for a jury to make a decision regarding the standard of care of the monitoring by prison officials in this instance, expert testimony is required. [...] the

---

<sup>51</sup> Fictional depictions of corrections and law enforcement in the media include popular TV shows such as *Orange is the New Black*, *Justified*, *Crime Scene Investigation*, *Oz*, *Prison Break*, *The Wire*, *Law & Order*, *Criminal Minds*, and *NYPD Blue*.

mere fact that [plaintiff] was assaulted does not prove that the prison monitoring fell below the required standard of care.”

- *Estate of Belden v. Brown County*, 46 Kan.App.2d 247, 286, 261 P.3d 943, 969 (2011): “[t]here is nothing so obviously wrong with [...] the Brown County jail policies and practices that we could suggest a jury reasonably might find them to be negligent simply by reading them and considering their application to these circumstance, even with a generous dollop of common sense.”
- *Wilkinson v. District of Columbia*, 879 F.Supp.2d 35, 38-42 (D.D.C. 2012): “whether prison officials acted reasonable to secure the safety of an inmate is not one within the reals of the everyday experiences of a lay person, so [the plaintiff] was required to present expert testimony to establish the standard of care.”

### **3. No Evidence To Rebut Presumption That Kitsap County Performed Its Duties**

Under Washington law, there is a rebuttable presumption that a corrections officer has performed his duties and exercised reasonable care.<sup>52</sup> Without evidence to rebut this presumption, whether an officer has performed his duties cannot be a question of fact for the jury.<sup>53</sup> Here, Ms. Gordon has failed to point to any evidence to rebut the presumption that Kitsap County appropriately considered the threat posed by Neal and took reasonable and adequate precautions to prevent him from injuring others.

#### **D. This Court Should Affirm Dismissal Because Kitsap County Did Not Owe A Non-Delegable Duty To Ms. Gordon**

Ms. Gordon incorrectly relies upon *Kelley v. Great Northern*

---

<sup>52</sup> *Winston v. State/Department of Corrections*, 130 Wn. App. 61, 64, 121 P.3d 1201 (2005); *Riggs v. German*, 81 Wn. 128, 142 P. 479 (1914).

<sup>53</sup> *Id.*

*Railway Company*, 59 Wn.2d 894, 371 P.2d 528 (1962) to assert that employers owe a non-delegable duty to provide a safe work place. This case involved a statutory duty to provide a safe workplace under the Federal Employer's Liability Act between a railroad employee and a railroad. Ms. Gordon's reliance on this case is misplaced for several reasons. First, the federal statute in question in this case applies only to federal employers, and Ms. Gordon has not alleged that Kitsap County is a federal employer subject to that statute. Second, while *Kelley* involved a railroad employer and a railroad employee, Kitsap County never employed Ms. Gordon, who was an employee of an independent contractor. This case simply is inapplicable, does not control, and is of no analytical value to the present case.

Next, Ms. Gordon incorrectly relies upon a repealed rule set forth in *Jones v. Bayley Constr. Co.*, 36 Wn. App. 357, 674 P.2d 679 (1984). This case cites to *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978) for the proposition that a general contractor has a non-delegable duty to employees of a subcontractor. However, the holding regarding non-delegable duty in *Kelley* is premised solely upon a prior adoption of WISHA, RCW 49.16.030, which has since been repealed. In the more recent case of *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 463-64, 788 P.2d 545 (1990) the Washington Supreme Court noted that the non-

delegable duty in both *Jones* and *Kelley* was based upon that repealed statute.

The *Stute* case clarifies that the duties imposed under the current WISHA statutes are as follows: (1) a *general* duty to provide employment free from recognized hazards that are not covered by “specific safety regulations,” and (2) a *specific* duty to comply with specific rules and regulations regarding work place safety.<sup>54</sup> The general duty to provide a safe work environment only applies between an employer and his direct employees.<sup>55</sup> On the other hand, the specific duty to comply with specific safety regulations has been deemed to apply to all employees on a jobsite, including subcontractors.<sup>56&57</sup> Thus, employers only owe a non-delegable duty to comply with specific workplace safety regulations, not a general duty to provide a safe workplace.

Here, Ms. Gordon has made no allegation that there was a violation of a “specific safety regulation.” Ms. Gordon relies exclusively on WAC 296-800-11005 which merely sets forth the general duties of an

---

<sup>54</sup> *Stute v. P.B.M.C. Inc.*, 114 Wn.2d 454, 457, 788 P.2d 545 (1990) citing RCW 49.17.060.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Specific safety regulations which would impose a non-delegable duty to all employees are regulations such as WAC 196-800-22025 requiring employers to keep workroom floors dry, WAC 296-800-16025 requiring employers to train employees to use personal protective equipment, and WAC 296-800-17025 requiring employers to label containers holding hazardous chemicals. These specific regulations are in contrast to general regulations such as WAC 296-800-11005 which merely requires an employer to provide a safe work place.

employer (applicable only to direct employees) consistent with RCW 49.17.060 rather than set forth specific safety regulations which govern a worksite. WAC 296-800-110, in discussing WAC 296-800-11005, highlights that this regulation is merely a general rather than a specific regulation by stating, “use these rules where there are no specific rules applicable to the particular hazard.” No Washington case has held that the general duty outlined in WAC 296-800-11005 imposes a non-delegable duty to employees of an independent contractor.

Finally, Ms. Gordon relies upon *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013). This case does not support Ms. Gordon’s position. According to *Afoa*, an employer owes a common law duty to employees of an independent contractor only where the employer retains control over the work performed by the independent contractor.<sup>58</sup>

In the present case, Conmed was an independent contractor, retained to provide medical services for the County in the jail. Ms. Gordon was Conmed’s employee. As Ms. Gordon was an employee of an independent contractor, Kitsap County did not owe her a duty to provide a safe workplace. Furthermore, Kitsap County did not retain the right to control the performance of Ms. Gordon’s work or the work of Conmed. In

---

<sup>58</sup> *Afoa* at 477 citing *Kelley* at 330 (“where a principal retains control over ‘some part of the work’ we disregard the ‘independent contractor’ designation and require the principal [...] to maintain safe common workplaces for all workers on the site.”)

fact, Kitsap County could not have done so as a matter of law. Specialized expertise and training are required to provide medical care. While corrections staff informed medical staff of security protocols, they retained no authority to control or direct the work of rendering medical care or medical services. Kitsap County could not require Neal to sit during his blood draw, could not direct how or even if the blood draw was conducted, and could not instruct Ms. Gordon on how to administer prescriptions or other medical services. CP 194. There is no evidence to the contrary. Moreover, the Conmed contract states that Conmed's Medical Director will supervise medical staff and that Conmed will "accept legal, financial, and operational responsibility for health care staff." CP 167-68.

Furthermore, a subcontractor is liable for injuries arising from areas arising from its own control or responsibilities.<sup>59</sup> Here, Conmed (not Kitsap County) compelled the blood draw. In addition, local correctional facility regulations imposed several obligations squarely onto medical staff. For example, according to Kitsap County Code, medical staff are under an independent obligation to follow security regulations. KCC 2.21.250(2). KCC 2.21.320(8) provides that physical restraints for medical

---

<sup>59</sup> *Stute* at 461-64; *Jones v. Halverson-Berg*, 69 Wn. App. 117, 847 P.2d 945 (1993) citing *Bozung v. Condominium Builders, Inc.*, 42 Wn. App. 442, 711 P.2d 1090 (1985) and *Ward v. Ceco Corp.*, 40 Wn. App. 619, 626, 699 P.2d 814 (1985).

purposes shall be “medically directed.” Furthermore, Conmed contractually assumed all supervisory and operational responsibility.

**E. This Court Should Affirm Dismissal Because There Is No Evidence Kitsap County Was The Proximate Cause**

The mere occurrence of an injury does not necessarily lead to an inference of negligence.<sup>60</sup> For legal responsibility to attach to negligent conduct, the claimed breach of duty must be a proximate cause of the resulting injury.<sup>61</sup> Here, Kitsap County cannot be held liable unless it was Kitsap County’s negligence that *proximately caused* the incident.

A proximate cause of an injury is defined as a cause that, in a direct sequence, unbroken by any new or independent cause, results in the plaintiff’s injury.<sup>62</sup> Proximate cause is comprised of two elements (1) cause in fact, and (2) legal causation. Both must be established.<sup>63</sup>

**1. Kitsap County’s Acts Are Not A “Cause In Fact”**

An act is a cause in fact when the harm suffered would not have occurred “but for” the act or omission of the defendant.<sup>64</sup> There must be a “direct, unbroken sequence of events” that link the actions of the

---

<sup>60</sup> *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 792-93, 929 P.2d 1209 (1997).

<sup>61</sup> *Pratt v. Thomas*, 80 Wn.2d 117, 119, 491 P.2d 1285 (1971); *Ferris v. Donnellefeld*, 74 Wn.2d 283, 285, 444 P.2d 701 (1968).

<sup>62</sup> WPI 15.01.

<sup>63</sup> *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985).

<sup>64</sup> *Id.*

defendant and the injury to the plaintiff.<sup>65</sup> Cause in fact may be determined as a matter of law when the casual connection is so speculative and indirect that reasonable minds could not differ.<sup>66</sup> If the event would have occurred regardless of the defendant's conduct, that conduct is not a proximate cause of injury.<sup>67</sup>

Summary judgment is proper where the plaintiff lacks evidence that her injuries stemmed from the defendant's negligence.<sup>68</sup> The nonmoving party may not rely on mere speculation or argumentative assertions.<sup>69</sup> A cause of action is speculative when it is as likely that it happened from one cause as another.<sup>70</sup>

At the time of the incident, the restriction in place on Neil was that he was a two-officer detail and that he required belly chains when leaving his unit. At the time of the incident, Neal was within his unit in the proximity of two officers. Accordingly, all restrictions had been complied with at the time of injury. There was absolutely no evidence presented at the trial court level to suggest that Kitsap County should have placed increased restrictions on Neal. There is no evidence that any unlawful conduct of Kitsap County caused Ms. Gordon's injury.

---

<sup>65</sup> *Joyce v. State Department of Corrections*, 116 Wn. App. 569, 561, 75 P.3d 548 (2003), reversed in part on other grounds citing *Taggart* at 226.

<sup>66</sup> *Joyce* at 561.

<sup>67</sup> *Chhuth v. George*, 43 Wn. App. 640, 649, 719 P.2d 562 (1986).

<sup>68</sup> *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944 (2006).

<sup>69</sup> *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999).

<sup>70</sup> *Rasmussen v. Bendotti*, 107 Wn. App. 947, 959, 29 P.3d 56 (2001).

## 2. Kitsap County's Conduct Is Not A Legal Cause

Moreover, even if the Court were to find cause in fact, it cannot find legal causation, and therefore proximate cause can not be established. Legal causation is a distinct element of proximate cause, and must also be met as an essential element of a negligence claim.<sup>71</sup> Legal causation is a much more fluid concept and includes a determination as to how far the consequences of a defendant's conduct should extend as a matter of law.<sup>72</sup> The focus is whether the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability as a matter of policy.<sup>73</sup> Legal causation permits a court to limit liability for sound policy reasons where liability will unjustly attach solely on the basis of duty and foreseeability concepts.<sup>74</sup> For this reason, legal causation should not be assumed whenever a duty of care has been established.<sup>75</sup> In determining whether legal causation exists, the Court will decide whether logic, common sense, justice, policy, and precedent support liability considering the particular facts of the case at hand.<sup>76</sup>

To hold corrections officers responsible for intentional and unforeseeable assaults by inmates on employees of independent medical

---

<sup>71</sup> *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998).

<sup>72</sup> *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998).

<sup>73</sup> *Id.* at 479-80

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *King v. City of Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974), *superseded by statute on other grounds.*

contractors resulting, at least in part, from the medical employee's own violation of accepted medical standards results in poor public policy. First of all, justice will not be done by holding corrections officers strictly liable for all injuries that occur in a correctional facility regardless of whether or not such injuries are foreseeable.

Second, if corrections officers were strictly liable for every intentional assault by an inmate, this would cause corrections officers to take extreme measures to prevent random and unprovoked acts of aggression. To avoid liability for unforeseeable assaults and to uphold their obligations to protect others from these assaults, corrections facilities will believe they must physically restrain every inmate to the fullest extent possible. Even if this Court were to try to limit the scope of liability to those inmates with a history of aggressive or threatening behavior, this would still result in the jails routinely placing extreme physical restrictions on and infringement of the liberties of a significant portion of the inmate population, regardless of whether or not their recent behavior indicates that they are not an imminent threat. This would place a significant burden on limited government resources.

Finally, corrections officers held responsible for injuries caused, in part, by a medical staff's own failure to follow standard medical practices would result in unnecessary interference in the day-to-day provision of

medical services. This will encourage correction officers to attempt to control or restrict medical procedures to the fullest extent possible with regard to inmates with assaultive histories. In turn this may lead to the deprivation of an inmate's rights to adequate and necessary medical care.

### **3. Neal's Conduct Was A Superseding Cause**

Even if a defendant's conduct is said to be a legal cause, the doctrine of superseding cause will limit a defendant's liability. This doctrine applies where the act of a third person intervenes between the defendant's conduct and the plaintiff's injury so the defendant is no longer liable.<sup>77</sup> A superseding cause will break the chain of causation where the cause is not reasonably foreseeable.<sup>78</sup> To constitute a defense, the superseding cause must be an event without which the defendant's conduct would not have caused the injury.<sup>79</sup>

Ms. Gordon argues that Restatement (Second) of Torts §449 prevents Kitsap County from asserting Neal's conduct as a superseding cause. This provision does not apply here. The very happening of Neal striking Ms. Gordon during a medical procedure does not render Kitsap County negligent. There is no evidence that Neal's conduct was foreseeable and there is no evidence Kitsap County retained control over the medical

---

<sup>77</sup> *Schooley* at 482.

<sup>78</sup> *Id.*

<sup>79</sup> *State v. Roggenkamp*, 115 Wn. App. 927, 945, 64 P.3d 92 (2003).

procedure requiring the imposition of a duty of care. In the absence of a duty of care, §449 will not impose negligence.<sup>80</sup>

In *Chhuth v. George*, 43 Wn. App. 640, 719 P.2d 562 (1986), the parents of a schoolchild who was fatally hit by a car on his way home from school, sued the driver of the car and the school district for wrongful death. The jury issued a special verdict and found that the school district was negligent, but that its negligence was not the proximate cause of the plaintiff's injury. The jury instead found that the child's negligence was the sole proximate cause of the accident:

Having found the school district negligent, and that such negligence was not the proximate cause of the child's death, the jury in substance concluded that the child's own intervening negligence was the sole proximate cause. Thus, they concluded that even though the school district was negligent, that negligence was not a "cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which the injury would not have happened."<sup>81</sup>

Here, as in *Chhuth*, Kitsap County's conduct is not a cause "which in a direct sequence, unbroken by any new independent cause," produced Ms. Gordon's injury. As in *Chhuth* were the boy's own negligent act of running into the road caused his injury, here Neal's conduct caused Ms.

---

<sup>80</sup> Restatement (Second) of Torts §449, cmt a.

<sup>81</sup> *Chhuth*, 43 Wn. App. at 650.

Gordon's injury and therefore constitutes a superseding cause sufficient to break the chain of causation.

Neal's affirmative act of striking Ms. Gordon is a cause in fact of Ms. Gordon's injuries. Neal's conduct breaks the causal connection between Kitsap County's conduct and Ms. Gordon's injuries, thereby relieving Kitsap County of liability.

**F. This Court Should Affirm Denial of Ms. Gordon's Motion for Partial Summary Judgment Because There Is An Issue of Fact As To Whether She Was Contributorily Negligent**

**1. Cases Cited By Ms. Gordon Are Distinguishable**

Ms. Gordon argues that this Court should apply the holdings in *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005) and *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 641, 244 P.3d 924 (2010) to determine that she cannot be contributorily negligent as a matter of law. The cases cited by Ms. Gordon are substantially different and not applicable for several reasons.

*a. Public Policy Concerns are Substantially Different*

*Christensen* involves sexual abuse of minors and turns on unique concerns of public policy not applicable to the present case. The *Christensen* court held that a minor student cannot be held contributorily negligent for sexual abuse by a teacher. This court's holding was based on the public policy and "societal interest" of protecting minors from sexual

abuse by adults.<sup>82</sup> The court applied a principle in criminal law which imposes strict liability for child sexual abuse, regardless of the child's consent.<sup>83</sup> The "obvious purpose of these criminal statutes is to protect persons who, by virtue of their youth, are too immature to rationally or legally consent."<sup>84</sup> The court held that the civil rules surrounding a minor's consent should be consistent with the criminal rules. When asked to apply holdings of contributory negligence from cases not involving sexual abuse, the court refused and held that "[t]he act of sexual abuse is key" due to the unique public interest of protecting minors.<sup>85</sup>

Because this case is not a case of sexual abuse of a minor, the narrow holding in *Christensen* does not apply here. There is no societal interest which would require the law to protect Ms. Gordon from acts of her own negligence. She is fully capable of appreciating risks, giving rational consent, and making decisions regarding her own safety.

The narrowly tailored holding of *Christensen*, summarized as follows, bears no resemblance to the facts of the present case:

In sum, we hold that contributory fault may not be assessed against a 13-year-old child when that child brings a civil action against a school district and school principal for sexual abuse by her teacher. The child, in our view, lacks the capacity to consent to the sexual abuse and is under no duty to protect himself or herself from being

---

<sup>82</sup> *Christensen* at 67-69.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 68.

<sup>85</sup> *Id.* at 69.

abused.<sup>86</sup>

*b. No “Enhanced” Statutory Duty*

The holding in *Christensen* was also based upon the existence of a well-established, “enhanced and solemn” duty set forth by statute requiring schools to protect minors in their care when those minors are compelled by law to be in attendance.<sup>87</sup> Schools have a statutory duty to care for students.<sup>88</sup> As the court in *Christensen* explained, this duty is required because a student placed in a school’s care loses her ability to protect herself.<sup>89</sup> The court noted that the relationship between student and school is not voluntary but mandated by law. As a consequence, teachers have a mandatory “protective custody” over students, which is substituted for that of the parent.<sup>90</sup> As a consequence of this mandatory custodial relationship, the student cannot legally be contributorily negligent.

This duty is similar to the custodial duty between a correctional facility and an inmate as outlined in the *Gregoire* case which is also mandated by the Legislature and results in the inmate’s loss of liberty.<sup>91</sup>

Unlike the defendants in *Gregoire* or *Christensen*, Kitsap County owes no enhanced custodial duty of care to Ms. Gordon or to any other

---

<sup>86</sup> *Christensen* at 71-72.

<sup>87</sup> *Id.* at 70; See RCW 28.225.010 (requiring mandatory school attendance).

<sup>88</sup> *Id.* at 70-71.

<sup>89</sup> *Id.* at 70.

<sup>90</sup> *Id.*

<sup>91</sup> *Gregoire* at 635-36.

employees of its independent contractors. Even where an employer owes a duty of care to its own employees, courts have not likened this duty to a custodial duty nor have courts absolved employees or independent contractors of their own duty to act reasonably to avoid harm.<sup>92</sup>

c. “Intentional Act” Analysis Irrelevant Absent Special Duty

Ms. Gordon claims that she cannot be contributorily negligent because Neal’s acts were intentional. She fails to recognize that the court in *Christensen* declined to allow a contributory negligence defense only because the school district’s unique custodial duty specifically required it to protect students from the intentional conduct of sexual abuse. Here, before Kitsap County can be liable for an intentional conduct, it must first have a duty to protect a third person from intentional conduct. As explained above, the enhanced duty involved in *Christensen* does not apply in this case. Whether or not Neal acted intentionally is irrelevant.

**2. Evidence Establishing Negligence of Ms. Gordon.**

A plaintiff is contributorily negligent when she fails to exercise reasonable care to provide for her own safety.<sup>93</sup> Here, the trial court correctly held that there was an issue of fact as to whether Ms. Gordon

---

<sup>92</sup> *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 613, 260 P.3d 857 (2011)(in lawsuit for negligence related to safety practices against employer and exposure to toxic paint, plaintiff could have been contributorily negligent in disregarding policy to use a respirator).

<sup>93</sup> *Jaeger v. Cleaver Const. Inc.*, 148 Wn. App. 698, 713, 201 P.3d 1028 (2009).

was contributorily negligent in the manner in which she conducted Mr. Neal's blood draw. At the time of the blood draw, medical practices would have required that Neal be seated or lying down when having his blood drawn. However, prior to the blood draw, Neal asked to stand and Ms. Gordon said "that's fine." Accordingly, Neal stood while Ms. Gordon attempted to perform the blood draw. In addition, to avoid injury and risk of harm from Neal, Ms. Gordon was informed not to lean over the table towards Neal but to have him extend his arm over the table instead. Ms. Gordon disregarded this recommendation and leaned towards Neal.

Had Ms. Gordon not leaned over the table and had she required Neal to be sitting, she likely would not have been injured. If Neal had been sitting, Officer Davenport may have had time to intervene and prevent an attack. Furthermore, if Neal was seated, he likely would not have been able to reach Ms. Gordon to strike her face as he had less range of motion in a seated position, or the force of the blow would have been subdued. Accordingly, Ms. Gordon's own negligence in violating medical practices and failing to follow Officer Davenport's safety recommendations contributed to her injuries.

The purpose of the medical standard requiring patients to sit for a blood draw is irrelevant. The facts are that Ms. Gordon admitted to violating a medical standard and it is very likely that if she had not

violated that standard, she would not have been injured.

**G. This Court Should Affirm Denial of Ms. Gordon's Motion for Partial Summary Judgment Because There Is An Issue of Fact As To Whether She Assumed The Risk**

**1. Ms. Gordon's Authority Is Not Controlling**

Ms. Gordon's reliance on Restatement (Second) of Torts §496F and *Gregoire* is fatal to her argument that she could not have assumed the risks involved in this case.

First of all, Kitsap County could find no Washington case which discusses or addresses §496F. It does not appear that this Restatement has been adopted in Washington. Furthermore, according to Comment "d" of this Restatement, assumption of risk applies unless a statute or policy relieves a plaintiff of the responsibility to exercise ordinary care. As outlined above, *Afoa* makes clear that WISHA imposes a non-delegable duty on employers or jobsite owners to employees of an independent contractor with respect to specific violations of safety regulations.<sup>94</sup> However, Ms. Gordon has not pointed to a single specific safety violation which led to her injury. Nor has she established that Kitsap County retained control over medical practices in the Kitsap County jail sufficient to impose a general duty of care over Ms. Gordon. Accordingly, Ms. Gordon has failed to identify a statute or regulation which would relieve

---

<sup>94</sup> *Afoa* at 475-77.

her of the duty to exercise reasonable care for her own safety.

Furthermore, this case is unlike *Gregoire* in which the court dismissed an assumption of risk defense on the basis that a correctional facility has a non-delegable custodial duty to care for inmates deprived of their own liberty. *Gregoire* at 635-636. The special custodial relationship between a jailer and an inmate discussed in *Gregoire* is distinct from the relationship between a correctional facility and an independent contractor providing medical services. While an inmate is within a jailer's "complete control" and custody, Ms. Gordon has not been deprived of her own liberty and she does not lack the ability to care for herself.

Even if a duty of care is owed, which is not the case, that duty does not relieve Ms. Gordon from her own duty to act reasonably for her own safety. Unlike the statutory duties which specifically require a jailer to protect an inmate from suicide, any duty to provide a safe workplace which might be imposed on Kitsap County does not require Kitsap County to protect Ms. Gordon from her own acts or decisions. To the contrary, Washington courts apply assumption of risk defenses in the employer-employee setting involving workplace injuries.<sup>95</sup>

---

<sup>95</sup> *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 613, 260 P.3d 857 (2011)(in lawsuit for negligence related to safety practices against employer and exposure to toxic paint, plaintiff could have assumed risk in disregarding policy to use a respirator); *Laschied v. City of Kennewick*, 137 Wn. App. 633, 154 P.3d 307 (2007)(issue of fact as to whether police officer assumed risk of his employment).

## 2. Ms. Gordon Assumed the Risk of Assault By Neal

Kitsap County is relieved of liability pursuant to the doctrine of implied primary assumption of risk if Ms. Gordon: (1) impliedly consented to relieve Kitsap County of a duty concerning a specific, known, and appreciated risk; and (2) engaged in conduct from which consent is implied.<sup>96</sup> Whether a plaintiff knowingly and voluntarily encountered a risk is generally a question of fact, except when reasonable minds could not differ.<sup>97</sup> Implied primary assumption of risk is a complete bar to recovery for the risk assumed.<sup>98</sup>

Washington Courts have held that a plaintiff assumes a risk when he or she encounters the risk despite knowing of the risks involved and of the option for alternative courses of action.<sup>99</sup> The case of *Wirtz* involved a plaintiff injured while assisting in an effort to fell trees. The plaintiff did not have any experience in tree felling but had watched the defendants fell trees for several days prior to the incident.<sup>100</sup> Defendants explained both the tree felling process to the plaintiff and the dangers involved and suggested that he wear a hard hat, which the plaintiff declined. The plaintiff also had the option to stop participating in the activity at any time.

---

<sup>96</sup> *Wirtz v. Gillogly*, 152 Wn. App. 1, 8, 216 P.3d 416 (2009).

<sup>97</sup> *Id.*

<sup>98</sup> *Gregoire* at 636 citing *Dorr v. Big Creek Wood Prod., Inc*, 84 Wn. App. 420, 425, 927 P.2s 1148 (1996).

<sup>99</sup> *Wirtz v. Gillogly*, 152 Wn. App. 1, 8, 216 P.3d 416 (2009).

<sup>100</sup> *Id.*

During plaintiff's assistance, a tree split and struck the plaintiff. The Court held that because the plaintiff had been instructed in the tree felling process and the dangers involved and because he could have declined to participate at any time, the plaintiff voluntarily assumed the risk.<sup>101</sup>

The facts of the present case are similar to those in *Wirtz*. As in *Wirtz* where the defendant instructed the plaintiff in the tree felling process and warned him of the dangers, here corrections officers recommended how to handle Neal and warned of potential dangers in dealing with him. Furthermore, Ms. Gordon has more than seven years of experience as a nurse in a correctional facility setting. Finally, Ms. Gordon had just as much, if not more, access to information regarding Neal's behavioral history as this information was contained in his medical file.

Also as in *Wirtz* where the plaintiff could stop participating any time and leave the worksite, here Ms. Gordon had absolute authority to cancel the blood draw if she felt it was too dangerous. Whether to proceed or cancel medical procedures is entirely within the discretion of medical staff. CP 194. Ms. Gordon was instructed to keep the door to her back so that she could easily leave the room. She knew that leaving and terminating contact with Neal was an alternative option. "As the court stated in *Wirtz*, "if [the plaintiff] had felt uncomfortable," she "could have

---

<sup>101</sup> *Id.*

refused to assist in that activity and limit [her] involvement.”<sup>102</sup> As a result, she voluntarily accepted the known risks associated with her conduct. Furthermore, the blood draw was performed at Conmed’s request. Ms. Gordon’s direct employer created the situation and Ms. Gordon had the authority to stop it.

### **3. Ms. Gordon Assumed Risks Inherent In Employment**

Washington Courts have generally held that an employee assumes the natural risks inherent in his or her employment. A defendant is not liable to employees of an independent contractor where the harm involved was naturally inherent in the nature of the employee’s work.<sup>103</sup> An employee who undertakes a hazardous employment assumes the hazard inherent in the work involved as an ordinary risk of employment.<sup>104</sup> An experienced adult employee in “possession of his ordinary faculties” assumes the ordinary risks incident to the performance of her work.<sup>105</sup>

The potential risk of injury by assault from an inmate is naturally inherent for all persons who work with and around inmates in a correctional facility. This is why corrections staff receive assault

---

<sup>102</sup> *Wirtz* at 10-11.

<sup>103</sup> *Golding v. United Homes Corp.*, 6 Wn. App. 707, 711, 495 P.2d 1040 (1972).

<sup>104</sup> *Cummins v. Default*, 18 Wn.2d 274, 139 P.2d 308 (1943) over-ruled on other grounds, see *Jarr v. Seeco Cont. Co.*, 35 Wn. App. 324, 666 P.2d 392 (1983).

<sup>105</sup> See *Rosendahl v. Lesourd Methodist Church*, 68 Wn.2d 180, 412 P.2d 109 (1966).

benefits.<sup>106</sup> Dealing with potentially aggressive inmates is a routine part of the job for anyone who works within a correctional facility, especially for medical staff whose job requires close contact with inmates to administer and perform medical care and medical procedures. For medical staff, it is a known, inherent, and routine risk that inmates may engage in aggressive behavior. Ms. Gordon was well aware of and assumed this risk.

#### IV. CONCLUSION

For the reasons set forth above, this court should affirm the decision of the Kitsap County Superior Court in denying partial summary judgment in Ms. Gordon's favor with respect to contributory negligence and assumption of risk issues and dismissing Ms. Gordon's claims against Respondents.

Respectfully submitted this 5<sup>th</sup> day of June, 2014.

RUSSELL D. HAUGE  
Kitsap County Prosecuting Attorney



IONE S. GEORGE, WSBA No. 18236  
CHRISTY PALMER, WSBA No. 42560  
Deputy Prosecuting Attorneys  
Attorney for Respondents Kitsap County and  
Kitsap County Chief of Corrections, Ned  
Newlin

---

<sup>106</sup> See RCW 72.09.240 which, in recognizing the "hazardous nature of employment in state correctional institutions," provides correctional staff with assault benefits. Also see WAC 137-78 *et. seq.*

CERTIFICATE OF SERVICE

I, Batrice Fredsti, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document and Appendices in the manner noted upon the following:

W. David Rovang	<input checked="" type="checkbox"/>	Via U.S. Mail
Andrew Becker	<input checked="" type="checkbox"/>	Via Email
Becker Rovang, PLLC	<input type="checkbox"/>	Via Hand Delivery
1730 Pottery Ave., Ste. 210		
Port Orchard, WA 98366		

SIGNED in Port Orchard, Washington this 6<sup>th</sup> day of June, 2014.

  
BATRICE FREDSTI, Legal  
Assistant  
Kitsap County Prosecuting Attorney  
614 Division Street, MS-35A  
Port Orchard, WA 98366-4676  
(360) 337-4992

# KITSAP COUNTY PROSECUTOR

**June 06, 2014 - 9:07 AM**

## Transmittal Letter

Document Uploaded: 456486-Respondents' Brief.pdf

Case Name: Beverly Gordon v. Kitsap County and Kitsap County Chief of Corrections Ned Newlin

Court of Appeals Case Number: 45648-6

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Respondents'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

Brief of Respondents Kitsap County and Kitsap County Chief of Corrections Ned Newlin

Sender Name: Batrice K Fredsti - Email: [bfredsti@co.kitsap.wa.us](mailto:bfredsti@co.kitsap.wa.us)

A copy of this document has been emailed to the following addresses:

[IGeorge@co.kitsap.wa.us](mailto:IGeorge@co.kitsap.wa.us)

[cmpalmer@co.kitsap.wa.us](mailto:cmpalmer@co.kitsap.wa.us)

[CBruce@co.kitsap.wa.us](mailto:CBruce@co.kitsap.wa.us)