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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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M. GWYN MYLES, individually and as Personal Representative of the  
Estate of WILLIAM LLOYD MYLES, deceased,

Respondents,

v.

STATE OF WASHINGTON, et al.,

Appellants.

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**APPELLANT STATE OF WASHINGTON'S REPLY BRIEF**

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## I. INTRODUCTION

Carlos Villanueva-Villa was convicted of felony bail jumping and misdemeanor vehicle prowl in Clark County Superior Court on April 14, 2003. The court imposed one year of community custody supervised by the Washington State Department of Corrections (DOC or the Department) and one year of probation supervised by DOC, to be served concurrently. CP at 128-33. It is undisputed that the Legislature took away the authority of DOC to supervise any offender for bail jumping effective July 1, 2003. Laws of 2003, ch. 379, § 3, codified as former RCW 9.94A.501(3) (2003). It is also undisputed that the Legislature took away the authority of DOC to supervise any offender for vehicle prowl on July 1, 2005. Laws of 2005, ch. 362, § 1. Plaintiff's husband William Myles died in a car accident caused by Mr. Villanueva-Villa on January 27, 2006. Because DOC had no statutory authority to supervise this offender on that date, and thus had no authority to control his action, DOC had no duty of care toward Plaintiff Gwen Myles and has no liability to her for the death of her husband. *E.g., Estate of Davis v. State, Dep't of Corr.*, 127 Wn. App. 833, 113 P.3d 487 (2005); *Husted v. State*, 187 Wn. App. 579, 348 P.3d 776, *review denied*, 184 Wn.2d 1011 (2015). In determining whether DOC had a duty to Plaintiff it is irrelevant that the sentencing court retained jurisdiction over the offender and could have extended or tolled the period of his probation. It is also irrelevant for

purposes of determining whether a duty exists that public safety would have been better served if DOC had been able to continue its supervision of this offender on January 27, 2006. The undisputed facts are that DOC did not have such authority on this date. The superior court erred in denying DOC's motion for summary judgment on this issue. This Court should reverse.

## II. ARGUMENT

### A. **DOC'S Authority to Supervise for Felony Bail Jumping Ended on July 1, 2003, the Effective Date of ESSB 5990**

DOC's authority to supervise Mr. Villanueva-Villa for the felony offense of bail jumping ended on July 1, 2003, the effective date of ESSB 5990. The Legislature passed ESSB 5990 in 2003. Laws of 2003, ch. 379, § 3. This legislation limited DOC's authority to supervise persons sentenced to DOC-supervised community custody to offenders convicted of only certain felonies and crimes, including violent offenses, domestic violence, residential burglary, and certain drug offenses. Former RCW 9.94A.501(2) (2003); *see* Appendix (App.) at 55. Felony bail jumping was not one of the enumerated crimes.

ESSB 5990 went on to state expressly that DOC did *not have authority* to supervise offenders for any other felonies:

(3) The department *is not authorized to, and may not, supervise any offender* sentenced to a term of community custody, community

placement, or community supervision *unless the offender is one for whom supervision is required under subsection (2) of this section.*

Laws of 2003, ch. 379, § 3, codified as former RCW 9.94A.501(3) (2003) (emphasis added); App. at 19, 55.

As of July 1, 2003, DOC had no statutory authority to supervise Mr. Villanueva-Villa or any offender for felony bail jumping. This was true irrespective of the fact that he did not comply with the terms of his supervision when DOC initially closed its supervision on both the felony and the misdemeanor on April 14, 2004. CP at 47, 346. DOC continued to lack statutory authority after it rescinded the closure of supervision for the felony on August 12, 2004, an action it later realized was done in error. CP at 47, 48, 357. The fact that DOC entered into a written sanction agreement with Mr. Villanueva-Villa following his arrest in October 2005, which “extended” DOC’s supervision on the felony until March 2006 did not change the fact that DOC lacked statutory authority to supervise for the felony bail jumping conviction after the effective date of ESSB 5990 in July 2003. Regardless, DOC recognized its error and finally closed its file on January 13, 2006. CP at 48-49, 377-81. This absolutely ended any relationship between DOC and Mr. Villanueva-Villa, and ended DOC’s duty, two weeks before the death of Mr. Myles.

**B. DOC'S Authority to Supervise for Vehicle Prowl Ended on April 13, 2004**

Mrs. Myles argues that Mr. Villanueva-Villa's sentence to one year of probation was tolled by the fact that he "absconded" from the state prior to the expiration of his one-year sentence to probation for misdemeanor vehicle prowling. In support, she cites case law holding that the *authority of the court* to exercise jurisdiction over a party who fails to abide by the terms of his probation is tolled during the time that an offender unlawfully leaves the jurisdiction of the court during the term of his probation. These cases do not support plaintiff's theory that *the Department*, as opposed to the court, can maintain authority over an offender sentenced to DOC supervised probation under RCW 9.95.210(4) beyond the date of the sentence to DOC supervised probation. App. at 133.

In *Gillespie v. State*, 17 Wn. App. 363, 563 P.2d 1272 (1977), the Court of Appeals held that the sentencing court had continuing jurisdiction over an offender who absconded and never reported for probation as required. In *Gillespie*, the superior court sentenced the offender to three years of probation on May 5, 1972. The offender never reported and subsequently left the state without permission. A bench warrant was issued for the offender's arrest. After the offender was apprehended, the sentencing court ordered that probation be continued an additional four years on

May 29, 1975, several weeks after the original sentence had ended. The offender argued in a personal restraint petition that the sentencing court lacked authority to extend his probation beyond the three-year term. *Gillespie*, 17 Wn. App. at 365.

The Court of Appeals held that the *sentencing court* had statutory authority under RCW 9.95.230 to extend the term of probation because it was clear that the offender had purposefully absented himself from Washington during the term of probation. *Gillespie*, 17 Wn. App. at 366-67. Therefore, the sentencing court retained authority over the probationer to extend the term of probation. In other similar cases, the appellate courts have held that the sentencing court retains authority over an offender and has jurisdiction to extend the term of probation where there is evidence that the offender has absconded from the state during the initial term of probation. *Accord*, *State v. Frazier*, 20 Wn. App. 332, 579 P.2d 1357 (1978). *But see State v. Nelson*, 92 Wn.2d 862, 601 P.2d 1276 (1979) (holding that under the then-applicable version of RCW 9.95.230 the court had authority to revoke a deferred sentence or extend the term of probation only if a motion to revoke is made to the court before the term of probation ends). In each case, the courts' authority was based upon RCW 9.95.230, which grants the *sentencing court* authority to revoke, modify, or extend the term of probation. App. at 134-35.

None of the cases cited by Mrs. Myles authorize the Department of Corrections, to indefinitely retain authority over an offender pursuant to its supervisory authority under RCW 9.95.210(4). Instead, that statute authorizes the superior court to direct the offender sentenced to probation to report to and follow the instructions of the Department “for up to twelve months.” App. at 133-34. It does not however grant DOC authority to extend the term of probation regardless of the circumstances. This was something that could only be done by the court during the relevant period of probation.

In addition, the factual situation in the present case is different from the factual situation in *Gillespie* and similar cases where the jurisdiction of the sentencing court to extend or revoke probation was held to continue during the time that an offender had absconded from the jurisdiction of the court. In the present case, there is no evidence in the record that the offender here fled the jurisdiction of the court. In contrast to the offender in *Gillespie*, who never appeared at the probation office as directed, Villanueva-Villa reported to DOC after being sentenced in April 2003. He was also classified “RM-D,” the lowest risk category, based upon his lack of significant criminal history. CP at 46. Unlike offenders classified at a higher risk level, RM-D offenders were not required to report regularly to a community corrections officer. DOC did not receive automatic reports of encounters

that a RM-D offender had with law enforcement but at that time relied upon the offender to self-report any new arrests or convictions. CP at 46. The supervision of RM-D offenders was essentially administrative. Accordingly, Mr. Villanueva-Villa was not ordered to regularly report to an assigned community corrections officer. He was only required to keep DOC informed of a current address and to pay his legal financial obligations (LFOs). CP at 46.

When Villanueva-Villa's mail was returned by the post office as undeliverable, Community Corrections Officer Sherri Mullin filed a notice of violation with the court on December 29, 2003. The violations listed were failing to provide DOC with a change of address and failing to pay LFOs. CP at 337. The court set a hearing to modify or revoke sentence. CP at 347. When he failed to appear, the court issued a bench warrant on May 20, 2004. CP at 355. But, contrary to Mrs. Myles suggestion, there is no evidence that Villaneuva-Villa absconded from the jurisdiction or that he failed to report as ordered because he was never ordered to report to a community corrections officer in the first place.

Mr. Villanueva-Villa was arrested on the court's warrant following a routine traffic stop in October 2005. CP at 48. By order dated October 11, 2005, the court imposed a sentence of 30 days on the misdemeanor count. CP at 360. In the meantime, Villanueva-Villa was held on a DOC warrant

obtained in regard to the felony supervision in 2003 for the same violations of failing to keep DOC informed of a current address and failing to pay LFOs. CP at 363. Villanueva-Villa was released from jail on October 21, 2005, after serving a total of 11 days on his 30-day sentence. The warrants were cleared. CP at 48. Pursuant to a negotiated sanction entered with DOC, Mr. Villanueva-Villa was then to report daily to DOC for 30 days upon his release. CP at 363. He initially complied and reported as ordered, but abruptly stopped reporting on December 30, 2005. CP at 48, 365.

On January 27, 2006, Mr. Villanueva-Villa was involved in the accident that caused the death of Mr. Myles and was charged with vehicular homicide. It was not until February 2006 that the prosecutor filed a motion to modify his sentence to one-year probation. By order dated February 16, 2006, the court added 30 days to Villanueva-Villa's misdemeanor sentence. CP at 403. *Gillespie* and cases with similar holdings are authority for the fact that the court had authority, as it did in this case, to extend Mr. Villanueva-Villa's misdemeanor sentence by this 30-day order. They are not authority for the ability of DOC to impose sanctions upon him beyond the one-year term of his misdemeanor sentence, which by statute should have ended in April 2004.

Plaintiff also cites *City of Spokane v. Marquette*, 146 Wn.2d 124, 43 P.3d 502 (2002), for the principle that Mr. Villanueva-Villa's term of

probation was tolled. In *Marquette*, the Court held that tolling applied after interpreting statutes related to the offender's supervision by a city municipal court. The Supreme Court held that in those circumstances the municipal court retained jurisdiction over the offender to revoke or modify its original sentence to comply with RCW 3.35.255. *Marquette*, 146 Wn.2d at 132. Here, Mr. Villanueva-Villa was not sentenced to probation under the statutes governing the authority of the district court. Rather he was sentenced by the superior court to one year of DOC supervised probation pursuant to RCW 9.95, which does not grant DOC similar authority to revoke or modify the offender's sentence. Thus, like *Gillespie*, *Marquette* is not authority for DOC to retain ongoing jurisdiction under RCW 9.95 after the original period of probation ends.

Finally, Plaintiff's citation to *State v. McClinton*, 186 Wn. App. 826, 347 P.3d 889 (2015) in support of her claim that DOC had continuing authority to supervise Mr. Villanueva-Villa despite later legislative changes is misplaced. *McClinton* held that DOC retained authority to impose GPS monitoring as a condition of community custody imposed on offender convicted of several sex offenses because it had this authority at the time of the offender's sentencing. *McClinton*, 186 Wn. App. at 836. But *McClinton* does not concern whether DOC had authority to supervise the offender, which was not an issue in the case. Rather, the court merely presumed that

DOC had such authority and also had authority to impose the conditions of supervision. The court in *McClinton* held that DOC has the authority to impose conditions of supervision and the change in the law at issue clarified that authority. In contrast, in the present case, the Legislature *removed* DOC's authority to supervise for bail jumping and vehicle prowl.

Whether or not the court retained authority to revoke or modify Mr. Villanueva-Villa's sentence to one-year probation beyond April 14, 2004, the Legislature took away any possible authority of DOC to supervise for misdemeanor vehicle prowl in 2005 when it enacted SSB 5254 (Laws of 2005, ch. 362 § 1). After the effective date of this legislation on May 10, 2005, seven months before Mr. Myles' fatal accident, DOC had no further authority, and thus no duty, to supervise *any offender* for vehicle prowl. CP at 44-45, 452.

This Court should reverse the decision of the Superior Court, which held that whether DOC had a duty was a question to be argued to the jury.

**C. DOC'S Alleged Acts of Omission Were Neither a Cause in Fact nor a Legal Cause of Plaintiff's Injury**

Even if Plaintiff Myles could prove an actionable tort duty, which she cannot, her claim still fails for lack of proximate cause. This includes both cause in fact and legal causation. The superior court erred in concluding otherwise.

## 1. No Cause in Fact

Cause in fact refers to the “but for” consequences of an act – the physical connection between an act and an injury. There must be evidence of some act or omission of the defendant that produced injury to the Plaintiff in a direct, unbroken sequence under circumstances where the injury would not have occurred “but for” the defendant’s act or omission. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Although cause in fact in most cases is a question of fact for the jury, cause in fact becomes a legal determination to be made by the court when jurors are required to resort to speculation to find cause in fact. *E.g., Estate of Bordon ex rel. Anderson v. State Dep’t of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005).

An essential part of a Plaintiff’s burden of proof in a case alleging negligence supervision by the Department of Corrections is establishing by admissible evidence that but for the negligence of DOC the offender would have been in jail confinement on the date of plaintiff’s injury and therefore would have been unable to have caused the injury. *Bordon*, 122 Wn. App. at 240. Causation evidence most often includes testimony from a witness qualified to provide an opinion on whether or not the offender would have received a sanction of jail confinement for non-compliance with the conditions of supervision that would have resulted the offender being in jail

confinement on the date of injury. Evidence of cause in fact can also, in certain circumstances, include expert testimony about what a judge or hearing's officer would rule in particular proceedings. *Bordon*, 122 Wn. App. at 243-44. A plaintiff does not sustain his or her burden of proof when cause in fact is based upon speculation that the offender may have been in confinement or should have been in confinement. *Id.* at 240-42. *See also Hungerford v. State Dep't of Corr.*, 135 Wn. App. 240, 254, 139 P.3d 1131 (2006), *review denied*, 160 Wn.2d 1013 (2007); *Smith v. State Dep't of Corr.*, 189 Wn. App. 839, 853, 359 P.3d 867 (2015), *review denied*, 185 Wn.2d 1004 (2016) (cause-in-fact is not established when plaintiff presents no admissible evidence to support a theory that the offender would have been sanctioned with sufficient jail time to keep him in jail confinement at the time of the injury because jurors required to engage in speculation).

Here, Mrs. Myles argues that “[t]here is no better evidence than the actual conditions and sanctions the DUI Judge and the Department of Corrections actually imposed upon Carlos”. Brief of Respondent at p. 32. However, she fails in her burden to articulate with admissible evidence what the jail sanctions would have been imposed as of December 30, 2005, the date that Mr. Villanueva-Villa last reported to DOC, had DOC known of his new DUI offenses. As stated in the declarations of DOC supervisor Robert Storey, had DOC even known of Mr. Villaneuva-Villa's DUI citations, they

would not have been adjudicated within DOC's sanction system. His guilt or innocence would have been adjudicated by the courts. CP at 433. And as of December 30, 2005, the date he last reported, Mr. Villanueva-Villa's guilt or innocence of these new offenses had not been determined by the court system. According to Mr. Storey, whose testimony is unrebutted, the most likely sanction that would have been imposed by DOC in late 2005, had it been known that Mr. Villanueva-Villa had been cited for two new misdemeanor offenses, would have been the issuance of a warning for failing to obey all laws or, at most, a very short jail sanction. CP at 433-34. He would not have been sanctioned with a jail sentence that would have kept him in jail through January 27, 2006. Even these sanctions, Mr. Storey testified, would not have been imposed until after the criminal justice system had adjudicated Mr. Villanueva's guilt or innocence on the new offenses. CP at 433-34.<sup>1</sup>

Plaintiff points to the court's order of February 16, 2006, two weeks after Mr. Myles' death, which imposed another 30 days jail time Mr. Villanueva-Villa's probation violations on his original conviction.

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<sup>1</sup> Even if DOC had adjudicated the citations, Mr. Villanueva-Villa's penalty would likely have only been for 30 days, the same penalty he received for his prior address violations. CP at 433. Even then, he likely would have served only one third of that sentence with good time credits and, therefore, would have been free on January 27, 2006. *See Couch v. State Dep't of Corr.*, 113 Wn. App. 556, 54 P.3d 197 (2002), *review denied*, 149 Wn.2d 1012 (2003). In any event, all of this is pure speculation.

However, this same order expressly stated “The jail shall release defendant on this case, if he pays \$300 towards financial obligations on this case.” CP at 403. There is no reason to believe that the court would not have ordered the same bail had Mr. Villanueva-Villa been brought before the court earlier.

In sum, Mrs. Myles came forward with no admissible evidence, just speculation, sufficient for jurors to find cause in fact. *Compare with Schulte v. Mullan*, 195 Wn. App. 1004 (2016) (where the plaintiff did raise issues of fact on cause in fact by presenting testimony from experts that the offender would have been sanctioned to significant jail time beyond the injury date had a violation report been filed). The superior court erred in finding that a jury should reach this issue.

## **2. No Legal Causation**

Legal causation is grounded in policy determinations as to how far the consequences of a defendant’s acts should extend. That determination depends on “mixed considerations of logic, common sense, justice, policy and precedent.” *Braegelmann v. City of Snohomish*, 53 Wn. App. 381, 384, 766 P.2d 1137 (1989); *Binschus v. State*, 186 Wn.2d 573, 380 P.3d 468 (2016). DOC recognized on January 13, 2006 that it had no authority to continue its supervision of Mr. Villanueva-Villa. Any possible “take charge” relationship between DOC and Mr. Villanueva-Villa ended on that

date. The fact that such a relationship once existed (between April 14, 2003 and April 13, 2004) cannot be legally sufficient to hold DOC liable for crimes committed by the offender into the future after the “take charge” relationship ends.

Imposing liability upon DOC nearly two years beyond the date that the “take charge” relationship legally ended is not consistent with matters of logic, common sense, justice and policy. To hold otherwise would mean that DOC would be liable into the future for new crimes committed by anyone whom it once supervised.

The Superior Court erred in holding that proximate cause in this case is a jury question.

### **III. CONCLUSION**

The Washington State Department of Corrections had no legal authority to impose sanctions and control the conduct of Carlos Villanueva-Villa after April 13, 2004, nearly two years before the death of William Myles on January 27, 2006. DOC lost authority to supervise this offender for the felony conviction of bail jumping with the passage of ESSB 5990 in July 2003. It lost authority to supervise him for the misdemeanor on April 13, 2004, the last date that DOC, as opposed to a court, had statutory authority to impose sanctions upon the offender for probation violations. Even if DOC’s authority in regard to the misdemeanor continued beyond

that date, which it did not, DOC lost any possible authority to sanction offender Carlos Villanuevo-Villa when SSB 5254 became effective on July 1, 2005, the year before the accident that took the life of Plaintiff's husband.

In this case whether or not a "take charge" relationship existed to impose tort liability on DOC is dependent upon whether or the Legislature authorized DOC to supervise Mr. Villanueva-Villa in January 2006 for community custody and probation arising from his felony conviction for bail jumping and misdemeanor conviction for vehicle prowl. Clearly it did not. Any possible relationship between the offender and DOC ended when DOC closed its community custody supervision file on January 13, 2006, two weeks before January 27, 2006.

The Superior Court erred in finding that jurors were to determine whether DOC had legal authority to supervise this offender. The Superior Court also erred in ruling that proximate cause in this case was a jury

question. The decision of the Superior Court, which denied summary judgment to the Department of Corrections, should be reversed.

RESPECTFULLY SUBMITTED this 14th day of February, 2018.

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**CERTIFICATE OF SERVICE**

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

DATED this 14th day of February, 2018.

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