
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TANYA GREGOIRE, Guardian for the person and estate of BRIANNA
ALEXANDRIA GREGOIRE, a minor, and as Personal Representative for
EDWARD ALBERT GREGOIRE, deceased,

Plaintiff/Petitioner,

vs.

CITY OF OAK HARBOR, a municipal corporation,

Defendant/Respondent,

and

RICHARD WALLACE, and his marital community; BENJAMIN
SLAMAN, and his marital community; JOHN DYER, and his marital
community; RAYMOND PAYEUR, and his marital community;
STEVEN NORDSTRAND, and his marital community; and WILLIAM
WILKIE, and his marital community,

Defendants.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of the Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. These name changes were effective January 1, 2009.

WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the extent to which the affirmative defenses of assumption of risk and contributory negligence apply in negligence claims against municipalities operating public jail facilities, based upon breach of their duty to protect inmates.

II. INTRODUCTION AND STATEMENT OF THE CASE

This is a negligence action for wrongful death involving a suicide by an inmate in a municipal jail, and whether the municipality may raise assumption of risk and contributory negligence by the decedent as a defense. Tanya Gregoire brought the action as personal representative of the estate of Edward Gregoire, and as guardian for Mr. Gregoire's minor child, Brianna Gregoire (Gregoire). The defendant City of Oak Harbor (Oak Harbor) is a municipal corporation, and operates a jail facility. The

underlying facts are drawn from the unpublished Court of Appeals opinion, Gregoire v. City of Oak Harbor, noted at 141 Wn.App. 1016, WL 3138044 (2007), review granted, 164 Wn.2d 1007 (2008), the Court's Instructions to the Jury (CP 24-54), Jury Note & Court's Response (CP 55), and the completed Special Verdict Form (CP 21-23).¹

For purposes of this amicus curiae brief, the following facts are relevant: Edward Gregoire was arrested on outstanding warrants and incarcerated in the Oak Harbor jail. Shortly after arrival he was placed in a regular cell, where he hanged himself. Mr. Gregoire was transported to the hospital where he died shortly after arrival.

This action was commenced by Gregoire against Oak Harbor, and proceeded to trial on a negligence claim. Gregoire contended at trial that Oak Harbor negligently failed to fulfill its duty to protect Edward Gregoire (or decedent) in a number of different ways, resulting in his death by suicide. See Instr. # 6 ¶1 (enumerating five bases for alleged negligence); Instr. # 13 (instructing jury on Oak Harbor's "duty to provide for the mental and physical health and safety needs of persons locked in jail").

Over Gregoire's objection, Oak Harbor was allowed to assert affirmative defenses of assumption of risk and contributory negligence, and the jury was instructed on these issues. See Instr. ## 6 & 19-21. Oak Harbor defended based on two different "sole proximate cause" theories,

¹ WSAJ Foundation has also reviewed the appellate briefing of the parties before the Court of Appeals and this Court.

one of which rested on these affirmative defenses: First, Oak Harbor argued that it could not have reasonably anticipated Mr. Gregoire's act of hanging himself and thus this act was the sole proximate cause of his death. See Instr. # 6 ¶2; Instr. # 18. Second, Oak Harbor contended that "Mr. Gregoire was contributorily negligent and assumed the risk of death when he hanged himself, and therefore his own conduct was the sole proximate cause of his death." Instr. # 6 ¶2; see also Instr. ## 20 & 21.

The superior court also instructed the jury that Oak Harbor had the burden of proving "the negligence of Mr. Gregoire was a proximate cause of his own death and of any damages to his estate and damage to his daughter, Brianna Gregoire, and was therefore contributory negligence." Instr. # 9 ¶7. Contributory negligence was defined for the jury. See Instr. # 19. Special Verdict Form Question No. 6 addressed apportionment of negligence between Gregoire and Oak Harbor.²

The jury returned a verdict for Oak Harbor finding that it was negligent, but that its negligence was not a proximate cause of the death of Edward Gregoire. See Special Verdict Form.³ The jury did not reach the verdict form question whether Edward Gregoire was contributorily negligent. See id. at Question # 4. The verdict form did not pose a question to the jury explicitly addressing assumption of risk. During the

² Court Instructions ## 6, 9, and 18-21 are attached to this brief for the convenience of the Court. The full set of Court's Instructions to the Jury, including a supplemental jury question and court response, and the Special Verdict Form are also reproduced in the briefing. See Gregoire Br. at Appendix.

³ The executed Special Verdict Form is reproduced in the Appendix to the brief for the convenience of the Court.

course of deliberations, the jury asked for clarification regarding proximate cause, and the court provided a response amplifying on this issue. See Instr. # 17; Jury Note & Court's Response.

Gregoire appealed the adverse verdict to the Court of Appeals, which affirmed. Gregoire argued that when a special relationship raises an affirmative duty to protect, assumption of risk does not apply. See Gregoire, 2007 WL 3138044 at *4. The Court of Appeals found that this argument had not been adequately briefed, and that otherwise Gregoire had not provided authority for the contention that instruction on assumption of risk should not have been given. See id.

Regarding Gregoire's challenge to the jury instructions on contributory negligence, comparative fault and assumption of risk, the court indicated it did not need to consider these issues because they were not reached by the jury. See id. Nonetheless, the Court of Appeals concluded that it was not an error of law for the superior court to allow evidence relating to contributory negligence and submit the issue to the jury. See id. at *5. In affirming the superior court, the court also rejected a number of other claims of error by Gregoire.

Gregoire petitioned this Court for review on whether 1) the jury was erroneously instructed on assumption of risk and contributory negligence, 2) the instructions on proximate cause erroneously negated the duty owed by Oak Harbor, and 3) the superior court erred in not

questioning a deliberating juror for bias and violation of his oath. See Gregoire Pet. for Rev. at 1.

This Court granted review “only on the issue of whether the trial court erred in instructing the jury as to contributory negligence and assumption of risk.” Order (September 3, 2008).

III. ISSUES PRESENTED

In an action by an estate and wrongful death beneficiary of a jail inmate against a municipality for negligently failing to protect the inmate while in its jail, resulting in his suicide:

- 1) Is the municipality entitled to assert the affirmative defense of implied primary assumption of risk, to completely exculpate it from liability?
- 2) Is the municipality entitled to assert the affirmative defense of contributory negligence, including implied unreasonable assumption of risk?

IV. SUMMARY OF ARGUMENT

Re: Implied Primary Assumption of Risk

A municipality operating a jail facility that is sued for negligence for failing to fulfill its duty to provide for the health and safety of incarcerated persons, resulting in an inmate’s suicide, should not be permitted to raise the complete defense of implied primary assumption of risk. This defense is based upon the inmate’s consent to the risk that the municipality may negligently fail in its duty to protect him. Relieving the municipality of its duty to protect by allowing this complete defense violates public policy. Implied primary assumption of risk has the same elements as express assumption of risk, as both forms of this defense are

based upon a plaintiff consenting to relieve the defendant of a duty owed to the plaintiff involving specific known risks. If a municipality sought to avoid liability for violation of its duty to protect inmates by producing a written release waiving negligence, executed by the inmate on intake, such a release would be unenforceable on public policy grounds under this Court's Wagenblast factors analysis. The result should be no different when the municipality invokes implied primary assumption of risk as a complete defense.

Re: Contributory Negligence

A municipal jail's duty to protect the health and safety of inmates eliminates consideration of contributory negligence (including implied unreasonable assumption of risk) because the injury-producing act of the inmate, whether volitional or not, is the condition on which the municipality's duty is based, and for which the duty is imposed. Consideration of contributory negligence renders the duty to protect meaningless.

V. ARGUMENT

Introduction

The Court of Appeals concluded that assumption of risk and contributory negligence need not be discussed because the jury did not reach these issues, and they were otherwise not properly preserved or argued. See Gregoire, WL 3138044 at *4. These issues are addressed in this brief because this Court's order grants review on both of them. See

Order (Sept. 3, 2008). Moreover, given the interplay between Instr. ## 6, 9, 19-21, and the nature of the Special Verdict Form, it is conceivable that the jury may have answered “No” to Special Verdict Form Question No. 2 regarding proximate cause on the basis that decedent assumed the risk that Oak Harbor would negligently fail to protect him, or was contributorily negligent. See Special Verdict Form; Jury Instr. # 6 ¶2 (describing Oak Harbor’s contention that “Mr. Gregoire was contributorily negligent and assumed the risk of death when he hanged himself, and therefore his own conduct was the sole proximate cause of his death”).

A. A Municipal Jail Has The Duty To Protect An Inmate’s Health And Safety, And Under A Wagenblast Analysis Public Policy Prevents A Municipality From Invoking Implied Primary Assumption Of Risk As A Complete Defense.

The law of this case is that Oak Harbor owed a “duty to provide for the mental health and physical health and safety needs of persons locked in the jail.” Instr. # 13; see Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) (recognizing “jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal”). This instruction is in keeping with Washington law. In Kusah v. McCorkle, 100 Wash. 318, 170 Pac. 1023 (1918), this Court recognized that a sheriff operating a county jail:

owes the direct duty to a prisoner in his custody to keep him in health and free from harm, and for any breach of such duty resulting in injury he is liable to the prisoner or, if he be dead, to those entitled to recover for his wrongful death.

Id., 100 Wash. at 325. The duty owed “is a positive duty arising out of the special relationship that results when a custodian has complete control over a prisoner deprived of liberty.” Shea v. Spokane, 17 Wn.App. 236, 242, 562 P.2d 264 (1977) (involving municipal jail), *affirmed and opinion adopted*, 90 Wn.2d 43, 578 P.2d 42 (1978). This duty is nondelegable. See id., 17 Wn.App. at 242.

While Oak Harbor has acknowledged this duty to protect, it contends that the trial court properly allowed it to argue to the jury that Edward Gregoire assumed the risk of his death. See Oak Harbor Supp. Br. at 4-5; see also Instr. # 6 ¶2. By invoking implied primary assumption of risk, Oak Harbor appears to argue that by his conduct Mr. Gregoire voluntarily consented to assume the risk that Oak Harbor might negligently fail to protect him while in jail. See Instr. # 6 ¶2; Instr. # 20. Court Instruction # 20 ¶1 specifically references the “defense” that “decedent impliedly assumed a specific risk of harm.” See also Instr. # 21 ¶1 & ¶4; Oak Harbor Supp. Br. at 5-6; Oak Harbor Br. at 10-11; Gregoire Pet. for Rev. at 9; but see Instr. # 21 and Gregoire Br. at 12 (referencing superior court’s view of assumption of risk as a complete bar, but arguing that unreasonable assumption of risk would not serve to defeat Oak Harbor’s duty to protect).⁴

There are four kinds of assumption of risk in Washington: express and implied primary assumption of risk, which are based upon a plaintiff’s

⁴ The impact of the trial court’s instructions regarding contributory negligence/unreasonable assumption of risk is discussed in Section B., infra.

consent to relieve the defendant of a duty; and implied unreasonable and implied reasonable assumption of risk, which are based upon a plaintiff's fault, and serve as damage reducing factors. See generally Kirk v. WSU, 109 Wn.2d 448, 453-54, 457-58, 746 P.2d 285 (1987); Scott v. Pac. West Mt. Resort, 119 Wn.2d 484, 497-99, 834 P.2d 6 (1992). The elements for express and implied primary assumption of risk are the same. As explained in Kirk:

Express and implied primary assumption of risk arise where a plaintiff has consented to relieve the defendant of a duty to the plaintiff regarding specific known risks. Where express assumption of risk occurs, the plaintiff's consent is manifested by an affirmatively demonstrated, and presumably bargained upon, express agreement. Implied primary assumption of risk is similarly based on consent by the plaintiff, but without "the additional ceremonial and evidentiary weight of an express agreement". W. Keeton, D. Dobbs., R. Keeton & D. Owen [Prosser and Keeton on Torts], at 496 [(5th ed. 1984)]. The elements of proof are the same for both. The evidence must show the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.

109 Wn.2d at 453 (some citations omitted). These elements are reflected in Instr. # 20 in this case.

Gregoire argues that Oak Harbor should not have been allowed to invoke assumption of risk because application of this defense effectively nullifies Oak Harbor's duty to protect inmates in its custody. See Gregoire Pet. for Rev. at 4, 9-11; Gregoire Br. at 19-27. Gregoire principally relies on Christensen v. Royal School Dist., 156 Wn.2d 62, 67, 124 P.3d 283 (2005) (holding in a different duty to protect context it

would violate public policy to allow a school district to assert contributory negligence against a 13-year-old student in a tort action based upon sexual abuse by a teacher), and out-of-state case law refusing to apply an “incurred risk” analysis in a jail suicide context to “completely obviate the custodian’s legal duty to protect its detainees from that form of harm.” Sauders v. County of Steuben, 693 N.E.2d 16, 19 (Ind. 1998).

This public policy argument finds further support in this Court’s cases involving challenges to preinjury releases that seek to immunize a defendant for negligent breach of a duty imposed by law. See Wagenblast v. Odessa School Dist., 110 Wn.2d 845, 758 P.2d 968 (1988) (invalidating on public policy grounds preinjury releases signed by parents required of students as condition for participating in interscholastic athletics); see also Vodopest v. MacGregor, 128 Wn.2d 840, 913 P.2d 779 (1996) (invalidating on public policy grounds preinjury releases to the extent they purport to exonerate medical research facility for negligence in performance of its research).

Wagenblast adopted a set of six non-exclusive characteristics, or factors, for evaluating the validity of preinjury releases. See 110 Wn.2d at 852-56.⁵ No factor is dispositive, and not all factors must be met to

⁵The six Wagenblast factors are:

- (1) the transaction concerns a business of a type generally thought suitable for public regulation;
- (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public;
- (3) the party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards;
- (4) as a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any

invalidate a release. See id. at 852; Vodopest, 128 Wn.2d at 855. To the extent a preinjury release is invalidated under the Wagenblast factors, this necessarily eliminates express assumption of risk, which is simply “[a]nother name for a release.” Wagenblast at 856.

This authority is relevant here because, as indicated above, both express assumption of risk and implied primary assumption of risk involve the same elements. Consequently, the Wagenblast factors are useful in examining whether Oak Harbor should be allowed to invoke implied primary assumption of risk as a complete defense to Gregoire’s negligence claim, based upon Oak Harbor’s breach of its duty to protect jail inmates. The inquiry should be no different than if Oak Harbor had required Edward Gregoire to execute a preinjury release waiving negligence at the time he was incarcerated.

Preliminarily, in Wagenblast this Court recognized that courts “are usually reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to rid themselves of that obligation by contract.” 110 Wn.2d at 849. The same reluctance should obtain when a defendant seeks to invoke implied primary assumption of risk, also premised upon a plaintiff’s purported consent to assume a risk. See Kirk, 109 Wn.2d at 853.

member of the public who seeks his services; (5) in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; (6) as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents. Vodopest, 128 Wn.2d at 854-55 (footnote omitted).

Under the Wagenblast factors, implied primary assumption of risk should not be allowed as a complete defense in these circumstances:

- Operation of a municipal jail is subject to public regulation, in furtherance of meeting minimum state and federal constitutional requirements relating to the health, safety and welfare of inmates and staff (factor one). See RCW 70.48.071 (requiring standards for local governments operating adult correctional facilities); Title 289 WAC (regarding correctional standards); see also Instr. # 14 (detailing administrative regulations applicable to Oak Harbor jail).⁶
- Operation of a municipal jail facility is of great importance to the public and a matter of practical necessity, but is a uniquely public and nondelegable duty that government must perform and do so in a way that reasonably assures the health and safety of inmates (factors two and three). See Kusah, 100 Wash. at 325.
- In this non-economic setting, a municipality operating a jail facility exercises by force of law complete power over inmates, who necessarily must surrender to the authority of the jailers, with little in the way of protection for their own health and safety, particularly with respect to problems requiring immediate attention (factors four and five).
- A jail inmate is not in a position to negotiate the terms of incarceration, with little opportunity to immediately challenge or resolve time-sensitive dangers arising in the jail facility, and the inmate is consistently subject to the risk of carelessness by the jailers (factors five and six).

Oak Harbor should not have been permitted to assert assumption of risk as a complete defense in this case. This does not result in strict

⁶ The current version of RCW 70.48.071 is reproduced in the Appendix to this brief for the convenience of the Court.

liability for Oak Harbor. Gregoire is still required to establish that Oak Harbor negligently performed its duty.⁷

B. A Municipal Jail's Duty To Protect The Health And Safety Of Inmates Eliminates Consideration Of Contributory Negligence Because The Alleged Injury-Producing Act Of The Inmate Is The Condition On Which The Municipality's Duty Is Based, And For Which The Duty Is Imposed.

As the trial court instructed the jury in this case, “[t]he City of Oak Harbor, in operating and maintaining a holding facility or jail, has a duty to provide for the mental and physical health and safety needs of persons locked in the jail.” Instr. # 13. This instruction is the law of the case. See Roberson, 156 Wn.2d at 41. It is also consistent with Washington law generally. See Shea, 17 Wn.App. at 241-42.⁸

The duty is owed to “the prisoner himself to exercise reasonable and ordinary care to protect the prisoner’s life and health.” Kusah, 100 Wash. at 323-25. The duty to protect should include protection from self-inflicted harm. Cf. Hunt v. King County, 4 Wn.App. 14, 22-23, 481 P.2d 593 (upholding negligence verdict against hospital for failure to protect patient from attempted suicide; per Horowitz, J.), *review denied*, 79 Wn.2d 1001 (1971).⁹

⁷ The question of whether Oak Harbor may separately avoid liability based upon intervening cause, see Instr. ## 17 & 18, is a separate inquiry and is not before the Court on review. See Order (Sept. 3, 2008); text supra at 4-5.

⁸ The Court of Appeals concluded that “[t]he jury was accurately informed of the applicable law” in this regard. Gregoire, 2007 WL 3138044 at *4.

⁹ Hunt was cited with approval in Niece v. Elmview Group Home, 131 Wn.2d 39, 45-46 & n.2, 929 P.2d 420 (1997), although not for this proposition.

The existence of a duty to protect should absolve the injured party from his or her own contributory negligence.¹⁰ See Kusah, 100 Wash. at 326; Hunt, 4 Wn.App. at 22-23. As explained by then-Judge Horowitz, in the context of the duty to protect and self-inflicted harm:

Such a duty [to protect] contemplates the reasonably foreseeable occurrence of self-inflicted injury whether or not the occurrence is the product of the injured person's volitional or negligent act. In principle, as between the actor and the injured party, the necessary effect of such a duty undertaken or imposed during its operative period may be said to absolve the injured party from the performance of his otherwise existing duty to take reasonable care to avoid self-injury. He is not called upon to perform the duty of the actor. The injured party being absolved from the duty of self-care, the question of the injured party's conduct, whether or not volitional or whether or not otherwise constituting contributory negligence, does not arise. In the absence of a duty breached, the question of whether the injured party's conduct is a proximate cause becomes irrelevant. It therefore becomes unnecessary to consider whether his reasonably foreseeable conduct is a superseding or intervening cause so as to immunize the actor from liability. Any other rule would render the actor's duty meaningless. The rule would in the same breath both affirm and negate the duty undertaken or imposed by law. The wrongdoer could become indifferent to the performance of his duty knowing that the very eventuality that he was under a duty to prevent would, upon its occurrence, relieve him from responsibility.

Hunt, 4 Wn.App. at 22-23 (citations omitted).¹¹

In this light, it is error to instruct the jury on contributory negligence in the duty to protect context. The decedent's conduct should be treated as the

¹⁰ Contributory negligence subsumes implied unreasonable assumption of risk, and the two concepts "should be treated equivalently." Kirk, 109 Wn.2d at 454.

¹¹ Among the citations by the court is this Court's opinion in Kusah, 100 Wash. at 326. See Hunt at 22.

condition that gives rise to Oak Harbor's duty of care, rather than contributory negligence. Cf. id. at 24.

In Hunt, Judge Horowitz did leave open the possibility that the jury could be instructed on contributory negligence, if the conduct of the plaintiff is unforeseeable. See Hunt at 25-26. Even so, he expressed skepticism. See id. at 25 (commenting that "[t]o the extent that contributory negligence may be said to be a defense ..."). He also emphasized that the availability of contributory negligence as a defense is limited by foreseeability. See id. at 26 (noting "[e]ven voluntary participation by the plaintiff in his own [injury] is not a defense if such conduct is reasonably foreseeable").

Despite these misgivings, consistent with the foregoing quotation from Hunt, foreseeability should confine the scope of the defendant's duty rather than define the extent of a plaintiff's contributory negligence. It is more accurate to say that contributory negligence is simply inapplicable when there is a duty to protect. Cf. Christensen v. Royal Sch. Dist., 156 Wn.2d 62, 71-72 & n.2, 124 P.3d 283 (2005) (holding "[i]n our view, a child who has been sexually abused by her teacher should not have her recovery against her abuser, and those who had a duty to protect her from the abuse, diminished by any alleged failure to exercise reasonable care or otherwise avoid the injury").

In Christensen, in striking down contributory negligence as a defense on public policy grounds, in a case involving sexual abuse of a 13-year-old child by her teacher, this Court concluded:

The idea that a student has a duty to protect herself from sexual abuse at the school by her teacher conflicts with the well-established law in Washington that a school district has an enhanced and solemn duty to protect minor students in its care.

156 Wn.2d at 67.

A similar conflict between the duty to protect and contributory negligence is noted in Kusah, involving a claim by an inmate injured by another inmate, allegedly due to the jailer's neglect: "It would certainly be an inhuman rule that would require any care and caution on the part of an inmate of a jail as to the performance or nonperformance of the duty of his keepers toward him." 100 Wash. at 326.

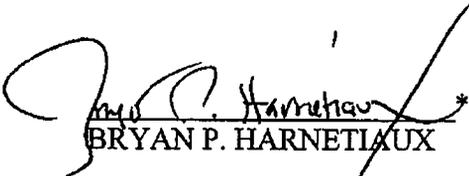
In this case, the jury found that Oak Harbor negligently failed to fulfill its duty to protect in one or more of the ways set forth in Instr. # 6. Nonetheless, the trial court instructed the jury on contributory negligence, describing it in a way that had a direct bearing on proximate cause. See Instr. ## 6 ¶2 & 19. Oak Harbor was allowed to argue that, on the basis of contributory negligence, no less than assumption of risk, Edward Gregoire's acts were the sole proximate cause of his death. Instr. # 6 ¶2. These instructions might well have led the jury to conclude that

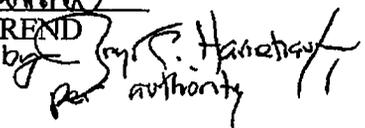
Mr. Gregoire's contributory negligence was the sole proximate cause of his death.¹²

VI. CONCLUSION

The Court should adopt the analysis set forth in this brief and resolve this appeal accordingly.

DATED this 27th day of April, 2009.


BRYAN P. HARNETIAUX
On behalf of WSAJ Foundation


GEORGE M. AHREND
by  per authority

*Brief transmitted for filing by email; signed original retained by counsel.

¹² As with implied primary assumption of risk, this leaves open the question of whether intervening cause is available, apart from contributory negligence. See supra at n.7; see also Hunt at 21-23.

APPENDIX

INSTRUCTION NO. 6

Plaintiff claims that the defendant was negligent in one or more of the following respects: (1) Failing to have a suicide prevention plan with procedures and training for its officers and jailers; (2) failing to have written standard operating procedures for officers to book and screen new inmates coming to the jail and failing to conduct receiving screening of Mr. Gregoire; (3) admitting Mr. Gregoire to the Oak Harbor City Jail rather than sending him to Whidbey General Hospital or the Island County Jail or some other appropriate facility; (4) placing Mr. Gregoire in a cell with a sheet and leaving him unobserved; and (5) failing to initiate CPR for Mr. Gregoire immediately, thereby reducing his chance of survival. Plaintiff claims that one or more of these acts or omissions was a proximate cause of the death of Mr. Gregoire, and damage to his estate and to his surviving daughter, Brianna Gregoire.

Defendant denies these claims. Defendant further claims that Mr. Gregoire's act of hanging himself could not, in the exercise of ordinary care, have been reasonably anticipated, and therefore Mr. Gregoire's act of hanging himself was the sole proximate cause of his own death. Defendant further claims that Mr. Gregoire was contributorily negligent and assumed the risk of death when he hanged himself, and therefore his own conduct was the sole proximate cause of his death. Plaintiff denies these claims.

Defendant further denies the nature and extent of the plaintiff's claimed injuries and damages.

INSTRUCTION NO. 9

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting or failing to act, the defendant was negligent;

Second, that Mr. Gregoire died;

Third, that the negligence of the defendant was a proximate cause of Mr. Gregoire's death and of damage to his estate and damage to his daughter, Brianne Gregoire.

The defendant has the burden of proving both of the following propositions:

First, that Mr. Gregoire acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, Mr. Gregoire was negligent;

Second, that the negligence of Mr. Gregoire was a proximate cause of his own death and of any damage to his estate and damage to his daughter, Brianna Gregoire, and was therefore contributory negligence.

INSTRUCTION NO. 18

If you find that the defendant was negligent but that the sole proximate cause of the injury/event was a later independent intervening cause that the defendant, in the exercise of ordinary care, could not reasonably have anticipated, the defendant's original negligence is superseded by the intervening cause and is not a proximate cause of the injury/event. If however, in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause it does not supersede defendant's original negligence and defendant's negligence is a proximate cause.

It is not necessary that the sequence of events or the particular resultant injury/event be foreseeable. It is only necessary that the resultant injury/event fall within the general field of danger which the defendant should reasonably have anticipated.

INSTRUCTION NO. 19

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

One way that a person is contributorily negligent is if he knows of the specific risk associated with a course of conduct and/or an activity, understands its nature, and voluntarily chooses to accept the risk by engaging in that conduct/activity.

INSTRUCTION NO. 20

It is a defense to an action for wrongful death that the decedent impliedly assumed a specific risk of harm.

A person impliedly assumes a risk of harm, if that person knows of the specific risk associated with a course of conduct and/or an activity, understands its nature, voluntarily chooses to accept the risk by engaging in that conduct/activity, and impliedly consents to relieve the defendant of a duty of care owed to the person in relation to the specific risk.

INSTRUCTION NO. 21

To establish the defense that the decedent impliedly assumed a specific risk of harm, the defendant has the burden of proving each of the following propositions:

First, that the decedent had knowledge of the specific risk associated with hanging himself;

Second, that the decedent understood the nature of the risk; and

Third, that the decedent voluntarily chose to accept the risk by hanging himself and impliedly consented to relieve the defendant of the duty of care owed to the decedent in relation to the risk.

If you find from your consideration of all the evidence that each of these propositions has been proved, then using 100% of the total combined conduct of the defendant and Mr. Gregoire (negligence and contributory negligence/assumption or risk) which contributed to the plaintiff's damages, you must reduce the total percentage you find to have been sustained by the plaintiff, by the percentage of that conduct attributable to the risk specifically assumed by the decedent. The court will furnish you with a special verdict form for this purpose.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR ISLAND COUNTY

FILED

MAY 31 2006

SHARON FRANZEN
ISLAND COUNTY CLERK

TANYA GREGOIRE, guardian for
the person and estate of
BRIANNA ALEXANDRA GREGOIRE, a
minor, and as personal
representative for EDWARD
ALBERT GREGOIRE, deceased,

Plaintiffs,

v.

CITY OF OAK HARBOR, a municipal
corporation,

Defendant.

NO. 02-2-00360-0

SPECIAL VERDICT FORM

ORIGINAL

We, the jury, answer the following questions submitted by
the court:

QUESTION 1: Was the City of Oak Harbor negligent?

ANSWER: YES [Write "yes" or "no"]

(INSTRUCTION: If you answered "no" to Question 1, do not
answer any further questions; sign this verdict. If you
answered "yes" to Question 1, answer Question 2.)

QUESTION 2: Was the City of Oak Harbor's negligence a
proximate cause of the death of Edward Gregoire?

ANSWER: NO [Write "yes" or "no"]

(INSTRUCTION: If you answered "no" to Question 2, do not
answer any further questions; sign this verdict. If you
answered "yes" to Question 2, answer Question 3.)

QUESTION 3: What do you find to be the amount of damages for each of the following (do not consider the issue of contributory negligence, if any, in your answer):

A. Economic Damages of Edward Gregoire:

\$ _____

B. Damages for Brianna Gregoire:

\$ _____

[INSTRUCTION: If you answered Question 3 with any amount of money, answer Question 4. If you found no damages in Question 3, sign this verdict form]

QUESTION 4: Was Edward Gregoire also ~~at~~ negligent?

ANSWER: _____ [Write "yes" or "no"]

(INSTRUCTION: If you answered "no" to Question 4, sign this verdict form. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5: Was Edward Gregoire's negligence a proximate cause of his death?

ANSWER: _____ [Write "yes" or "no"]

(INSTRUCTION: If you answered "no" to Question 5, sign this verdict form. If you answered "yes" to Question 5, answer Question 6.)

QUESTION 6: Assume that 100% represents the total combined negligence that proximately caused Edward Gregoire's death. What percent of this 100% is attributable to Edward Gregoire's

negligence and what percentage of this 100% is attributable to the negligence of the City of Oak Harbor? Your total must equal 100%.

ANSWER:

	<u>Percentage</u>
To Edward Gregoire:	_____ %
To City of Oak Harbor	_____ %
TOTAL	<u>100%</u>

DATED this 31 day of May, 2006.

Susan G. Bondes
Presiding Juror

RCW 70.48.071

Standards for operation — Adoption by units of local government.

All units of local government that own or operate adult correctional facilities shall, individually or collectively, adopt standards for the operation of those facilities no later than January 1, 1988. Cities and towns shall adopt the standards after considering guidelines established collectively by the cities and towns of the state; counties shall adopt the standards after considering guidelines established collectively by the counties of the state. These standards shall be the minimums necessary to meet federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff, and specific state and federal statutory requirements, and to provide for the public's health, safety, and welfare. Local correctional facilities shall be operated in accordance with these standards.

[1987 c 462 § 17.]