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No. 585444

DIVISION ONE, COURT OF APPEALS
OF THE STATE OF WASHINGTON

TANYA GREGOIRE, as guardian *ad litem* for BRIANNA ALEXANDRA
GREGOIRE, and as PERSONAL REPRESENTATIVE FOR THE
ESTATE OF EDWARD ALBERT GREGOIRE

Appellant,

v.

CITY OF OAK HARBOR, a Municipal Corporation,

Respondent.

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OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

If it is the law that an act of suicide in a locked jail cell, negates a jail's duty and liability for suicide prevention, then the law is nonsense. If it is the law that an act of suicide negates a jail's duty and liability to provide post injury medical care, the law is nonsense. This is not the law of the State of Washington.

II. ASSIGNMENTS OF ERROR

- A. Assignment of Error No. 1. The trial court erred in giving jury instructions 9, 16, 18, 19, 20, 21, instructing the jury to allocate fault and assumption of risk to a jail suicide decedent, Mr. Gregoire, in a "special relationship" negligence case where Appellant's alleges the City of Oak Harbor had a duty to protect Brianna Gregoire's father from his own acts of either intentional, or non-volitional impulsive suicide. CP 1- 8; RP 289 – 295.
- B. Assignment of Error No 2. The trial court erred in giving jury instructions 20 and 21, instructing the jury that assumption of the risk was a bar to recovery in a jail suicide

case. CP 1- 8; RP 289 – 295.

- C. Assignment of Error No. 3. The trial court erred in instructing the jury on comparative negligence and assumption of risk as a defense to the jail's withholding of CPR from Mr. Gregoire where there is both a statutory and common law duty of the jail to render emergency and necessary aid, including resuscitation, regardless of the cause of the injuries.
- D. Assignment of Error No. 4. The trial court erred in giving two proximate cause instructions, Jury Instruction #17 and the court's answer to juror question #1, (CP55) while failing to give Appellant's proposed proximate cause instruction, WPI No. 15.02. (CP 13)
- E. Assignment of Error No. 5. a) The trial court erred in failing to excuse Prospective Juror No. 12 for cause during *voir dire* where she stated to the court firmly held opinions adverse to the Appellant's case, including *inter alia*, that Juror No. 12 heartily endorsed the same statements which

resulted in Juror No. 30 being excused for cause; and Juror No. 12 stated in summary that she was “completely” with the defense table; or “very” with Oak Harbor and was “hard to sway”; and b). The court further erred when it restricted counsel’s further inquiry of Juror No. 12. (RP 24):

- F. Assignment of Error No. 6. The trial court erred in failing to excuse or interview Juror No. 5 (Ross), when during deliberation it was brought to the court’s attention that the juror had 1) prior to jury selection, posted to his “blog” information inconsistent with his responses or lack of responses during voir dire, regarding experiences of those close to him with suicide, and 2) posted during deliberation a “blog” about the case, “Yes, I have been gone for awhile. It has to do with me serving on Jury Duty. I still cannot talk about it, but later this week when I can, I am going to have lots and lots to say to you lawyers who keep coming to this blog everyday. That’s right, I know.”
- G. Assignment of Error 7: The trial court erred in entering

summary judgment dismissing Appellant's general claim of negligence based on the "special relationship" the jail has to an inmate.

H. Assignment of Error 8: The trial court erred in entering summary judgment dismissing State Constitutional and civil rights claims where there were material issues of fact as to Respondents' motives and credibility as to violations of jail standards, suicide prevention standards, and standards requiring CPR for inmates.

I. Assignment of Error 9: The trial court erred in denying Appellant's Motion in Limine (CP 568-581) to exclude evidence and argument as to "contributory fault." (CP 519)

III. ISSUES RELEVANT TO ASSIGNMENTS OF ERROR

- a. **Re Assignments of Error 1, 2, 3, 4, 9** -- Whether a new trial is necessary where the court applied the wrong legal standard for a jail suicide, and allowed evidence and instructed the jury to consider the inmate's suicide as a) contributory negligence; b) "assumption of risk"; c) an "intervening cause"; d) "Sudden emergency" and a proximate cause of his own death".
- b. **Re Assignment of Error 5**, Whether a new trial is necessary when a clearly biased juror who expressed that firmly held

bias in favor of the Defense, was challenged for cause, but left on the jury.

c. **Re Assignment of Error 6**, Whether a new trial is necessary where a juror remained seated on the case without interview by the court, after the court learned he had:

i. communicated about the case in a “blog” during trial, and i.e., expressed in a blog a “message” to attorneys whom he believed had visited his “blog” during trial and/or deliberation; and failed to respond in written or oral questioning during voir dire about direct, close, personal, emotional, recent and ongoing experiences he was currently having dealing with the issue of youth suicides in the community, and this information was discovered on a blog and brought to the court’s attention during deliberation.

d. **Re Assignment of Error 1, 2, 3, 4, 9**: Whether a new trial is necessary where the jury was instructed that the same proximate cause definition applied to hanging himself as well as the “proximate cause” of his death. Appellant proposed WPI 15.02 as a more appropriate proximate cause instruction for the necessary causal link between the City’s breach of duty and the death.

e. **Re Assignment of Error No. 1, 2, 3, 4, 9**: Whether Appellant is entitled to a trial based on Constitutional, civil rights and “special relationship” issues dismissed on summary judgment

IV. STATEMENT OF THE CASE

A. NATURE OF LITIGATION

Brianna Gregoire’s father Edward Gregoire, was found hanging

within 2 hours of being taken into the Oak Harbor Jail on misdemeanor warrants. After part of Appellant's claims were dismissed on summary judgment, an Island County jury in this case found that the City of Oak Harbor was "negligent". However, Appellant alleges that the court's instructions to the jury effectively prevented the jury from finding that negligence to be a proximate cause of damages. Appellant contends that the Instructions negated the statutory¹ and common law² "special relationship duty" of a holding facility to its misdemeanor detainee.

B. THE PROCEDURAL HISTORY OF THIS APPEAL

A Jury Trial was held in Island County Superior Court in May, 2006. The jury, on instructions from the court CP 24-25 which were excepted to by Appellant RP 289-322, returned a special verdict form finding that the City of Oak Harbor was "negligent". (App.) The second answer on the verdict form was a finding of no "proximate cause". This appeal is taken after that verdict and related rulings.

Prior to trial, Judge Alan Hancock entered a decision on summary

¹ WAC 289-15-200; WAC 289.20.105; 110; 130 (adopted in 1981)

² *Shea v. Spokane* 90 Wn.2d 43, 578 P.2d 42 (1978); *Hunt v. King County*, 4 Wn. App. 14, 481 P.2d 593, review denied, 79 Wn.2d 1001 (1971); *Christensen v. Royal City School District*, 156 Wn.2d 62 (2005); *Caulfield v. Kitsap County* 108 Wn. App. 242, 29 P.3d

judgment motions in state court, by letter identifying the issues remaining for trial.⁹³ CP 590-613. That decision eliminated Appellant's contention on summary judgment that there were a material issue of fact as to the credibility and consistency of the police version of Mr. Gregoire's death, warranting trial as to whether he was negligently or intentionally injured by jail personnel prior to his death, or withholding of CPR prior to his death, depriving him of life, or liberty without due process.

C. FACTUAL SUMMARY

Why don't you just shoot me, please just shoot me CP 628
(Inquest p25 line 23) screams Eddie Gregoire as he is tackled to the ground and carried kicking and screaming while strapped down in to the city of Oak Harbor Jail where he is strapped into a restraint chair CP 628
Inquest p24 .

Eddie Gregoire had just tried to escape by running from an open Sally port at the Oak Harbor Police Department while handcuffed and officers present. Eddie Gregoire was on his way to jail on misdemeanor

738 (2001); *Niece v. Elmview* 131 Wn2d.39, 929 .2d 420 (1997)

3 The age of this case results from the case coming to Island County Superior Court after Extensive discovery and a decision of the Federal District Court dismissing federal civil rights claims, and allowing Appellant 30 days to refile her state claims

warrants and riding in the back of Washington State Trooper Harry D Nelson's patrol car Mr. Gregoire was being arrested and taken to the City of Oak Harbor as he had four outstanding misdemeanor warrants CP 1005 lines 22-24

While he was being transported, handcuffed and seated in the back of Trooper Nelson's patrol car, something unusual happened. Eddie Gregoire started kicking the shield behind the front seat with his knee and began crying saying he hated his friends, using profanity and that "I take one step forward and my friends take me two steps back" CP 627 Inquest p 19 lines 2-4 , CP 626 Inquest p 17, lines 16-24, p. 8

Trooper Nelson was at one point so concerned about him becoming violent, he asked for another officer to meet him at the jail. (CP 627), Inquest p. 21.

After Eddie Gregoire was strapped into the restraint chair he is reported to have gotten out of the restraint chair on his own and calmed down. He then was taken with no screening regarding his mental condition from a holding cell to a regular cell where he is placed alone, by himself

in state court.

with a sheet and a metal heating grate available for him to commit suicide, CP 656, Inquest pp 159-165.

Eddie is found hanging only 25 or 30 minutes after he is left alone in the cell with the sheet and metal grate to attach the sheet to and no handcuffs CP 659 Inquest p 177 line 5-11, CP 660 Inquest p 182, 183-184, CP 645 Inquest p p108 which is only about an hour after he had been wrestled to the ground while attempting to escape from the sally port at the Oak Harbor Jail. CP 643 Inquest p 99-100

After he was found hanging, no CPR was administered by officers of the City of Oak Harbor even though it had only been 5-10 minutes since Eddie Gregoire was reported to have been seen alive CP 646, Inquest pp 109-117, CP 862 , Dep of Raymond Payeur p 47-50,CP 1430

Appellant contends in this appeal that there were errors in pretrial rulings, jury selection, and jury instructions, that deprived Appellant of a fair trial. The city detention facility had no policies or procedures complying with WAC 289-15-200; WAC 289-20-105; -110;-130 and thus did not have training on mental health screening or suicide prevention. Further Respondent did not administer CPR when they found him hanging in a cell

10 minutes or less after he was seen standing.

Appellant took strong exception to the court's instruction to the jury calling for determination of Mr. Gregoire's contributory fault and assumption

D. JURY SELECTION

Jury selection included an extensive confidential juror questionnaire and oral voir dire (EP 3-262).

Juror No. 12: The trial court denied Appellant's Motion to excuse Juror No. 12 for cause during *voir dire*. Juror 12, stated to the court firm opinions adverse to the Appellant's case, heartily endorsing the statements that resulted in excusing Juror No. 30 for cause. RP 240:6 – 243:3. Included in her statements were the following:

“Ditto is basically all I have to say. I think there is too much of this lawsuit thing going on. Its unfortunate for the child, but ultimately that was her father's when he made the decision. I mean, if she was trying to get some kind of ruling like there has to be a screening process, I'd be all for that, but maybe for education that she's had but not like, you know, frivolous types of things. So I'm kind of – **I'm completely over here so far.**” [indicating Defense table]

RP 240:6 - 243:3 [emphasis added]

When asked if she had an “open mind”, her answer is a

classic for text books on jury selection, but confirms unequivocally that she would be “difficult to sway” from her present position in favor of law enforcement. She stated:

“I have an open mind about everything. It’s hard to sway me especially since I grew up with law enforcement all around me. I always looked to my uncle, and he’s been a police officer for about 13 years.

RP 242:5-13

The court restricted Appellant’s counsel’s further inquiry of Juror No. 12 when counsel sought to explore whether Juror No. 12 had rigid views about the proper outcome on issues other than those she volunteered. Appellant’s counsel was restricted from fully exploring the scope and rigidity of her preset and strongly held beliefs applied to. RP 241:12 – 242:4 However, she repeated the commitment to the defense. When Juror 12 was asked to clarify a statement to Appellant’s counsel that “I don’t know if you’d want me either”, she stated “Mostly because I might be difficult to sway. I’m **very over here**” [indicating] “right now.” She confirmed on the record that “over here” meant the Oak Harbor table.

RP 242:20 – 243:3

E. JURY MISCONDUCT

Juror No. 5: During the deliberation of the jury, Appellant's counsel brought before the court an allegation of possible jury misconduct and asked the court to interview and/or excuse Juror No. 5. The court refused to do either. RP 335-348

F. JURY INSTRUCTIONS

Appellant excepted to Jury Instruction No. 64 regarding negligence, assumption of risk, and contributory negligence. Appellant briefed the issue for the court and the court's review of that briefing is noted in the record. RP 289,290, 291, 303, 304. The court stated its belief that "assumption of the risk" could be a complete bar to recovery and could completely "negate any duty that might be owed". RP 304. The court spoke at length about the basis for that instruction at the end of Appellant's exceptions. The court stated:

Mr. Gregoire engaged in the unreasonable assumption of risk by hanging himself. The court should not overrule the legislative will by taking away a defense which is available under statutory law by judicial

fiat. RP 320-321

Appellant excepted to Jury Instruction No. 9 regarding burdens of proof of the parties including “contributory negligence” of Mr. Gregoire.

RP 306:1-307

Appellant excepted to Jury Instructions No. 11 and 12 in that it instructed on “ordinary negligence” rather than special duty. RP 307

Appellant also provided a supplemental brief on that issue to the court.

CP 1-8 Appellant offered supplemental jury Instruction (Appendix). .

Appellant Excepted to Jury Instruction No 16 regarding “unforeseeable emergency”. Respondent responded that the instruction related to the failure of the city personnel to give CPR when Mr. Gregoire was found hanging. The court indicated it also related to the jailer’s ignorance of the operation of the panic alarm and his failure to start CPR.

RP 308-309.

Appellant excepted to Jury Instruction No. 17, the instruction on proximate cause (WPI 15.01) and proposed in its place WPI 15.02, a “substantial factor” causation instruction. (CP 13) The court’s decision

⁴ The court’s jury instructions are in the Appendix at CP 24-25.

was based on its conclusion that Mr. Gregoire's death was an independent or intervening cause that could entirely relieve the Defendant of its negligence in failing to have screening and training and emergency aid procedures to prevent suicide deaths in jail. The jury here found the city "negligent", but answered NO on these instructions as to "proximate cause". Appellant cited to the court cases holding that the "substantial factor" instruction was more appropriate in similar cases. CP 1-8.

Appellant excepted to Jury Instruction No 18, the "intervening cause" instruction. Appellant asserted that prevention of jail suicide and the need to administer CPR were clearly within the anticipated duties and statutorily required duties of the jail personnel. RP 310: 17-25

Appellant excepted to the giving of Jury Instruction No. 19 instructing on contributory negligence. The court held that "unreasonable assumption of risk is part of the definition of contributory fault". RP 311

Appellant excepted to giving Jury Instructions 20 and 21 regarding assumption of risk. RP 312. Appellant excepted to the Special Verdict form, RP 313.

V. AUTHORITY AND ARGUMENT

A. STANDARD OF REVIEW

1. Review of jury instructions is guided by the familiar principle jury instructions are sufficient if “they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). On appeal, jury instructions are reviewed *de novo*, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977); *Cox v. Spangler*, 141 Wn.2d 431, 442 (2000). Appellant asserts the jury instructions were not a correct statement of the law and deprived Appellant of the ability to argue her case to the jury.

2. When reviewing an order of summary judgment, the court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). The court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the non-moving party. *Hoff v. Mountain Const., Inc.*, 124 Wn. App. 538, 102 P.3d 816 (2004).

B. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY REGARDING “SPECIAL RELATIONSHIP”, COMPARATIVE FAULT AND ASSUMPTION OF THE RISK

A special relationship existed between Eddie Gregoire and the City of Oak

Harbor when he was transferred to their custody. 5

The trial court denied the applicability of “special relationship” in its ruling on summary judgment, as to Appellants motions in limine and jury instructions.

5 Washington courts describe those relationships between a Respondent and a foreseeable victim where the Respondent has a special relationship with the victim as "protective in nature, historically involving an affirmative duty to render aid." *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 228, 802 P.2d 1360 (1991) (citing *W. Keeton et al., Prosser & Keeton on Torts* § 56, at 383 (5th ed. 1984)). For example, a school has a duty to protect students in its custody from reasonably anticipated dangers. *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953). See also *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 57, 871 P.2d 1106 (1994); *Briscoe v. Sch. Dist. No. 123*, 32 Wn.2d 353, 362, 201 P.2d 697 (1949). The rationale for such a duty—the placement of the student in the care of the Respondent with the resulting loss of the student's ability to protect himself or herself—is also the basis for the similar duty of an innkeeper to protect guests from the criminal actions of third parties. *Niece*, 131 Wn.2d at 44; see also *Miller v. Staton*, 58 Wn.2d 879, 883, 365 P.2d 333 (1961). "Other relationships falling into the general group of cases where the Respondent has a special relationship with the victim are also protective in nature, historically involving an affirmative duty to render aid. The Respondent may therefore be required to guard his or her charge against harm from others. Thus a duty may be owed from a carrier to its passenger, from an employer to an employee, from a hospital to a patient, and from a business establishment to a customer." *Niece*, 131 Wn.2d at 44 (quoting *Hutchins*, 116 Wn.2d at 228). See also *Bartlett v. Hantover*, 9 Wn. App. 614, 620-21, 513 P.2d 844 (1973) (duty of employer to protect employees from criminal activity to which the employment exposes the employee), *rev'd on other grounds*, 84 Wn.2d 426 (1974); *Marks v. Alaska S.S. Co.*, 71 Wash. 167, 127 P. 1101 (1912) (duty of common carrier to protect passengers from crew members); *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 202-03, 943 P.2d 286 (1997) (duty of business establishment to protect its customers). In *Hunt v. King County*, 4 Wn. App. 14, 481 P.2d 593, review denied, 79 Wn.2d 1001 (1971), a disturbed and suicidal patient was admitted to the psychiatric ward of a county hospital. The patient was injured when he found an open window and jumped five stories to the ground. The Court of Appeals held that the hospital owed the patient a duty of care, which included a "duty to safeguard the patient from the reasonably foreseeable risk of self-inflicted harm through escape." *Hunt*, 4 Wn. App. at 20. The Supreme Court has recognized that a hospital or group home's duty of reasonable care to protect its patients from the tortious or criminal actions of third parties is based on the special relationship between the hospital or home and its vulnerable patient. *Niece*, 131 Wn.2d at 46 n.2. In *Niece*, a developmentally disabled woman brought an action for damages against a group home after she was sexually assaulted by a staff member. The court held that the group home for developmentally disabled persons had a duty to protect its residents from all foreseeable harms. *Niece*, 131 Wn.2d at 41, 47. "[T]here is no reason to differentiate between foreseeable harms caused by potentially hazardous physical conditions (McLeod), visitors (Shepard) or staff." *Niece*, 131 Wn.2d at 47 n.4 (quoting

Special relationships are recognized under Washington law. These relationships “involve[e] an element of ‘entrustment’; i.e., one party was, in some way, entrusted with the well-being, of the other party. *Webstad v. Storing*, 83 Win. App. 857, 869, 924 P.2d 940 (1996) (Citing *Laurite v. Laurite*, 74 Win. App. 432, 440, 874 P.2d 861, review denied, 125 Wn.2d 1006 (1994), review denied, 131 Wn.2d 1016 (1997); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997) at 50. Special relationships are typically custodial or at least supervisory, such as the relationship between doctor and patient, **jailer and inmate**, or teacher and student. *Caulfield v. Kitsap County*, 29 P.3d 738, (2001).

“In *Hunt v. King County*, 4 Wn. App.14, 481 P.2d 593, review denied, 79 Wn.2d 1001 (1971) a disturbed and suicidal patient was admitted to the psychiatric ward of a county hospital. The patient was injured when he found an open window and jumped five stories to the ground. The Court of Appeals held that the hospital owed the patient a duty of care, which included a ‘duty to safeguard the patient from the reasonably foreseeable risk of self-inflicted harm through escape.’ *Hunt*,

Niece v. Elmview Group Home, 79 Wn. App. 660, 669, 904 P.2d 784 (1995)

4Wn. App. At 20” *Caulfield* at 254.

Likewise the Supreme Court of Washington in *Christensen v. Royal School District*, 156 Wn.2d 62, 70 (2005) recognized that the special relationship that exists between students and their school to be protected negates the defense of contributory negligence. In that case the school district argued that the Plaintiff-Student had engaged in a consensual sexual relationship with a teacher and therefore the school district should be able to argue contributory negligence on the Student’s part. In holding otherwise the Supreme Court stated

Our conclusion that the defense of contributory negligence should not be available to the Royal School District and Principal Anderson is in accord with the established Washington rule that a school has a 'special relationship' with the students in its custody and a duty to protect them 'from reasonably anticipated dangers.' *Niece v. Elmview Group Home*, 131 Wn.2d 39, 44, 929 P.2d 420 (1997) (citing *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953)). The rationale for imposing this duty is on the placement of the student in the care of the school with the resulting loss of the student's ability to protect himself or herself. *Niece*, 131 Wn.2d at 44. The relationship between a

school district and its administrators with a child is not a voluntary relationship, as children are required by law to attend school. See McLeod, 42 Wn.2d at 319. Consequently, 'the protective custody of teachers is mandatorily substituted for that of the parent.' Id, Royal at 70.

Professor Gregory Sisk, a prominent commentator on Washington tort reform has written on this in his article entitled Interpretation of the Statutory Modification of Joint and Several Liability : Resisting the Deconstruction of Reform, 16 U. Puget Sound L. Rev.1, 30-38 (1992)

In a section entitled "Cases involving a Duty to Protect Based Upon a "Special Relationship,"" Professor Sisk stated as follows:

The very essence of duty of care in such a circumstance is one of protection. That duty would effectively be nullified if we were to allow a negligent guardian to escape responsibility by shifting the lion's share of fault to an intentional wrongdoer who is not deterred because the guardian afforded inadequate protection. In other words, an individual with a fiduciary or other special relationship giving rise to a duty to prevent harm by third-parties cannot evade responsibility by pointing the finger at the third person who caused the harm To do so would render this affirmative duty of protection meaningless. Id. at 33. .

Death by suicide in jail is a mental health emergency and medical emergency that the jail has a duty to train, screen, and have policies and

procedures to prevent and respond to . .

Jailhouse suicide is a national, albeit understated problem. The first comprehensive survey of jailhouse suicides, accomplished by the National Center on Institutions and Alternatives (NCIA) in 1979, identified 419 jailhouse suicides in the United States. A second survey by NCIA reported 453 Suicides behind bars in 1985 and 401 in 1986.

Felthous, MD, *Bull Am Acad Psychiatry Law*, Vol 22, No. 4, 1994

A municipality taking custody of a prisoner has a non-delegable duty to the prisoner "to keep him in health and safety." *Kusah v. McCorkle*, 100 Wash. 318, 323, 170 P.2d 1023 (1918). See also *Fischer v. Elmira*, 75 Misc. 2d 510, 347 NYS 2d 770 (1973) ; *Pisacano v. New York*, 8 App. Div. 2d 3356, 188 N.Y.S. 2d 35 (1959). The duty to the prisoner arises because when one is arrested and imprisoned for the protection of the public, he is deprived of his liberty as well as his ability to care for himself. The duty which defendant owed to Appellant [prisoner] arose out of this special relationship in which defendant was one "required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection." 2 restatement Torts, 2d Section 314A(4), p. 118. *Thornton v. Flint*, 39 Mich App. 260, 275, 197 N.W. 2d 485, 493 (1972); cr.*DeZon v. American President Lines*, 318 U.W. 660, 87 L. Ed. 1065, 63 S. Ct. 814 (1943) When a city takes custody of a prisoner, it must provide health care for that prisoner. *Kusah v. McCorkle, supra*. This 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, 562 P.2d 264 (1977)

This standard has been enacted by the legislature and by the executive⁶, and repeatedly cited and developed in case law⁷. Likewise, sensibly, the Washington Appellate courts and Supreme Court have held that where there is a “special relationship” creating an affirmative duty of care for another person, contributory fault does not apply.⁸

Regardless of the cause of an inmate’s mental health or medical health crisis, the jail that deprives him of his liberty must meet statutory and common law duties of care. This duty and the special relationship is not limited by traditional defenses of contributory negligence, assumption of the risk, sudden emergency or linear proximate cause. No jail is absolved from withholding resuscitation from an injured inmate, whether the injury is self inflicted or inflicted by a third party. That law of the State of Washington is stated in a long line of cases.⁹

6 WAC 289-15-200; WAC 289.20.105;-110;-130 (Appendix)

7 *Shea v. Spokane* 90 Wn.2d 43, 578 P.2d 42 (1978) ; *Hunt v. King County*, 4 Wn. App. 14, 481 P.2d 593, review denied, 79 Wn.2d 1001 (1971); *Christensen v. Royal City School District* 156 Wn.2d 62 (2005); *Caulfield v. Kitsap County* 108 Wn. App. 242, 29 P.3d 738 (2001); *Niece v. Elmview* 131 Wn2d.39, 929 .2d 420 (1997)

8 *Shea v. Spokane* 90 Wn.2d 43, 578 P.2d 42 (1978) ; *Hunt v. King County*, 4 Wn. App. 14, 481 P.2d 593, review denied, 79 Wn.2d 1001 (1971); *Christensen v. Royal City School District* 156 Wn.2d 62 (2005); *Caulfield v. Kitsap County* 108 Wn. App. 242, 29 P.3d 738 (2001); *Niece v. Elmview* 131 Wn2d.39, 929 .2d 420 (1997)

9 Id. *Shea v. Spokane* 90 Wn.2d 43, 578 P.2d 42 (1978) ; *Hunt v. King County*, 4 Wn. App.

The court in this case instructed the jury that the jail's duty to Mr. Gregoire could be negated by multiple illogical barriers¹⁰ breaking the chain of proximate cause of damages. The jury asked the court for an additional definition of "proximate cause".¹¹

Likewise jail suicide involves a custodian with a special relationship to the incarcerated with a duty to protect from reasonably anticipated dangers. The City of Oak Harbor has a duty to protect its inmates because the city has taken their liberty away. Jail suicides are a reasonably anticipated danger as to which there is a clear and longstanding standard of care requiring suicide prevention plans with procedures and training. Mr. Gregoire did not have the ability to "consent" to an unsafe jail or to evaluate its compliance with law. He did not have an option to

14, 481 P.2d 593, review denied, 79 Wn.2d 1001 (1971); *Christensen v. Royal City School District* 156 Wn.2d 62 (2005); *Caulfield v. Kitsap County* 108 Wn. App. 242, 29 P.3d 738 (2001); *Niece v. Elmview* 131 Wn.2d 39, 929 P.2d 420 (1997)

¹⁰ The instructions, inter alia, directed the jury that the decedents' "contributory negligence" of committing suicide must be compared to the city's fault (CP 35, 45), that Mr. Gregoire's "assumption of risk" by committing suicide would be a bar to liability (CP 46-47), that Mr. Gregoire's suicide could be an intervening cause cutting off the duty of the jail (CP 32, 43-44), that Mr. Gregoire's suicide could be a "sudden emergency" cutting off the city's negligence (CP 42), and that Mr. Gregoire's act of suicide as a "proximate cause" of his death could trump the duty of the jail to have policies and procedures and training to prevent suicide and render medical aid. (CP 32)

¹¹ RP 329-334, the court gave WPI 15.01.01, CP 55.

go to a safe place of his choosing. He was in a full blown mental health crisis obvious to those who arrested and transported him and those who subdued him and placed him in a restraint chair for mentally disturbed and self destructive persons. His intentional self destructive acts, or his impulsive acts beyond his control, however they are characterized, are exactly the acts the Respondent City of Oak Harbor had a duty to protect against.

It would be nonsense if the law allowed the “intentional” conduct to negate liability for the duty to prevent it.

Christensen tells us that where there is a “special relationship” with a duty to protect against “reasonably anticipated dangers”, contributory negligence does not apply to those dangers the duty was to protect against.

To hold otherwise would create a defacto bar to enforcement of the duty for protection against self harm. See *Hickey v. Zezulka* 439 Mich. 408, 444-445 ; 487 N.W. 2d 106 (1992)

“However a jail suicide presents a situation where a defendant has a duty to give aid to

and protect another person in the Defendant's custody, even from his own intentional acts. Thus, a Defendant in a case such as this breaches her duty by negligently failing to prevent another person's violation of the standard of care with respect to his own safety. We hold then, that in a jail suicide case, a negligent Defendant cannot plead, in mitigation of damages, the fact that a Plaintiff, to whom she owed a duty, violated a standard of care for his own protection."

Id. At 444

... "we find it difficult in the situation before us to envision a jury instruction that would accurately advise a jury on how to apportion fault between these two distinct types of conduct."

Id at 445

The Respondent City of Oak Harbor should have been estopped from claiming mitigation when the harm that occurs is exactly the one they have a duty to prevent. There should be no apportionment or "mitigation of damages" because the act The City of Oak Harbor was duty bound to prevent occurred.

Additionally there could be no assumption of risk Eddie Gregoire could not relieve the Respondent City of Oak Harbor of its duties under WAC 289-20-105 et seq. There is no evidence to support a finding that Edward Gregoire in this case chose to knowingly encounter a

jail that did not meet standards of the State or the Profession. He did not voluntarily come to the jail, did not voluntarily waive “receiving screening”, did not voluntarily waive Respondent’s duty to train its staff or have a suicide prevention plan; did not knowingly or voluntarily move to a cell with a sheet knowing Respondent had a duty to keep him out of such a cell without screening and transfer to another facility. Eddie Gregoire did not knowingly agree to be placed in an unsafe cell with instruments of suicide. The City of Oak Harbor has not shown that Mr. Gregoire had a “full subjective understanding of the presence and nature of the specific risk, and voluntarily chose to encounter the risk. See e.g. *Egan v. Cauble*, 92 Wn. App. 372 (1998). There is no evidence that he made any conscious decision, or if he did, that when he made such a decision he “actually and subjectively knew all facts that a reasonable person in the Respondent’s shoes would know and disclose, or, concomitantly, all facts that a reasonable person in the Appellant’s shoes would want to know and consider.” *Id* at 378. There is no evidence that Mr. Gregoire made any decision to relieve the jail of its duty of care.

Furthermore, to allow such a charge affirmatively renders the

special relationship duty of protection meaningless. The flaw in allowing such a charge is that the Respondent's failure to protect Eddie Gregoire from intentional conduct on his part is central to its duty to protect him. The school district in *Christensen* was not allowed to argue contributory negligence because of the special relationship where the duty was to protect "from reasonably anticipated dangers." (cites omitted) As suicide was a known danger the trial court should not have charged on assumption of the risk.

C. THE COURT ERRED IN INSTRUCTING THE JURY ON PROXIMATE CAUSE.

If it is the law that an act of suicide in jail negates the jail's duty for suicide prevention, then the law is nonsense. If it is the law that an act of suicide negates a jail's duty and liability to provide post injury emergency medical care, the law is nonsense. That is not the law of the State of Washington. The duty is one "protective in nature, historically involving an affirmative duty to render aid." *Shea v. Spokane*, 17 Wn App 236, 562 P.2d 264 (1977)

The court's proximate cause Instruction No. 17, when combined with the jury's other instructions, did just that. The jury had no way to get

from the jail's negligence in violation of the special relationship duty, to Mr. Gregoire's damages when the suicide itself was set up as a barrier in at least 5 instructions. The instructions were that the suicide would cut off the Respondent's negligence based on assumption of risk, contributory negligence, intervening cause, proximate cause, and sudden emergency.(Appendix) No jail can be unaware of the risk of jail suicide, *supra*..

The jail was negligent in its breach of duty to have receiving screening for mental health, receiving screening training, suicide prevention program, a safe cell, ability to observe, transfer mentally disturbed or violent detainees to Island County or Whidbey General Hospital. WAC 289 (See Appendix) When Oak Harbor put Mr. Gregoire in a "restraint chair" but then transferred him directly to a regular cell with sheets and overhead iron bars without screening for mental health, every possible policy and procedure for screening and suicide prevention was violated.¹² When the jail withheld CPR from a man who had just minutes before seen standing by his bunk alive, they violated statutory and

¹² WAC 289 (Appendix)

common law duties.

Instructing the jury to determine whether Mr. Gregoire's suicide proximately caused his damages, negated the special relationship duty. The type of negligence the city engaged in, would be a substantial factor in the suicide taking place because their duty was to have policies and procedures and training to prevent suicides and to render aid to injured detainees. If the jury is instructed that the act of suicide can negate proximate causation of damages from breach of the special relationship duty to prevent suicides, because the suicide is "contributory negligence", "assumption of the risk", an independent intervening cause, or the proximate cause of death, then Appellant has been deprived of a way to argue the damages proximately caused by breach of the special relationship duty. WPI 15.02, CP 13, was proposed by the Appellant, it allows the jury to find that the negligence was a "substantial factor" in bringing about the harm. That is appropriate to "special relationship duties" where the duty is to protect the injured party from intentional harmful conduct.

The jury went aground on the "proximate cause" instruction and

asked the court for additional definition of that term. (RP 329-334; CP 55) Rather than giving WPI 15.02 (CP 13), the court gave WPI 15.01.01, which still required a direct causation, inconsistent with the facts and law of this case.

Appellant alleged and proved negligence. The failures of the Respondent City of Oak Harbor (to have a Suicide Prevention Plan, to have Written Standard Operating Procedures for Mental Health Receiving Screening, to Screen and Book Mr. Gregoire, to not get information about his suicidal statements from arresting officers; failing to transfer him to another facility that had safe cells and trained personnel; failure to call a Mental Health professional or emergency medical care leading to his being able to commit suicide in jail).

Respondent Oak Harbor did not provide CPR to Mr. Gregoire, which was within the negligence the jury found. Causation as defined in WPI 15.02 was necessary to give Appellant any way to argue its case to the jury. Appellant asked that WPI 15.02 be given.

**D. THE TRIAL COURT ERRED IN DENYING CAUSE
CHALLENGE TO POTENTIAL JUROR NO. 12**

The trial court erred in failing to excuse Prospective Juror No. 12 for cause during *voir dire* where she stated to the court firm opinions adverse to the Appellant's case, including *inter alia*, that Juror No. 12 heartily endorsed the statements which resulted in Juror No. 30 being excused for cause and stating in summary that she was "completely" with the defense table; or "very" with Oak Harbor and was "hard to sway"; and b). The court further erred when it restricted counsel's further inquiry of Juror No. 12. (RP 240:25 – 243 and 252:12 - 25) Appellant asserts she was prejudiced when prospective juror number 12 was seated as a trial juror and Appellant's motion to dismiss her for cause was denied. RP 249:15-252:12.

RCW 4.44.170(2) allows **challenges for cause** "for the existence of a state of mind on the part of the **juror**" . . . which shows the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging. Appellant need not use a peremptory challenge on the juror to preserve the challenge. *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001).

Juror 12 could not have made her state of mind and affiliation with

the defense clearer.

E. THE TRIAL COURT ERRED IN NOT DEALING WITH APPARENT JURY MISCONDUCT OF JUROR NO 5, MR. ROSS

A juror's misrepresentation or failure to speak when called upon during voir dire regarding a material fact can amount to juror misconduct. *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 158, 776 P.2d 676 (1991).

When there is strong evidence to the effect that a juror was biased when he entered upon the case and swore falsely on voir dire, concealing his bias, the trial court will not abuse its discretion in granting a motion for new trial. The misconduct consists of his deception of the court and counsel as to his incompetence as an impartial juror.

The court must make an objective inquiry into whether the extraneous evidence could have affected the jury's verdict, not a subjective inquiry into the actual effect. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, at 273 (1990).

Juror Number 5 did not answer any of the questions about suicide on the jury questionnaire, which were critical issues in this case. CP 130.

Likewise he did not raise that issue in response to intense and repeated questioning about suicide in oral voir dire. RP 1-134. However during deliberation counsel for the plaintiff brought to the attention of the court, a “blog” published on the internet by Juror No 513 RP 335 – 348 (supplemental designation of the record, to be filed) which, within two weeks prior to the trial expressed “I am really pissed right now.” He had just spent the last weekend comforting, counseling, consoling, and confronting “hurtful and damaging theology concerning suicide that made a bad situation even worse.” He stated “This one hits close to home and I am tired of dealing with death”. He stated “8 students in two years” had died.

During trial his blog referenced his jury service (supplemental designation), but during deliberation, on May 29, 2006, his blog stated “Yes I have been gone for a while. It has to do with me serving on jury duty. I still cannot talk about it, but later this week, when I can, I am going to have lots and lots to say to you lawyers who keep coming to this blog everyday. That’s right, I know.” (Supplemental designation of the

13 The blog which the court directed to be filed.(Supp Desig Rec)

record to be filed)

The court refused to interview or excuse Juror No. 5. RP

F. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING CLAIMS AND INDIVIDUAL RESPONDENTS PRIOR TO TRIAL.

Appellant's Response to Respondent's Motion for Summary Judgment CP 1497 – 1521.

Court's Decision ruling Granting in Part Defendants Motion for Summary Judgment dismissed all individual defendants, dismissed Appellant's claim of negligence based on violation of a duty to Mr. Gregoire CP 591; and dismissed all other claims except a negligence claim based on violation of WAC 289-20-105 (written standard operating procedures including receiving screening, deciding the emergency nature of illness or injury etc); WAC 289-20-110 (requires receiving screening to be performed upon admission to a facility); WAC 289-20-130 (Training in first aid and medical emergency, and resuscitation, at least one person per shift trained in receiving screening and CPR). CP 590 – 596

The Order Granting in Part Defendants' Motion for Summary Judgment dismissed all federal civil rights claims and all Washington

State Constitutional claims on the basis that there is no individual right of action for constitutional violations. CP 614, 615.

Appellant asserted, and the trial court dismissed, claims that the Appellant asserted that under the Washington State Constitution¹⁴ and common law¹⁵, Mr. Gregoire could not be deprived of necessary mental health screening or necessary CPR when his life depended on it, while he was being deprived of his liberty in jail. *Shea v. Spokane* ¹⁶ Mr. Gregoire was locked in an unsafe cell with sheets and overhead bars, while deeply disturbed, after yelling at police officers to please shoot him and “get it over with”. He was deprived of his chance for medical and mental health care necessary to preserve his life. He was deprived of his liberty on misdemeanor warrants when he could have been taken to court that afternoon. He was deprived of essential mental health and medical screening before being placed in grossly dangerous jail cell with a sheet. Finally he was deprived of basic resuscitation CPR, necessary emergency

14 CP 1518-1521

15 CP 1497-1521

16 *Shea v. Spokane* 90 Wn.2d 43, 578 P.2d 42 (1978) ; *Hunt v. King County*, 4 Wn. App. 14, 481 P.2d 593, review denied, 79 Wn.2d 1001 (1971); *Christensen v. Royal City School District* 156 Wn.2d 62 (2005); *Caulfield v. Kitsap County* 108 Wn. App. 242, 29 P.3d 738 (2001); *Niece v. Elmview* 131 Wn2d.39, 929 .2d 420 (1997)

medical care and his only chance for life, in violation of legal standards, without due process of law. Contrary to the trial court's finding on Summary Judgment, individuals do have standing to remedy State Constitutional violations, *Darrin v. Gould* 85 Wn.2d 859 (1975), and the Washington State Constitution emphasizes the importance of "recurrence" to "fundamental principals" to secure individual rights. Article I. Section 32 Washington State Constitution.

G. DENIAL OF DUE PROCESS AND INTENTIONAL HARM

Appellant in this case alleged that Defendants treatment of Gregoire included a material issue of fact as to whether Gregoire was intentionally harmed by the Oak Harbor Police after he ran, asked to be shot and struggled with them and was confined in a "full restraint device."

Though intent and credibility are issues for the jury the court dismissed all such causes of action. The remaining case is based entirely on the version of facts told by the police and jail personnel, ignoring substantial inconsistencies in their stories that were detailed in summary judgment briefing. Appellant asserts that the issue of whether the police and jail

story of Mr. Gregoire taking his own life lacks credibility, CP 1498-1505, should be restored to the case on remand.

VI. CONCLUSION

This case should be remanded to Island County Superior Court for a new trial. Appellant seeks attorney fees on appeal.

Respectfully submitted this 2rd day of February, 2007.

LAW OFFICE OF MANN & KYTLE

A handwritten signature in black ink, appearing to read "Mary Ruth Mann", written over a horizontal line.

Mary Ruth Mann, WSBA #9343
Attorney for Tanya Gregoire

Appendix

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ossible after the use of the carotid sleeper hold or the choke hold.

[Statutory Authority: RCW 70.48.050 (3)(c), 84-16-042 (Order 84-02), § 289-15-130, filed 7/27/84. Statutory Authority: Chapter 70.48 RCW, 81-08-014 (Order 13), § 289-15-130, filed 3/24/81.]

WAC 289-15-200 Emergency procedures. (Detention and correctional facilities.) (1) The department of corrections or the chief law enforcement officer shall formulate written emergency procedures relative to escapes, riots, rebellions, assaults, injuries, suicides or attempted suicides, outbreak of infectious disease, fire, acts of nature, and any other type of major disaster or disturbance. The emergency plan shall outline the responsibilities of jail facility staff, evacuation procedures, and subsequent disposition of the prisoners after removal from the area or facility. Such plan shall be formulated in cooperation with the appropriate supporting local government units.

(2) Emergency plans shall always be available to the officer in charge of the jail, and all personnel shall be aware of, and trained in, the procedures.

[Statutory Authority: Chapter 70.48 RCW, 81-07-057 (Order 10), § 289-15-200, filed 3/18/81.]

WAC 289-15-210 Fire prevention and suppression. (Detention and correctional facilities.) (1) The department of corrections or chief law enforcement officer shall consult with the local fire department having jurisdiction over the facility in developing a written fire prevention and suppression plan which shall include, but not be limited to:

(a) A fire prevention plan to be part of the operations manual of policies and procedures;

(b) A requirement that staff are alert to fire hazards during their daily rounds;

(c) Fire prevention inspections at least semi-annually by the fire department having jurisdiction; provided, that when such inspections cannot be obtained from such fire department the facility shall provide such inspections by an independent, qualified source.

(d) Recommendations resulting from inspections should be promptly implemented WAC 289-15-210 (1)(d) ADVISORY; and

(e) A regular schedule for inspections, testing and servicing fire suppression equipment.

(2) Results of all fire department inspections shall be kept on file at the jail, together with records of actions taken to comply with recommendations from such reports.

[Statutory Authority: RCW 70.48.050 (3)(c), 84-21-042 (Order 84-50), § 289-15-210, filed 10/12/84. Statutory Authority: Chapter 70.48 RCW, 81-07-057 (Order 10), § 289-15-210, filed 3/18/81.]

WAC 289-15-220 Overcrowding. (Detention and correctional facilities.) (1) Purpose. The purpose of this section is to provide a means for determining and setting maximum population figures for local detention and correctional facilities. In so doing, the commission recognizes that each facility is unique and that the establishment of rigid criteria for defining and identifying

overcrowding in most existing facilities would be unworkable. However, overcrowding remains a concern of constitutional dimensions within local jails and must be addressed. It is the purpose of these standards to provide a firm approach to preventing overcrowding in new jail facilities and to create a workable and flexible process for addressing overcrowding in existing jails.

(2) No prisoner shall be required to sleep directly on the floor for any length of time, or on a mattress on the floor in excess of one 72-hour period, unless there are reasonable grounds to believe that such provisions are necessary to prevent the prisoner from damaging property, inflicting bodily harm to himself or others or substantially compromising the security of the jail.

(3) Existing jails.

(a) The director of the local department of corrections or chief law enforcement officer shall propose a maximum capacity for each detention or correctional facility within his or her jurisdiction. This capacity shall reflect a judgment as to the maximum number of prisoners who may be housed within the facility in question in a humane fashion. Notice of such proposed maximum capacity shall be delivered to the state jail commission within 30 days of the final adoption of this revision to this standard. The proposed maximum capacity shall be the maximum capacity of the facility unless revised by the commission.

(b) Within 45 days of the receipt by the jail commission of notice of a proposed maximum capacity for a given facility, the commission shall schedule a public meeting to concur in or revise those capacity figures, pursuant to RCW 34.04.025 through 34.04.058. A written notice of such meeting shall be provided by the director to all known interested parties at least 20 days in advance of such meeting. It shall be the responsibility of the jail commission to establish cause for revising the maximum capacities proposed by the governing unit in question. The commission's concurrence in or revision of proposed maximum capacities shall take into account a detailed analysis of the following factors:

(i) The average amount of cell and day room space which would be available to each prisoner at maximum capacity;

(ii) The number of hours each day prisoners in the area have access to day rooms;

(iii) If the day room access is less than 12 hours each day, the amount of space per prisoner in the cell area;

(iv) The classification and types of prisoners held;

(v) The average length of stay of prisoners held;

(vi) The maximum length of actual stay of prisoners held;

(vii) The nature and amount of physical exercise available to prisoners;

(viii) The amount of access to visitation;

(ix) The amount of other out-of-living area time available to prisoners;

(x) Description of other services and programs available to prisoners, especially those covered by custodial care standards; and

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TITLE 289. CORRECTIONS STANDARDS BOARD
CHAPTER 20. CUSTODIAL CARE STANDARDS - HEALTH AND WELFARE

WAC § 289-20-105 (2005)

WAC 289-20-105. Health care policies and procedures. (Holding facilities.)

Written standard operating procedures shall consist of but not be limited to the following:

- (1) Receiving screening;
- (2) Nonemergency medical services;
- (3) Deciding the emergency nature of illness or injury;
- (4) First aid;
- (5) Notification of next of kin or legal guardian in case of serious illness, injury or death;
- (6) Screening, referral and care of mentally ill and retarded inmates, and prisoners under the influence of alcohol and other drugs;
- (7) Detoxification procedures; and
- (8) Pharmaceuticals.

Statutory Authority: Chapter 70.48 RCW, 81-08-014 (Order 13), § 289-20-105, filed 3/24/81.

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TITLE 289. CORRECTIONS STANDARDS BOARD
CHAPTER 20. CUSTODIAL CARE STANDARDS -- HEALTH AND WELFARE

WAC § 289-20-110 (2005)

WAC 289-20-110. Health screening. (Holding facilities.)

(1) Receiving screening shall be performed on all prisoners upon admission to the facility, and the findings recorded on a printed screening form.

(2) If the results of receiving screening indicate a medical problem that may be detrimental to the health or safety of the prisoner, but is of a nonemergency nature, then the prisoner shall be seen within a reasonable time by a physician or nurse to determine the need for further diagnosis or treatment.

Statutory Authority: Chapter 70.48 RCW, 81-08-014 (Order 13), § 289-20-110, filed 3/24/81.

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TITLE 289. CORRECTIONS STANDARDS BOARD
CHAPTER 20. CUSTODIAL CARE STANDARDS - HEALTH AND WELFARE

WAC § 289-20-130 (2005)

WAC 289-20-130. Health care training. (Holding facilities.)

- (1) Jail personnel shall be trained in standard first-aid equivalent to that defined by the American Red Cross and usual emergency care procedures prior to employment or during the probationary period. Written standard operating procedures and training of staff shall include but not be limited to:
- (a) Awareness of potential medical emergency situations;
 - (b) Notification or observation-determination that a medical emergency is in progress;
 - (c) First aid and resuscitation;
 - (d) Call for help; and
 - (e) Transfer to appropriate medical provider.
- (2) At least one person per shift shall have training in receiving screening.
- (3) At least one person available per shift shall have training in basic life support cardiopulmonary resuscitation (CPR).
- (4) All persons delivering medication shall be properly trained.

Statutory Authority: Chapter 70.48 RCW. 81-08-014 (Order 13), § 289-20-130, filed 3/24/81.

4.44.170

Statutes and Session Law

Title 4 CIVIL PROCEDURE

Chapter 4.44 TRIAL

4.44.170 Particular causes of challenge.

4.44.170 Particular causes of challenge.

Particular causes of challenge are of three kinds:

(1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

(2) For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

(3) For the existence of a defect in the functions or organs of the body which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the party challenging.

[1975 1st ex.s. c 203 § 3; Code 1881 § 211; 1877 p 44 § 215; 1869 p 52 § 215; RRS § 329.]

NOTES:

Reviser's note: The word "code" appeared in Code 1881 § 211.

Qualification of jurors: RCW 2.36.070.

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70.48.071

Statutes and Session Law

Title 70 PUBLIC HEALTH AND SAFETY

Chapter 70.48 CITY AND COUNTY JAILS ACT

70.48.071 Standards for operation -- Adoption by units of local government.

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.]

NOTES:

Effective dates -- 1987 c 462: See note following RCW 13.04.116.

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70.48.130

Statutes and Session Law

Title 70 PUBLIC HEALTH AND SAFETY

Chapter 70.48 CITY AND COUNTY JAILS ACT

70.48.130 Emergency or necessary medical and health care for confined persons -- Reimbursement procedures -- Conditions -- Limitations.

70.48.130 Emergency or necessary medical and health care for confined persons -- Reimbursement procedures -- Conditions -- Limitations.

It is the intent of the legislature that all jail inmates receive appropriate and cost-effective emergency and necessary medical care. Governing units, the department of social and health services, and medical care providers shall cooperate to achieve the best rates consistent with adequate care.

Payment for emergency or necessary health care shall be by the governing unit, except that the department of social and health services shall directly reimburse the provider pursuant to chapter 74.09 RCW, in accordance with the rates and benefits established by the department, if the confined person is eligible under the department's medical care programs as authorized under chapter 74.09 RCW. After payment by the department, the financial responsibility for any remaining balance, including unpaid client liabilities that are a condition of eligibility or participation under chapter 74.09 RCW, shall be borne by the medical care provider and the governing unit as may be mutually agreed upon between the medical care provider and the governing unit. In the absence of mutual agreement between the medical care provider and the governing unit, the financial responsibility for any remaining balance shall be borne equally between the medical care provider and the governing unit. Total payments from all sources to providers for care rendered to confined persons eligible under chapter 74.09 RCW shall not exceed the amounts that would be paid by the department for similar services provided under Title XIX medicaid, unless additional resources are obtained from the confined person.

As part of the screening process upon booking or preparation of an inmate into jail, general information concerning the inmate's ability to pay for medical care shall be identified, including insurance or other medical benefits or resources to which an inmate is entitled. This information shall be made available to the department, the governing unit, and any provider of health care services.

The governing unit or provider may obtain reimbursement from the confined person for the cost of health care services not provided under chapter 74.09 RCW, including reimbursement from any insurance program or from other medical benefit programs available to the confined person. Nothing in this chapter precludes civil or criminal remedies to recover the costs of medical care provided jail inmates or paid for on behalf of inmates by the governing unit. As part of a judgment and sentence, the courts are authorized to order defendants to repay all or part of the medical costs incurred by the governing unit or provider during confinement.

To the extent that a confined person is unable to be financially responsible for medical care and is ineligible for the department's medical care programs under chapter 74.09 RCW, or for coverage from private sources, and in the absence of an interlocal agreement or other contracts to the contrary, the governing unit may obtain reimbursement for the cost of such medical services from the unit of government whose law enforcement officers initiated the charges on which the person is being held in the jail: PROVIDED, That reimbursement for the cost of such services shall be by the state for state prisoners being held in a jail who are accused of either escaping from a state facility or of committing an offense in a state facility.

There shall be no right of reimbursement to the governing unit from units of government whose law enforcement officers initiated the charges for which a person is being held in the jail for care provided after the charges are disposed of by sentencing or otherwise, unless by intergovernmental agreement pursuant to chapter 39.34 RCW.

Under no circumstance shall necessary medical services be denied or delayed because of disputes over the cost of medical care or a determination of financial responsibility for payment of the costs of medical care provided to confined persons.

Nothing in this section shall limit any existing right of any party, governing unit, or unit of government against the person receiving the care for the cost of the care provided.

[1993 c 409 § 1; 1986 c 118 § 9; 1977 ex.s. c 316 § 13.]

NOTES:

Effective date -- 1993 c 409: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 15, 1993]." [1993 c 409 § 2.]

FILED

JUN 06 2006

**SHARON FRANZEN
ISLAND COUNTY CLERK**

The Honorable Alan R. Hancock

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

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

Plaintiffs,

vs.

CITY OF OAK HARBOR,

Defendants.

NO. 02-2-00360-0

PLAINTIFF'S SUPPLEMENTAL
JURY INSTRUCTION ON WAC

Plaintiff submits the following supplemental jury instructions as requested by the court
along with a supplemental memorandum of authorities.

DATED this 30th day of May, 2006.

LAW OFFICE OF MANN & KYTLE, PLLC



Mary Ruth Mann, WSBA 9343

INSTRUCTION NO _____

A Washington State Administrative Regulation applicable to the Oak Harbor City Jail, in effect December 15, 1995, provided :

Health Care Policies and Procedures:

Written Standard Operating Procedures shall consist of but not be limited to the following: receiving screening; deciding the emergency nature of illness or injury; first aid; and screening, referral and care of mentally ill and retarded inmates and inmates under the influence of alcohol.

Health Screening:

Receiving screening shall be performed on all prisoners upon admission to the facility and the findings recorded on a printed screening form.

Emergency Medical Care:

(1) Emergency Medical Care shall be available on a 24 hour basis in accordance with a written plan that includes:

- a) arrangements for the emergency evacuation of the prisoner from the jail;
- b) arrangements for the use of an emergency medical vehicle
- c) arrangements for the use of one or more designated hospital emergency rooms to other appropriate health facilities.
- d) arrangement for emergency mental illness care for prisoners.

Health Care Training:

(1) Written Standard Operating procedures and training of staff shall include but not be limited to:

- a) awareness of potential emergency situations
- b) notification or observation – determination that a medical emergency is in progress:
- c) first aid and resuscitation
- d) call for help; and
- e) transfer to appropriate medical provider

(2) At least one person per shift must have training in receiving screening; and

(3) At least one person per shift shall have training in basic life support cardiopulmonary resuscitation (CPR); and

INSTRUCTION NO _____

The term "proximate cause" means a cause that was a substantial factor in bringing about the event even if the result would have occurred without it.

15.02

See eg. *Herskovits v. Group Health Cooperative*, 99 Wn. 2d 609, 613-19 (1983);
Mavroudis v. Pittsburgh-Corning Corp 86 Wn App. 22, 32 (1997)

INSTRUCTION NO. _____

Damages in this case might be the responsibility of as many as two parties: The City of Oak Harbor is one such party. Edward Albert Gregoire is responsible only if his suicide was intentional.

If you find that the City of of Oak Harbor was negligent and was a cause of damages to Plaintiff, and you also find that Edward Albert Gregoire's suicide was intentional and that it was the proximate cause of damages to plaintiff, determine if the damages are "divisible" and if so you must divide them between The City of Oak Harbor's negligent acts and the suicide of Edward Gregoire. Defendant City of Oak Harbor has the burden of proving that the damages are divisible and what that division is by a preponderance of the evidence. If you find that the City of Oak Harbor has not met its burden to prove that the damages are divisible you must find that the damages are "indivisible".

The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

WPI 41.04 *Tegman v. Accident & Medical Investigations*, 2003 WL 22019522, 75 P.3d 497, 502 (2003). *Cox v. Spangler* 141 Wn 2d 431, 439-40 (2000); *Phennah v. Whalen* 28 Wn. App. 19, 28-29 (1980)

NOTE: PLAINTIFF CONTENDS THIS INSTRUCTION WOULD BE ERROR
BASED ON *Christensen v. Royal School District* Docket no 75214-1 (December 8, 2005)

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

)	
Plaintiff,)	SPECIAL VERDICT FORM
)	
v.)	
)	
CITY OF OAK HARBOR,)	
)	
Defendants.)	
_____)	

We, the jury, answer the questions submitted by the court as follows:

Question 1: Was the City of Oak Harbor negligent in one or more of the ways alleged by Plaintiff?

Answer:
Yes ____ No ____

If your answer is Yes, go on to Question 2; If your answer is No, please sign the verdict form and return it to the bailiff.

Question 2: Was Defendant City of Oak Harbor's negligence a proximate cause of damages to Plaintiff?

Answer:
Yes ____ No ____

If you answer **either** Question No. 1 or 2 "yes" go to No. 3. If you answer **both** Question No. 1 **and** 2 "no" then sign and return this verdict.

Question 3: What do you find to be the damages to the Estate of Edward Albert Gregoire and beneficiary Brianna Gregoire?

Answer: (a) Present Value of Economic Damages

\$ _____

(c) Non-economic Damages

\$ _____

If you answered Question No. 3 with any amount of money, answer Question No. 4.

Question 4: Was Edward Gregoire's suicide both 1) an intentional act, and
2) Na proximate cause of harm to the Plaintiff ?

Answer:

Yes ____ No ____

If your answer is Yes, go on to Question 5; if your answer is No sign the verdict form and return it to the Bailiff.

Question 5: If you answered Question 4 "yes" you must determine whether the damages are divisible between the acts of the City of Oak Harbor and the suicide of Edward Gregoire.

Are the damages are divisible? ____ YES ____ NO

If you answer YES please answer Question 6; If your answer to was No, please go to the bottom of the form and sign the verdict.

Question 6: Please show the division of the damages between the acts of the City of Oak Harbor and the suicide of Edward Gregoire:

City of Oak Harbor _____%

Edward Albert Gregoire _____%

The total must be 100%

(INSTRUCTION: Sign this verdict form and notify the bailiff.)

DATE: _____

Presiding Juror

WPI 45.26; Joyce v. State

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,

NO. 02-2-00360-0

SPECIAL VERDICT FORM

Plaintiffs,

v.

CITY OF OAK HARBOR, a municipal
corporation,

Defendant.

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 Linder
Presiding Juror

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF ISLAND

3 **FILED**

MAY 31 2006

SHARON FRANZEN
ISLAND COUNTY CLERK

4 TANYA GREGOIRE, guardian for)
the person and estate of)
5 BRIANNA ALEXANDRIA GREGOIRE,)
a minor, and as personal)
6 representative for EDWARD)
ALBERT GREGOIRE, deceased,)
7)
Plaintiffs,)
8)
vs.)
9)
CITY OF OAK HARBOR, a)
10 municipal corporation,)
11)
Defendant.)

Cause No: 02-2-00360-0

12
13 COURT'S INSTRUCTIONS TO THE JURY
14

15
16 Dated this 30th day of May, 2006.
17

18
19 *Alan R. Hancock*

20 Alan R. Hancock
21 Judge

22
23 ORIGINAL
24
25

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome of the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of

all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to any comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own

views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 3

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 4

Any act or omission of an agent within the scope of authority is the act or omission of the principal. Officers of the Oak Harbor Police Department were the agents of the defendant City of Oak Harbor, and, therefore, any acts or omissions of the agents were the acts or omissions of the defendant City of Oak Harbor.

INSTRUCTION NO. 5

Plaintiff, Tanya Gregoire, as personal representative of the estate of Edward Gregoire, brings two separate legal claims on behalf of the estate:

1. In one claim she represents the estate for the personal losses suffered by Edward Gregoire; and

2. In the other claim she represents the estate for the losses suffered by the beneficiary of the estate, Brianna Gregoire.

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. 7

Plaintiff alleges that defendant's failure to immediately initiate CPR was negligent and that it proportionately reduced Mr. Gregoire's chance of survival. If you find that the defendant was negligent in this regard, and that such negligence was a proximate cause of Mr. Gregoire's reduced chance of survival and a proximate cause of damage to his estate and to his surviving daughter, Brianna Gregoire, the damages recoverable in this regard, if any, would be an equivalent proportion of the damage resulting from the wrongful death of Mr. Gregoire.

INSTRUCTION NO. 8

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed; and you are to consider only those matters that are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

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, Brienne 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, Brienne Gregoire, and was therefore contributory negligence.

INSTRUCTION NO. 10

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 11

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

INSTRUCTION NO. 12

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

INSTRUCTION NO. 13

The 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.

INSTRUCTION NO. 14

Washington State administrative regulations applicable to the Oak Harbor City Jail, in effect December 15, 1995, provided:

Health care policies and procedures:

Written standard operating procedures shall consist of but not be limited to the following: receiving screening; deciding the emergency nature of illness or injury; first aid; and screening, referral and care of mentally ill and retarded inmates and prisoners under the influence of alcohol and other drugs.

Health screening:

Receiving screening shall be performed on all prisoners upon admission to the facility, and the findings recorded on a printed screening form.

Access to health care:

Emergency medical care shall be available on a twenty-four hour basis in accordance with a written plan that includes:

- a) arrangements for the emergency evacuation of the prisoner from the jail;
- b) arrangements for the use of an emergency medical vehicle;
- c) arrangements for the use of one or more designated hospital emergency rooms to other appropriate health facilities;
- d) arrangements for emergency mental illness care for prisoners.

Health care training:

Written standard operating procedures and training of staff shall include but not be limited to:

- a) awareness of potential medical emergency situations;
- b) notification or observation-determination that a medical emergency is in progress;
- c) first aid and resuscitation;
- d) call for help; and
- e) transfer to appropriate medical provider.

At least one person per shift must have training in receiving screening.

At least one person available per shift shall have training in basic life support cardiopulmonary resuscitation (CPR).

INSTRUCTION NO. 15

The violation, if any, of a state administrative regulation or of an internal directive or department policy of a municipal corporation is not necessarily negligence, but may be considered by you as evidence in determining negligence.

INSTRUCTION NO. 16

A person who is suddenly confronted by an emergency through no negligence of his or her own and who is compelled to decide instantly how to avoid injury and who makes such a choice as a reasonably careful person placed in such a position might make, is not negligent even though it is not the wisest choice.

INSTRUCTION NO. 17

The term "proximate cause" means a cause which in a direct sequence unbroken by any new independent cause, produces the injury/event complained of and without which such injury/event would not have happened.

There may be more than one proximate cause of an injury/event.

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.

1 his actual earnings prior to death and the earnings that
2 reasonably would have been expected to be earned by him
3 in the future. Further, you should take into account
4 the amount that you find that Edward Gregoire reasonably
5 would have consumed as personal expenses or reasonably
6 would have contributed to Brianna Gregoire during his
7 lifetime and deduct this from his expected future
8 earnings to determine the net accumulations.

9 If your verdict is for the plaintiff, then
10 you must determine the amount of money that will
11 reasonably and fairly compensate Brianna Gregoire for
12 such damages as you find were proximately caused by the
13 death of Edward Gregoire.

14 If you find for the plaintiff, you should
15 consider the following items with respect to Brianna
16 Gregoire:

17 (1) Economic damages:

18 (A) You should consider as past
19 economic damages any benefit of value, including money,
20 goods, and services that Brianna Gregoire would have
21 received from Edward Gregoire up to the present time if
22 Edward Gregoire had lived.

23 (B) You should also consider as future
24 economic damages what benefits of value, including
25 money, goods, and services Edward Gregoire would have

1 contributed to Brianna Gregoire in the future had Edward
2 Gregoire lived.

3 (2) Noneconomic damages:

4 You should also consider what Edward
5 Gregoire reasonably would have been expected to
6 contribute to Brianna Gregoire in the way of love, care,
7 companionship, and guidance.

8 In making your determinations, you should
9 take into account Edward Gregoire's age, health, life
10 expectancy, occupation, and habits of industry,
11 responsibility, and thrift. You should also take into
12 account Edward Gregoire's earning capacity, including
13 Edward Gregoire's actual earnings prior to death and the
14 earnings that reasonably would have been expected to be
15 earned by Edward Gregoire in the future. In determining
16 the amount that Edward Gregoire reasonably would have
17 been expected to contribute in the future to Brianna
18 Gregoire, you should take into account the amount you
19 find Edward Gregoire customarily contributed to Brianna
20 Gregoire.

21 The burden of proving damages rests upon the
22 plaintiff. It is for you to determine, based upon the
23 evidence, whether any particular element has been proved
24 by a preponderance of the evidence.

25 Your award must be based upon evidence and

1 not upon speculation, guess, or conjecture.

2 The law has not furnished us with any fixed
3 standards by which to measure noneconomic damages. With
4 reference to these matters you must be governed by your
5 own judgment, by the evidence in the case, and by these
6 instructions.

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INSTRUCTION NO. 23

Any award for future economic damages must be for the present cash value of those damages.

Noneconomic damages such as love, affection are not reduced to present cash value.

“Present cash value” means the sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when the benefits would have been received.

The rate of interest to be applied in determining present cash value should be that rate which in your judgment is reasonable under all the circumstances. In this regard, you should take into consideration the prevailing rates of interest in the area that can reasonably be expected from safe investments that a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

In determining present cash value, you may also consider decreases in value of money that may be caused by future inflation.

INSTRUCTION NO. 24

Upon retiring to the jury room for your deliberations, first select a presiding juror. The presiding juror shall see that your discussion is sensible and orderly, that you fully and fairly discuss the issues submitted to you, and that each of you has an opportunity to be heard and to participate in the deliberations on each question before the jury.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. However, do not assume that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to the bailiff. The court will confer with counsel to determine what answer, if any, can be given.

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, or in any other way express your opinions about the case.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror must sign the form, whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that the jury has reached a verdict, and the bailiff will bring you back into court where your verdict will be announced.

FILED

MAY 31 2006

SHARON FRANZEN
ISLAND COUNTY CLERK

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

Tanya Gregoire, guardian (etc.))

Plaintiff,)

vs.)

City of Oak Harbor,)

Defendant.)

No. 02-2-00360-0

JURY NOTE & COURT'S RESPONSE
(JYN)

JURY INQUIRY:

Can we get a clearer definition
of proximate cause?

Susan Standish
PRESIDING JUROR

DATE & TIME RECEIVED: 5-31-06 ; approx. 11:00 a.m.

COURT'S RESPONSE: (After affording all counsel/parties opportunity to be heard.)

A cause of an event is a proximate cause if it is related to the
event in two ways: (1) the cause produced the event in a direct
sequence unbroken by any new, independent cause, and (2) the event
would not have happened in the absence of the cause.

There may be more than one proximate cause of an event

Alan R. Hamrick
JUDGE

DATE & TIME RETURNED TO JURY: 5-31-06 ; 11:33 a.m.