

76008-4

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No. 95511-5

No. 76008-4

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

CATHY HARPER, et al,

Appellants,

v.

STATE OF WASHINGTON, DEPT. OF CORRECTIONS,

Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Bruce Heller

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

In its “Respondent’s Brief,” the Department of Corrections (“DOC”) raises several issues that are procedurally barred because they were not raised in the summary judgment motion below. Also in support of the trial court’s summary judgment order, DOC restates arguments that must fail because it neglects to recognize factual disputes over the department’s lackadaisical approach to supervising Scottye Miller. Considered in the light most favorable to Appellant, there is a triable issue that must be decided by a jury as to whether DOC was grossly negligent. Finally, because this court should reverse the trial court’s grant of summary judgment for Ms. Harper’s claim of negligent supervision, the court should also reverse the tandem decision to grant summary judgment dismissing her claim of negligent infliction of emotional distress (“NIED”).

II. REPLY ARGUMENT

A. DOC RAISES ISSUES THAT ARE PROCEDURALLY BARRED

1. Issues Not Raised in Opening Summary Judgment Brief Cannot be Considered Here

When a party moves for summary judgment, “[i]t is the responsibility of the moving party to raise in its summary judgment

motion all of the issues on which it believes it is entitled to summary judgment.” *White v. Kent Medical Center*, 61 Wn.App. 163, 168, 810 P.2d 4 (1991). No new issues may be raised by the moving party after filing the opening brief: “Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond.” *Id.*

The rule barring new issues after the opening brief extends to appellate litigation: “(I)n the analogous area of appellate review, the rule is well settled that the court will not consider issues raised for the first time in a reply brief.” *Id.*, citing *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990); *Stevens v. Security Pac. Mortgage Corp.*, 53 Wash.App. 507, 519, 768 P.2d 1007, review denied, 112 Wn.2d 1023 (1989); *State v. Manthie*, 39 Wn.App. 815, 826 n. 1, 696 P.2d 33, review denied, 103 Wn.2d 1042 (1985); RAP 10.3(c). This Court stated plainly that “[w]e do not decide appeals on the basis of issues not clearly stated in the moving party's opening summary judgment papers.” *King v. Rice*, 146 Wn.App 662, 668, 191 P.3d 946 (2008).

This rule applies even where the party opposing summary judgment arguably raises new issues in its response brief. “If, in its response memorandum, the nonmoving party discusses new issues without

actually seeking summary judgment on them, these issues are not proper subjects for the moving party to rebut in its reply memorandum." *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993), citing *White*, 61 Wn. App. at 169.

The issue of proximate cause raised here by DOC is no exception to this rule. In *White*, the court refused to consider a late-raised proximate cause issue:

Preliminarily, we address the trial court's consideration of the proximate cause issue first raised in Defendants' reply memorandum. At oral argument in this court, Defendants contended that it was proper to address proximate cause in their rebuttal materials because the deposition testimony submitted by White in response to their motion included testimony concerning causation. We disagree.

White, 61 Wn.App. 163, 168 (1991).

2. Appellees Did Not Raise Proximate Cause Below and Thus Cannot Raise It Here

When DOC moved for summary judgment below, the issue of proximate cause was not addressed in its opening brief. CP 15-29.

Likewise, it did not raise proximate cause in its reply brief. CP 1193-1198.

In the summary judgment opening brief below, DOC listed the issues on which they sought summary judgment as follows:

1. Whether plaintiffs supply evidence to prove DOC negligently released Miller.

2. Whether plaintiffs supply evidence to prove Freeland failed to exercise slight care in monitoring the conditions of Miller's community supervision.
3. Whether Cathy Harper can prove negligent infliction of emotional distress.

CP 22-23.

DOC now adds a wholly new fourth issue in its appellate response brief: "Whether Appellants supply evidence establishing proximate cause." Respondent's Brief, at 2. DOC never raised proximate cause below, and the trial court did not reach the issue or make any relevant findings or conclusions that could be reviewed in this proceeding. CP 1245-1255, CP 1277-1278, CP 1286-1287, CP 1288-1289.

DOC now raises the issue of proximate cause for the first time in its response brief, without ever giving Appellants a fair opportunity to respond.¹ This argument is untimely, unfair, and procedurally barred. This Court should follow its precedents and disregard DOC's' belated attempt to raise brand new bases to support summary judgment.

3. Appellees Did Not Raise Immunity Below and thus Cannot Raise it Here

¹ It is worth noting in this context that after Ellis caught Miller texting with Patricelli, he served 150 days in custody for DOC violations, and was charged, convicted and sentenced to 180 days in jail. CP 985-987, 989-998. Patricelli was murdered seven days after Miller presented the forged shelter confirmation sheet that Freehand made no effort to verify with a simple phone call.

DOC also now raises defenses based on the two doctrines of quasi-judicial and discretionary immunity under former RCW 9.94A.704(10) (now RCW 9.94A.704(11)) and *Taggart v. State*, 118 Wn.2d 195, 214-15, 822 P.2d 243 (1992). *See* Respondent's Brief at 2, 7, 17, 20, and 21. However, as with the issue of proximate cause, DOC did not raise immunity anywhere in their summary judgment opening brief in the trial court. CP 1245-1255. Also as with proximate cause, the trial court made no findings or conclusions relating to immunity that could be reviewed here. CP 1245-1255, 1277-1278, CP 1286-1287, CP 1288-1289.

Before filing its motion for summary judgment, the department knew about the facts on which it based its immunity arguments. DOC deposed Appellants' expert and confirmed that he would be offering opinions relating to their failure to impose conditions to supervise Miller pursuant to DOC policies and his known proclivities. CP 1199-1210, CP 1205. Nonetheless, DOC failed to raise the issue.

As described above, because it failed to raise the concept of immunity in its opening summary judgment brief, DOC is barred from arguing it now.

B. DOC IGNORES OR MISSTATES CRITICAL EVIDENCE ABOUT GROSS NEGLIGENCE

In its Brief, DOC ignores critical facts supporting Appellants' theory of gross negligence by Freeland. When Miller reported to Freeland on October 23, 2012, he gave Freeland a "shelter confirmation sheet" purporting to show that he had stayed with his mother Leola Benson every night in the previous week. CP 707, 786-87. DOC fails to mention that this constituted changing his address without informing Freeland, and it also fails to mention that the form did not even have Benson's purported address on it. CP 786-787, Respondent's Brief 5, 12. Since the sheet did not have Benson's address on it, Miller was in violation of his conditions of supervision by not providing his new address. CP 536-537. Freeland should have arrested Miller on the spot, in light of his history and dangerousness. CP 303.

DOC likewise fails to mention that *Freeland never even bothered to call Benson* to check that Miller was telling her the truth about having stayed with Benson. Respondent's Brief 4-5. The undisputed evidence is that Miller was lying, and in fact had been staying with Patricelli every night since his release. CP 323-327. If Freeland had simply called Benson while Miller was sitting in her office, she would have discovered that he was lying to her and would have arrested him on the spot, saving Patricelli's life. CP 103-108, 289-290, 479, 706-707.

DOC also misleadingly describes Coker's call with Patricelli. DOC fails to mention that when Coker spoke to Patricelli, Coker never even asked Patricelli for her address. CP 139. This made it impossible for Coker or Freeland to know if Miller's activities or residence would put him in proximity to Patricelli, which was one of Coker's responsibilities. CP 1091-1096. More importantly, given Miller's history of immediately violating no-contact orders, not knowing Patricelli's address made it impossible for DOC to visit her residence to arrest Miller on sight as they had successfully done on multiple occasions in the past. CP 399, 748, CP 978, 1075. In fact, in an email to Coker and Freeland's CCO predecessor on the case, Michael Buchanan, on September 12, 2012, DOC Counselor John Walner was emphatic that he believed Miller would try to contact Patricelli again. CP 1123.

Lastly, DOC asserts that Patricelli had engaged in a pattern of "routinely" "actively undermin[ing]" no contact orders. Respondent's Brief at 2. DOC also claims that Patricelli asked for assistance with breaking her lease "under the pretense that she was avoiding Miller." *Id.*, at 13. DOC fails to mention at all that the *only* relevant evidence in the record concerning how Miller came to be staying with Patricelli is that

Patricelli did not want him to be there but was too afraid of him to kick him out. CP 324-325.

C. THERE IS SUFFICIENT EVIDENCE TO REQUIRE A TRIAL ON THE ISSUE OF GROSS NEGLIGENCE

As discussed in Appellants' Opening Brief², DOC is aware that DV offenders pose a unique, life-threatening danger to their victims. DOC knows that DV dynamics require specialized, highly vigilant supervision of offenders, which must include careful consideration of adding conditions such as polygraphs and GPS monitoring. DOC knows that it cannot rely on DV victims to protect themselves by reporting their ongoing victimization. DOC knows that it is critical for CCOs supervising DV offenders to study offense and violation histories of DV offenders to recognize and proactively supervise patterns of behavior by DV offenders. DOC has policies requiring Community Corrections Supervisors ("CCS") to actively and personally supervise their Community Corrections Officers ("CCO") to make sure they are implementing their training specific to DV offenders.

Nonetheless, DOC failed to train CCS Crisp on his responsibilities; he had no idea that supervision of a chronic DV offender should be

² See Appellant's Opening Brief, at 5-14, and citations to the record therein.

approached any differently from that of a first time shoplifter. CP 530, 538-540. Not surprisingly, then, neither did Freeland. CP 406, 486, 494. Crisp's failure to train and supervise Freeland was even more egregious because Freeland had only been back at DOC for a few weeks when Crisp put Miller on her caseload, and she had never before supervised an offender in the field. CP 469-471, 527, 706-708, 1106-1116, 1118.

Since Freeland had never been trained on the unique challenges of supervising DV offenders, she made no effort to review Miller's history and learn his patterns. CP 480, 486. In fact, Miller had an obvious pattern of using the same clumsy lies over and over to his previous CCOs³. Freeland was never trained that she should consider adding conditions to improve her supervision of Miller, such as polygraphs or GPS monitoring, and never considered those steps. CP 486.

Freeland was so unprepared to supervise a highly dangerous DV offender that when Miller gave her a falsified "shelter confirmation sheet" claiming he had stayed with his mother for the last seven days, but not giving her address, it did not even occur to Freeland to simply call the number on the sheet while Miller was sitting in her office. CP 103-108, 289-290, 479, 706-707.

³ See Appellant's Opening Brief, at 14-28, and citations to the record therein.

The outcome of DOC's collective and Freeland's individual gross negligence could not have been more foreseeable, in light of everything DOC knows about DV offenders, the DV dynamic, and Miller's history of violence, violations of no contact orders and death threats against Patricelli. This extremely high degree of foreseeability is what makes DOC and Freeland's actions so grossly negligent.⁴

To distract from those facts, DOC makes two conflicting arguments that both fly directly in the face of its own policy on supervising DV offenders. On one hand, DOC blamed Patricelli for being personally responsible for the threat posed to her by Miller because she "actively undermined" the no-contact orders intended to protect her. Respondent's Brief at 2-3. But on the other hand, the department shrugged off its own responsibility for recognizing Patricelli's behavior as the coping mechanism of a DV victim, claiming it was entitled to take her at her word that she would avoid contact with Miller and report any attempts by him to contact her. Respondent's Brief at 4.

DOC relies on *Whitehall v. King County*, 140 Wn.App. 761, 167 P.3d 1184 (2007), and *Kelley v. Department of Corrections*, 104 Wn.App.

⁴ See Appellant's Opening Brief, at 36-38, and authorities cited therein.

328, 17 P.3d 1189 (2000). Both cases are readily distinguishable, as discussed in Appellants' Opening Brief, 38-42.

DOC continues to have no response to the logic of this Court's recent ruling in *Schulte v. Seattle*, Court of Appeals Div. I, Case No. 72821-1-I (Unpublished Slip Opinion). This Court in *Schulte* distinguished *Kelley* and *Whitehall*, finding that:

(T)he trial court persuasively distinguished *Whitehall* and *Kelley* when noting that unlike in those cases, here there was a "direct correlation" between the allegedly inadequate supervision of Mullan and the danger reflected in his recent criminal activities. The probation officer was confronted with the arguably foreseeable hazard that Mullan would continue to drink and continue to drive under the influence. Because a jury could find that the probation officer breached her duty by failing to track the Snohomish County case and contact collateral sources, a jury could also find that the breach was a failure to use even slight care.

Schulte, Slip Op. at 8.

This Court in *Schulte* additionally held that, regardless of the scope of the duty of supervision, summary judgment was inappropriate because opposing experts disagreed about fact of breach. "In *Whitehall*, it was undisputed that the probation officers complied with local policies and procedures. Here, it is disputed. Expert testimony on both sides creates a genuine issue of material fact." *Schulte* at 5. Beyond a mere dispute of expert opinion, Appellants below presented uncontradicted expert

testimony that DOC was grossly negligent, and violated its own training and policies in multiple respects. CP 278-322.

In this case, Appellants have presented evidence establishing the extremely high degree of foreseeability of Patricelli's murder by Miller, that DOC violated its own policies in supervising him, and that a simple, obvious step could have saved Patricelli's life. This, along with uncontradicted expert testimony, is sufficient to require that a jury decide DOC's gross negligence.

D. FREELAND'S GROSS NEGLIGENCE IS NOT ENTITLED TO QUASI-JUDICIAL OR DISCRETIONARY IMMUNITY

Even though DOC did not raise either of the two species of immunity in its summary judgment motion below, the court can still find that no such immunity applies on the facts of this case and eliminate that issue following remand.

A specific decision to set, modify, or enforce a condition of community custody is entitled to quasi-judicial immunity from liability. *See* former RCW 9.94A.704(10) (now RCW 9.94A.704(11)), *Tibbits v. DOC*, 186 Wn.App. 544, 346 P.3d 767 (2015). An omission inferred from such a specific decision is likewise entitled to the same immunity. *Tibbits* at 541, 346 P.3d 767.

This doctrine of quasi-judicial immunity, however, does not apply to Ms. Harper's claims in this case. Contrary to the assertions of DOC, Ms. Harper did not assert her claims based on the defendant's specific decisions to enforce various conditions of Miller's community custody. As discussed thoroughly in all prior briefing, Ms. Harper's claims instead assert gross negligence in the virtual abdication of the duty to enforce any conditions and, in the process, to protect Ms. Patricelli from a well-known, obvious threat.

For example, CCS Crisp chose to be uninvolved in the assignment of offenders to appropriately trained and experienced CCOs, and he was willfully ignorant of the work being done by his CCOs to know whether they were doing their jobs properly. See CP 295-299. Likewise, CVL Coker and CCO Freeland simply made no effort to know where Patricelli would be living and made only a token effort to know where Miller was while in the community. Of course, without knowing Patricelli's residence, Freeland's token efforts offer no meaningful opportunity to keep Miller away from her.

In sum, DOC's neglectful supervision of Miller was not the product of specific decision-making of a quasi-judicial nature; it was the

product of utter disinterest in doing its job to protect Patricelli or the rest of the community from Miller.

DOC also responds — for the first time — that Ms. Harper’s claims of training failures are barred by the doctrine of discretionary immunity. See *Taggart v. State*, 118 Wn.2d 195, 214-15, 822 P.2d 243 (1992). But in arguing so, DOC conflates policy-making with policy execution. As *Taggart* explains, “(T)he State is immune only if it can show that the decision was the outcome of a conscious balancing of risks and advantages.” *Id.* at 215 (citing *King v. Seattle*, 84 Wash.2d 239, 246, 525 P.2d 228 (1974)). “in addition, ... discretionary immunity is narrow and applies only to basic policy decisions made by a high-level executive.” *Id.*

In this case, of course, Ms. Harper does not fault DOC for high-level executive policy-making. She faults DOC for failing to do its job to comply with the department’s well developed guidance for supervising domestic violence offenders. None of the department’s CCSs, CCOs, and CVLs followed the policy articulated by “DOMESTIC VIOLENCE: BEST PRACTICES FOR COMMUNITY CORRECTIONS” (CP 337-365), which anticipates the very scenario that played out here and demonstrates vividly that the department institutionally was well aware of the frightening danger that Miller posed to Patricelli. That training policy

clearly was produced by “a conscious balancing of risks and advantages,” and the various CCSs, CCOs, and CVLs responsible for Patricelli’s safety failed to take even slight care to follow it.

E. THERE IS SUFFICIENT EVIDENCE TO REQUIRE A TRIAL ON NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The trial court granted summary judgment dismissing Harper’s NIED claim based on the same analysis of gross negligence that it used in decision on summary judgment against the negligent supervision claim. CP 1286-1287. As discussed above, the trial court should be reversed because there is sufficient evidence of gross negligence to require a trial. Dismissal of Harper's NIED claim should be reversed for the same reason.

III. CONCLUSION

For the reasons discussed above, this Court should reverse the order of summary judgment and remand the case back to the Superior Court for a trial on the merits.

Respectfully submitted this 22nd day of May, 2017.

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