

NO. 44841-6-II

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

JANET HUSTED as Personal Representative of the ESTATE OF KURT
JUSTED; WILBERT R. PINA, an individual; and JOEL FLORES,
guardian ad litem for minor EMMETT PINA,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.



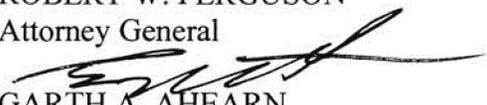
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BRIEF OF RESPONDENT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a question of first impression – that question being what, if any, tort duty a corrections agency has to apprehend an offender who absconds from supervision. Contrary to Plaintiffs’¹ contention, the State is not contending, nor did the trial court find, that an offender can terminate his own supervision simply by absconding. The Department of Corrections agrees that the supervision obligation is tolled during the period of absconding (which incidentally assumes the supervision obligation is not enforceable during the period of tolling) and resumes once the offender is apprehended. But, that is not the question before this court. The question before this court, and the question decided by the trial court, is whether a correctional officer has a tort duty, unlimited in time and scope, to apprehend any offender who absconds from supervision. The trial court correctly concluded no such duty exists. Further, the trial court correctly concluded that, even if such a duty exists, Plaintiffs failed to present any competent evidence establishing causation. The trial court’s decision was correct and should be affirmed for the following reasons.

¹ Appellants are Janet Husted as Personal Representative of the Estate of Kurt Husted, Wilbert Pina and Joel Flores, Guardian ad litem for Emmett Pina. The State will refer to Appellants as “Plaintiffs” in this brief. No disrespect is intended.

First, the trial court properly granted summary judgment because Mr. Finley's failure to report as required upon his release from jail prevented the creation of a definite, established, continuing relationship between the Department of Corrections (DOC) and Finley. By absconding upon release from jail, an offender precludes the creation of a definite, established, continuing relationship whereby the parole officer can monitor the offender's behavior and "control" the parolee by imposing conditions or seeking sanctions for violations of their parole does not arise. Therefore, no duty arises under our Supreme Court's decision in *Taggart*.²

Second, Plaintiffs' assertion DOC has a duty to apprehend a fugitive offender is without merit. No law enforcement group in the nation, including correctional agencies, has a tort duty to apprehend fugitive offenders, as any such duty is contrary to public policy. Plaintiffs never address this argument because they cannot refute it. In 2009, the Department of Corrections issued 17,330 arrest warrants alone. The imposition of a duty to apprehend over 17,000 fugitive offenders as proposed by the Plaintiffs exposes correctional agencies to unlimited liability and unnecessarily constrains the discretion a parole officer and

² *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992).

other members of law enforcement need when making decisions based on the best interests of any ongoing investigations or operations.

Third, summary judgment was proper because the parole officer assigned to Finley is entitled to qualified immunity and, as such, no duty arose under *Taggart*. The duty created in *Taggart* arises only once it has been established that the parole officer lacks both absolute and qualified immunity. The parole officer in this case timely issued a warrant for Mr. Finley's arrest when he failed to timely report and therefore qualified immunity applies and no duty arises under *Taggart*. The Plaintiffs never attempted to pierce the qualified immunity of the parole officer and the trial court's decision should be affirmed because no duty arose as stated in *Taggart*.

Fourth, summary judgment was proper because discretionary immunity and the separation of powers doctrine preclude imposing liability against DOC based on any contention that DOC should have had different or additional policies in place related to supervision and searching for offenders. DOC offender supervision standards are discretionary acts for which no tort liability may attach and intrusion into the policy and budget concerns of the Department is barred by the separation of powers doctrine.

Fifth, summary judgment is proper because Plaintiffs' factual cause theory is based on pure speculation. The Plaintiffs failed to present any admissible evidence to establish that, if DOC acted differently, Mr. Finley (1) would have been apprehended prior to the shooting and (2) that if he had been apprehended prior to the shooting he would have received a sanction which would have placed him in jail on the day of the shooting thereby preventing his participation in the shooting. Absent such evidence, Plaintiffs cannot establish factual causation as the trial court properly concluded.

Finally, summary judgment was appropriate because the Department of Corrections is not the legal cause of Plaintiffs' claims. Plaintiffs' theory places liability on the Department of Corrections based on the actions of a fugitive over which the Department of Corrections had no control. Plaintiffs attempt to impose an unlimited duty to search for DOC fugitives until they are found, or risk incurring liability any time they do not. This liability theory lacks common sense and would be poor public policy.

The trial court properly granted summary judgment and the ruling should be affirmed.

II. COUNTER-STATEMENT OF THE ISSUES

- A. Whether correctional agencies are liable for failing to find and apprehend fugitives when no other law enforcement agency is held liable under similar circumstances?
- B. Whether the trial court properly granted summary judgment when the Plaintiffs have not, and cannot, pierce the qualified immunity of the parole officer and, as such, no duty arose under *Taggart*?
- C. Whether the Plaintiffs' argument that the department should have different or more stringent policies concerning the supervision of offenders who fail to report is barred by discretionary immunity and the separation of powers doctrine?
- D. Whether the Plaintiffs failed to establish factual causation when there is no admissible competent evidence establishing that Mr. Finley (1) would have been apprehended prior to the shooting and (2) that if he had been apprehended prior to the shooting he would have received a sanction which would have placed him in jail on the day of the shooting thereby preventing his participation in the shooting?
- E. Whether the trial court properly granted summary judgment based on a lack of legal causation when, just as with the police, policy and common sense dictate that DOC should not be liable for crimes committed by fugitives from justice simply because DOC is unable to apprehend the fugitive prior to their committing an additional crime?

III. COUNTER-STATEMENT OF THE FACTS

A. **Supervision History Of Calvin Finley Prior To His Release From Jail On February 14, 2008**

Calvin Finley was convicted of a Domestic Violence Court Order Violation in Pierce County and sentenced to 15 months confinement and 9 to 18 months of community custody on September 1, 2006. CP at 131-41. Finley was released from the Pierce County Jail on March 1, 2007, and reported to DOC for supervision as required the next day. CP at 128-29.

Finley was compliant with the terms and conditions of his supervision until October 2007, when he tested positive for marijuana. CP at 123. As a result of this violation, Finley agreed to a negotiated sanction which increased his reporting requirements, and required him to get a chemical dependency evaluation and comply with any treatment recommendations. CP at 122.

Finley was again compliant with his conditions of supervision until July 2008 when he was again found to have consumed marijuana. CP at 117. He was arrested on July 11, 2008, and transported to the Pierce County Jail. On July 24, 2008, he was found guilty of one violation for consuming marijuana, was sentenced to confinement for time served plus one business day and directed to report to DOC within one day of his release. CP at 108-46.

Finley failed to report as required after his release on July 25, 2008, and in addition, DOC received information that he had assaulted Sandra Oliver, the mother of his former girlfriend, Diamond Oliver, who was the subject of the no contact order that had resulted in his conviction. CP at 114. A warrant for his arrest was issued on July 28, 2008, and he was eventually arrested pursuant to that warrant on September 14, 2008. CP at 113. On September 26, 2008, he was found guilty of failing to report, failing to complete his domestic violence counseling, failing to

obey all laws by obstructing a public servant, failing to obey all laws by driving with a suspended license, and failing to obey all laws by possessing marijuana. CP at 112. As a result, he agreed to a negotiated sanction of thirty-five (35) days confinement to be served at the Kitsap County Jail. CP at 112, 151.

While incarcerated at the Kitsap County Jail, DOC filed another violation report which charged Finley with eleven separate violations and requested the Hearings Officer to impose 240 days confinement. CP at 154-58. The request for 240 days was extraordinary as Department policy at the time was that the presumptive sanction at a third or subsequent violation hearing was 60 days regardless of the number of violations alleged. CP at 160-75. An in-custody hearing was held on October 15, 2008, at which Finley was found guilty of 7 violations and sanctioned to 200 days confinement. CP at 177-79. Finley was ordered to report within one business day of his release from jail. CP at 177-79.

B. Finley's Failure To Report Upon His Release From Jail, And DOC's Issuance Of A Warrant For His Arrest

Finley was released from jail on February 14, 2009, which was a Saturday. CP at 110. The following Monday was President's Day and when Finley failed to report as required on Tuesday, February 17, 2009, a

Secretary's Warrant for his arrest was requested that day per DOC Policy 350.750. CP at 192-99.

On February 18, 2009, an office assistant with the Department of Corrections Southwest Region Community Response Unit (CRU) received a list of recently issued DOC Secretary's Warrants which included Calvin Finley's name. CP at 208. Every day the CRU receives a list of Secretary's Warrants issued the previous day for individuals under supervision by DOC. CP at 208. Warrants are assigned out on a priority basis based on a set of guidelines which includes the offender's classification and community concerns, among other things. CP at 208. Mr. Finley was classified as a high violent offender and had community concerns, so his warrant was assigned to CRU Officers Evan Brady and Anthony Nisco that same day. CP at 208.

Evan Brady is a Community Corrections Specialist in the CRU. CP at 203. His role is to search for offenders who are on warrant status with DOC. CP at 204. In 2009, DOC issued 17,330 Secretary's Warrants statewide. In 2009, 1,649 Secretary's Warrants were issued in the Southwest Region alone. CP at 200-01.

C. The Department Of Corrections Southwest Region Community Response Unit

The Department of Corrections Southwest Region runs from Pierce County south to Vancouver and includes Pierce, Kitsap, Thurston, Lewis, Cowlitz, Clark, Grays Harbor, Pacific and Mason Counties. CP at 207-08. There are eleven CRU Officers assigned to the Southwest Region who are assigned to various task forces and operate under memorandums of understanding with other law enforcement agencies. CP 208.

Evan Brady and Anthony Nisco are assigned to the South Sound Gang Task Force. Officer Brady is deputized by the Pierce County Sheriff, is a Special Deputy with the U.S. Marshall's Service and is a Special Federal Officer with the FBI. CP at 204. The task force includes representatives from the FBI, the Bureau of Alcohol, Tobacco and Firearms, the Drug Enforcement Administration, the Washington State Patrol, and the Cities of Tacoma and Lakewood Police Departments. CP at 203-04.

The task force works together on reducing gang related activity. For example, if a DEA or ATF representative is executing a search warrant or arrest of a major drug dealer, members of the task force will assist in that effort by providing support and backup. Similarly, if a CRU member of the task force is staking out a residence where a DOC offender on warrant status may be, or arresting an offender on warrant status, the

other members of the task force will assist the CRU member in the stakeout or arrest. CP at 204.

D. Officer Brady's Search For Mr. Finley

After receiving the assignment, CRU Officer Brady began his search for Finley by checking a number of law enforcement computer databases including the FBI, LESA, and DOC databases as well as Accurint, SCOMIS and LINX. CP at 204. Based on this information he learned that Finley was homeless, but Officer Brady was able to develop contact information for Finley's former girlfriend, Diamond Oliver. CP at 204. Officer Brady contacted Ms. Oliver on February 18th, 2009, and learned that Finley had been in contact with Oliver as he wanted to retrieve some of his personal property. CP at 204. As a result, Officer Brady enlisted Ms. Oliver in an effort to set Mr. Finley up by having her meet him at the Target Store on Union Avenue to deliver his property. CP at 204-05. Officer Brady was actually enroute to the Target store when Ms. Oliver called him and said that Mr. Finley was not going to show. CP at 205.

Officer Brady asked Ms. Oliver if she had any information as to where Mr. Finley might be staying. CP at 205. Ms. Oliver provided a description of a house located on Portland Avenue in Tacoma's eastside which Officer Brady, and the other members of the South Sound Gang

Task Force, staked out that same day. CP at 205. However, they never observed Mr. Finley enter or leave the residence despite being there for several hours. CP at 205.

With no further leads to pursue, Officer Brady turned his attention to other matters, although he did not abandon his efforts to locate Mr. Finley. On occasion he drove by the house on Portland Avenue and Mr. Finley's mother's home on Tyler Street, but he never observed Mr. Finley at either location or any vehicles associated with Mr. Finley. CP at 205. Some months later, he received a call from Ms. Oliver indicating that Mr. Finley might be hanging out in the area of 56th and Orchard. As he was already in the area, Officer Brady drove around the area in an attempt to locate Mr. Finley but was unsuccessful in doing so. CP at 205.

On June 2, 2009, Mr. Finley shot Pina and Husted during an armored car robbery at the Lakewood Walmart giving rise to this lawsuit.

E. Procedural History

DOC moved for summary judgment on Plaintiffs' claims. CP at 79-212. In response, Plaintiffs' counsel filed a memorandum which included the Declarations of William Stough (CP at 948-982) and Allen Garber (CP at 940-947), among other declarations in support of their brief. CP at 213-1406.

In reply, defense counsel objected to portions of Plaintiffs' response, including portions of Mr. Stough's and Mr. Garber's declarations on the basis that they contained improper legal conclusions, and speculative assumptions among other things. CP at 1412-14; 1420-22. Additionally, DOC noted the opinions of Stough and Garber were inadmissible because neither Mr. Stough or Mr. Garber have ever been Department of Corrections Hearing Officers, so they lacked the expertise to render opinions concerning what sanctions Finley would have received and whether Finley would have been in jail on those sanctions at the time of the robbery. CP at 1421-22.³

After hearing argument from counsel on the motions, the court granted summary judgment. CP 1475-79.

IV. ARGUMENT

A. **The Trial Court Properly Granted Summary Judgment Because Finley Absconded Upon His Release From Jail And DOC, Therefore, Did Not Have A Duty To Control His Behavior**

A review of a trial court's ruling granting summary judgment is de novo. *Trimble v. Washington. State Univ.*, 140 Wn.2d 88, 993 P.2d 259

³ While Judge Serko did not specifically rule on DOC's objections, she did comment on the speculative nature of Plaintiffs' experts' opinions throughout argument in her ruling suggesting that she only considered admissible evidence in making her ruling. In any event, DOC raises the issue here merely to point out that its' objections have been preserved and therefore are properly before this court.

(2000). A trial court properly grants summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Plaintiffs assert the trial court erred in granting summary judgment by arguing the Department of Corrections has a duty to apprehend fugitive offenders. This assertion is without merit.

1. Finley absconded upon release from jail and, therefore, DOC did not have a definite, established and continuing relationship with Finley giving rise to a duty.

The trial court properly granted summary judgment because Finley absconded upon release from jail and, therefore, DOC did not have a definite, established and continuing relationship with Finley giving rise to a duty.

Washington recognizes the general rule that there is no duty to control the conduct of a third party so as to prevent him from causing physical harm to another. *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992). However, in *Taggart*, the court recognized an exception to the general rule and held that the relationship between a parole officer and a parolee gives rise to a duty on the part of the parole officer to control the conduct of a parolee. *Id.* at 219. The court premised this duty on the *Restatement (Second) of Torts*, § 319, which provides, “One who takes charge of a third person, whom he knows or should know to be likely to

cause bodily harm to others if not controlled, is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.” *Id.*

In finding that a parole officer “takes charge” of a parolee, and therefore has a duty to control the parolee, the court noted several aspects of the relationship between the two that gives rise to the duty. The court noted as follows:

Parole officers have the statutory authority under RCW 72.04A.080 to supervise parolees. The State can regulate a parolee’s movements within the state, require the parolee to report to a parole officer, impose special conditions such as refraining from using alcohol or undergoing drug rehabilitation or psychiatric treatment, and order the parolee not to possess firearms. The parole officer is the person through whom the State ensures that the parolee obeys the terms of his or her parole. Additionally, parole officers are, or should be, aware of their parolees’ criminal histories, and monitor, or should monitor their parolees’ progress during parole. Because of these factors, we hold that parole officers have “taken charge” of the parolees they supervise for purposes of section 319. When a parolee’s criminal history and progress during parole show that the parolee is likely to cause bodily harm to others if not controlled, the parole officer is under a duty to exercise reasonable care to control the parolee and to prevent him or her from doing such harm.

Taggart, 118 Wn.2d at 219-220.

The Supreme Court noted in *Taggart* that the duty it created only applies upon a showing of a “definite, established and continuing relationship between the defendant and the third party.” *Taggart*, 118

Wn.2d at 219. In a subsequent case, the court framed the question of whether a duty exists as being whether the actor has taken charge of the third party and whether the actor knows or should know of the danger posed by the third party. *Bishop v. Miche*, 137 Wn.2d 518, 526, 973 P.2d 465 (1999).

The need for the parole officer to have actually “taken charge” of the parolee through the existence of a “definite, established and continuing relationship” before a duty to control arises is also reflected in the nature of the parole officer’s duty once it does arise. The parole officer’s duty is to adequately monitor and report violations of the parolee’s conditions of supervision. *Bishop*, 137 Wn.2d at 526. In RCW 9.94.720, the Legislature codified the actions parole officers can take in the course of supervising offenders. The underlying premise of both *Bishop* and RCW 9.94.720 is that the parolee’s conduct is controlled by the specter of being incarcerated, or otherwise punished by the court or other sanctioning authority, if the offender fails to abide by the terms and conditions of his or her parole. When an offender absconds, the parole officer no longer has the ability to control the offender’s behavior through the actions authorized by the Legislature and recognized by the courts.

Here, the trial court properly granted summary judgment because Finley absconded upon release from jail and, therefore, DOC did not have

a definite, established and continuing relationship with Finley giving rise to a duty. It is undisputed Mr. Finley failed to report for supervision upon his release from the Pierce County Jail. Therefore, DOC did not have the ability to impose, monitor or enforce conditions that would allow DOC to control Finley's behavior, monitor his behavior, or bring him before the court for punishment, as long as he remained a fugitive. Because DOC could not "take charge" of Mr. Finley or control him while he was a fugitive, no duty to do so arose under *Taggart*.

Plaintiffs mischaracterize DOC's position as arguing a felon terminates supervision by absconding. To the contrary, DOC's position is that it loses the ability to supervise during the period of time the offender absconds, which is why the supervision is tolled, but that the duty to supervise resumes once the offender is apprehended. Plaintiffs premise their argument on RCW 9.94A.720 which allows DOC to impose conditions during supervision among other things. However, when an offender fails to report, the ability to impose conditions and ensure they are being met is lost. Thus, RCW 9.94A.720 does not apply. It does not even mention what to do when an offender absconds.

Contrary to their assertions, the tolling statute does not support Plaintiffs' claims either. RCW 9.94A.171⁴ the tolling statute, recognizes that there is no supervision when the offender absconds, and that the period of supervision and the duty resume once the offender is apprehended.

Plaintiffs' arguments fail to recognize DOC lost the ability to control Finley once he absconded. The parole officer's duty is to adequately monitor and report violations of the parolee's conditions of supervision. *Bishop*, 137 Wn.2d at 526. When an offender absconds and becomes a fugitive, the parole officer has no ability to monitor the offender's behavior and cannot utilize the coercive force of the court or other sanctioning authority to punish the parolee. As a result, DOC lacked the type of definite, established and continuing relationship with Finley giving rise to a duty to control his behavior and the trial court's summary judgment ruling should be affirmed.

2. There is no duty to apprehend a felon who absconds.

The trial court properly granted summary judgment because DOC does not have a duty to apprehend fugitive felons. The Plaintiffs' assertion that the trial court erred in granting summary judgment because

⁴ Formerly RCW 9.94A.625. No substantive changes were made to the statute when it was amended and recodified that affect Calvin Finley's supervision.

the Department did not apprehend Mr. Finley, a fugitive offender, is without merit. Plaintiffs seek the creation of a new duty to apprehend fugitive offenders. This represents a significant departure from the underpinnings of the *Taggart* duty, is not the law, nor should it be.

No court has ever even addressed the specific question of whether a parole officer has a duty to apprehend a fugitive actionable in tort. On the other hand, numerous courts have addressed the question of whether the police have a duty to arrest a fugitive on an outstanding warrant actionable in tort and answered it negatively. *See generally, Dore v. City of Fairbanks*, 31 P.3d 788 (Alaska 2001) and cases cited therein.

The rationale for refusing to impose a duty in such situations was articulated by the Alaska Supreme Court as follows:

Imposing a duty to execute a warrant would allow claims in all cases where a person with an outstanding warrant injures another. It would also impose liability in those cases where police failure to execute the warrant was determined, with twenty-twenty hindsight, to have been negligent. "Such a decision would invariably lead to the diversion of resources from other projects and investigations. Decisions regarding the allocation of limited resources are better left to their executive branch." (Footnote and citations omitted.) Plus, the decision of when to execute an arrest warrant is a fundamental aspect of police discretion. Imposing a duty to execute warrants will unnecessarily constrain the discretion that the police need in making the "quick and important decisions that characterize a criminal investigation."(footnote and citations omitted.)

Wongittilin v. State, 36 P.3d 678, 684 (Alaska 2001).

Washington courts and the Legislature have similarly recognized the strong public policy reasons against imposing liability on agencies and individuals engaged in law enforcement activities. *Keates v. City of Vancouver*, 73 Wn. App. 257, 869 P.2d 88 (1994). Law enforcement activities are not typically reachable in negligence. *Id.* at 267. This is based in part on the deterrent effect lawsuits have on the exercise of law enforcement officers' discretion and the inhibiting effect such lawsuits have on law enforcement agencies' performance of their public duties. *Id.* at 268.

In this case, the trial court properly granted summary judgment because there is no duty in tort to apprehend fugitive felons. Although no court has addressed the issue of whether a parole officer has a duty to apprehend a fugitive felon, the same public policy which counsels against imposing such a duty on other law enforcement agencies applies to DOC. Plaintiffs have failed to overcome the strong policy reasons which mitigate against imposing such a duty. The reason such a duty does not exist is because it leads to a diversion of resources from other activities that may be more important, and impacts the officer's exercise of discretion as to how to react to any particular piece of information. Further, it would impose liability based on 20/20 hindsight resulting in what amounts to strict liability.

Contrary to Plaintiffs' claims, DOC internal policies and the statutes concerning the supervision of offenders do not create a duty to apprehend fugitive felons. As a preliminary matter, agencies' policies do not give rise to a duty in tort. *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990). Additionally, Plaintiffs cannot identify any statute or policy requiring DOC to search for an offender who has absconded. To the extent the statutes and policies concerning supervision of offenders create any duty concerning fugitive felons, the duty is to issue a warrant when they abscond. That is precisely what DOC did in this case and why the trial court's ruling should be affirmed.

Furthermore, nothing in the court's holding in *Taggart* or subsequent cases creates a duty to apprehend fugitive offenders. The authority of DOC to resume monitoring of offenders who are no longer fugitives is completely separate from the creation of the extraordinary duty to apprehend fugitive felons advocated by Plaintiffs.

Plaintiffs ignore the fact that imposition of a duty to apprehend fugitive felons would lead to the diversion of resources from the many other public safety functions DOC performs to the detriment of public safety. As outlined in the declaration of James Harms, DOC issued 17,330 Secretary's warrants in 2009 alone. If a duty to execute on those

warrants is recognized, that means there were, at a minimum, 17,330 potential claims against DOC created in 2009.

Rather than the relatively manageable duty of reporting violation behavior to the court based on knowledge gained from an ongoing relationship, Plaintiffs' proposed new duty would burden parole officers with an unlimited duty to search for and apprehend fugitives or risk being held liable for any new crime committed by the fugitive. Plaintiffs' experts Mr. Stough's and Mr. Garber's opinions confirm this point. Under their theory, absent expending substantial and significant resources (which is left undefined) to apprehend an offender, DOC would be liable for the actions of the fugitive. CP at 969.

Plaintiffs also fail to recognize or even address the severe impact such a duty would have on a parole officer's ability to make necessary discretionary decisions. Just like the police, imposing such a duty would limit a parole officer's discretion in how and when they decide to execute a warrant which is impacted by both tactical and safety concerns. Moreover, it impedes their ability to make decisions based on the best interests of any competing ongoing investigations or operations by requiring all resources to be diverted to the apprehension of fugitives. As other courts have recognized, such a result is contrary to public policy. *Wongittilin v. State*, 36 P.3d 678, 684 (2001). There simply is no basis to

distinguish between the police and parole officers when it comes to their relationship with the offender because the reason the duty is not imposed does not turn on the relationship between the fugitive and law enforcement. Rather, the rationale is premised on the fact that imposing such a duty would have unduly hamper law enforcement operations by imposing limitless liability and fettering the discretion of law enforcement agencies when it comes to decisions related to the allocation of resources, tactics and strategy. Those considerations apply to DOC the same as they apply to any law enforcement agency.

Plaintiffs have never made any attempt to rebut the strong policy reasons supporting why, as a public policy matter, parole officers like police officers do not have a duty to apprehend fugitive offenders. The reason they do not is because they cannot.

3. The trial court properly granted summary judgment because the parole officer's qualified immunity precludes liability in this case.

The trial court properly granted summary judgment because Plaintiffs' failure to pierce the qualified immunity of the parole officer precludes liability. Plaintiffs' assertion the trial court erred because the parole officer's qualified immunity does not extend to DOC based on *Savage* is meritless because it misconstrues DOC's argument and the court's holding in *Taggart*. No duty arose under *Taggart* because the

Plaintiffs failed to pierce the qualified immunity of the parole officer and, as such, the trial court's granting of summary judgment was proper.

In *Taggart*, the Supreme Court held that **the duty** created in *Taggart* arises only once it has been established that **the parole officer lacks both absolute and qualified immunity**. *Taggart*, 118 Wn.2d at 224 (emphasis added). Parole Officers are entitled to qualified immunity from liability for allegedly negligent parole supervision if their actions are in furtherance of a statutory duty and in substantial compliance with the directives of superiors and relevant regulatory guidelines. *Taggart*, 118 Wn.2d at 216. In order to pierce the immunity, Plaintiffs must show that the officer failed to perform a statutory duty according to the procedures dictated by statutes and superiors. *Taggart*, 118 Wn.2d at 224. Only then does a duty arise. *Id.*

It is undisputed that DOC issued a warrant for Finley's arrest the day he failed to report as required. It is also undisputed at that point, the only statutory "duty" the supervising officer had was to issue a Secretary's Warrant for Mr. Finley's arrest and DOC policy required the warrant to be issued within 72 hours of his absconding. CP at 192-99. Because the warrant was issued the same day that Mr. Finley was required and failed to report, the officer complied with the relevant statutory and departmental guideline and is entitled to qualified immunity. Plaintiffs failed to pierce

the qualified immunity of the parole officer at the trial court, and now. As a result, no duty arose under *Taggart* and summary judgment was properly granted.⁵

In one lonely paragraph, Plaintiffs argue that the parole officer's qualified immunity does not extend to the State. Appellants' Br. at 50, citing *Savage v. State*, 127 Wn.2d 424, 899 P.2d 120 (1996). This is incorrect for two reasons. First, the State is not arguing that the qualified immunity of the parole officer extends to the State. The State is arguing, pursuant to the Court's explicit holding in *Taggart* which has not been overruled or modified in any fashion, that no duty arises out of the acts of the parole officer if the parole officer is entitled to qualified immunity. *Taggart, supra*, 118 Wn.2d at 224. Significantly, the State was the only defendant in the *Taggart* case and thus the court was analyzing the question of whether the State, not the parole officer, owed a supervisory duty to the plaintiffs and the court specifically held that if qualified immunity applies no duty arises. Because the State was the only defendant in *Taggart* the only possible interpretation of *Taggart* is that, if qualified immunity applies, no duty arises as it relates to the acts of the

⁵ The State expects Plaintiffs to belatedly attack the qualified immunity of the parole officer for the first time in their reply. When reviewing a grant of summary judgment, the court considers solely the issues and evidence the parties presented to the trial court in the motion. RAP 9.12. Attempts to address the parole officer's qualified immunity for the first time in reply should be rejected because Plaintiffs failed to do so at the trial court and in their opening brief.

parole officer. This of course does not preclude a claim based on independent acts of negligence of the State. Here, Plaintiffs have not, and cannot, demonstrate that qualified immunity does not apply and therefore no duty arises out of the supervisory acts of the parole officer under *Taggart*.

Second, although *Savage*⁶ holds that the qualified immunity of the parole officer does not extend to the State, the State is unaware of any case where a principal has been held liable for the acts of a supervising officer when the officer is entitled to immunity. Indeed the only case to specifically address the issue since *Savage* was decided, *Hertog v. City of Seattle*⁷, holds that a determination that the individual parole officer has qualified personal immunity does not resolve the question of duty on the part of the employing governmental agency. *Hertog, supra*, 138 Wn.2d at 278. The court went on to hold that qualified immunity did not run to the county, however, ***which may be held liable for failure to use reasonable care in its directive and regulations.***⁸ *Hertog*, 138 Wn.2d at 292. Significantly, the court identified an independent basis for finding a duty on the part of a municipality, not the *Taggart* duty, as the basis for

⁶ *Savage v. State*, 127 Wn.2d 434, 899 P.2d 1270 (1995).

⁷ 138 Wn.2d 265, 979 P.2d. 400 (1999).

⁸ The State would note that the question of whether discretionary immunity or the separation of powers doctrine preclude imposing liability on this basis was neither briefed nor decided in *Hertog*. As argued *infra*, these doctrines preclude liability in the present case.

imposing liability on the municipality. *Id.* Plaintiffs have identified no independent duty that the State breached in their complaint, their pleadings in the trial court or in their opening brief to this court. To the contrary, Plaintiffs' entire case is premised on the actions of the parole officer. Because no duty arose under *Taggart*, Plaintiffs have failed to identify any duty to support their claim, and the trial court's order of dismissal should be affirmed.

4. Any attempt by Plaintiffs to allege DOC is liable for failing to adopt appropriate or reasonable standards is precluded by Plaintiffs' failure to make such a claim at the trial court level, discretionary immunity and the separation of powers doctrine.

Liability in this case cannot be premised on the alleged failure to "properly" supervise the offender by the supervising officer because, as already pointed out, the officer is entitled to qualified immunity and therefore no supervisory duty to control Finley arose. Thus, in order to survive, Plaintiffs' case must be premised on some act of DOC independent of any acts of the allegedly "negligent" supervising officer.⁹ Plaintiffs have not identified any such act to this point and, as a result, the granting of summary judgment was proper.

⁹ See *Hertog v. City of Seattle*, 138 Wn.2d 265, 269 fn. 2, 282, 979 P.2d 400 (1999).

The State anticipates that Plaintiffs may belatedly argue DOC's policies regarding supervision were inadequate or that inadequate resources were devoted to apprehending fugitives. Any such argument is precluded by Plaintiffs' failure to raise this claim in the trial court. Additionally, any such claim would improperly invite a jury to substitute its policy and budget determinations for those of the executive branch officials statutorily charged with making those decisions. Any such claim is precluded by discretionary immunity and the separation of powers doctrine.

Turning first to the issue of discretionary immunity, DOC's enabling legislation expresses the same or comparable governmental objectives as those which were involved in the seminal case on discretionary immunity – *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965). In *Evangelical*, a boy who had been placed at Green Hill School for setting fires and engaging in other anti-social behavior escaped and set fire to a church and house. The plaintiff owners of the destroyed buildings sued the State, alleging that the State's operation of the school was negligent because it had employed only minimum security measures for the boy when it knew or should have known that the boy had a propensity for setting fires.

The *Evangelical* court concluded that the governmental acts complained of were not actionable because they were discretionary acts for which the State had immunity. The court observed:

. . . in any organized society there must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort liability, or, as stated by one writer “Liability cannot be imposed when condemnation of the acts or omissions relied upon necessarily brings into question the propriety of governmental objectives or programs or the decision of one who, with the authority to do so, determined that the acts or omissions involved should occur or that the risk which eventuated should be encountered for the advancement of governmental objective.” Peck, *The Federal Tort Claims Act*, 31 Wash. L. Rev. 207-40 (1956). See also Comment, *Abolition of Sovereign Immunity in Washington*, 36 Wash. L. Rev. 312 (1961).

Evangelical, 67 Wn.2d at 253-54.

In deciding whether an act of government is discretionary and entitled to immunity from tort liability, the court in *Evangelical* set out the following test:

. . . (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act,

omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.

Evangelical, 67 Wn.2d at 225.

In this case, DOC's community supervision standards involve a basic governmental objective, how to allocate limited resources to enforce the conditions of supervision for each offender under DOC supervision. By legislative grant of authority, DOC is authorized to make its own rules for the proper execution of its powers. RCW 72.09.050.¹⁰ Thus, the Legislature created and authorized a basic state objective to establish the conditions, procedures and rules governing the supervision of each offender who is subject to DOC supervision. This answers the first *Evangelical* question affirmatively.

The second question is whether the challenged act is essential to the realization of the government objective. Among the powers and duties of the DOC is the promulgation of standards and goals for the operation, and evaluation of all components of the correctional system and related services at the state and local levels within the funding allocated to DOC

¹⁰ For example, DOC outlines in Policy No. 350.750 the steps to take when issuing warrants for offenders who abscond. CP 192-199.

by the Legislature. RCW 72.09.050. The purpose of DOC supervision standards is to provide guidance to Community Corrections Officers to assist them in their supervision of offenders within the financial constraints imposed by the Legislature. Without the promulgation of standards, the ability of the DOC to properly supervise would be severely jeopardized and, thus, the standards are essential to the realization of the government objective. Furthermore, allowing juries to second guess what DOC's supervision policies should or should not be usurps DOC's decision making authority thereby undermining DOC's ability to manage the offender supervision program and its budget. This answers the second *Evangelical* question affirmatively.

The third question is whether the decision requires the exercise of basic policy evaluation, judgment and expertise on the part of the governmental agency involved. The DOC enacts its policies based upon a conscious balancing of the risks and benefits inherent in those policies at the highest level of the DOC administration. The agency must allocate limited resources to meet competing demands. Such resource allocation is a discretionary function. Moreover, in promulgating its supervision policies, the DOC solicits and accepts input from correctional experts both within and outside the DOC. The DOC's promulgation and implementation of supervision standards is an essential, discretionary act

involving basic governmental policy evaluation, judgment, and expertise by a state agency. This answers the third *Evangelical* question affirmatively.

Finally, the fourth question is whether the agency has the requisite constitutional or statutory authority to make the challenged decision. There is no question that, in the promulgation and implementation of its offender supervision policies, the DOC is acting as a state agency with all of the requisite constitutional, statutory, and lawful authority and duty to implement these policies. This answers the fourth *Evangelical* question affirmatively.

Thus, under the *Evangelical* test, the formulation of DOC offender supervision standards are discretionary acts for which no tort liability may attach. The purpose of all immunities is to protect the governmental process. It is the function being performed which gives rise to the immunity. *Babcock v. State*, 116 Wn.2d 596, 623, 809 P.2d 143 (1991); *Evangelical*, 67 Wn.2d at 254. Discretionary immunity exists to prevent juries from second-guessing those actions of government necessary for the formulation and regulation of basic governmental policy. *Evangelical*, 67 Wn.2d at 254. So, to the extent Plaintiffs are claiming DOC standards are inadequate by not requiring more intensive supervision of offenders and more exhaustive efforts to locate and apprehend offenders who fail to

report, the trial court's granting of summary judgment should be affirmed because such claims do not form a basis for tort liability.

Mr. Stough's questioning of the Department's allocation of resources is also precluded by the separation of powers doctrine. The separation of powers doctrine recognizes the distinct functions of the executive, legislative and judicial branches and the need to limit the encroachment of one branch into areas constitutionally delegated to another.

Washington has specifically recognized the inappropriateness of judicial intrusion into the difficult areas of balancing planning, policy, and budget concerns that are entrusted to the executive and legislative branches. *Avellaneda v. State*, 167 Wn. App. 474, 486, 273 P.2d 477 (2012). This principle applies to DOC's policy decisions, and precludes any claim by Plaintiffs that DOC was negligent in formulating the policies applicable to the supervision of offenders in the community or its allocation of resources.

Plaintiffs' citation to *Savage v. State*¹¹ and *Bishop v. Miche*¹² does not get around the bar created by the separation of powers doctrine or discretionary immunity. In neither of these cases did the court actually find a supervising agency could be liable for failing to exercise reasonable

¹¹ 127 Wn.2d 434, 899 P.2d 1270 (1995).

¹² 137 Wn.2d 518, 973 P.2d 465 (1999).

care in fashioning its guidelines, nor was it even a question in either case. The question of whether such a claim would be barred by either discretionary immunity or the separation of powers doctrine was neither briefed nor decided.

To allow such claims, would usurp the function of managing the Department of Corrections from those officials statutorily charged with doing so and gives that authority to the jury to determine on an ad hoc case by case basis. The opinions of Garber and Stough illustrate this point.

Under Plaintiffs' theory of liability, all a plaintiff needs to do is hire an expert to claim DOC should have done something more for liability to attach. It is not difficult to see that jury decisions based on such a legal theory would at once be result oriented based on hindsight and completely ineffective at managing the agency within the resources allocated by the Legislature. As such, Plaintiffs' theory should be rejected and the trial court's ruling should be affirmed.

B. The Trial Court Properly Granted Summary Judgment Because Actions By The State Were Not A Proximate Cause Of Mr. Husted's Death

The trial court properly granted summary judgment because, even if a duty existed in this case, which it does not, actionable negligence requires that the breach of a duty be the proximate cause of the claimed

injury. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985); *Braegelmann v. Snohomish County*, 53 Wn. App. 381, 766 P.2d 1137, review denied, 112 Wn.2d 1020 (1989). That is not the case here. Plaintiffs failed to establish cause in fact or legal causation in the present case so the trial court's granting of summary judgment should be affirmed.

1. The trial court properly granted summary judgment because Plaintiffs failed to establish factual proximate cause.

Summary judgment on proximate cause is proper when the plaintiff fails to affirmatively produce competent admissible evidence of causation that rises beyond mere speculation. *Walters v. Hampton*, 14 Wn. App. 548, 543 P.2d 648 (1975). The Supreme Court held in *Bell v. State*, 147 Wn.2d 166, 52 P.3d 503 (2002) that the plaintiff bears the burden of proving that DOC's alleged negligent supervision is a proximate cause of the plaintiff's injuries.

Cause in fact is established if the plaintiff's injury would not have occurred but for defendant's breach of duty. It is not established if plaintiff's injury would have occurred without defendant's breach of duty. *Walker v. Transamerica Title Insurance*, 65 Wn. App. 399, 403, 828 P.2d 621 (1992). When the connection between a defendant's conduct and the plaintiff's injury is too speculative and indirect, the cause in fact

requirement is not met. *Taggart v. State*, 118 Wn.2d 195 at 227 (quoting *Walters v. Hampton*, 14 Wn. App. 548, 543 P.2d 648 (1975)).

In *Walters*, the plaintiff alleged that the Port Orchard Police failed to protect him from a person with known proclivities for violence with firearms. The police had investigated the man who shot the plaintiff because of several previous violent incidents involving firearms. Police confiscated the man's rifle once, but he was never arrested or prosecuted for these events. The Court addressed factual causation by stating:

In our view, there are too many gaps in the chain of factual causation to warrant submission of that issue to the factfinder. It would require a high degree of speculation for the jury or the court to conclude that some sort of prosecutorial action by the police against Hampton in September 1970 would have prevented plaintiff's injuries at Hampton's hands in February 1972. Such a conclusion would require the assumption of a successful prosecution of Hampton. This in turn would require an assumption that Mrs. Hampton . . . would cooperate Finally, we would have to assume that Hampton would be incarcerated for the offense, or unable to procure another weapon in the event the one he possessed was confiscated. Factual causation requires a sufficiently close, actual connection between the complained of conduct and the resulting injuries. Where inferences from the facts are remote or unreasonable, as here, factual causation is not established as a matter of law.

Walters, 14 Wn. App. at 555-56.

Turning to the facts of this case, the trial court properly granted summary judgment because the Plaintiffs failed to establish cause in fact. Just as in *Walters*, the trial court properly granted summary judgment

because there are simply too many gaps in the chain of causation to warrant submission of this case to a jury.

- a. It is speculative to assume Mr. Finley would have been apprehended prior to the shooting if DOC acted differently.**

The trial court properly granted summary judgment because it is speculative to assume Mr. Finley would have been apprehended prior to the shooting if DOC acted differently. Plaintiffs' entire case is premised on speculation and conjecture.

To the extent Plaintiffs base their factual proximate cause argument on Diamond Oliver's declaration, their reliance is misplaced because the record contains no evidence suggesting that Oliver provided an actual address for Odies Walker. In fact, she could not even definitely say if she ever informed Officer Brady that Finley was staying with Walker. CP at 924-31.

However, even if one assumes for the sake of argument (1) Oliver told Officer Brady that Finley was allegedly staying at Walker's, (2) she provided an actual address for Walker's residence (3) Officer Brady was able to find an address for Walker by running his name through some database, or (4) Officer Brady was able to speak to Walker, the trial court still properly granted summary judgment because the jury would still have

to speculate Officer Brady would have been able to apprehend Finley after going to the location he was allegedly staying at.

The undisputed facts of this case show just how speculative the assumptions Plaintiffs' factual cause arguments are based on. Plaintiffs presume that if Officer Brady had simply called Odies Walker or driven to Odies Walker's house and asked if Finley was there, Finley would have given himself up for arrest. The latter assumption is sufficiently refuted by the undisputed fact that Finley refused to turn himself in once he was told he would go to jail if he did. CP at 109.

Additionally, Plaintiffs' mechanistic assumption that Officer Brady should or was required to attempt to contact Finley or Walker by calling Walker's cell phone or showing up at Walker's house asking for Finley is unrealistic. One consequence of utilizing Plaintiffs' mechanistic approach of contacting anybody the offender may know or be with is that if law enforcement doesn't apprehend the offender, the offender now knows he is being looked for, which complicates the search process. Thus, officers typically use other methods such as surveillance to apprehend an offender at a location he is known to frequent and one of the realities of doing surveillance is that it takes time and the suspect frequently doesn't appear. One does not have to speculate as to this latter point as there is direct evidence of it in the present case.

It is undisputed Officer Brady, based on a tip from Oliver, along with other members of the FBI Task Force, staked out a house on the east side of Tacoma where Oliver claimed Finley was living. Despite staking out the home for approximately four hours and periodically going back to the area to look for Finley, Officer Brady was unable to apprehend him. Plaintiffs' assertion that Finley would have been arrested prior to the shooting if DOC had simply put surveillance on Odies Walker's home at some unidentified time is therefore entirely speculative.

Plaintiffs' claim that Officer Brady would have apprehended Finley if he had gone to Walker's home and asked if Finley was there, or simply called Walker's cell phone, is also without merit because it is based on the speculative notion that that either Finley, or one of his criminal co-conspirators, would actually give himself up. Again, one of consequences of this approach is that if Finley does not give himself up, he now knows he is being looked for. As a result, one of the considerations in using or not using this approach is the reality that whether or not the offender is at the designated location at any particular time is a product of pure chance which is why the direct contact methods advocated by Plaintiffs are not always utilized. In addition, Plaintiffs assume that Finley would actually be at the location at that time and Brady would be able to see Finley in an area where Brady did not need a warrant

to enter. DOC cannot enter a home of a private citizen without a warrant simply because a parolee might be a guest there. *State v. Sims*, 10 Wn. App.75, 516 P.2d 1088 (1973); *Hocker v. Woody*, 26 Wn. App. 393, 613 P.2d 1183 (1980).

Furthermore, it is speculative that Finley would not have avoided arrest if Officer Brady had located him, especially since he managed to evade contact with any law enforcement for four months while planning a robbery. Plaintiffs' claim Finley was not "actively" hiding because others actively planning the robbery may have seen Finley at Odies Walker's is ludicrous. If he was not "actively" hiding or avoiding DOC one might ask why he didn't turn himself in February when he contacted DOC and asked what would happen if he turned himself in. CP at 232. More to the point, if he wasn't hiding why wouldn't he be in contact with DOC, and/or advise them where he was living? The answer is obvious, he didn't want DOC to know where he was and what he was doing, and he was not interested in going to jail. In any event, it is pure speculation for the Plaintiffs to argue Finley would not have attempted to avoid arrest even if DOC had been aware of his location.

The speculative nature of Plaintiffs' arguments holds true even if Officer Brady had attempted to contact Walker by calling his cell phone number as Plaintiffs suggest. Even if Officer Brady did locate Walker's

cell number, Plaintiffs' assumption that Finley's co-conspirator in a criminal enterprise would have given him up flies in the face of reality.

Any claim Finley could have been located if Officer Brady had tracked Walker's cell phone is no less speculative because it is based on the meritless assumption Officer Brady would have sufficient evidence to convince a judge to issue a warrant to allow the tracking of a cell number of a person who is not under DOC supervision. CP at 1453. Even if Officer Brady was able to get over that hurdle, Plaintiffs' arguments are meritless because they also assume the tracking of the phone would provide sufficient information to identify the location of the phone which is not always possible. CP at 1453. It further assumes that, upon going to that location, Officer Brady would have been able to locate the user of the phone, which may not be Finley, while not alerting the user that he is being followed by law enforcement. This is assuming the user of the phone is not inside a home so he can be identified and has not moved from the location where the phone was tracked.

All the while, Plaintiffs assume Finley would have been arrested on such a day that he would have been given a sanction that would not have allowed him to be released sometime prior to the robbery. As such, the trial court properly granted summary judgment because Plaintiffs' causation argument is entirely speculative.

b. Plaintiffs failed to provide admissible evidence Finley would have been in jail the day of the robbery.

Plaintiffs' causation theory is also speculative because they failed to provide admissible evidence that Finley would have been in jail at the time of the robbery. Plaintiffs' assertion they don't have to provide evidence establishing Finley would have been in jail the day of the robbery is without merit for numerous reasons.

First, it is without merit because a plaintiff must produce evidence establishing that the offender would have been incarcerated on the date of the plaintiff's injury but for the Department's alleged negligence in order to establish causation. In *Bordon*,¹³ the Court of Appeals held that the plaintiff had failed to meet her burden of producing evidence that, but for DOC's failure to report violations to the court, the offender would have been in jail on the date of plaintiff's injury. As a result, the court reversed a verdict in favor of the plaintiff with an order to dismiss. *Bordon*, 122 Wn. App. at 240-47.

In *Hungerford*¹⁴, the Court of Appeals affirmed an order granting summary judgment when the plaintiffs failed to produce evidence showing the offender would have been in jail at the time of the murder. Contrary to

¹³ *Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 95 P.3d 764 (2004), review denied, 154 Wn.2d 1003 (2005).

¹⁴ *Hungerford v. Dept. of Corrections*, 135 Wn. App. 240, 139 P.2d 1131 (2006).

Plaintiffs' assertion, the court did not affirm simply based on a "supervening cause". In the pages that follow the court's "supervening cause" analysis at pp. 253-254, they go on to say plaintiffs failed to establish proximate cause because they failed to present evidence establishing that the offender would have been in jail on the date he murdered Hungerford.

Second, it is not enough for a party to simply claim DOC's supervision was the proximate cause of a third party's injuries. Courts have previously rejected arguments claiming that if the offender had been more closely supervised he or she would have complied with the conditions of supervision and not engaged in the conduct which injured the plaintiff. *Hungerford*, 135 Wn. App. at 256. These types of "failure to rehabilitate" arguments have been rejected because they are speculative and amount to claims DOC has a duty to rehabilitate the offender contrary to the court's holding in *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990).

Third, Plaintiffs' reliance on the holdings of *Joyce*¹⁵, *Hertog*, *Bishop*, and *Taggart* to support their argument on factual proximate cause is misplaced. These cases do not absolve them from having to show through admissible evidence that Finley would have been incarcerated the

¹⁵ *Joyce v. State*, 155 Wn.2d 306, 119 P.3d 825 (2005).

day of the shooting. In fact they all focus the proximate cause determination on whether the offender would be in jail on the date of the plaintiffs' injury.¹⁶

Fourth, Plaintiffs' claim based on Garber's assertion that any term in jail, no matter how brief, would have prevented Finley from participating in the robbery is equally baseless. Neither Stough nor Garber can predict whether Finley would have participated in the robbery if he had been caught and released at any time prior to the shooting. Just as in *Bordon*, neither Stough nor Garber talked to Finley and he could easily have participated just as the other conspirators who joined the robbery effort in April and May. App. Brief, p. 11; *Bordon*, 122 Wn. App. at 242. Stough and Garber have no ability to predict what Finley would have done, even if he had been released within hours preceding the shooting. This argument amounts to nothing more than a failure to rehabilitate argument, which was rejected in *Bordon* and is contrary to the court's ruling in *Melville*.

¹⁶ In *Taggart*, proximate cause was premised in part on the State's failure to issue an arrest warrant. *Taggart* at 227. In *Joyce*, proximate cause is established because if a warrant had been issued there was competent evidence the offender would have been in jail. *Joyce* at 322. In *Bishop*, there was no proximate cause because the court decided not to put the offender in jail, which implicitly recognizes the claim is premised on jailing the offender. *Bishop* at 518. *Hertog* says the failure to discover and report violations may satisfy proximate cause because it may result in revocation. All of these cases identify incarceration as the relative factor to consider. *Hertog* at 57. Absent jail or rehabilitation, there is little DOC can do to prevent a particular crime.

Fifth, to the extent the Plaintiffs premise their argument on Stough's opinion about what sanction Finley would have received, their factual cause argument still fails. Neither Mr. Stough nor Mr. Garber is competent to offer opinions on the subject.

To establish proximate cause, the Plaintiffs must also produce affirmative competent evidence that the offender, if caught, would have been given a sanction which would have incarcerated him or her at the time of the crime but for the DOC's negligence. That evidence may take the form of:

1. Direct testimony of the decision-maker;
2. Qualified expert testimony;
 - a. Present or former judges or Indeterminate Sentence Review Board members;
 - b. Prosecutors or others familiar with the sanction process;
 - c. Statistical evidence.

Estate of Bordon v. Dep't of Corr., 122 Wn. App. 227, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005). Whether a violation occurred and what sanction is to be imposed are matters entrusted to the discretion of a trained DOC Hearings Officer. In exercising that discretion, the Hearings Officer must consider a number of factors including the nature of the violation, the offender's adjustment otherwise

and the impact the sanction will have on the offender's adjustment, among other things.¹⁷ CP at 161-175. The appropriate person to testify on these matters is a Hearings Officer, not a layperson. *See Peterson v. State*, 100 Wn.2d 421, 442, 671 P.2d 230 (1983).

The trial court properly granted summary judgment because neither Mr. Stough nor Mr. Garber is a former Hearings Officer or judge. CP at 1435-37. Neither Mr. Stough nor Mr. Garber worked for the Department using the sanctioning process. *Id.* Neither Mr. Stough nor Mr. Garber engaged in any statistical analysis of prior violation sanction hearings either. *Id.*¹⁸

Mr. Stough simply took the DOC sanctioning guideline and came up with an arbitrary sanction without any statistical support. This is the exact type of speculation he engaged in in *Bordon* and was rejected. *See Estate of Bordon v. Dep't of Corrections*, 122 Wn. App. 227, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005).

Mr. Stough's lack of expertise and the speculative nature of his opinion is further underscored by his statement concerning the imposition of good time credit. Appellants' Br. at 47. This statement shows just how expansive the duty is Plaintiffs are attempting to impose on DOC. Not

¹⁷ Liability cannot be premised on a Hearings Officer's ruling which is subject to quasi-judicial immunity. RCW 9.94A.704(10).

¹⁸ Garber candidly admits he is not an expert in this area, but bases his opinion on Stough's impermissible speculative assumptions. CP at 945.

only are Plaintiffs attempting to premise liability on a duty which no other law enforcement agency has, but they are also arguing that DOC could be held liable for granting good time credits to offenders, a practice which is common within corrections. Finley was entitled to good time credit. CP at 1446-48. Offenders have a liberty interest in good time credit. *See generally In re Personal Restraint of Dutcher*, 114 Wn. App. 755, 758, 60 P.3d 635 (2002).

Finally, any reliance on the sanction Finley received after the robbery fails as well. It not only requires the jury to speculate he would have received the same sanction, it requires the jury to speculate when he would have been allegedly apprehended.¹⁹ As such, the trial court properly granted summary judgment and the ruling should be affirmed.

2. The trial court properly granted summary judgment because Plaintiffs failed to establish legal causation.

The trial court properly granted summary judgment because the Plaintiffs failed to establish legal causation. Just as with other members of law enforcement, policy and common sense dictates that DOC should not be liable for crimes committed by fugitives from justice simply because DOC is unable to apprehend them.

¹⁹ On June 11, 2009, Mr. Finley underwent a full DOC violation hearing for violation of his conditions of parole prior to the shooting. The Department of Corrections Hearings Officer issued a sanction of 120 days with credit for time served for the violations. Mr. Finley was eligible for 1/3 off the overall sanction based on good time. CP at 172.

Legal causation is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Schooley v. Pinch's Deli Market*, 124 Wn.2d 468, 478, 951 P.2d 749 (1998). The focus is on whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or unsubstantial to impose liability. *Id.* A determination of legal liability will depend upon "mixed considerations of logic, common sense, justice, policy and precedent." *Hartley*, 103 Wn.2d at 779.

In *Hartley*, the court held that the State was not liable to the estate of a person killed by a drunk driver whose license was renewed when there was clearly cause for revocation due to numerous drunk-driving arrests. *Id.* at 770. The court concluded that "the failure of the government to revoke Johnson's license [was] too remote and insubstantial to impose liability for Johnson's drunk driving." *Hartley*, 103 Wn.2d at 784. The court went on to state:

While a license is necessary for anyone wishing to drive an automobile legally in this state, a license does not grant authority to disobey the law. [citations omitted.] The failure to revoke Johnson's license (even assuming that Johnson would have honored the revocation and not driven) is simply too attenuated a causal connection to impose liability.

. . . Public policy considerations also dictate against liability in this case. The government would be open to unlimited liability were we to hold potentially liable every decision by a prosecutor of the Department of Licensing to delay proceedings [to revoke a license].

Id. at 785.

In the present case, considerations of logic, policy and common sense dictate that the Department of Corrections not be held liable when an offender absconds from supervision and subsequently causes harm. The theory underlying the imposition of liability in *Taggart* is that the supervising officer has an ongoing relationship with the offender and is therefore able to observe whether the offender is compliant with the terms of supervision. As an extension of that logic, the officer has the ability to “control” the offender by reporting violations of the conditions of supervision to the court.

While DOC disagrees that this somehow gives the parole officer the ability to control the offender’s activities, at least the officer knows where the offender is, knows what they are doing, and therefore, has the ability to control the offender through the imposition of sanctions or the threat thereof.

When an offender absconds from supervision, any realistic ability the officer has to control the offender disappears. The officer has no ability to know what behavior the offender is engaging in or to affect that behavior in any way. The officer’s ability to impact the offender’s behavior through the threat or imposition of sanctions no longer exists. In

the absence of the ability to control, it is manifestly unreasonable to continue to hold that DOC retains the duty to control an offender.²⁰

Here, DOC did not have the ability to control Finley while he was a fugitive, and so what Plaintiffs are really claiming in this case instead is DOC has a duty to apprehend Mr. Finley. However, the same policy considerations which counsel against imposing a duty on police to apprehend fugitives also apply to DOC.

It bears repeating that, in 2009 alone, DOC issued 17,330 Secretary's Warrants. Requiring DOC to devote the amount of money, time and resources necessary to actively pursue every one of those warrants to avoid the risk of incurring liability would significantly impair DOC's ability to manage its budget and operations. Any claim to the contrary should be rejected. That type of decision is one better left to the Legislative and Executive branches than to a jury.

V. CONCLUSION

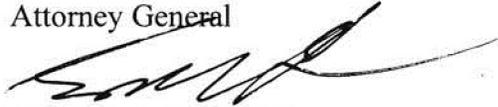
Policy and common sense dictate that the court reject Plaintiffs' attempt to impose a duty on DOC that would require DOC to search for DOC fugitives until they are found, or risk incurring liability any time

²⁰ That principle has been recognized in cases in which appellate courts have held that when the period of supervision ends, the duty to control ends. See *Couch v. State*, 113 Wn. App. 556, 570, 54 P.3d 197 (2002); *Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 258, 139 P.2d 1131 (2006).

they do not. The trial court properly granted summary judgment and the ruling should be confirmed.

RESPECTFULLY SUBMITTED this 16th day of December, 2013.

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I certify that I served a copy of the *Brief of Respondent* on Appellants' counsel of record on the date below by hand delivering it, as follows:

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

DATED this 16th day of December, 2013, at Olympia, WA.



CORIE SKAU, Legal Assistant

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