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SUPREME COURT OF THE STATE OF WASHINGTON

JOYCE SMITH, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE FOR THE ESTATE OF JAMES W. SMITH,
IZETTA DILLINGHAM, AS LIMITED GUARDIAN AD LITEM FOR
THE MINOR CHILDREN JAMARI SMITH, JANAJA SMITH AND
JAMAE SMITH; AND SHAREE DAMMELL, AS LIMITED
GUARDIAN AD LITEM FOR THE MINOR CHILD SHALYSE SMITH,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

**WASHINGTON STATE DEPARTMENT OF CORRECTIONS'
ANSWER TO PETITION FOR REVIEW**

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 ORIGINAL

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I. INTRODUCTION

Antwane Goolsby absconded from the Department of Corrections' (DOC) supervisory custody after he missed a scheduled drug treatment appointment. DOC immediately issued a warrant for his arrest, but Goolsby managed to avoid contact with law enforcement until he was arrested a few weeks after shooting Mr. Smith at a party in Tacoma, Washington. Appellants, the victims of Goolsby's crime, sued the State seeking to hold DOC liable for Goolsby's actions.¹

The Court of Appeals rejected Appellants' claims finding that DOC had no duty to control Goolsby at the time he committed his crime. Specifically, the Court of Appeals concluded that, "DOC's ongoing relationship with Goolsby ended when he absconded community supervision and DOC issued a warrant for his arrest. The take charge relationship ceased to exist and there are no facts to support the reestablishment of the special relationship." *Smith v. Washington State Department of Corrections*, __Wn.App.__, 359 P.3d 867 (2015). Additionally, the trial court and the Court of Appeals also rejected Appellants' claims finding "the Estate failed to establish a prima facie

¹ Appellants are Joyce M. Smith, individually and as Personal Representative for the Estate of James W. Smith; Izetta Dillingham, as Limited Guardian Ad Litem for the minor children, Ja'Mari Smith, Janaia Smith, and Jamae' Smith; and Sharee Dammell, as Limited Guardian Ad Litem for the minor child Shalyse Smith. The State will refer to them collectively as Appellants in this Answer. No disrespect is intended.

case of proximate cause for any alleged negligent supervision before the offender absconded.” *Id.*

The trial court granted summary judgment to DOC on the threshold issue of lack of proximate cause. The Court of Appeals affirmed the decision holding Appellants failed to establish a prima facie case regarding any alleged failure to supervise Mr. Goolsby. Appellants have not identified the ruling regarding proximate cause as an issue for review. RAP 13.7(b) limits review only to those issues properly raised in the petition as directed in RAP 13.4(c)(5). Appellants have not presented any argument claiming the decision on proximate meets the criteria for review under RAP 13.4(b) either. As such, this petition is moot because regardless of whether any duty was owed in this case, Appellants failed to establish proximate cause and do not take issue with the Court of Appeals’ ruling on the matter.

Turning to the issue identified in the petition, Appellants’ argue review should be granted because the Court of Appeals’ decision conflicts with this Court’s decision in *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), as well as other appellate decisions. There is no conflict. Appellants raise almost the same arguments which were recently rejected as a basis for discretionary review by this court in *Husted v. State*, 187 Wn. App. 579, 348 P.3d 776, 778 (2015). Here, the Court of Appeals,

consistent with *Husted*, correctly applied this Court's analysis in *Taggart* that there must be a "definite, established and continuing relationship between the defendant and the third party" for a duty to arise. Because Goolsby absconded, the continuing relationship that afforded DOC control over Goolsby's conduct was suspended until a time the relationship is re-established. This conclusion was reached because when an offender absconds from supervision, DOC no longer has the ability to impose, monitor or enforce the conditions of supervision that allow DOC the ability to monitor the offender's behavior.

II. IDENTITY OF RESPONDENT

The Respondent is the State of Washington Department of Corrections.

III. COURT OF APPEALS DECISION

Division Two of the Court of Appeals affirmed the superior court's grant of summary judgment to DOC in a published decision. *See* Appendix 1 to Petition for Review (Pet.).

IV. ISSUES PRESENTED

If review is granted, the issue in this case would be:

1. **Whether DOC has a duty to control an offender that has absconded from supervision and a warrant has been issued for the offender's arrest?**

V. STATEMENT OF THE CASE

Mr. Goolsby was released from Monroe Correctional Complex (Monroe) on January 21, 2009, after serving his prison sentence. CP at 61.² The same day Mr. Goolsby was released from Monroe, his community corrections officer, Judith Lang, transported Mr. Goolsby to Seattle. CP at 61. Ms. Lang reviewed with Goolsby his supervision conditions. CP at 61. He was then transported to the King County Sheriff's Department to complete sex offender registration. CP at 61. Mr. Goolsby was homeless so he was taken to the Seattle Bread of Life Shelter and directed to report daily at DOC's Seattle Day Reporting Office starting the following day. CP at 61.

A. Supervision of Goolsby.

Goolsby failed to report the very next day and a warrant was issued immediately for his arrest. CP at 61. On January 26, 2009, Goolsby reported to DOC's Seattle Day Reporting Program (Day Reporting) and was arrested.³ CP at 61. Goolsby was in custody from January 26, 2009 to February 17, 2009. CP at 59-60. A violation hearing was held on February 17, 2009. He was sanctioned to credit for time served and released. CP at 59.

² He was sentenced to a term of 18 – 36 months community custody. CP at 350.

³ The Day Reporting Program is open Monday through Friday for reporting.

Over the next two weeks, Goolsby reported to DOC with regularity. He reported on February 18, 19 and 20, 2009. CP at 58-59. Starting again on Monday the 23rd of February, he reported every day through Friday the 27th. CP at 57-58. He reported on the following Monday, March 2, 2009, and again on March 4th. CP at 56.

On March 4th, his failure to report the previous day was addressed. Goolsby explained he had been busy trying to comply with his other conditions of supervision and was unable to make his appointment. CP at 56. The CCO confirmed Goolsby had obtained a copy of his birth certificate so he could begin receiving public benefits, a prerequisite to receiving mental health treatment. CP at 55-56. Goolsby was also admitted into a chemical dependency program with a start date of March 11, 2009. *Id.* Goolsby self-reported he was now staying at the Airline Motel. This was confirmed by Detective Fields from the Seattle Police Department the same day. CP at 55. Goolsby again reported as required on the 5th and 6th of March. CP at 56.

On March 6, 2009, a DOC supervisor, made a field visit to Goolsby at the Airline Motel. CP at 55. While there, the DOC supervisor observed one of the residents trying to flush what appeared to be drugs down the toilet and Goolsby attempted to block the officer's way. CP at 55. Goolsby was detained and transported to jail.

He was in custody from March 6, 2009, until March 23, 2009. CP at 53. A violation hearing was held on March 23, 2009. Goolsby was found guilty of associating with known drug users and gang members. CP at 53. He was sanctioned to credit for time served and ordered to report daily for 30 days.⁴ CP at 53. Goolsby reported to DOC as directed the next day. CP at 53.

From March 24, 2009, through April 9, 2009, Goolsby reported to DOC approximately thirteen times. CP at 50-53. During this time period, Mr. Goolsby re-entered treatment and was scheduled for a mental health evaluation on April 21, 2009. CP at 50.

On Friday April 10, 2009, Goolsby reported to Day Reporting as directed. CP at 50. A CCO at Day Reporting called the Downtown Emergency Service Center to see if Goolsby was staying there at night as directed. CP at 50. The center's records indicated Goolsby had not been staying at the shelter since March 30, 2009. CP at 50. That same day, Ms. Lang met with Goolsby and warned him that any future failure to stay at the shelter would result in a violation and possible arrest. CP at 50.

On April 16, 2009, DOC learned Goolsby had failed to attend a group treatment meeting the previous day. CP at 50. A warrant was immediately requested and issued. CP at 813-17. Approximately four

⁴ DOC recommended the hearing officer sanction Goolsby to 60 days. CP 53-54.

months later, on August 5, 2009, Goolsby went to a party in Tacoma. Goolsby shot and killed Mr. Smith. Goolsby was later apprehended in Las Vegas on August 24, 2009. CP at 47.

B. Corrections to Appellants' Statement of Facts.

Appellants made a number of factual assertions in their petition that are unsupported by the record. For example, Appellants contend Mr. Goolsby went unsupervised in the community implying DOC did nothing to supervise the offender. Pet. at 8. This is not true. Over the approximately three months from when Goolsby was released from Monroe until he absconded on or about April 16th, Goolsby met with a DOC officer 26 times. CP at 216-227. Additionally, on two separate occasions when Goolsby was found to be in violation of his conditions, he was arrested and sanctioned by a hearing examiner. CP at 59-60, CP at 53-54. This resulted in Mr. Goolsby being in custody for 41 days. Put another way, in the 86 days before he absconded, Mr. Goolsby had contact with DOC in one way or another for 67 of those days.

Appellants also contend that DOC failed to search the motel where Goolsby was living at the time he absconded or search motel registries after Goolsby had absconded, implying DOC knew where Goolsby was

when he absconded. Pet. at 12.⁵ However, there is no evidence in the record showing Goolsby was living in a motel at the time he absconded or anytime afterwards. In addition, law enforcement agencies, including DOC do not have the legal authority to randomly search motels registries. *Kelley v. State*, 104 Wn. App. 328, 17 P.3d 1189 (2000).

Appellants also contend DOC did not request that a warrant be issued for Mr. Goolsby until May 7, 2009, implying if DOC had issued the warrant sooner this incident would not have occurred. Pet. at 12. This also is not true. As the record shows, a warrant was issued for his arrest on April 16, 2009. CP at 813-17. More to the point, there is no evidence in the record showing Mr. Goolsby would have been arrested and in jail the day of the shooting if DOC had issued an arrest warrant on May 7, 2009, let alone when the warrant was actually issued.

Finally, absent from the Appellants' petition is any citation to any admissible testimony or evidence creating a material issue of fact regarding whether Goolsby would have been in jail on the day of the incident if additional violations or information had been reported to a sanctioning authority. This is because the only testimony Appellants were going to offer was the alleged testimony of their expert, William Stough, who they claimed would have testified that Goolsby would have been in

⁵ Whether these statements are made based on a misinterpretation of the record or due to some perceived tactical advantage, they warrant a close review of the record.

jail if additional actions had been taken. However, as the trial court and the appellate court noted, Mr. Stough never offered any testimony to that effect and was not qualified to do so. *Smith v. Washington State Department of Corrections*, __Wn. App.__, 359 P.3d 867, 873 (2015). Thus, the Court of Appeals concluded Appellants failed to establish a prima facie case of causation.

C. Procedural History.

DOC moved for summary judgment on Appellants' claims. CP at 79-212. After hearing argument from counsel on the motions, the trial court granted summary judgment to DOC. CP at 1475-79. The Court of Appeals affirmed. Appendix 1.

VI. REASONS WHY REVIEW SHOULD BE DENIED

A. The Appellants Do Not Take Issue With the Court of Appeals' Ruling That Appellants Failed to Establish Proximate Cause Rendering the Appeal Moot.

The sole issue identified for review by the Appellants is whether the duty outlined in *Taggart* continues when an offender absconds and a warrant is issued for the offender's arrest. Pet. at 2. Appellants have not identified the Court of Appeals ruling regarding Appellants' failure to establish proximate cause as an issue for review or provided any case law showing the decision meets the standard for review under RAP 13.4(b). RAP 13.7(b) limits review only to those issues properly raised in the

petition as directed in RAP 13.4(c)(5). As such, Appellants' petition is moot because even if a duty existed after Goolsby absconded, which the Court of Appeals properly found it did not, Appellants have failed to establish, absent speculation, Goolsby would have been in jail at the time of the shooting. *See Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 253, 139 P.3d 1131 (2006).

In this case, before the trial court and the Court of Appeals, Appellants attempted to rely on the testimony of Mr. Stough to claim Goolsby would have been in jail at the time of the shooting if DOC acted differently. However, as the Court of Appeals noted, Mr. Stough never offered any testimony to that effect and was not qualified to do so. *Smith*, 359 P.3d at 873. The Court of Appeals went on to note DOC does not have a duty enforceable in tort to rehabilitate offenders and so there is no causal connection between DOC's supervision of Goolsby and the fact that he was willing to engage in criminal activity. *Smith*, 359 P.3d at 873-74.

As such, even assuming for the sake of argument a duty existed, which it did not, Appellants' failure to identify the Court of Appeals' decision on proximate cause as an issue that meets the standard for review renders the petition moot and review should be denied.

B. Appellants Have Not Met the Standards Required for Granting a Petition for Review Under RAP 13.4(b) Because the Court of Appeals' Decision Is Consistent With *Taggart*.

The Court of Appeals affirmed the superior court by applying the principles of *Taggart* and subsequent case law to find that DOC does not have a duty when an offender absconds from supervision and a warrant for his arrest has been timely issued. *Smith*, 359 P.3d at 871. Appellants' argument that the decision conflicts with *Taggart* and other appellate opinions interpreting *Taggart* is simply incorrect. Pet. at 2.

Washington recognizes the general rule that there is no duty to control the conduct of a third party so long as there is not a special relationship that gives rise to a duty to control the person's conduct. *Taggart*, 118 Wn.2d at 218-19. This Court in *Taggart* held that the relationship between a parole officer and a parolee gives rise to such a duty upon a showing of a "definite, established, and continuing relationship between the defendant and the third party." *Id.* at 219. In the case below, the Court of Appeals recognized that, as per this Court's decision in *Taggart*, DOC has a duty to control offenders under DOC's supervision. *Smith*, 359 P.3d at 870. Appellants contend that the Court of Appeals' decision conflicts with *Taggart* because that case allegedly held that DOC's duty to supervise an offender is terminated by the offender when the offender misses a supervision appointment. Pet. at 1. They also

contend that *Taggart* requires that DOC has an ongoing, unlimited in time and space, take-charge duty to supervise offenders regardless of the circumstances. *See, e.g.*, Pet. at 13-18. Both contentions are based on a flawed understanding of the courts' decisions.

The Court of Appeals recently held in *Husted* that the exercise of authority depends on the continuing nature of the relationship between DOC and the offender. *Husted v. State*, 187 Wn. App. 579, 348 P.3d 776, 780 (2015) (citing *Taggart*, 118 Wn.2d at 219). The offender in *Husted* absconded from supervision and DOC immediately issued a warrant for the offender's arrest. *Id.* In affirming the trial court's decision, the Court of Appeals noted if the offender absconds and a warrant is issued for the offender's arrest, the offender is no longer subject to the community corrections officer's control because the offender cannot be monitored, given direction, or sanctioned. *Id.* at 780. Making the exact same arguments as the Appellants are making in this case, the Appellants in *Husted* petitioned this court for review and the petition was rejected.

Consistent with the analysis in *Husted* and this Court's analysis in *Taggart*, the Court of Appeals in this case correctly held when the offender absconded and a warrant had been issued, the take charge relationship ceased to exist. *Smith*, 359 P.3d at 870. This is also reflected in RCW 9.94A.171(3), the tolling statute, which recognizes there is no

supervision when the offender absconds, and that the period of supervision and the duty resumes once the relationship with the offender is re-established.⁶

The Court of Appeals' ruling was rational and straightforward. DOC's duty is not premised merely on its authority to monitor offenders but its ability to do so as well. The community corrections officer's duty is to adequately monitor and report violations of the offender's conditions of supervision. See *Bishop v. Miche*, 137 Wn.2d 518, 526, 973 P.2d 465 (1999). In RCW 9.94.720, the Legislature codified the actions that community corrections officers can take in the course of supervising offenders, including monitoring the offender, and even incarceration.

The underlying premise of both *Bishop* and RCW 9.94.720 is that offender's conduct can be controlled by the specter of being incarcerated, or punished by a court or other sanctioning authority, if the offender fails to abide by the terms and conditions of their supervision. But this control is only possible through continuous, direct contact with the offender allowing community corrections officers to take such actions. When an offender absconds, the officer can no longer use these tools because the

⁶ Formerly, RCW 9.94A.625. No substantive changes were made to the statute when it was amended and re-codified that affect Goolsby's supervision.

offender cannot be monitored or brought before the appropriate authority for sanctioning.

Contrary to Appellants' assertions, the Court of Appeals' ruling is consistent with this Court's decision in *Taggart*. DOC did not have an ongoing, continuous relationship with Goolsby after he absconded, and therefore had no duty or ability to control him.

C. The Court of Appeals' Ruling Is Consistent With *Joyce v. Department of Corrections*.

Appellants also assert that the Court of Appeals' decision conflicts with *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 119 P.3d 825 (2005), because the Court of Appeals ruled DOC no longer had an ongoing continuous relationship with Goolsby whereby it could control his behavior when he absconded and DOC issued a warrant for his arrest.

First, as discussed above, Appellants' assertions lack merit because the Court of Appeals' decision was not based on a mere "missed appointment." Rather, the Court of Appeals found that DOC had no continuing duty of control over Goolsby once he absconded and a warrant was issued for his arrest. *Smith*, 359 P.3d at 868.

Second, the Court of Appeal's holding is consistent with *Joyce* because DOC had no contact with Goolsby after he had absconded and a warrant was issued for his arrest. In *Joyce*, despite failing to report as directed, no warrant was issued for his arrest.

Joyce, 155 Wn.2d at 312-15. Thus, neither the offender's absconding nor whether the issuance of a warrant temporarily terminated the duty to supervise the offender were issues in *Joyce*. In addition, although he missed some reporting dates, the offender in *Joyce* maintained ongoing contact with his community corrections officer. *Joyce*, 155 Wn.2d at 312-15. Therefore, because DOC "maintained a definite, established, and continuing relationship by assigning community corrections officers to monitor and notify the judge if [the offender] failed to substantially comply with the court's conditions of release," this court found that a duty existed. *Id.* at 320. However, unlike in *Joyce*, when Goolsby absconded, DOC had no ability to maintain a relationship with Goolsby allowing it to enforce his conditions of release, and so no duty could exist.

Finally, this court in *Joyce* recognized that DOC's breach of duty was the failure to issue a warrant. *Joyce*, 155 Wn.2d at 322-23. In *Joyce*, the offender had been arrested shortly before the accident, which had injured the plaintiff. The plaintiff presented admissible evidence that the offender would have been in the King County jail on the day of the accident injuring plaintiff had DOC issued a warrant as was required. *Id.* at 322. In effect, this court held that issuing the warrant is the last act of "control" DOC has over an absconding offender and thus to the extent

Joyce creates a duty to issue a warrant, DOC met that duty here by issuing a warrant the day Goolsby failed to attend treatment.

The Court of Appeals' ruling is consistent with *Joyce* and there is no basis for further review.

D. DOC's Internal Policies and Statutes Do Not Create a Duty to Apprehend Fugitive Offenders Either.

Appellants also rely on DOC's authority to monitor offenders and DOC's internal policies to claim the appellate court's ruling conflicts with *Joyce*. See Pet. at 14-15. Their reliance is misplaced because DOC's authority to monitor offenders and DOC's internal policies do not create a duty to apprehend a fugitive offender. More importantly, Appellants provide no authority or explanation as to how DOC's internal policies give rise to a recognized basis for review under RAP 13.4.

Agencies' policies do not give rise to a duty in tort. *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990). The fact that an agency may have a policy regarding the ability to engage in a particular act is irrelevant to policy reasons and factual realities underlying the decision of whether to create a duty to perform the particular action. This is particularly true when the duty advocated by the Appellants is an unlimited duty not recognized by any court.

Further, the *Taggart* duty is derived from the common law as outlined in section 315 of the Restatement. Restatement (Second) of Torts

§ 315 (1965). The scope of the duty is dictated by the court order placing the offender on supervision and the statutes which describe the officer's power to act. *Couch v. Dep't of Corr.*, 113 Wn. App. 556, 54 P.3d 197 (2002), *review denied*, 149 Wn.2d 1012, 69 P.3d 874 (2003). But here, neither the court's order placing Goolsby on supervision, nor the statutes granting DOC authority to monitor Goolsby, dictate that DOC had a duty to monitor Goolsby when DOC is unable to do so.

In sum, the ruling does not conflict with *Taggart* because Appellants' cannot identify any statute or policy requiring DOC to apprehend an offender who has absconded. Because DOC was not charged with the duty to apprehend Goolsby by statute or the criminal court's sentencing order, DOC did not have a duty to apprehend Goolsby. *Couch*, at 204. As such, the Court of Appeals' ruling is consistent with *Taggart* and subsequent case law interpreting *Taggart*, which do not create a duty to apprehend an offender.

E. The Court of Appeals' Ruling Is Consistent With *Bordon v. State*.

Appellants also claim without any analysis that the Court of Appeals' ruling "irreconcilably clashes" with *Estate of Bordon v. Dep't of Corrections*, 122 Wn. App. 227, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005). However, Appellants' reliance on the ruling in *Bordon* is misplaced.

In *Bordon*, the offender was being supervised as the result of a number of convictions at the time he killed Ms. Bordon in a drunk driving accident. *Id.* Prior to the accident, the offender had failed to report to supervision twice. *Id.*, at 231-35. Because DOC was unaware of an eluding conviction which placed the offender under active supervision, the community corrections officer believed the offender was only being monitored for financial obligations and did not issue a warrant for his arrest for failing to report. *Id.* The Court of Appeals in that case found DOC should have known of the conviction and, therefore, had a duty to monitor the offender. *Id.* at 237. However, the Court of Appeals overturned the jury's verdict in favor of the plaintiff because at trial the plaintiffs failed to meet their 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. *Id.* at 241-244.

The appellate court's ruling in this case is consistent with *Bordon* because the issue here is not about whether DOC knew it had the legal authority to monitor Goolsby. Rather, the issue is whether DOC had the ability to monitor and control Goolsby's behavior when he absconded. When Goolsby absconded, DOC no longer had a direct, ongoing, continuous relationship with the offender whereby DOC could control his

behavior. As such, the court of Appeal's ruling does not conflict with *Bordon*.

Further, the appellate court's ruling in this case is consistent with *Bordon*, because unlike here, the offender in *Bordon* was in custody when the community corrections officer failed to report the offender had violated his supervision. *Bordon*, at 233-34. Because the officer had the ability to seek sanctions against the offender while he was in custody, the Court of Appeals found that a duty arose. *Id.* That is the exact opposite of this case. When DOC had ongoing, continuous, contact with Goolsby, DOC was able to monitor and sanction Goolsby for violations of his community custody conditions. Once Goolsby absconded, there no longer was ongoing, continuous, contact whereby DOC could monitor Goolsby's behavior or seek sanctions from the court. Also, unlike in *Bordon*, DOC issued a warrant for Goolsby's arrest. If Goolsby had come in contact with law enforcement and been arrested on his warrant, DOC could have reported the violations to a sanctioning authority and began monitoring his behavior consistent with its duty.

Finally, the Court of Appeals' ruling is consistent with *Bordon* because the Appellants failed to meet their burden of producing admissible evidence to support their theory that if DOC had acted differently the offender would have been in jail on the date of plaintiff's injury.

Bordon, at 241-244. The Appellants here presented no evidence suggesting that if DOC had reported any alleged violations before Goolsby had absconded, he would have been sanctioned with confinement which would have placed him in jail at the time of the shooting. The Court of Appeals also pointed out here, "Any suggestion that Goolsby would have committed additional violations and received further sanctions is pure speculation which is insufficient to create a genuine issue of material fact." *Smith*, 359 P.3d at 873. As such, the Court of Appeals' decision is consistent with *Bordon* and there is no basis for review.

VII. CONCLUSION

The Court of Appeals properly concluded that the duty recognized in *Taggart* did not arise in this case because, when an offender absconds and is on warrant status, DOC lacks an ongoing continuous relationship with the offender whereby DOC can control the offender's behavior. Thus the appellate court's decision does not conflict with any decisions of this court or the Court of Appeals. Appellants' petition should be denied.

RESPECTFULLY SUBMITTED this 2nd day of December, 2015,

ROBERT W. FERGUSON
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Assistant Attorney General
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on this 2nd day of December, 2015, I caused a true and correct copy of this Motion for Extension of Time to File Respondent's Brief to be served on the following in the manner indicated below:

Counsel for Appellants:

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KATHERINE KERR, Legal Assistant

APPENDIX 1

FILED
COURT OF APPEALS
STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

2015 AUG 26 PM 12:53

JOYCE M. SMITH, individually and as
Personal Representative for the Estate of James
W. Smith; IZETTA DILLINGHAM, as Limited
Guardian Ad Litem for the minor children,
JA'MARI SMITH, JANAJA SMITH, and
JAMAE SMITH; and SHAREE DAMMELL,
as Limited Guardian Ad Litem for the minor
child SHALYSE SMITH,

STATE OF WASHINGTON
No. 45479-3-11

BY
DEPUTY

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF
CORRECTIONS; and JOHN AND JANE DOE
(1-10)

PUBLISHED OPINION

Respondents.

MELNICK, J. — Joyce Smith, individually and in her capacity as personal representative of the estate of her husband James Smith,¹ appeals from the trial court's grant of summary judgment in the Department of Corrections' (DOC) favor. The Estate argues that DOC negligently supervised an offender on community custody, causing the offender to murder James Smith. We conclude that because DOC promptly issued an arrest warrant for the offender after he absconded and it had no information about his whereabouts, DOC had no further duty to control the offender. Additionally, the Estate failed to establish a prima facie case of proximate cause for any alleged negligent supervision before the offender absconded. Accordingly, we affirm the trial court's grant of summary judgment to DOC.

¹ For the purpose of clarity, we will refer to the appellants collectively as "the Estate" and will refer to James Smith individually by name. We intend no disrespect.

FACTS

I. BACKGROUND

Antwane Goolsby pleaded guilty to a charge of conspiracy to commit robbery in the first degree. He received a sentence of 56.25 months in prison and 18 to 36 months of community custody. Goolsby was released from prison on January 21, 2009. Judith Lang, a DOC community corrections officer, supervised Goolsby's community custody.

Lang understood that Goolsby was a "high risk offender" and she was "skeptical about [his] motivation for change." Clerk's Papers (CP) at 62. Goolsby had gang affiliations, mental health issues, and an extensive criminal history.² Although Goolsby required mental health medications, he had not been on his medication for a month before his release. Because of his criminal history and his "behaviors while incarcerated," Lang believed that Goolsby was unsuitable to be released in the community. CP at 723.

DOC categorized Goolsby as a "High Violent, untreated, Level II Sex Offender." CP at 300. DOC requires its officers to have three "face to face" contacts and one "collateral" contact per month with offenders at this level. CP at 180. Two of the three "face to face" contacts must be outside the DOC office. CP at 180. At no time during Goolsby's community custody did Lang contact Goolsby in person outside the DOC office. Goolsby received no mental health medications.

² Goolsby's criminal history included prior convictions for rape in the third degree, violation of the Uniform Controlled Substances Act, failure to register as a sex offender, unlawful possession of a firearm in the second degree, and several misdemeanors.

II. GOOLSBY'S COMMUNITY CUSTODY

The terms of Goolsby's community custody forbade him from using drugs or associating with drug users. He had to obey all laws and all DOC's instructions. Lang instructed Goolsby to report to DOC daily, to stay in DOC-approved housing, and to stay in King County.

Goolsby had inconsistent compliance. Goolsby reported to DOC on most days when he was not detained.³ Goolsby also entered a chemical dependency treatment program, but failed to attend most of his sessions. Goolsby lied to DOC about where he resided; he never stayed in a DOC-approved location. Instead, he stayed at a motel where he associated with a fellow offender and drug user. Goolsby may also have been "prostituting girls out and/or dealing from motel room." CP at 54.

DOC arrested and detained Goolsby twice for violating his community custody terms. On his first day of community custody, January 22, 2009, Goolsby walked away from the homeless shelter where Lang had left him. DOC requested a warrant for Goolsby's arrest.⁴ Four days later, when Goolsby reported to DOC, he was arrested. On that same day, before his arrest, Goolsby submitted to a drug test that came back positive for marijuana. Goolsby was detained until a DOC hearing on February 18. The hearing officer found Goolsby guilty of violating his community custody conditions, and imposed 21 days confinement as a sanction, with credit for time served.

³ DOC indicated that some of Goolsby's failures to report may have been because he was "legitimately busy handling DOC requirements." CP at 56. Additionally, it is noted in the report that Goolsby's illiteracy was causing him problems accomplishing tasks.

⁴ Both of the warrants for Goolsby's arrest were administrative secretary's warrants that may be served either by law enforcement or by a DOC community corrections officer. See RCW 9.94A.716(1).

Lang alerted the DOC Community Response Unit (CRU) in Tacoma that Goolsby was out of jail and could not be in Pierce County.⁵

Goolsby's second arrest occurred on March 6, when a DOC agent visited Goolsby at his motel room. There, a man later identified as a fellow gang member of Goolsby's ran to the toilet and attempted to flush a baggie containing cocaine. Goolsby attempted to block the agent from recovering the baggie. The DOC agent immediately detained Goolsby. Pending Goolsby's violation hearing, Lang reported to the hearing officer in a report of "Alleged Violations" that Goolsby's "activities outside the office are indicative of his continued criminal thinking," and that his "behavior and his recent affiliations" are "truly a concern for community safety." CP at 300. Lang recommended that Goolsby be sanctioned to 60 days confinement. Instead, the hearing officer imposed 16 days as a sanction, with credit for time served. Because he had served all of his time for the violation, Goolsby was released on March 23 after the hearing. DOC warned Goolsby not to reside in a motel and Goolsby stated that he intended to "reside homeless in Seattle." CP at 53-54.

Goolsby's last contact with DOC occurred on April 10. On that day, a DOC officer confronted Goolsby because he had been lying about staying in a DOC-approved shelter. The officer warned Goolsby that "failure to reside at [the shelter] would result in violation and possibly arrest." CP at 50. Goolsby agreed to stay at the shelter, but absconded from supervision the following day. On April 16, DOC requested an arrest warrant for Goolsby, which issued the next day. Goolsby was missing until August 5, when he shot and killed James Smith in Tacoma.

⁵ A CRU is responsible for cooperating with law enforcement to apprehend DOC violators.

III. PROCEDURAL HISTORY

The Estate sued DOC, claiming that DOC had negligently supervised Goolsby. The Estate's expert, William Stough, declared that "intensive supervision, combined with treatment" has a statistically significant downward effect on recidivism. CP at 154. Stough opined that DOC had failed to enforce Goolsby's community custody conditions and that DOC's omissions "directly led to him absconding supervision," and led to James Smith's death. CP at 157. Stough further opined that if DOC had done more to enforce Goolsby's conditions, "Goolsby would have been under control or incarcerated and would not have absconded and 'blown off' supervision completely." CP at 157. Finally, Stough opined that strict enforcement of supervision and holding offenders accountable prevents absconding and recidivism and would have done so in this case.

DOC moved for summary judgment dismissal of the Estate's claim for negligent supervision. After hearing argument and considering the proffered evidence both in support of and in opposition to the motion, the trial court granted DOC's motion for summary judgment. The Estate appeals.

ANALYSIS

The Estate argues that DOC negligently supervised Goolsby, causing him to murder James Smith. "The elements of a negligence cause of action are the existence of a duty to the plaintiff, breach of the duty, and injury to plaintiff proximately caused by the breach." *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Initially, DOC owed a duty to supervise Goolsby; however that duty ended when Goolsby absconded supervision and DOC issued a warrant for his arrest. DOC is not liable for its alleged inaction after Goolsby absconded because its duty to supervise him ended. As for DOC's alleged negligent supervision before Goolsby absconded, we conclude that the Estate failed to establish a prima facie case of proximate

cause. Therefore, the trial court did not err by granting DOC's summary judgment motion to dismiss the Estate's negligent supervision claim.

I. STANDARD OF REVIEW

We review a trial court's decision to grant summary judgment de novo. *Hertog*, 138 Wn.2d at 275. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hertog*, 138 Wn.2d at 275. We consider all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). But we do not weigh evidence or resolve factual disputes. *Babcock v. State*, 116 Wn.2d 596, 598-99, 809 P.2d 143 (1991).

The parties bear different burdens in a summary judgment motion. The moving party bears the burden of showing that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). If the moving party is the defendant and meets its burden,⁶ then the inquiry shifts to the party with the burden of proof at trial to present admissible evidence to establish a material factual dispute. *Atherton*, 115 Wn.2d at 516; *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "If, at this point, the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the motion." *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In such a situation, a failure of proof "concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial". *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp.*, 477 U.S. at 322-23).

⁶ The moving defendant may meet this initial showing "by pointing out" to the court that there is an absence of evidence to support the nonmoving party's case. *Young*, 112 Wn.2d at 225 n.1 (quoting *Celotex Corp.*, 477 U.S. at 325).

“Circumstantial evidence is sufficient to establish a *prima facie* case of negligence if it affords room for . . . reasonable minds to conclude that there is a greater probability that the conduct relied upon was the proximate cause of the injury than there is that it was not.”

Hernandez v. W. Farmers Ass'n, 76 Wn.2d 422, 426, 456 P.2d 1020 (1969) (quoting *Wise v. Hayes*, 58 Wn.2d 106, 108, 361 P.2d 171 (1961)); *Martini v. Post*, 178 Wn. App. 153, 165, 313 P.3d 473 (2013). But the nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

II. DUTY

The Estate argues that DOC had a duty to exercise reasonable care to supervise Goolsby and protect the public from his harmful propensities. DOC concedes that it initially had a duty to supervise Goolsby, but argues that this duty ended when Goolsby absconded from community custody and a warrant issued for his arrest. We agree with DOC.

The existence of a duty is a question of law. *Hertog*, 138 Wn.2d at 275. Generally, an actor “has no duty to prevent a third person from causing physical injury to another.” *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992). An important exception to this rule exists when “a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct.” *Taggart*, 118 Wn.2d at 218 (quoting RESTATEMENT (SECOND) OF TORTS § 315 (1965)). One example of such a special relation is the relationship between a parole officer and a parolee. *Taggart*, 118 Wn.2d at 219. Because a parole officer takes charge of a parolee, our Supreme Court imposes a special duty on parole officers:

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 220; see RESTATEMENT (SECOND) OF TORTS § 319 (1965). Community corrections officers have the same duty with regard to the offenders they supervise. *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 316-17, 119 P.3d 825 (2005). DOC “assume[s] the duty of supervising an offender’s conduct” and “has the ability to take steps to ensure, as a condition of release, that the offender complies with the conditions of release.” *Joyce*, 155 Wn.2d at 316.

Recently, Division One of our court considered whether DOC continues to owe a duty to supervise an offender after the offender absconds and DOC issues a warrant for his arrest. *Husted v. State*, 187 Wn. App. 579, 348 P.3d 776, 778 (2015). The *Husted* court recognized that DOC’s ability to exercise control over an offender is dependent on the continuing nature of the relationship between an offender and his or her community corrections officer. *Husted*, 348 P.3d at 780. Where an offender absconds and a warrant issues for his arrest, the offender is no longer subject to the community correction officer’s control because the offender cannot be monitored, given direction, or sanctioned. *Husted*, 348 P.3d at 780. Division One concluded that “where an offender absconds from supervision and a warrant is issued for his or her arrest, the requisite continuing relationship no longer exists and the duties associated with the take charge relationship are terminated unless and until the person is apprehended.” *Husted*, 348 P.3d at 781.

We agree with Division One that DOC’s duty to supervise an offender is dependent on the existence of a continuing relationship between the offender and the community corrections

officer.⁷ In this case, the special relationship between the offender and DOC terminated once Goolsby absconded and an arrest warrant issued.

Here, Goolsby's last contact with DOC occurred on April 10. DOC issued a warrant for Goolsby's arrest within one week. DOC had no contact with Goolsby and no information about his whereabouts until August 5, when he shot and killed James Smith in Tacoma. Under the facts of this case, DOC's ongoing relationship with Goolsby ended when he absconded community supervision and DOC issued a warrant for his arrest. The take charge relationship ceased to exist and there are no facts to support the reestablishment of the special relationship. Therefore, we conclude that DOC did not have a duty to supervise Goolsby at the time he murdered James Smith.

This conclusion, however, does not end our analysis. It is undisputed that DOC owed a duty to supervise Goolsby for compliance with the court's sentencing order prior to his absconding. Therefore, we must still consider the Estate's argument that DOC's breach of its duty to supervise Goolsby, prior to him absconding and a warrant issuing, was a proximate cause James Smith's murder.

⁷ We want to make clear that, we are not adopting Division One's holding that the relationship cannot be reestablished "unless and until the person is apprehended." *Husted*, 348 P.3d at 781. A court evaluating whether DOC owes an ongoing duty to supervise an offender must determine whether, under the facts of the particular case, the offender and his or her community corrections officer have a continuing relationship that enables DOC to exercise meaningful control over the offender. We note that there may be circumstances short of apprehending the offender that arguably could reestablish DOC's duty to supervise an offender. For example, DOC cannot ignore information about an absconding offender's whereabouts to avoid reestablishing a continuing relationship with the offender. But, such facts are not present here, and we decline to speculate what facts would constitute that situation.

III. CAUSATION⁸

We now address whether the Estate's evidence raised an issue of material fact regarding whether DOC's alleged breaches of its duty to supervise, prior to Goolsby absconding and a warrant issuing, caused James Smith's death. The Estate seems to argue that DOC proximately caused James Smith's death based on two theories: if DOC had not breached its duty, Goolsby either would have been in custody at the time of the murder or he would have been rehabilitated. No genuine issue of material fact exists regarding causation under either theory.

Proximate cause is generally a question for the trier of fact, but if reasonable minds cannot differ, then it may be decided as a matter of law. *Hertog*, 138 Wn.2d at 275. Proximate cause consists of two elements: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Cause in fact concerns the "but for" consequences of an act: those events the act produced in a direct, unbroken sequence, and which would not have resulted had the act not occurred. *Hartley*, 103 Wn.2d at 778. Legal causation rests on considerations of logic, common sense, policy, justice, and precedent as to how far the defendant's responsibility for the consequences of its actions should extend. *Hartley*, 103 Wn.2d at 779.

DOC argued on summary judgment that its actions were not a proximate cause of James Smith's death. Specifically, it argued that the connection between its conduct and James Smith's murder was too speculative and indirect to impose liability because there was no evidence that had DOC acted differently, Goolsby would have been in jail at the time he murdered James Smith. By pointing out that there was no evidence of causation, DOC met its initial burden to show that no material factual dispute existed. Therefore, the critical inquiry is whether the Estate presented

⁸ For purposes of this appeal, we assume without deciding that material factual issues exist regarding whether DOC breached its duty to supervise Goolsby before he absconded supervision and a warrant issued.

evidence of a sufficient quantity or quality to raise a material issue of fact as to whether Goolsby would not have killed James Smith if DOC had acted differently.

The Estate argues that DOC breached its duty regarding Goolsby in two ways, and that issues of material fact exist regarding whether these breaches caused Smith's murder. First, the Estate argues that DOC failed to properly sanction Goolsby for violations of his community custody conditions. For instance, DOC should have asked the hearing officer to incarcerate Goolsby before April 10 for failing to live in approved housing. The Estate argues that if DOC had sought appropriate sanctions for Goolsby's violations, he would have been in jail at the time of Smith's murder.⁹

However, it is pure speculation that if DOC had reported Goolsby's violations before April 10 that he would have been in jail almost four months later when he murdered James Smith. DOC reported two of Goolsby's violations. At the first violation hearing, the hearing officer imposed 21 days confinement as a sanction; and, at the second violation hearing, the hearing officer imposed 16 days confinement as a sanction, despite Lang's recommendation for a sanction of 60 days confinement. The Estate presented no evidence suggesting that if DOC had reported Goolsby's violations before April 10, he would have been sanctioned with confinement of over

⁹ The Estate claims Stough testified that Goolsby would have been in jail at the time of Smith's murder if DOC had engaged in proper supervision. However, the Estate provides no record citation for this testimony and Stough's declaration does not contain such testimony. Even if it did, Stough is not qualified to give an opinion on what a hearing's officer might have done at a specific SRA (Sentencing Reform Act of 1981) violation hearing. *See Estate of Bordon ex rel. Anderson v. Dep't of Corr.*, 122 Wn. App. 227, 246-47, 95 P.3d 764 (2004) (affirming determination that Stough is not qualified to testify about what a judge would do in a SRA violation hearing, where he is not a judge, has never supervised an SRA offender, and has never attended an SRA violation hearing). An expert's opinion must be based on facts. *Theonnes v. Hazen*, 37 Wn. App. 644, 648, 681 P.2d 1284 (1984). "An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury." *Theonnes*, 37 Wn. App. at 648. In any event, we will address the Estate's argument.

115 days. Any suggestion that Goolsby would have committed additional violations and received further sanctions is pure speculation which is insufficient to create a genuine issue of material fact. *Hungerford v. Dep't of Corrs.*, 135 Wn. App. 240, 254, 139 P.3d 1131 (2006).

Second, the Estate argues that DOC negligently failed to gain control over Goolsby through its supervision. The Estate relies on Stough's testimony that appropriate supervision reduces recidivism and that if DOC had properly supervised Goolsby, he would not have absconded.

However, we expressly rejected a similar recidivism argument in *Hungerford*, 135 Wn. App. 240. In *Hungerford*, Stough also testified that there was a correlation between recidivism and supervision. 135 Wn. App. at 255. We emphasized that DOC "does not have a duty enforceable in tort" to rehabilitate offenders. *Hungerford*, 135 Wn. App. at 256. As a result, we concluded:

Even if *Hungerford* could show that DOC's lack of supervision contributed to Davis's recidivism, as a matter of policy, the connection between the ultimate result and DOC's action is too remote to establish liability. Accordingly, we hold that as a matter of law, DOC's alleged failure to closely supervise Davis and rehabilitate him is not the legal cause of *Hungerford-Trap's* death.

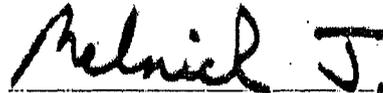
Hungerford, 135 Wn. App. at 256.

Similarly, DOC's supervision duties did not encompass a duty to rehabilitate Goolsby or to somehow change his behavior such that he would not commit murder. As a result, we hold that there is no causal connection between DOC's failure to control Goolsby and the fact that he absconded or the fact that he was willing to engage in criminal activity such as murdering James Smith.

The Estate has failed to meet its prima facie case because it did not identify a theory of causation and provide admissible evidence in support of that theory. The Estate relies on Stough's declaration to show causation. But in reviewing the evidence in the light most favorable to the

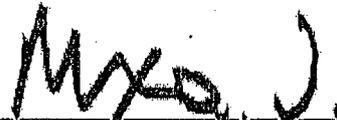
Estate, we conclude that because the Estate failed to make a prima facie showing of causation, DOC was entitled to judgment as a matter of law.

We affirm the trial court's grant of summary judgment in DOC's favor.

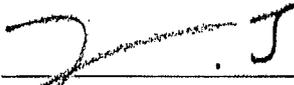


Melnick, J.

We concur:



Maxa, P.J.



Lee, J.

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Good afternoon-

Please find attached a pdf copy of Washington State Department of Correction's Answer to Petition for Review, for filing with the Supreme Court of Washington today.

Case name: Smith, et al., v. Washington State Department of Corrections
Case number: 92285-3

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