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No. 72821-1

King County Superior Court No. 13-2-35695-3SEA

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION I

DANIEL SCHULTE and KARINA ULRIKSEN-SCHULTE, husband and wife; DANIEL SCHULTE as Guardian ad Litem of ELIAS ULRIKSEN-SCHULTE, a minor; MARILYN SCHULTE, individually, and as Personal Representative of the Estate of DENNIS SCHULTE, deceased, and as Personal Representative of the Estate of JUDITH SCHULTE, deceased,

Plaintiffs/Appellees,

vs.

CITY OF SEATTLE,
Defendant/Appellant

BRIEF OF APPELLANT, CITY OF SEATTLE

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I. INTRODUCTION

On March 25, 2103, Mark Mullan, while drunk, drove his vehicle into a family crossing a neighborhood street. As a direct consequence of Mullan's actions, plaintiff Karina Ulriksen-Schulte and her infant son, Elias, were critically injured. Dennis and Judith Schulte, Elias' grandparents, were killed.

At the time of this crash, Mullan was midway through the first 90-day review period of his probation with Seattle Municipal Court following his conviction on a DUI charge 75 days earlier. Relying on *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999), plaintiffs brought suit against the City of Seattle ("the City"), alleging generally "unlawful conduct" by the municipal court's probation department over those 75 days in "failing to supervise, monitor, and enforce the terms and conditions of Mullan's probation[.]" More specifically, plaintiffs alleged that probation counselor Stacey Lamond was grossly negligent by (1) failing to verify that Mullan comply with State ignition interlock licensing restrictions and (2) not seeking out collateral sources to verify the truthfulness of Mullan's assurances that he was not driving.

On the parties' cross-motions for summary judgment, the trial court (the Honorable Jeffrey Ramsdell) agreed with the City that the scope of its duty in supervising Mullan did not extend to independently verifying

that Mullan apply for an ignition interlock license (IIL) or install an ignition interlock device (IID) – licensing provisions that by statute are regulated and enforced by the State alone. The court ruled, however, that under *Hertog* it was a question of fact for the jury as to whether Ms. Lamond could be found grossly negligent for not doing *more* during her brief supervision of Mullan to ensure that he was not driving. The court did not address, either on summary judgment or on the City's motion for reconsideration, the City's argument as to proximate cause, but certified its order for discretionary review.

While unquestionably tragic, this case should have been dismissed on core principles of tort law and legislative moves post-*Hertog* that have significantly changed both the source of a duty and the standard of care (from simple negligence to gross negligence) in a failure-to-supervise case against a municipality that chooses to offer probation services. Specifically, claims against Ms. Lamond arising out of her supervision of a first-time, misdemeanor DUI defendant necessarily fail for lack of a duty (under *Whitehall v. King County*, 140 Wn. App. 761, 167 P.3d 1184 (2007)) and/or lack of sufficient evidence (under *Kelley v. State*, 104 Wn. App. 328, 333, 17 P.3d 1189 (2000)) when it is undisputed (1) that Ms. Lamond not only met but exceeded court expectations, set forth in policies promulgated pursuant to Administrative Rule for Courts of Limited

Jurisdiction (ARLJ) 11.1, for supervision of even a higher-level offender; and (2) Ms. Lamond never received any information concerning any probation violation, including any allegation that Mullan was drinking and driving, that she could have brought to the court's attention. Indeed, to the extent that the trial court hinged its finding on the foreseeability of Mullan's relapse, outside agency alcohol treatment records showed Mullan to be motivated and compliant with his treatment up to, and even including, the day of the crash at issue here.

Moreover, even if (contrary to *Whitehall*) Ms. Lamond's failure to seek out collateral sources to verify the truthfulness of Mullan's assurances could support a finding of gross negligence, plaintiffs' claims against the City still fail for lack of causation under *Bordon v. State*, 122 Wn. App. 227, 95 P.3d 764 (2004) – an argument that the City raised but the trial court did not address. Consistent with *Bordon*, the City submits that even had Ms. Lamond sought out (and found) collateral sources to verify Mullan's activities, it is wholly speculative to conclude (1) that such sources would have provided her contrary information concerning Mullan's behavior sufficient to provide articulable basis to bring to the court's attention, (2) that if she had such information, the court would have chosen to hold, and would have had opportunity to hold, a contested hearing on such allegations prior to the crash at issue here, and (3) that the

court would have found Mullan to be in violation of his probation *and* would have then taken action to incarcerate Mullan for a period of time that would have included the date of this crash – the only sure way to protect against the threat that any drunk driver may pose.

The City shares the frustration and anger that Mullan's conduct has generated. But while this case highlights the unpredictable threat created by an unknowable subset of offenders who, like Mullan, will sidestep statutory licensing requirements, relapse on their treatment, and violate conditions of their judgment and sentence, to blame Mullan's actions on anyone other than Mullan alone is contrary to fundamental principles of tort law and public policy. Accordingly, the City respectfully requests that this court reverse the trial court's order denying the City's motion for summary judgment and remand this case for dismissal of all claims against the City.

I. ASSIGNMENTS OF ERROR

1. In *Kelley v. State*, 104 Wn. App. 328, 17 P.3d 1189 (2000), the Court of Appeals held that even repeated failures to make contact or follow up on known probation violations over multiple review periods were insufficient as a matter of law to establish gross negligence. In this case, where there is no evidence of any known probation violations or missed contacts, where one full review period had not yet elapsed, and

where affirmative reports from Mullan's treatment provider showed him to be current and compliant with this treatment up to and even including the day of this crash, the trial court erred in declining to dismiss the case, pursuant to *Kelley*, for lack of sufficient evidence as to gross negligence.

2. Post-*Hertog*, the scope of a municipal probation department's duty to supervise is determined by policies that are promulgated at the discretion of individual courts, pursuant to ARLJ 11. In *Whitehall v. King County*, 140 Wn. App. 761, 167 P.3d 1189 (2000), this Court recognized that probation counselors do not have a duty to undertake investigatory actions that are outside the scope of court policy. In ruling that a jury could find Ms. Lamond to be grossly negligent by not undertaking to further verify the truth of Mullan's assurances, the trial court erred.

3. In *Bordon v. State*, 122 Wn. App. 226, 95 P.3d 764 (2004), this Court reversed a jury verdict against the State, holding that an expert's speculation and conjecture as to how a court would rule in response to a known probation violation could not be a basis for a jury finding on proximate cause. Here, by sidestepping the City's arguments under *Bordon* and thus leaving it to a jury to speculate, based on the opinions of that same expert, that this crash would not have occurred had Ms. Lamond

brought heretofore unknown probation violations to the court's attention, the trial court erred.

II. ISSUES PRESENTED

1. Whether the trial court erred in ruling that a reasonable jury could find that Ms. Lamond failed to exercise even slight care in her supervision of Mullan when, following a meeting she need not have called in the first place, she did not further undertake to seek out collateral sources to verify the truthfulness of Mullan's assurances that he was not driving;

2. Whether the trial court erred when it ruled that the duty owed by a municipal probation counselor could be expanded to include obligations not contemplated under court policies promulgated pursuant to ARLJ 11;

3. Whether the trial court erred in sidestepping its obligations under Civil Rule 56 with respect to the City's arguments on proximate cause, thus implicitly leaving it to a jury to speculate as to how Ms. Lamond and the court might together have prevented this crash, aided only by conclusory and speculative expert opinions that, the court conceded, may be inadmissible at trial and thus improper under CR 56(e).

III. STATEMENT OF THE CASE

a. MULLAN'S PRIOR ARREST AND ADJUDICATION

On December 25, 2012, three months prior to the crash at issue here, Seattle police officers responded to a report that a driver had crashed

into the Seals Motel on Aurora Ave. N. and was attempting to leave the scene. When officers arrived, they found the vehicle stopped near the exit to the motel parking lot and the driver, Mark Mullan, slumped over the steering wheel. Breath alcohol tests showed alcohol concentrations well over the legal limit. *CP 62-65.* On January 7, 2013, Mullan entered a plea of guilty to a charge of DUI (SMC 11.56.020). *CP 310-13.*

Seattle Municipal Court Judge Steven Rosen entered the Judgment and Sentence (J&S) on a form from the Administrative Office of the Courts (AOC) that follows the sentencing grid as then set forth in the Criminal Rules for Courts of Limited Jurisdiction. *See* CrRLJ (2013) 4.2 (Washington Court Rules 2013, p. 687); *CP 306-08 at* ¶ 5. Consistent with RCW 46.61.5055 and 46.20.720(2) as then in effect, the sentencing grid required that a defendant like Mullan with no prior offenses[1] within seven years: (1) comply with ignition interlock restrictions as imposed by the Department of Licensing (DOL); and (2) obtain alcohol/drug education and/or treatment as ordered by the court. The J&S in this case

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[1] A prior offense is defined as a conviction on all offenses where the arrest date of the prior offense occurred within seven years before or after the arrest date on the current offense. *See* RCW 46.61.5055(14)(a); CrRLJ 4.2 at fn. 1. Although at the time of his sentencing Mullan had a separate DUI charge pending in Snohomish County following an arrest on October 8, 2012, that matter had not yet been adjudicated, and thus could not be considered an "offense" for purposes of sentencing. *See also State v. Castle*, 156 Wn. App. 539, 234 P.3d 260 (2010) (pending DUI charges that have not been reduced to final judgment are not "prior offenses" within the meaning of the statute).

followed the AOC form order and required that Mullan, as mandatory conditions of his sentence:

- Not drive a motor vehicle without a valid license and proof of insurance;
- Incur no criminal violations of law or alcohol related infractions;
- Comply with mandatory ignition interlock device requirements as imposed by the Department of Licensing; and
- Comply with the requirement to apply for an ignition interlock driver's license and to install an ignition interlock device on all vehicles operated by the defendant as required by the Department of Licensing[,](RCW 46.20.720(2), 46.20.385, and RCW 46.61.5055(5), (6).[2]

CP 315-17 (emphases supplied). The court further imposed, as additional conditions of his sentence, the requirements that Mullan

- Submit to probation for 60 months (24 months supervised);
- Obtain an alcohol/drug evaluation from an approved agency, and begin any recommended treatment or education per probation schedules;
- Within 180 days, complete a DUI victim's panel; and
- Use no alcoholic beverages, non-prescribed drugs, or marijuana.

Id. (Emphases supplied).

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[2] The J&S did not require an ignition interlock device other than as regulated by the Department of Licensing pursuant to RCW 46.20.385. *CP 316.* The trial court ruled that the City's obligations in supervising Mullan did not extend to verifying that he had installed an ignition interlock device. The Schultes did not seek discretionary review of this ruling.

b. THE PROBATION DEPARTMENT'S ROLE AND SUPERVISION OF MARK MULLAN

To put plaintiffs' claims against the City in proper context, it is important to understand (1) the nature and extent of the services that a probation department provides to misdemeanor defendants and the court; and (2) the policies, procedures and timelines that guide Seattle Municipal Court probation counselors in the performance of their duties. As to these inquiries, the following undisputed facts are material.

i. OBLIGATIONS OF MUNICIPAL COURT PROBATION DEPARTMENTS ARE DEFINED BY INDIVIDUAL COURTS

Unlike the State Department of Corrections' Community Custody program, which is created and directed by statute (*see* RCW 72.04A *et seq.*; RCW 9.94A *et seq.*), misdemeanor probation departments are established solely at the discretion of individual courts pursuant to ARLJ 11.1. This rule provides:

> A misdemeanor probation department, if a court elects to establish one, is an entity that provides services designed to assist the court in the management of criminal justice and thereby aid in the preservation of public order and safety. ... The method of providing these services shall be established by the presiding judge of the local court to meet the specific needs of the court.

(Emphases supplied). **If established**, misdemeanor probation departments provide the services set forth generally in ARLJ 11.2(b), which includes, in relevant part, the following:

(2) For offenders referred to the misdemeanant probation department, determine their risk to the community using a standardized classification system with a minimum of monthly face-to-face interviews for offenders classified at the highest level.

(3) Evaluate offenders' social problems, amenability to different types of treatment programs, and determine appropriate referral.

(4) Supervise offenders with face-to-face interviews depending on risk classification system.

(5) Oversee community agencies providing services required of offenders with input to the judicial officer (e.g. alcohol/drug, domestic violence, sexual deviancy, and mental illness).

Pursuant to ARLJ 11.1, Seattle Municipal Court has policies and procedures that guide probation counselors in the intake, risk assignment, and supervision of misdemeanor defendants. *CP 243-50 at ¶ 4.* Consistent with ARLJ 11.2, the court has directed Seattle's probation department (Probation) to focus its efforts specifically towards (1) assisting the courts in decision making through probation reports and in the enforcement of court orders; (2) providing services and programs that afford opportunities for offenders to change behavior; and (3) brokering community referrals for therapeutic intervention programs including substance abuse, mental health, domestic violence, homelessness and

unemployment.[3] *CP 105, 107; 239-42 at* ¶ *7.* The Seattle Municipal Court's focus on addressing behavioral change through facilitating access to services is consistent with the evolving practices in the field of community corrections nationally. *CP 186-238* at p. 7.

ii. PROBATION'S RESPONSIBILITIES DEPEND ON THE NATURE OF THE CONDITION

A probation counselor's responsibilities with respect to conditions of a defendant's probation, and the methods for carrying out its responsibilities, depend on the nature of each particular condition. The court distinguishes between active and passive conditions of an offender's sentence in terms of Probation's monitoring role. Conditions that require a defendant to take affirmative actions in order to bring himself into compliance with specific requirements of his sentence are deemed "active" conditions. With respect to active conditions that fall within the

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[3] RCW 10.64.120 requires the Administrative Office of the Courts (AOC) to "define a probation department." Separate from ARLJ 11.1 but consistent with the Seattle Municipal Court's probation program, the AOC explains as follows:

> A probation counselor administers programs that provide pre-sentence investigations, supervision and probationary treatment for misdemeanant offenders in a district or municipal court. Probation counselors can make sentencing recommendations to the court, including appropriate treatment (i.e. drug and alcohol counseling) that an offender should receive. The probation counselor periodically advises the district/municipal court judges of an offender's progress while the offender is on supervision.

http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.display&altMenu=Citi&folderID=jury_guide&fileID=limited#P37_5984.

scope of Probation's purview under ARLJ 11.2 (providing services, programs, and community referrals for behavioral intervention programs), probation counselors are expected to monitor compliance with timelines set at the time of intake. In that way the probation officer can measure an offender's progress towards completing or satisfying a required condition within whatever timeframe the court has ordered. *CP 243-50 at* ¶ 7.

In contrast, "passive" conditions are ongoing obligations on the part of the offender to abstain or refrain from particular conduct. Obligations to abstain from consuming drugs or alcohol, not to drive without a valid license, and to refrain from incurring any new criminal law violations are examples of passive conditions. Probation officers are expected to report to the court violations of such conditions "when presented with specifically articulable reason(s) to believe a violation of probation conditions occurred," but probation counselors do not otherwise track defendants' whereabouts or activities, or otherwise affirmatively act, to ensure that a defendant does not lapse into prohibited behavior. *CP 109-11; 243-50 at* ¶ 8. Nor does the court have any expectation that probation counselors will do so. *CP 239-42 at* ¶ *6; CP 74 p. 20.*

With respect to Mullan, Ms. Lamond's role was specific to conditions of sentencing that were directed towards behavior modification and treatment. *CP 107-09.* The court expected that Ms. Lamond would

monitor Mullan's compliance with **active** conditions of his sentence that (1) required him to obtain a chemical dependency evaluation through a State-certified facility, (2) enroll in any alcohol abstention, treatment and recovery programs that facility might recommend, and (3) participate in a DUI Victim's Panel within 180 days of his sentence. The court did not task Ms. Lamond with ensuring Mullan's compliance with DOL licensing requirements (either applying for an IIL or obtaining an IID)[4] or taking affirmative steps to ensure his compliance with **passive** conditions of his sentence (obligations to abstain from alcohol and drug use and not drive without a valid license). *CP 95-96, 97-100.*[5]

iii. PROBATION'S INTERACTIONS WITH MULLAN

a. MULLAN'S INTAKE

When a defendant first enters the probation system, he is assigned a probation counselor, who will meet with him, review sentencing conditions, and provide information about agencies or services that relate to conditions of probation. The probation counselor is expected to review

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[4] *CP 142-43, 147, 151, 164; CP 243-250 at ¶¶ 4, 19; CP 239-42 at ¶ 6.*

[5] Judge Rosen, the sentencing judge testified that he **did not** expect Probation to "monitor compliance" with ignition interlock restrictions imposed as part of the J&S. *CP 73-74, 77.* He testified that his primary reasons for ordering supervised probation were so that the court would be able to monitor conditions relating to chemical dependency treatment and a victim's impact panel. *CP 77-78; 239-42 at ¶ 6.*

the court docket, conduct a criminal records check, and schedule an intake appointment to be completed within 30 days of the sentencing date.

At intake, a probation counselor will:

- Interview the offender to gather information on the offender's treatment history, criminal history, and life situation;
- Review the probation information sheet with the offender;
- Review the probation agreement and explain the probation conditions, including (1) probation staff's supervisory role; (2) the offender's responsibilities, and (3) consequences of violations;
- If chemical dependency evaluation or treatment is ordered, (1) provide a list of treatment programs or agencies, (2) give the offender a deadline to make the selection and to provide probation with the name of the agency and the target start date (ordinarily, an offender is given 30-60 days to select an agency and complete an assessment), and (3) have the offender sign a release of information form once an agency has been selected;
- Administer a risk/needs assessment through the municipal court's automated tracking system to determine the appropriate supervision classification system for that defendant; and
- Set target dates for completing assignments and explain reporting expectation and requirements according to supervision guidelines for the offender's classification level.

CP 252-59.

In Mullan's case, Probation scheduled his intake for 2:30 p.m. on January 8th – less than 24 hours after his sentencing. *CP 243-50 at* ¶ 9. Ms. Lamond, who was assigned to Mullan, met with Mullan and reviewed his court-ordered obligations, the Seattle Municipal Court Information

System (MCIS) database, and the State-wide District and Municipal Court Information System (DISCIS), which tracks court proceedings in other jurisdictions. Other than the still-pending DUI charge in Snohomish County (*see* fn. 1), Mullan had no other charges pending and no new convictions were reported. *CP 143, 145-47, 156, 158, 165, 167, 168-70.*

At that first meeting, Mullan completed a Probation Services Information Sheet, listing a stable address, his employment and education history, and his criminal history. *CP 286-89.* He informed Ms. Lamond that he had already completed a chemical dependency evaluation (an active condition of his sentence) and that he was scheduled to start treatment at Lakeside Milam, a rehabilitation facility in Edmonds, WA. Mullan signed a release of information sheet to allow Ms. Lamond to receive a copy of his chemical dependency evaluation and monthly status reports from Lakeside Milam. *CP 126; 291.*

Mullan also signed a Probation Agreement, acknowledging the terms of his sentence and probation. *CP 286-89.* Ms. Lamond gave Mullan a list of referrals to complete the Victim's Panel, which he was obligated to attend within 180 days of his sentencing (by July 5, 2013). Mullan appeared to Ms. Lamond to be motivated, sincere, and proactive in taking responsibility for his actions and seeking treatment. He told her that he was not driving. *CP 137, 144-45, 150, 158, 164.*

b. MULLAN WAS ASSIGNED TO LEVEL III SUPERVISION

Seattle provides four levels of supervision of misdemeanor defendants. Defendants are assigned to a supervision level by a standardized, validated risk/needs assessment tool (the Wisconsin Client Management Classification System) that is incorporated into the court's computerized tracking system (SeaTrac). The assessment tool uses an automated and weighted algorithm to balance static risk factors (*e.g.*, the nature of the offense, the defendant's prior criminal history, employment history) with an offender's criminogenic needs (address stability, education/vocational skills, financial management, emotional stability) to produce an objective, evidence-based risk/needs score that determines the level of supervision to which an offender is assigned. *CP 100-01.*[6]

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[6] Offenders who score into Level I are deemed the highest-risk offenders. Such individuals typically have a long criminal history, a history of violent acts and recidivism, and lack social support systems (housing, education, employment). Individuals under Level IV supervision, in turn, are deemed the lowest-risk offenders. At Level I, offenders are required to make contact with their probation counselor at least once every 30 days; probation counselors are required to review on a monthly basis a defendant's compliance with active probation conditions, reassess the defendant's risk level every four months, and review the defendant's criminal history for new violations at each reassessment (or every four months). At the other end of the continuum, individuals under Level IV supervision are not required to meet with probation counselors, and probation counselors are not tasked with monitoring such defendants other than by way of a criminal history review every six months. At Level II supervision, a defendant is required to make contact (either in person, by phone, or by email) with his probation counselor a minimum of once every 90 days. Probation counselors, in turn, are expected to review, also at 90-day intervals, a defendant's progress towards meeting target dates for active conditions of probation. **At Level III supervision, applicable here, probation officers conduct records reviews on the same 90-day schedule as at Level II supervision, but**

SeaTrac assigned Mullan to Level III supervision.[7] He was a first-time non-violent offender who reported a stable address and employment history. He had already completed a chemical dependency evaluation, thus satisfying well in advance of any court deadline one active condition of his probation even prior to intake. He appeared to be motivated and willing to accept responsibility for his actions. As a Level III offender, he was not required to meet with or report in to Probation at any particular interval (*see* fn. 6). Probation's obligation for such an offender is to review, **at 90-day intervals**, the offender's progress towards meeting target dates for active conditions of probation. A probation officer satisfies this expectation, for example, by reviewing letters or data entry verifying a defendant's compliance with a treatment plan or participation in required programs. In addition, probation officers, with the assistance of administrative staff, are expected to conduct criminal history checks of such offenders every six months. *CP 243-50 at ¶ 14, CP 161-68.*

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defendants are not otherwise required to be in contact with the Department. *CP 243-50 at ¶ 13, CP 261-68.*

[7] At the time of this incident, and as of this writing, there is no consistent standard of practice for assessing DUI offenders that is recommended nationally. With funding from the U.S. Department of Transportation, National Highway Safety Administration (NHTSA), the American Probation and Parole Association (APPA) is currently working to develop a risk assessment tool specific to DUI. However, the current state of the research on predicting DUI recidivism has not found the factors that may accurately predict DUI recidivism. *CP 192-200, 220.*

c. PROBATION SUPERVISED MULLAN MORE CLOSELY THAN REQUIRED

After the initial intake, Ms. Lamond's next required action with respect to Mullan would have been a records check, **90 days later**, to review his progress towards meeting the active conditions of his sentence. *CP 149-50, 165, 167-68; CP 243-50 at ¶ 15.* This record check did not require a face-to-face visit; ordinarily, a Level III offender would be assigned to the Level III "bank" of defendant files that are reviewed on a 90-schedule for treatment reports and records checks. *CP 101.*

Ms. Lamond, nonetheless, directed Mullan to report back in person **45 days later** (halfway through the 90-day period before <u>any</u> action would otherwise be required with respect to offenders at either Level II <u>or</u> Level III supervision) so that she could personally assess his progress and demeanor. *CP 147, 168.* Ms. Lamond thus monitored Mullen under closer supervision than the court's policies and guidelines required for even higher-risk offenders. *CP 101, 243-305 at ¶* 16.

On February 21, 2013 (one day before Mullan was to report back) Ms. Lamond received a letter from Lakeside Milam, dated February 18th, that documented Mullan's progress in treatment. The letter verified that Mullan was meeting the expectation that he participate in a treatment program, stating: "Mark began intensive outpatient treatment at our

Edmonds office on February 8, 2013. As of this date, Mark is current in his recovery program." *CP 243-305 at ¶ 11 and CP 293-96.*

On February 22, 2013, **Mullan reported as directed**. He met with Ms. Lamond and advised her that treatment was going well and that he was working. He again stated that **he was not driving**. He stated that he was planning to attend a Victim's Panel soon (due by July 5, 2013 per the court order). He seemed upbeat, enthusiastic, and had no problems or concerns to report. *CP 145-46, 148, 150, 160-61, 164-65, 168.*

The next required action with respect to Mullan's file was an **April 8th records review** (due, per policies for Levels II and III offenders, 90 days from intake). *CP 243-305 at* ¶ 17.

On March 26, 2013, Seattle Municipal Court discovered through local media reports that on the previous day, Mullan had been taken into custody for vehicular homicide. **This was the first notice to Probation that Mullan had violated any term of his probation.** Later that same day, Probation received a monthly status report from Lakeside Milam, dated March 26th, stating that Mullan had missed intensive outpatient sessions on February 15th and 25th because of work-related obligations, and had missed sessions on March 13 and 15 after calling in sick, but had otherwise attended all other scheduled sessions (February 20, 22, 27, and March 1, 4, 6, 8, 11, 18, 20, and 22 (2013)). That report also reported that

toxicology tests taken on February 27 and March 20, after his absences, were negative for all drugs tested. Lakeside Milam reported that Mr. Mullan was inconsistent, but still compliant, with the 12-step aspect of his treatment program. *Id. at ¶ 18; CP 298-99.*

d. PROBATION HAD NO BASIS FOR TAKING ANY ACTION THAT COULD HAVE STOPPED MULLAN FROM DRIVING DRUNK ON MARCH 25

Unlike State Department of Corrections officers, municipal court probation counselors do not conduct field visits, nor does the court task its probation counselors to verify a defendant's whereabouts or behavior through collateral contacts other than would be made through records checks and status reports from treatment facilities. *CP 109-11; 7483; 243-305 at ¶ 19; 239-242 at ¶ 6.* Municipal court probation counselors do not have arrest authority (warrantless or otherwise), and thus cannot take immediate steps to intervene even if they have notice of a potential violation. *CP 107,109; see also* RCW 72.04A.090.

When a probation counselor has articulable basis to suspect that a defendant has violated a condition of his release (*e.g.*, by way of a defendant's self-admission or notice from a third party), the probation counselor's authority to take action is limited to providing notice of the concern to the court by way of a status report or a notice of violation. *CP 147, 151, 154-44, 159, 171, 173-74; 108; 243-305 at ¶ 20; 284.* Under

CrRLJ 7.6(b), any modification or revocation of probation can only be made following a review hearing at which the defendant has both opportunity for representation and appearance. *See CrRLJ 7.6; CP 173; 108-09.* Depending on the availability of the court and/or the defendant's counsel, it can take weeks for a review hearing to be held. *CP 173-74.*

In this case, Ms. Lamond never received any notice that Mullan had violated any condition of his probation until March 26th, when the court became aware through media reports of the March 25th crash. Mullan's treatment records showed him to be compliant with his program through March 22nd and do not provide an articulable basis on which Ms. Lamond might reasonably have petitioned the court for a review hearing prior to March 25th. *CP 243-305 at ¶ 18, 293-96, 298-99, and 301-02.*

As plaintiffs will note, it was subsequently discovered, **after** the March 25th crash, that when Mullan appeared in Snohomish County District Court on January 14th in connection with his October 8th DUI, the court determined he was intoxicated at that hearing, and he was taken into custody where he remained until February 8th. *CP 153-54, 165, 171.* This information was obviously not in DISCIS as of January 8, 2013, when Ms. Lamond conducted her first criminal records check at Mullan's intake. At no point prior to March 25th did Snohomish County provide notice of this circumstance to the Seattle Municipal Court. Further, because the

Snohomish County matter was pending[8] and unrelated to the Seattle conviction and Municipal Court supervision, a Seattle probation counselor would not be expected to review that docket. *CP 243-305 at ¶ 20; 239-42 at ¶ 9.* But even had Ms. Lamond received notice of this circumstance or had any articulable basis to suspect that Mullan was in violation of any of his probation conditions, and had she requested the court to set a review hearing, it is pure speculation (1) whether the court would have set a review hearing, (2) whether a hearing would have been held prior to the March 25th crash, and (3) what, if any, action the court would have taken with respect to the conditions of Mullan's release on the Seattle charge – particularly since he had just served three weeks in custody in Snohomish County, had reported upon his release to Lakeside Milam, and was reportedly thereafter compliant with that treatment. *CP 173-74; 81.*

c. PROCEDURAL HISTORY

The City moved for summary judgment on plaintiffs' failure to supervise claims on four grounds. *CP 24-58.* First, the City argued that it had no legal duty to monitor whether Mullan had applied to the State for an

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[8] Because defendants are usually represented by counsel in pending matters, probation counselors are not expected to inquire substantively into such matters. *CP 243-305 at ¶ 20; 236-242 at ¶ 9.*

ignition interlock device as a condition of regaining his driving privileges – an area that the State alone has authority and responsibility to regulate and enforce. Thus, to the extent that plaintiffs allege City liability for failing to ensure that Mullan not drive without a valid license, apply for an ignition interlock license, or install an ignition interlock device, such claims fail because they fall outside the scope of the City's duty. *Id.*

The second basis for the City's motion was that to recover from a municipal probation department on a theory of negligent supervision, the plaintiffs must supply "substantial evidence" that the officer's level of disregard for her duties and responsibilities rises to the level of **gross negligence** – a failure to exercise even slight care. *See* RCW 4.24.760(1) (a limited jurisdiction court that provides misdemeanant supervision services is not liable for civil damages based on the inadequate supervision or monitoring of a misdemeanor defendant or probationer unless the inadequate supervision or monitoring constitutes gross negligence). Here, during the brief time Mullan was on probation (75 days), Ms. Lamond supervised Mullan above a level prescribed by policy for even a higher-risk offender. The City submits that, under *Kelley v. State*, 104 Wn. App. 328, 333, 17 P.3d 1189 (2000) and *Whitehall v. King County*, 140 Wn. App. 761, 167 P.3d 1184 (2007), the undisputed facts simply do not allow for any finding of gross negligence, and on this point reasonable minds could not differ. *Id.*

Third, the City argued, pursuant to *Bordon v. State*, 122 Wn. App. 226, 95 P.3d 764 (2004), that plaintiffs could not establish that any act or omission by Ms. Lamond was a cause in fact of the crash, absent asking the jury to undertake rampant and improper speculation as to what Ms. Lamond might have discovered had she investigated further, let alone what the court might have done had Ms. Lamond been able to get hypothetical facts before the court at some indeterminate point prior to this crash. Finally, the City argued that where municipal probation departments exist solely at the discretion and funding of individual courts and pursuant to their individual direction, principles of logic, common sense, justice, policy, and precedent could not support a finding of legal causation in this case. *Id.*

The plaintiffs also moved for summary judgment, arguing that Ms. Lamond had a duty to verify that Mullan had installed an ignition interlock device on his vehicle and that her failure to undertake any action, in the weeks that she supervised Mullan, to verify that he had done so constituted gross negligence as a matter of law. *CP 3622-44.* In support of their motion, the plaintiffs offered declarations from certain of Mullan's friends and neighbors, testifying as to their knowledge that Mullan was drinking and driving. None, however, testified that they had ever reported these concerns or observations to the police, to the court, or to any City agent. *CP 2145-53.* Plaintiffs also offered the declarations of two purported experts, William

Stough and Dan Hall, who provide their opinions on the scope of the legal duty of a Seattle probation counselor. Plaintiffs also offered the declaration of a retired Puyallup Municipal Court judge, Steven Shelton, who offered his speculation as to both (1) what Ms. Lamond might have learned had she conducted further investigation into Mullan's activities and (2) how Judge Rosen likely would have ruled had such hypothetical facts come before him. *CP 1900-90.*

The City moved to strike the declarations of the friends and neighbors for lack of foundation as to their expectations of a probation counselor. Further, insofar as none of these individuals reported ever bringing Mullan's activities to the court's attention prior to this crash, their testimony is immaterial to demonstrate what Ms. Lamond actually knew prior to the crash. *CP 3464-68, 3479-3531.* Citing this Court's evidentiary holdings in *Bordon*, the City also moved to strike the declarations of plaintiffs' experts as impermissibly speculative, lacking in foundation, and irrelevant given the Seattle Municipal Court's exclusive authority under ARLJ 11 to determine the nature and scope of a probation counselor's duties. *Id.*

Despite acknowledging that these opinions would likely be inadmissible at trial, the trial court denied the City's motion to strike, but without prejudice to revisit in motions in limine. *VRP 103-04.* The trial

court denied plaintiffs' motion for summary judgment, ruling as a matter of law that the scope of Ms. Lamond's duty did not extend to verifying that Mullan apply for an ignition interlock license or install an ignition interlock device on his vehicle. *VRP 113-14.*

In ruling on the City's motion, Judge Ramsdell both noted "how complex this area of law is and that it's fraught with certain perils, both legally and from a perspective of policy[,]" and conceded the City's "valid concern" that it was only because Ms. Lamond had first exercised extraordinary care in her supervision of Mullan by requiring him to report back in person 45 days into his first 90-day review period that she had effectively opened the door to plaintiffs' claims of gross negligence.[9] *VRP 104.* Nothwithstanding, Judge Ramsdell denied the City's motion, ruling that a jury could determine that Ms. Lamond acted with gross negligence by failing to further investigate the truthfulness of Mullan's assurances:

> I think a material issue of fact exists as to whether the probation officer exercised even slight care to protect the public from Mr. Mullan's dangerous propensity by simply relying upon Mr. Mullan's own assurances that he was not driving, when [she] knew he had to travel to Edmonds for treatment, to Seattle for meetings with probation, and had to daily transport him to some sort of full-time job at a location that remains unspecified. Was it gross negligence to

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[9] "I understand where you're coming from. You know, the fact that [Ms.] Lamond actually had him come back in 45 days instead of 90, did that inure to her detriment, I guess is what you're wondering .... And I didn't really give that any particular thought. I was dealing with the facts I had, but I think that's a valid concern." *VRP 115.*

> simply rely upon Mr. Mullan's assertion that his son was driving him around when [Ms. Lamond] never saw the son? ... I don't know.

VRP 112-113.

The City submits that this ruling is erroneous. It expands the duty owed by a municipal court probation counselor in a manner rejected by *Whitehall*, narrows the focus of the legal inquiry under a gross negligence standard to only one aspect of Ms. Lamond's supervision of Mullan's probation rather than her overall supervision as contemplated by *Kelley*. Further, the ruling entirely sidesteps the proximate cause inquiry mandated under *Bordon*, a separate source of error.

V. ARGUMENT

A. STANDARD OF REVIEW

The standard of review of an order on summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 W.2d 291, 300, 45 P.3d 1068 (2002). A summary judgment motion under CR 56(c) should be granted if the pleadings, affidavits, and depositions before the court establish there is no genuine issue of material fact and that as a matter of law the moving party is entitled to judgment. *Dickinson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

In a negligence action, a plaintiff must show (1) the existence of a

duty owed to the complaining party; (2) a breach of that duty; and (3) a resulting injury. *Hansen v. Washington Natural Gas Co.*, 95 Wn.2d 773, 776, 632 P.2d 504 (1981). However, "[f]or legal responsibility to attach to the negligent conduct, the claimed breach of duty must be the proximate cause of the resulting injury." *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975). Although the issues of negligence and proximate cause are generally not susceptible to summary judgment, "when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Hartley*, 103 Wn.2d at 775, 698 P.2d 77.

B. THE TRIAL COURT ERRED IN FINDING A TRIABLE QUESTION OF FACT AS TO WHETHER MS. LAMOND FAILED TO EXERCISE EVEN SLIGHT CARE IN SUPERVISING MULLAN BY NOT INVESTIGATING THE TRUTHFULNESS OF HIS STATEMENTS

1. POST-*HERTOG*, THE NATURE AND SCOPE OF THE CITY'S DUTY IS PRESCRIBED BY POLICIES PROMULGATED PURSUANT TO ARLJ 11, AND THE STANDARD OF CARE IS GROSS NEGLIGENCE

As a general rule, there is no third party liability for the criminal acts of others, nor a duty to control the acts of another, absent a special relationship between the defendant and the other or the defendant and a third person. *Restatement (Second) of Torts*, § 315. Restatement § 319 establishes an exception to this general rule and articulates a duty by those having custody or control over persons with "dangerous propensities." In

Taggart v. State, 118 Wn.2d 195, 822 P.2d 243 (1992), the Supreme Court determined on narrow grounds that the statutory authority granted to parole officers to supervise parolees (RCW 72.04A.080) gave rise to an actionable duty to protect against a parolee's criminal acts. In *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999), this duty was extended to municipal probation counselors and county pre-trial release counselors.

To determine the nature and scope of a probation officer's duty, however, the court must examine the nature of the relationship between the officer and the supervised person, "including all of that relationship's 'various features'" – specifically, the court order and applicable statutes that describe and limit an officer's powers to act. *Couch v. Dep't of Corrections*, 113 Wn. App. 556, 565, 54 P.3d 197 (2002). Here, unlike in cases involving Department of Corrections supervision where a DOC officer's authority and responsibility is established and directed by statute, there are no statutes or administrative code provisions that authorize or direct municipal court probation counselors in their duties. Rather, the Presiding Judge of the Court, **at the discretion of the court**, determines a Seattle Municipal Court probation counselor's responsibilities under ARLJ 11; those policies control the determination as to the nature and scope of a probation counselor's duty.

In both *Taggart* and *Hertog*, decided in 1992 and 1999 respectively, the standard of proof for the plaintiff was simple negligence. *Taggart* and

Hertog continue to be cited for the proposition that by virtue of their "take charge" relationship to those they supervise, DOC community corrections officers (*Taggart*) and municipal court probation counselors (*Hertog*) owe a duty under Restatement (Second) of Torts § 319 to exercise care to control those under their supervision to prevent them from doing harm. The City does not dispute that the general rule articulated in *Taggart* and *Hertog* continues to apply, but ARLJ 11 and RCW 4.24.760(1) have since changed the inquiry as to the scope of duty and the standard of care that is owed, from simple negligence (reasonable care) to gross negligence (slight care). RCW 4.24.760(1) extends to municipalities the protections already granted to the State under RCW 72.09.320. Gross negligence – the absence of slight care – is the standard applicable here.

2. THE COURT OF APPEALS' ANALYSES AND APPLICATION OF THE GROSS NEGLIGENCE STANDARD IN *KELLEY* AND *WHITEHALL* MANDATE DISMISSAL HERE

Under the gross negligence standard, plaintiffs must show more than that Ms. Lamond failed to act as would have a reasonable municipal probation officer under the same circumstances (a point on which plaintiffs offered the declarations of Richard Stough and Dan Hall).[10] They must

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[10] There are no standardized guidelines for supervising DUI offenders specifically, despite the recognized need to establish evidence-based practices for addressing DUI

establish that Ms. Lamond failed to exercise "even slight care" in her supervision of Mullan over the ten weeks prior to the crash at issue here. *See* WPI 10.07; *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34 at 211 (5th ed. 1984) (discussing standard for gross negligence). In *Kelley*, Division II articulated the distinction:

> Gross negligence is failure to exercise slight care. But this means not the total absence of care but care substantially or appreciably less than the quantum of care inhering in ordinary negligence. It is "negligence substantially and appreciably greater than ordinary negligence. Ordinary negligence is the act or omission which a person of ordinary prudence would do or fail to do under *like* circumstances or conditions. There is no issue of gross negligence without substantial evidence of serious negligence.

Kelley, 104 Wn. App. at 333 (citations and internal quotations removed).

Kelley, decided after *Hertog* and under the gross negligence standard established in RCW 4.24.760(1), is instructive.[11] Finding that over the

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offenders, and despite the considerable (albeit often conflicting or inconclusive) research dedicated to predicting DUI recidivism. *CP* 192-200.

[11] In that case, a DOC inmate (Ingalls) assaulted Kelley while on community custody status. Kelley sued the DOC, alleging negligent supervision. Noting that Ingalls had been classified as a Level 1A offender – subject to the highest level of supervision – Kelley brought forth evidence of several instances over the course of the DOC's eight-month supervision of Ingalls as support for her claim that the DOC was liable for her injuries. These included a failure to follow up on two police contacts with Ingalls which indicated that Ingalls was violating the curfew condition of his parole and failing to initiate a disciplinary hearing following the second police contact, in which Ingalls attempted to escape from the police car following arrest. Kelley also produced evidence that Ingalls' community custody officer had made only 14 of the required 27 field visits to Ingalls – a violation of DOC directives that required at least two office visits and four field contacts a month. *Kelley*, 104 Wn. App. at 336.

course of an eight-month supervision, multiple instances of police contact and a failure by the corrections officer to make half of the scheduled field visits legally could not sustain a finding of gross negligence, the Court of Appeals affirmed summary judgment for the State.[12]

Whitehall follows *Kelley*. In *Whitehall*, an assault victim sued King County, alleging that the County had been negligent in its supervision of the assailant (Vomenici), who was on probation following a theft conviction. Vomenici also had a prior DUI on his criminal record, along with several juvenile misdemeanors. Over the course of a year, Vomenici met with his probation officer as scheduled, made progress on a community service obligation, reported no new arrests or convictions, but had not made progress on his financial obligations. County probation policies and guidelines did not call for home visits or field investigations for probationers at Vomenici's level of supervision, however, and none

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[12] *See Kelley*, 104 Wn. App. at 338 ("We conclude that the evidence is insufficient to find gross negligent. [The DOC officer] knew that Ingalls may have been drinking and may have violated his curfew[.] He also knew that Ingalls had committed a crime in Ocean Shores but failed to discover that Ingalls had violated his curfew – information that was readily available in the police report. Kelley's expert opined that these deficiencies constituted negligence. We agree that a jury could so find. But we hold that this was not 'substantial evidence of serious negligence' and, thus, fell short of showing gross negligence.") [Citation omitted.]

were done.[13] Citing *Kelley*, Division I affirmed summary judgment for the County, noting that in actions alleging negligent supervision "the duty of care is one of slight care that can be violated only by gross negligence" and held that the plaintiff had not met this higher burden of proof. *Whitehall*, 140 Wn. App. at 769.

Kelley and *Whitehall* mandate dismissal of the City here. Mullan, who had 30 days to complete his intake, met with Probation within 24 hours of his sentencing. *CP 243-250 at ¶ 8.* He was assessed as a Level III (low-level) offender. *Id at ¶ 15.* Ms. Lamond exceeded court expectations regarding the supervision of even high-risk offenders by directed Mullan to report back in person 45 days from his sentencing (halfway through the first 90-day review period) to allow her to personally assess his progress. *Id. at ¶ 16.*

Mullan reported as required and at that meeting gave Ms. Lamond no reason to suspect that he was violating any condition of his probation. Mullan assured Ms. Lamond he would complete his Victim's Panel obligation before their next meeting. Ms. Lamond observed nothing about

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[13] In *Whitehall*, the Court noted that the King County District Court Probation Division policy manual was adopted by the superior court, and that the probation unit followed the policies and procedures in the manual. *Whitehall*, 140 Wn. App. at 769-70. Likewise here, the probation department guidelines and policies are established by the Seattle Municipal Court, through its Presiding Judge, consistent with ARLJ 11.1.

Mullan's conduct, his presentation, or the information he and Lakeside Milam provided that would have led her to conclude anything other than that Mullan continued to be optimistic, motivated, and compliant with his treatment program and other terms and conditions of his sentence. Indeed, although the court emphasized that Ms. Lamond "knew at the time that Mr. Mullan was not above violating the law,"[14] *VRP 108*, there is no evidence in this record that Ms. Lamond had **actual knowledge** that Mullan was "violating the law" between January 7 and March 25, 2013 – the date of this tragic crash.

In delivering its oral ruling, the trial court sought to distinguish *Kelley* and *Whitehall* on the grounds that in those cases, there was no "correlation between the alleged inadequate supervision and the danger posed[.]" *VRP 110.*

> The Washington Supreme Court has told us in *Hertog* that probation officers have a duty to exercise reasonable care to control a parolee, to protect anyone in the public who might reasonably be endangered by the parolee's dangerous propensities. And I think every part of that standard was intended to have meaning, including the part about the parolee's dangerous propensity. The dangerous propensity here for Mr. Mullan was his

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[14] The same, of course, could be said about *any* probationer in that persons only become subject to probation because they are not "above violating the law." Prior criminal acts factor into one's risk assessment score and may thus influence the level of supervision, but outside of one's risk assessment, there is no reason to treat one defendant differently from another. Moreover, the undisputed fact is that in this case, Ms. Lamond **did** supervise Mullan more closely than would have been required at even a higher-level score. *CP 101; 243-305 at* ¶ 16.

> proclivity to drink and drive, and that's exactly what the concern was when it came to supervision. It's –that's what I think sets it apart from *Kelly* and *Whitehall.*"

VRP 105-106. Neither *Kelley* nor *Whitehall* supports such a categorical distinction. But even assuming such a distinction had a basis in law,[15] the court's reasoning falls flat.

Purporting to avoid a hindsight analysis, the court began by framing the central issue: "Should we have foreseen that [this crash would happen] with the information that was available at the time? That's the fairest way to assess this." *Id.* at p. 106. The City acknowledges that, as a general principle, foreseeability can be one angle of a tort inquiry. Thus, if properly analyzed under a gross negligence standard, the inquiry at bar would be, **based on the information that Ms. Lamond actually had during the time she supervised Mullan**, was it foreseeable that Mullan would drink and drive **and** – as relates to her **professional obligation – over the ten weeks that she supervised Mullan, did Ms. Lamond exercise "slight care" to follow the policies set forth by the court for monitoring a Level III offender.**

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[15] The causal connection between the crime being supervised and a later tortious act may be a factor in determining whether there is a "take charge" relationship in the first place (*i.e.*, whether a duty to supervise exists at all), but that is not an issue here. *See Couch v. Washington State Dep't of Corrections,* 113 Wn.App. 556, 568 (2002). Legally and logically, the connection or lack thereof between the crime being supervised and a later tortious act cannot be used to retroactively expand the scope of the duty owed.

Setting aside that robust medical, academic, and professional research has yet to identify any predictive scale by which a probation counselor might determine (foresee) whether any one alcoholic is more likely to relapse in his disease (*see* CP 176-230), as relates to the second inquiry, the answer is patent under hornbook principles that direct a gross negligence inquiry. Considering that **nothing** more was required of Ms. Lamond for a 90-day period following his intake, reasonable minds could not dispute that Ms. Lamond, by requiring Mullan to return 45 days into his first review period, at which time he was reported to be compliant with his treatment, not only met but exceeded the standard of care (as set forth in court policies promulgated at the sole discretion of the court pursuant to ARLJ 11) for supervision of even a higher-level offender.

Indeed, the trial court acknowledged the City's "valid concern" that it was only because she first exercised **extraordinary** care in her supervision of Mullan that, under the court's analysis, she effectively set herself up for a claim of gross negligence for not doing even more. *See* fn. 9. That is not the law. The court's reasoning is not remotely consistent with logic, common sense, and public policy objectives that should all weigh against punishing a probation counselor for taking **additional** care in her activities.

Nor, critically, is that ultimately the question the court addressed.

Despite having distinguished this case from *Kelley* and *Whitehall* on the correlation between Mullan's dangerous propensity to "drink and drive" and the supervision at issue, the court inexplicably extracted from its calculus altogether the critical element of whether Mullan was "drinking" – arguably the more concerning element of Mullan's behavior (given the crime for which he was convicted and insofar as there is no evidence that Mullan posed any threat if driving sober) and an active condition of his probation that she was specifically tasked with monitoring by way of Lakeside Milam reports. Instead, the court limited its inquiry solely to Ms. Lamond's attention to Mullan's licensing restrictions, reframing the duty: "The probation officer's duty is to exercise at least slight care to satisfy the concern that Mr. Mullan wasn't driving." (*VRP* 109). Respectfully, this is wrong.

This restatement of the duty sets up the court's straw man and completely recharacterizes the role of a probation counselor generally. Probation counselors are the eyes and ears of the court; they are not an investigatory or enforcement arm of the Department of Licensing. But even if the duty could be so articulated, the court's analysis continues to falter under a gross negligence inquiry. Having stripped its inquiry to this one point, the court recited all the "facts" known to Ms. Lamond, and the actions she took, to determine whether she had met the standard of "slight

care" with respect to verifying that Mullan was not driving. *VRP 106-09.* **In other words, the court implicitly acknowledged that she had taken at least slight care to verify that he wasn't driving.** But the court concluded by focusing on what she **didn't** do:

> Given these objective facts, Ms. Lamond apparently determined that it wasn't sufficient to question any of his representations with regard to how he was getting around and making all of his appointments at different places, including his full-time work, and she never confirmed in any way, shape or form even the existence of his son.

VRP 108-09.

By flipping the analysis, the court erred. What Ms. Lamond **could** have done, juxtaposed against what she actually did, is only relevant to the analysis **if she had a legal duty to take additional steps to verify Mullan's statements**. Here, the court effectively imposed that duty on Ms. Lamond in a situation where the undisputed facts gave her no reason to believe – let alone articulable basis to bring allegations to the court – that Mullan was driving, let alone driving **drunk**.

It is this precise scenario that *Whitehall* rejects. The *Whitehall* court looked specifically at the argument – like that presented here – that the probation officer **could or should** have done more.[16] This court

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[16] "*Whitehall* asserts that the County was negligent in failing to require the probation officers to perform home visits or contact third parties in the community to ensure

properly declined to expand the scope of a probation officer's duty to supervise by considering what more could or should have been done,[17] focusing instead on what **was** done, not what **could** have been done.[18]

This court's reasoning in *Whitehall* should apply here, and the policy reasons underlying this court's decision in *Whitehall* are sound. There is no basis to conclude that Mullan should have been treated any differently from any other defendant, as the trial court suggests could have been done even beyond Ms. Lamond's already heightened attention. By denying the City's motion, the court effectively set up the inevitable situation where a jury could **always** be asked, for **any** defendant, to speculate[19] about what more a probation counselor could have learned had

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Vomenici was fulfilling the provisions of his probation and not committing any further crimes." [*Id.* at 769]

[17] "The King County District Court could not have afforded to provide probation services to superior court misdemeanants if doing so would have required such activities by the probation officers. The limited resources available to provide probation services would have precluded the court from performing such functions." [*Id.*]

[18] "Vomenici met regularly with his probation officers who conducted reasonable inquiries into his status and activities. The officers were under no statutory or administrative obligation to conduct home visits or contact third parties, as Whitehall asserts. *We hold that under the facts of the case, the County had no duty to monitor Vomenici more closely than it did. Even if there were such a duty, there is no substantial evidence of serious negligence, and thus no showing of gross negligence."Whitehall*, 140 Wn. App. at 770 [emphasis supplied].

[19] Here, had Ms. Lamond attempted to contact the son, would she have been successful? Would he have talked to her, being under no obligation to do so? What might he have said? Did he know what his father was doing when they weren't together? If he had said he was driving Mullan around, should she have then investigated further to see whether the son was being truthful? Had she contacted Lakeside Milam to inquire about how Mullan was getting to his treatment sessions, what might she have learned?

she done more, and from such conjecture, find gross negligence.

The trial court's error in allowing such an inquiry to reach a jury is particularly patent when viewed against the backdrop of this case. The March 25th crash occurred 76 days after Mullan became a probationer, and two weeks before a 90-day compliance review of his probation conditions would be triggered. There is no evidence that any concerns that Mullan was driving were ever brought to Ms. Lamond's attention; indeed, the court, in ruling on plaintiffs' motion, deemed Ms. Lamond to be "entirely warranted" in not questioning whether he'd installed an ignition interlock device "because she know that Mr. Mullan's license was suspended and therefore he was not allowed to drive, which is a logical inference." *VRP 109.*

Even had Ms. Lamond prematurely conducted a records review, there is nothing in Mullan's Lakeside Milam reports that would have indicated anything other than that he was compliant with his treatment up to *and including* March 25th. There is no evidence of any new criminal law violations prior to March 25th of which Ms. Lamond could have been aware. In short, had Ms. Lamond conducted her 90-day review earlier, there was nothing new in Mullan's criminal history, his driving abstract, or his treatment records that would have provided an articulable basis for her to schedule a review hearing with the court.

Mullan's actions on March 25th were unquestionably horrific, but neither those actions, nor information that came to light only after this crash, can properly factor into the legal analysis. "Hindsight may be a more accurate gauge of human conduct, but it should never be the basis for imposition of a legal duty." *McKenna v. Edwards*, 65 Wn. App. 905, 918, 830 P.2d 385 (1992). Based on what Ms. Lamond did, and what she actually knew, plaintiffs have no evidence of negligence – let alone gross negligence – regarding the Ms. Lamond's supervision of Mullan over the ten weeks between January 8 and March 25, 2013. Under the facts of this case, including the policies that prescribe the scope of Ms. Lamond's duty and the fundamental rules of tort law that direct the inquiry under a gross negligence standard, as applied in *Kelley* and *Whitehall*, the City's lack of culpability for Mullan's actions is beyond question by reasonable minds. The trial court erred in holding otherwise.

D. PLAINTIFFS CANNOT ESTABLISH THAT ANY ALLEGED ACT OR OMISSION BY THE SEATTLE MUNICIPAL COURT'S PROBATION DEPARTMENT WAS A PROXIMATE CAUSE OF MULLAN'S CRIMINAL CONDUCT AND PLAINTIFFS' DAMAGES

A proximate cause of an injury is a cause which, in a direct sequence, unbroken by any new, independent cause, produces the injury complained of and without which the injury would not have occurred. *Stoneman v. Wick Constr. Co.*, 55 Wn.2d 639, 643, 349 P.2d 215 (1960). Proximate cause

comprises two elements: (1) cause in fact, and (2) legal cause. *Baughn v. Honda Motor Co. Ltd.,* 107 Wn.2d 127, 727 P.2d 655 (1986). Cause in fact refers to the "but for" consequences of an act, or the physical connection between an act and the resulting injury. *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985). Legal causation "rests on policy considerations as to how far the consequences of a defendant's acts should extend [and] involves a determination of whether liability should attach as a matter of law given the existence of cause in fact." *Id.* at 779. Both elements must be satisfied. *v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 753, 818 P.2d 1337 (1991).

1. PLAINTIFFS CANNOT SHOW THAT ANY ACT OR OMISSION BY MS. LAMOND WAS A CAUSE IN FACT OF MULLAN'S CRIMINAL ACT

To establish cause in fact, plaintiffs must put forth evidence showing that in direct sequence, unbroken by any new independent cause, an act or omission by Ms. Lamond produced their harm, without which their harm would not have happened. *Hoffer v. State*, 110 Wn.2d 415, 424, 755 P.2d 781 (1988). Plaintiffs "'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Gingrich v. Unigard Sec. Ins. Co.*, 47 Wn. App. 424, 430, 788 P.2d 1096 (1990) (*quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). They must put forth facts that would be admissible in evidence and

that are specific, detailed, and not speculative or conclusory. *Sanders v. Woods*, 121 Wn. App. 593, 600, 89 P.3d 312 (2004); CR 56(e).

Particularly given the limited duration of Mullan's supervision prior to this crash, it is abject speculation to conclude that, but for anything Ms. Lamond did or didn't do, Mullan would not have been on the road, drunk, at the time of this crash. *Bordon v. State*, 122 Wn. App. 227, 95 P.3d 764 (2004), is controlling on this point, and the timeline and reasoning of *Bordon* are particularly instructive.

In *Bordon*, this court reversed a jury verdict against the State, concluding that that the trial court had erred by submitting the case to the jury when there was insufficient evidence of a causal connection between the DOC's negligence and the decedent's death. In *Bordon*, the offender (Jones) entered DOC community custody on February 29, 1996, after serving three months on a conviction of two counts of forgery and two counts of possession of stolen property. Upon his release, he twice failed to report to his DOC supervisor. Eight months into his DOC supervision, he was convicted of second degree burglary; while on bond for that charge, he was arrested for eluding police. He was released in November 1997, after serving 20 months in-custody. As a condition of his release, he (like Mullan) was ordered not to drive unless he was licensed to do so. *Bordon*, 122 Wn. App. at 231-32.

Following his release, he reported to his Community Corrections Officer (CCO) as directed, but did not return on either of the next two scheduled dates. His CCO informed his aunt that she would request a bench warrant for his arrest if he did not report the following day. He did not report the following day, and his CCO drafted a violation report but did not file it. She then transferred his file to the offender minimum management unit (OMMU). *Bordon*, 122 Wn. App. at 231-34.

The OMMU assistant reviewed Jones' file on January 2, 1998. Rather than file the violation report, she decided to attempt to persuade Jones to report for intake. Over the next two months, she sent several letters directing him to report, but he did not. During that time, Jones was arrested for driving without a license. *Id.* at 233-34.

On March 3, 1998, the OMMU assistant filed the violation report. Two weeks later, the court issued a bench warrant; ten days after that, Jones was arrested. At the violation hearing, DOC informed the court that Jones had failed to report on four separate occasions, had not provided a valid address, and had failed to pay his financial obligations – but did not advise the court of his arrest for driving without a license. The court ordered Jones to serve 15 days in jail; he served eight days and was released on April 7, 1998. Four days later, while driving without a license and while intoxicated, he crashed into the decedent. *Id.* at 234.

As here, plaintiffs in *Bordon* offered Mr. Stough as an expert witness. On motions in limine, the trial court excluded portions of Stough's testimony wherein he sought to opine (as he did here) that based on his experience supervising community corrections officers and dealing with the courts on such matters, on a more probable basis, had the DOC adequately advised the court of Jones' violations, he would have been sentenced to more than 15 days in jail, and thus would have been in custody on the date of the crash. Stough also sought to testify that had the DOC more timely responded to Jones violations, Jones would have better complied with his supervision. *Id.* at 245, fn. 53.

This court upheld the trial court's order striking these portions of Stough's testimony as speculative and lacking in expertise. The court then ruled that the trial court had erred in submitting the case to the jury when plaintiff had insufficient evidence on which a jury could base a finding of proximate cause.[20]

The *Bordon* court's reasoning is particularly instructive when

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[20] "Bordon did not present evidence about when a violation report would have been filed or when it would have been heard. She offered no testimony about whether the violation would have been pursued or proven. Nor did she present evidence or testimony, expert or otherwise, suggesting that the court would have sentenced Jones to additional jail time if DOC had reported that Jones violated the driving condition on January 5, 1998, or that the jail time would have encompassed the accident. This lack of evidence requires a jury to guess not only whether and when the violation would have been pursued but also whether a judge would have done something differently if he or she had known about the violation and what that different result would have been." *Id.* at 241-42.

juxtaposed against the facts and timeline here. In *Bordon*, Jones repeatedly failed to report for intake. Here, Mullan reported the next day – as directed. In *Bordon*, Jones incurred multiple new criminal charges, including a charge of driving without a license (a new criminal law violation). Here, it is undisputed that Mullan incurred no new charges following his supervision with the Seattle Municipal Court until the March 25th crash. It is undisputed that, whatever wrongful acts plaintiffs may now allege, no concerns were brought to the attention of the City, whether by report to the court, to probation, or to the police. In short, whereas the DOC had actual knowledge of violations, there is no evidence that the City had any basis to suspect that Mullan was in violation of his probation, let alone articulable basis to bring concerns to the court's attention.

But as in *Bordon*, there is no competent evidence in this case about when a violation report might have been filed, when it might have been heard, whether a violation would have been proven, and what a judge might have done with that information – a particularly speculative inquiry given that the court alone, as *Bordon* notes, may determine what, if any, sanction will be imposed for a probation violation.

Here, Mullan entered treatment following his release from Snohomish County Jail on February 8th. He was seen by either a treatment professional (or Ms. Lamond) on average once every two-and-a-half days

thereafter. According to the professionals at Lakeside Milam, Mullan complied with his treatment program leading up to the March 25th crash. A judge cannot speculate how he would rule under any hypothetical set of facts (*see* Cannon 2 of the Code of Judicial Conduct, Rule 2.10(B)), and only speculation could lead to an assumption that, had Ms. Lamond sought to further investigate the truthfulness of Mullan's assurances, she would have discovered information to bring to the court's attention, that a review hearing would have taken place prior to the March 25th crash, and that the municipal court would have taken action to re-incarcerate Mullan – the only sure way any court can eliminate the threat that any drunk driver poses.

As in *Bordon*, no facts support a cause in fact link between Ms. Lamond's supervision and Mullan's criminal act on March 25, and the court erred in deferring both this inquiry and a CR 56(e) ruling on the City's motion to strike the testimony of plaintiff's experts in this regard.

2. PLAINTIFFS CANNOT ESTABLISH LEGAL CAUSATION.

Legal causation – whether liability *should* attach as a matter of law – is a matter reserved for the court. *Hartley*, *supra*. While issues of duty and legal cause are intertwined, the existence of a duty does not automatically satisfy the requirement of legal causation. *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998). Rather,

The focus in the legal causation analysis is whether, as a matter of

> policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. A determination of legal liability will depend upon "'mixed considerations of logic, common sense, justice, policy, and precedent.'"

Id. 478-79 (citation omitted). Here, strong considerations of logic, common sense, policy and justice mandate dismissal. Particularly with the specter of joint and several liability looming large, it should be patent that no local jurisdiction in this state is in position to shoulder the potentially uncapped financial burden of insuring against the thousands of drunk drivers who plague Washington roadways, held in check largely only by their own recognizance and a legislative framework that predicates a DUI offender's liberty to drive on his license to drive – a matter that the State alone controls. Again, municipal probation departments are not an enforcement arm of the Department of Licensing, and should not be judicially made to be so.

Constitutionally sound means of effectively confronting the DUI threat remain elusive, in Washington and across the nation.[21] Municipal probation departments are not the answer to this societal problem and cannot be made to shoulder the impossible responsibility of insuring against an

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[21] *See*, e.g., *Virginia v. Harris*, 130 S.Ct. 10, 11 (2009) (C.J. Roberts, dissenting from Supreme Court's denial of certiorari of Virginia Supreme Court decision holding that Fourth Amendment prohibits officers from acting on anonymous tips of drunk driving absent independent corroboration of erratic driving); *see also City of Seattle v. Mesiani*, 110 Wn.2d 454, 462, 755 P.2d 775 (1986).

alcoholic's relapse and the unpredictable threat he may pose. The Legislature has recognized the difficulties of even those State agencies it has specifically tasked and funded to monitor licensing restrictions to ensure an offender's compliance. *See* ESSB 5912, 2013 Ch. 35 § 38. Subjecting probation officers to tort liability for their inability to keep drunk drivers off the road would serve only to encourage municipal courts across the state to disband their departments altogether. This would leave thousands of addicts and other at-risk offenders without the access to services and programs that probation departments can facilitate. As the record reflects, it is precisely this reasoning that compelled the State Legislature, post-*Hertog*, to bar these kinds of suits against municipal probation officers absent a showing of gross negligence, a finding no reasonable jury could reach under the undisputed facts and timeline of this case. Neither actual nor legal cause exists.

IV. CONCLUSION

In ruling on the parties' motion, Judge Ramsdell appropriately acknowledged the magnitude of the tragedy underlying this case:

> [T]he hardest part about all of our jobs in this regard is that the facts of this case are so egregious and so sympathetic that it's often hard to keep your eye on what the law requires as opposed to what you would like to accomplish and what you think might be the right answer in that more global sense.

VRP 104. The City likewise sympathizes deeply with the Schulte family. With respect to this civil action, however, as a matter of law there is

insufficient evidence to sustain a finding of negligence, let alone gross negligence, against Ms. Lamond for anything she did, or didn't do, over the ten short weeks she supervised Mullan, nor facts on which a reasonable jury could sustain a finding that any alleged act or omission was a proximate cause of the damages sustained. The trial court's denial of the City's Motion for Summary Judgment on these points was in error, and the City respectfully requests that this court reverse that order and remand this case for entry of an order dismissing all claims against the City.

DATED this 20th day of August, 2015

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