No. 93594-7

SUPREME COURT OF THE STATE OF WASHINGTON

No. 72821-1-I

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,

Respondents,

v.

MARK W. MULLAN and JANE DOE MULLAN, husband and wife,

Defendants,

CITY OF SEATTLE, a municipal corporation,

Appellant.

PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals here misapplied the gross negligence standard adopted by the legislature after this Court's decision in *Hertog v. City of Seattle*, 138 Wn.2d 265, 278-81, 979 P.2d 400 (1999). In doing so, the Court of Appeals improperly focused on actions a Seattle Municipal Court ("SMC") probation officer could have taken, as opposed to the actions the officer actually took pursuant to court-established probation supervision policies. This error and the resulting expansion of probation officers' duties conflicts with established case authority, raises issues of substantial public interest, and warrants review by this Court.

Hertog applied a negligence standard for liability of limited jurisdiction courts' supervision of misdemeanant probationers, but invited legislative clarification of that standard.[1] In response, the legislature enacted RCW 4.24.760 and imposed liability only for gross negligence. Also following *Hertog*, the Administrative Office of the Courts ("AOC") adopted Administrative Rule for Courts of Limited Jurisdiction ("ARLJ") 11. ARLJ 11 permits limited jurisdiction courts to adopt misdemeanor probation departments and to establish the means and methods by which probation services are provided.

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[1] *Hertog*, 138 Wn.2d at 278-81. In so holding, this Court cited its prior decision in *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), which held that the state may be liable for the negligence of a parole officer in supervising a parolee.

Following the adoption of ARLJ 11 and RCW 4.24.760, SMC voluntarily determined to continue its probation program and refined its policies and procedures defining the scope of supervisory services expected of its probation officers. Although the probation officer involved in this case exceeded SMC's supervision requirements, and despite the lack of substantial evidence of serious negligence, the Court of Appeals held that Plaintiffs had established an issue of fact on gross negligence. The Court thus (1) undermined the legislature's and AOC's actions and expanded the duty owed by limited jurisdiction courts and their officers in a manner rejected by previous Courts of Appeals and (2) applied a lower standard for defeating summary judgment in a gross negligence case than had been previously applied by this Court. Accordingly, the opinion on review here is in conflict with decisions of this Court and the Court of Appeals, rendering review appropriate under RAP 13.4(b)(1) and (2).

Further, review is warranted under RAP 13.4(b)(4) because this case involves issues of substantial public interest that should be determined by this Court. After careful consideration and balancing of the benefits and liabilities inherent in the provision of probation services by limited jurisdiction courts pursuant to ARLJ 11, the legislature acted to encourage such courts to offer probation services by making them liable only for gross negligence. The Court of Appeals decision here eviscerates

this important limitation and re-imposes significant liability on SMC. In doing so, the Court of Appeals creates a disincentive for municipal governments to provide voluntary probation services. And the decision also implicates state and county probation systems, which are subject to the same gross negligence standard. The Court of Appeals' decision will thus broadly affect multiple governments.

II. IDENTITY OF PETITIONER

Petitioner is the City of Seattle, defendant in the trial court and appellant in the Court of Appeals. The City of Seattle is a municipal government consisting of executive, legislative, and judicial branches. SMC is the judicial branch of the Seattle City government.

III. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals issued its unpublished decision in *Schulte et al. v. Mullan & City of Seattle*, No. 72821-1-I, on July 18, 2016 ("Decision"). A copy of the Decision is attached as Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

1. This Court and the Court of Appeals have held that there can be no issue of gross negligence unless there is substantial evidence of serious negligence. Should the Court grant review under RAP 13.4(b)(1) and (2) where the Court of Appeals decision here concluded that ordinary negligence was sufficient to send the issue of gross negligence to the jury?

2. Post-*Hertog* Court of Appeals decisions defined probation officers' duties by the statutory or administrative obligations governing such officers' responsibilities. Should the Court grant review under RAP 13.4(b)(2) where the Court of Appeals decision here expands that duty beyond specified obligations and directly conflicts with those decisions?
3. The legislature has expressed its intent to encourage limited jurisdiction courts to voluntarily establish misdemeanor probation departments by adopting a gross negligence standard for liability. Should this Court grant review under RAP 13.4(b)(4) where the Court of Appeals decision here undermines the legislature's intent and creates a disincentive for cities, counties, and the state to provide misdemeanor probation services?

V. STATEMENT OF THE CASE

A. SMC's voluntary misdemeanor probation department.

Misdemeanor probation departments are established solely at the discretion of individual courts under ARLJ 11. ARLJ 11.1 specifies that "if a court elects to establish" such a department, "[t]he method of providing [misdemeanor probation services] shall be established by the presiding judge of the local court to meet the specific needs of the court."[2] Misdemeanor probation departments provide services including offender

[2] RCW 10.64.120 authorizes ARLJ 11. Several other statutes also recognize the ability of limited jurisdiction courts to establish voluntary probation departments. *See* RCW 4.24.750; RCW 4.24.760; RCW 35.20.255.

risk assessment and classification, evaluation and referral to treatment, and supervision of offenders based on their risk classification. ARLJ 11.2(b).

SMC chose to retain its voluntarily adopted misdemeanor probation department following the AOC's adoption of ARLJ 11 in 2001. SMC has established policies and procedures that govern the intake, risk assessment, and supervision of misdemeanants. CP 240. SMC's probation policies establish four levels of and define required probation officer responsibilities for supervision for misdemeanants. CP 246-47, 262-66. SMC's probation program assists judges in decision-making with respect to particular offenders and connects offenders to services and programs that afford opportunities for rehabilitation. CP 241, 244.

In 2007, the legislature enacted legislation that specifically recognized the public benefit of courts offering probation services:

> The legislature finds that the provision of preconviction and postconviction misdemeanor probation and supervision services, and the monitoring of persons charged with or convicted of misdemeanors to ensure their compliance with preconviction or postconviction orders of the court, are essential to improving the safety of the public in general.

RCW 4.24.750. The legislature further provided that limited jurisdiction courts are liable only for gross negligence in the supervision of misdemeanant probationers. *See* RCW 4.24.760(1).

B. Mullan's history of DUI and assignment to probation.

In January 2013, Mark Mullan was sentenced to SMC probation for a December 25, 2012 DUI arrest and guilty plea. CP 307, 310-13, 315-17. As conditions of his probation, Mullan was required to not drive without a valid license, to comply with mandatory ignition interlock device requirements in the event he obtained a license and drove his vehicle, and to refrain from drinking alcohol, among other things. CP 315-16. At the time he was sentenced to probation, Mullan also had a separate pending DUI charge in Snohomish County. CP 248.

SMC's risk assessment tool assigned Mullan to Level III supervision. CP 247-48. Under SMC policy, probation officers are not required to monitor Level III offenders through face-to-face visits; rather, their duties are limited to (1) reviewing the offender's compliance with court conditions every 90 days, (2) reviewing the District and Municipal Court Information System and SMC violator history every six months, and (3) following up "as appropriate on new information that requires action." CP 247-48, 266 (MCS-210-3.06.020(IV)(B)(1), (B)(2), (D)).

Mullan's probation intake appointment occurred on January 8, 2013. CP 245. Because Mullan's probation officer, Stacey Lamond, knew of his pending Snohomish County DUI, and because Lamond had no prior behavioral history to rely on, Lamond opted to supervise him at a

higher level than SMC policies required. Thus, although not required, Lamond directed Mullan to report for a face-to-face meeting on February 22, 2013—45 days after intake and 45 days prior to SMC's first required supervisory actions. CP 248. On February 21, SMC received a letter from Mullan's alcohol treatment program indicating that he was current with his treatment. CP 298-99. At the February 22 meeting, Mullan told Lamond that treatment was going well, that he was working, and that he was not driving. CP 145-48, 150, 160-61, 164-65, 248. At that time Lamond had no indication that Mullan was violating his probation conditions. Lamond's next scheduled action was on April 8, 2013 (90 days after intake), when she was required by policy to review Mullan's compliance with his probation conditions. CP 248.

C. Plaintiffs file a lawsuit after a March 2013 DUI crash.

On March 25, 2013, Mullan, while drunk, drove his vehicle into Karina and Elias Ulriksen-Schulte and Elias's grandparents, Dennis and Judith Schulte. CP 5. The Ulriksen-Schultes were severely injured and the Schultes were killed. Only after the crash did SMC learn of allegations that Mullan had been drinking and driving his vehicle while on probation. SMC also learned only after the crash that Mullan had been in custody January 14 through February 8, 2013, for arriving intoxicated at a hearing in his Snohomish County DUI charge. CP 153-54, 165, 171.

Plaintiffs filed a Complaint in October 2013, alleging that the City's negligent failure to monitor, supervise, and sanction Mullan for violations of his probation proximately caused the March 25, 2013 collision. CP 1-14. The City moved for summary judgment on grounds that insufficient evidence supported a finding that any act or omission by the City constituted gross negligence or proximately caused the damages sustained. CP 24-58. The trial court denied the City's motion. Record of Proceedings (Oct. 31, 2014) at 112-13; CP 3532-37.

D. The Court of Appeals' Decision.

The Court of Appeals affirmed. The Court determined that Plaintiffs met their burden to oppose summary judgment merely upon a showing of potential negligence. Specifically, the Court held that "[b]ecause a jury could find that the probation officer breached her duty by failing to track the Snohomish County case and contact collateral sources", the standard for negligence, "a jury could also find that the breach was a failure to use even slight care", the standard for gross negligence. Decision at 8. The Court also held expert testimony that faulted the probation officer for failure to take actions beyond those required by SMC policy raised an issue of fact on gross negligence.[3]

[3] The Court did so without reaching the evidentiary standards required under CR 56(e) or the City's motion to strike these expert conclusions.

VI. ARGUMENT

A. The Decision conflicts with decisions of this Court and the Court of Appeals applying a gross negligence standard.

Contrary to the Court of Appeals' holding, a plaintiff cannot survive summary judgment on gross negligence by presenting evidence of potential negligence. Rather, other courts have made clear that the nonmoving party must show substantial evidence of serious negligence.

In *Nist v. Tudor*, 67 Wn.2d 322, 407 P.2d 798 (1965), this Court exhaustively analyzed the meaning of "gross negligence" in addressing whether a trial court properly ruled that defendants' actions did not constitute gross negligence. The Court explained that gross negligence is

> [A] form of negligence on a larger scale.... It means, therefore, gross or great negligence, that is, negligence substantially and appreciably greater than ordinary negligence. Its correlative, failure to exercise slight care, means not the total absence of care but care substantially or appreciably less than the quantum of care inhering in ordinary negligence.

Id. at 331. Consequently, the Court noted "there can be no issue of gross negligence unless there is substantial evidence of serious negligence." *Id.* at 332. In determining the sufficiency of the evidence presented in *Nist*, this Court emphasized that the driver had turned into the path of an oncoming truck after failing to slow down, signal, or even look. *Id.* Thus, "a jury could well infer that she acted in the exercise of so small a degree

of care under the circumstances as to be substantially and appreciably more negligent than ordinary, and hence could be held guilty of gross or great negligence." *Id.*

Consistent with *Nist*, multiple Court of Appeals decisions have concluded that evidence of ordinary negligence is not evidence of gross negligence and that to survive summary judgment, the plaintiff "must offer something more substantial than mere argument that the defendant's breach of care arises to the level of gross negligence." *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 460, 309 P.3d 528 (2013); *see also Boyce v. West*, 71 Wn. App. 657, 665-66, 862 P.2d 592 (1993).

Indeed, two Court of Appeals cases have reached the above conclusion affirming summary judgment where the plaintiff alleged negligent probation supervision. In *Kelley v. State*, 104 Wn. App. 328, 330-32, 17 P.3d 1189 (2000), Court of Appeals Division Two addressed the plaintiff's claim (dismissed on summary judgment) that the state Department of Corrections ("DOC") negligently supervised an offender who assaulted her while on probation. The plaintiff presented evidence that the probation officer failed to comply with statutes and DOC rules that required the officer to monitor and enforce the offender's curfew, investigate the offender's encounters with police, and make required field contacts with the offender. *Id.* at 332-34. The Court agreed with the

plaintiff that a jury could possibly find negligence from the evidence presented, but held that this was "not 'substantial evidence of serious negligence' and, thus, fell short of showing gross negligence." *Id.* at 338 (citing *Nist*, 67 Wn.2d at 332).

Similarly, in *Whitehall v. King Cnty.*, 140 Wn. App. 761, 763, 167 P.3d 1184 (2007), Court of Appeals Division One affirmed summary judgment dismissal of a claim that King County's negligent supervision of a misdemeanant probationer led to serious injuries. The plaintiff argued the County was negligent in failing to monitor the offender more closely, among other things. *Id.* at 769-70. The Court, following *Kelley*, held that even if the County had such a duty, "there [was] no substantial evidence of serious negligence, and thus no showing of gross negligence." *Id.* at 770.

These decisions applied a common sense rule: plaintiffs must meet a higher burden to survive a summary judgment motion with respect to gross negligence than would be required under an ordinary negligence standard. *See also Johnson*, 176 Wn. App. at 461 (where standard of proof is gross negligence, nonmoving party on summary judgment must show it can support its claim under the higher standard). The decisions further indicate that the gross negligence analysis properly focuses on what the probation officer actually did over the course of supervision

given the circumstances presented—not on what additional steps the officer could have taken. *See Whitehall*, 140 Wn. App. at 768-69.

The Court of Appeals' Decision ignores this heightened burden and conflicts with the well-established rule. First, the Court concluded that evidence of ordinary negligence was enough to send the issue of gross negligence to the jury. *See* Decision at 8 ("Because a jury could find that [Lamond] breached her duty by failing to track the Snohomish County case and contact collateral sources, a jury could also find that the breach was a failure to use even slight care."). The Court did not even address whether plaintiffs met their burden to provide "substantial evidence of serious negligence". Instead, the Court summarily distinguished *Whitehall* and *Kelley* on the ground that in those cases there was no "direct correlation" between the allegedly inadequate supervision and the danger posed by the offenders. *See* Decision at 8. But neither *Whitehall* nor *Kelley* relied on any such "correlation" in finding a lack of evidence to support a claim of gross negligence; the Decision here inappropriately incorporates such an analysis.[4]

[4] In *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 119 P.3d 825 (2005), this Court indicated that the nexus between the crime being supervised and the subsequent act that causes harm may be relevant to what is foreseeable and, thus, the scope of a correction officer's duty. *Id.* at 315. But *Joyce* did not apply such an analysis in determining whether an officer's breach of such duty amounts to gross negligence.

Second, contrary to *Whitehall*, the Court of Appeals focused principally on what more Lamond could have done to ensure Mullan complied with his probation conditions, rather than considering the actual scope of Lamond's supervisory activities prior to the March 2013 crash. In doing so the Court improperly constricted the gross negligence analysis.

In addition to the above conflicts, the Court of Appeals' failure to apply a heightened gross negligence standard tainted its cause in fact analysis. This Court held in *Nist* that plaintiffs have "the burden of proving gross negligence as the proximate cause of the injuries...." 67 Wn.2d at 332-33 (emphasis added). Thus, the heightened burden for showing gross negligence impacts the proximate cause analysis. Here, the Decision concluded that Plaintiffs submitted sufficient evidence to support a non-speculative finding of cause in fact without considering any heightened burden. *See* Decision at 10. The Decision's cause in fact conclusion thus conflicts with *Nist*.

B. The Decision is in conflict with Court of Appeals Decisions regarding the duty of probation officers.

The Decision also conflicts with the *Kelley* and *Whitehall* holdings regarding the scope of a probation officer's duty. Specifically, *Kelley* and *Whitehall* affirmed summary judgment dismissal of negligent supervision claims in part because (1) the supervising officer had no duty to act where

it had no knowledge of probation violations and (2) the supervising officer had no duty to go beyond the adopted policies and procedures.

In *Kelley*, the plaintiff sued DOC, alleging she was assaulted due to DOC's negligent supervision of a probationer. 104 Wn. App. at 329. The Court—citing RCW 72.09.320's[5] gross negligence standard for DOC community placement activities—first held that "a community custody officer's duty is not 'to take reasonable precautions to protect anyone who might foreseeably be endangered,' but to refrain from gross negligence." *Id.* at 333. In determining the scope of this duty, the Court turned to applicable statutes and DOC rules. *Id.* at 333-34. In analyzing whether the officer "knew or should have known" that the probationer violated one or more conditions of his probation, the Court distinguished between (1) an officer's failure to investigate and discover violations in the first place (i.e., by proactively checking police reports) and (2) his failure to take appropriate action after learning of violations. *Id.* at 334, 337-38. With respect to the former, the Court determined that a jury could not find the officer breached his duty to avoid gross negligence. *Id.* at 338. Thus, although the officer generally believed the offender was dangerous, the evidence was insufficient to find gross negligence because, "to [the

[5] RCW 72.09.320 is the gross negligence statute applicable to the state's provision of probation services.

probation officer's] knowledge, [the offender] had not violated any of his community custody conditions." *Id.*

In *Whitehall*, the Court of Appeals similarly focused on the level of supervision required by the County's probation department.[6] *See Whitehall*, 140 Wn. App. at 764 ("The level of supervision followed by the County's probation department for a misdemeanant probationer . . . did not include home visitations or field investigations, and none were performed. Vomenici's probation officers observed no behavior that raised any concern that Vomenici was likely to cause harm or do violence against others."). The Court rejected the argument, similar to the one here, that the County was negligent in failing to require its probation officers to do more to ensure the probationer was compliant with his probation conditions, noting that "the King County District Court's policy was that probation officers would not conduct home visits or contact third parties in the community." *Id.* at 769. The Court concluded that nothing in the statutory scheme governing County probation services "give[s] rise to the supposition that such affirmative actions as home visits or third party contacts are required in supervising misdemeanant probationers." *Id.*

Kelley and *Whitehall* establish that (1) the policies and procedures governing probation set the probation officer's duty with respect to

[6] *Whitehall* was decided under the gross negligence statute applicable to counties that provide probation services. *See* RCW 9.95.204(4).

supervision, (2) a probation entity's failure to take affirmative action beyond what is required by such policies and procedures (such as home visits or third party contacts) is not grounds for liability, and (3) a probation officer's lack of knowledge of probation violations must be distinguished from the officer's failure to follow up on known violations. Under *Kelley* and *Whitehall*, the question is not whether Lamond could have done more to prevent the accident; it is whether the undisputed steps she actually took met the "slight care" required under the gross negligence standard given SMC's policies and procedures.

The Court of Appeals' Decision, however, allows the trial court to define the standard of care based not just on SMC's policies but on whether expert witnesses "opine that more is required under a generalized standard of care for probation officers." Decision at 6. The Decision thus wrongly concludes that Lamond's failure to contact collateral sources and follow up on Mullan's DUI charge in another court (the "more" than the SMC's policies require) could constitute gross negligence. There is no claim here that Lamond did not meet SMC's policies and procedures nor that Lamond had knowledge of any probation violation. Allowing Plaintiffs' case to proceed on the theory that Lamond should have done more conflicts with *Kelley* and *Whitehall*.

C. Review is warranted because the Decision raises an issue of substantial public interest.

The Decision also raises an issue of substantial public interest because it disrupts settled expectations regarding liability for probation supervision and creates a disincentive for governments to establish voluntary misdemeanor probation departments. The Decision therefore undermines the legislature's considered decision to encourage limited jurisdiction courts to provide misdemeanor probation services and to allow such courts to set standards for those services.

As noted above, *Hertog*'s ordinary negligence standard predated the adoption of ARLJ 11, which gives limited jurisdiction courts the authority to structure and manage their own probation departments. *Hertog* was also decided before the legislature adopted RCW 4.24.760's gross negligence standard. In changing the standard for breach of duty from ordinary negligence to gross negligence, the legislature explicitly recognized that "the provision of preconviction and postconviction misdemeanor probation and supervision services . . . are essential to improving the safety of the public in general." *See* Laws of 2007, ch. 174, § 1 (codified at RCW 4.24.750). In the House bill report on S.H.B. 1669 (the bill enacted as RCW 4.24.750 and 4.24.760), the summary of testimony supporting the bill noted:

> Accountability is the cornerstone of the criminal justice system. Having a probation department is one of the best ways to obtain that accountability and protection for our citizens. Under our current system, the more people we put on supervision, the greater our liability. We are always subject to the charge that we could do more, but it is not possible to get 100 percent compliance from this population of offenders. When an offender on supervision re-offends, we bear an unfair burden of liability. Cities are drastically changing how they deal with probation as a result of this liability exposure. They are doing less supervision, not more, which may actually increase the risk to public safety.

H.B. Rep. on Substitute H.B. 1669, 60th Leg., Reg. Sess., at 3 (Wash. 2007) (emphasis added). Similarly, in the Senate bill report on S.H.B. 1669, the summary of testimony supporting the bill stated:

> Judges aren't sentencing offenders to probation because of concerns about liability. So instead, they are sentenced to a period of time in jail and that isn't going to change a person's behavior. A gross negligence standard still provides accountability. The policy of encouraging municipalities to do probation balances against the possible harm to people in terms of having to prove to a higher standard.

S.B. Rep. on Substitute H.B. 1669, 60th Leg., Reg. Sess., at 3 (Wash. 2007) (emphasis added).

Contrary to the legislature's intent to encourage the provision of probation services, the Decision indicates that compliance with court-established probation policies may still lead to liability if a jury could possibly find that the probation officer could have done more to prevent a tragedy. The Decision thereby makes limited jurisdiction courts liable for

omissions that are not violations of the courts' own policies and for which those courts never intended to assume liability when adopting probation programs. As foreshadowed in the House and Senate bill reports, local governments will likely choose to end misdemeanant probation services rather than run the risk of extraordinary damage awards if the Court of Appeals' Decision is allowed to stand.

Moreover, the standards applied by the Court of Appeals increase the potential liability for the state and counties that operate probation programs. The legislature has subjected those entities to the same gross negligence standard as SMC. *See* RCW 72.09.320; RCW 9.95.204. By departing from *Kelley* and *Whitehall* (which addressed state and county probation systems)[7], the Decision imposes gross negligence liability on such entities even if their officers follow all required procedures.

Finally, this Court should address the policy concerns raised by SMC's legal causation argument. The Court of Appeals concluded that argument was "foreclosed by *Hertog*, where the court rejected a similar argument." Decision at 11. In doing so, the Court of Appeals failed to address the impact of ARLJ 11 and RCW 4.24.760, both of which post-date *Hertog*. As this Court has recognized, "[T]he issues regarding

[7] *Kelley* and *Whitehall* are consistent with the notion that where the legislature has authorized a voluntary probation system and made it subject to a gross negligence standard, a court's application of that standard must be informed by what the legislature was attempting to accomplish in encouraging the adoption of probation systems.

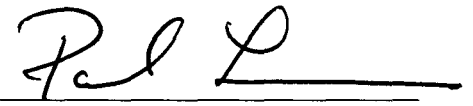
whether duty and legal causation exist are intertwined....This is so because some of the policy considerations analyzed in answering the question whether a duty is owed to the plaintiff are also analyzed when determining whether the breach of the duty was the legal cause of the injury in question." *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998). Because ARLJ 11 and RCW 4.24.760 bear on the question of duty, their impact should be addressed as part of the "mixed considerations of logic, common sense, justice, policy, and precedent" that guide the legal causation analysis. *Id.* (citations omitted).

VII. CONCLUSION

The Decision makes SMC potentially liable for Mullan's actions although no substantial evidence of serious negligence was presented by Plaintiffs. The Decision also expands municipal probation departments' duties in a manner not supported by other Court of Appeals decisions and contrary to legislative intent. And the Decision's impact is not limited to the SMC and other limited jurisdiction courts; to the contrary, it will make any similarly situated municipality, county, and even the state itself similarly liable. Because the Decision conflicts with decisions of this Court and the Court of Appeals and presents an issue of substantial public interest, review is appropriate under RAP 13.4(b)(1), (2), and (4).

RESPECTFULLY SUBMITTED this 17th day of August, 2016.

PACIFICA LAW GROUP LLP

By 

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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,	)	No. 72821-1-I
	)	DIVISION ONE
Respondents,	)	UNPUBLISHED OPINION
v.	)	FILED: July 18, 2016
MARK W. MULLAN and JANE DOE MULLAN, husband and wife,	)	
Defendants,	)	
CITY OF SEATTLE, a municipal corporation,	)	
Appellant.	)	

BECKER, J. — The City of Seattle is a defendant in a suit for wrongful death and personal injury caused by a drunk driver who was on probation for a previous drunk driving conviction. The plaintiffs allege the probation officer was grossly negligent for failing to supervise the driver more closely. Because the

record contains evidence from which a jury could find the contested elements of breach of duty and causation, the trial court correctly denied the city's motion for summary judgment.

FACTS

The plaintiffs seek damages on behalf of four members of the Schulte family. Dennis and Judy Schulte were killed, and their daughter-in-law Karina Ulriksen-Schulte and her newborn son were seriously injured, when a drunk driver hit them as they were crossing a street on March 25, 2013. The driver was Mark Mullan. At the time, he was on probation in Seattle for driving under the influence on December 25, 2012. Charges were pending against him in Snohomish County for driving under the influence on October 8, 2012.

The plaintiffs filed this lawsuit in October 2013 against the city and Mullan, alleging a breach of the duty to supervise probationers. They contend that with proper supervision, Mullan would not have been behind the wheel on March 25, 2013, because he would have been in custody or under close alcohol monitoring for probation violations that should have been discovered. The city moved for summary judgment. The trial court's order denying the city's motion for summary judgment is before us on discretionary review.

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). We make the same inquiry as the trial court. Hertog, 138 Wn.2d at 275. The facts and

reasonable inferences are considered in the light most favorable to the nonmoving party. Hertog, 138 Wn.2d at 275.

The elements of a negligence cause of action are (1) the existence of a duty to the plaintiff, (2) breach of the duty, and (3) injury to plaintiff proximately caused by the breach. Hertog, 138 Wn.2d at 275. Existence of duty is a question of law. Hertog, 138 Wn.2d at 275. Breach and proximate cause are generally fact questions for the trier of fact. But if reasonable minds could not differ, these factual questions may be determined as a matter of law. Hertog, 138 Wn.2d at 275.

DUTY AND BREACH

To determine whether genuine issues of material fact preclude summary judgment on the issue of duty, it is helpful to contemplate in broad strokes how the jury will be instructed on duty if the case goes to trial. Here, the applicable duty is articulated in Hertog: "the City and its probation counselors have a duty to control municipal court probationers to protect others from reasonably foreseeable harm resulting from the probationers' dangerous propensities." Hertog, 138 Wn.2d at 281.

The plaintiffs allege that the probation officer who supervised Mullan breached the city's duty under Hertog in several ways. First, plaintiffs allege the probation officer was negligent in failing to track the pending charge against Mullan for driving under the influence in Snohomish County in October 2012. If she had done so, they contend, she would have discovered that the Snohomish County court issued a warrant when Mullan failed to appear for a court date on

January 4, 2013, that Mullan was drunk when he came to court on January 14 to quash the warrant, and that he was held in custody there for more than two weeks until he bailed out. Second, the plaintiffs allege that the probation officer was negligent in failing to contact collateral sources to verify what Mullan was telling her. Arguably, through such inquiry, she would have discovered that Mullan was missing treatment appointments and was continuing to drink and drive.

The city responds that a jury cannot find that Mullan's probation officer breached the duty stated in Hertog because the evidence shows she fully complied with policies and procedures promulgated by the Seattle Municipal Court to guide the intake, risk assignment, and supervision of misdemeanor defendants. The city phrases its argument on appeal as a request for this court to elucidate the "nature and scope" of the duty imposed by Hertog. But in effect, the city is arguing that a Hertog instruction on duty must be accompanied by an instruction informing the jury that the city's duty is limited by policies and procedures decided at the municipal court level and that the duty is fulfilled by compliance with such policies and procedures. The plaintiffs do not agree that the administrative policies and procedures of the municipal court are legal limitations on the city's duty. In the plaintiffs' view, the duty as stated in Hertog is complete and sufficient for a duty instruction, without limitation, embellishment or elaboration.

The city relies on Whitehall v. King County, 140 Wn. App. 761, 167 P.3d 1184 (2007). The offender in Whitehall, while on probation in King County for

theft, maliciously exploded an illegal firework near a residence. The explosion injured an occupant, who then sued the county for negligent supervision. This court upheld a grant of summary judgment to the county, holding that the probation officers had complied with applicable court policies and under the facts of the case, the county was not obligated to monitor the offender more closely than it did. Whitehall, 140 Wn. App. at 770. The plaintiffs contend that Whitehall was wrongly decided.

Even if the duty of supervision is limited as the city asserts, a trial would still be necessary to determine whether the city breached its duty. For example, one of the administrative policies and procedures of the Seattle Municipal Court provides, "Probation staff will follow up as appropriate on new information that requires action." MCS-210-3.06.020(IV)(D). It is a disputed issue whether, as alleged by expert witnesses for the plaintiffs, the pending charge against Mullan in Snohomish County qualified as "new information that requires action." It is also a disputed issue whether an obligation to contact collateral sources for information about Mullan beyond what he himself supplied was imposed by local policy requiring "assessment of offender risk, needs and compliance with court ordered probation conditions." MCS-210-3.06.020. Thus, even if Whitehall is controlling, the trial court did not err in denying the city's motion for summary judgment. In Whitehall, it was undisputed that the probation officers complied with local policies and procedures. Here, it is disputed. Expert testimony on both sides creates a genuine issue of material fact.

Accordingly, we decline to revisit Whitehall. Nor do we attempt to draw from Whitehall a conclusion about how the jury should be instructed on duty. We are dealing here with a denial, not a grant, of summary judgment. We are mindful of the pitfalls of interlocutory review of an order denying summary judgment. See Maybury v. City of Seattle, 53 Wn.2d 716, 720-21, 336 P.2d 878 (1959). The trial court has yet to decide, under the facts of the present case that differ significantly from the facts of Whitehall, whether it will be appropriate to instruct the jury that the city's duty is confined to the policies and procedures the municipal court has generated for probation officers. A related question is whether the local policies and procedures exclusively define the standard of care or whether the trial court will permit expert witnesses to opine that more is required under a generalized standard of care for probation officers. The law will be better served if these issues are first decided concretely in the trial court rather than abstractly in this court.

GROSS NEGLIGENCE

The city is liable for the inadequate supervision or monitoring of its misdemeanant probationers only if its conduct constitutes gross negligence. RCW 4.24.760(1). Presumably, at trial the jury will be instructed that negligence is the failure to exercise ordinary care and that gross negligence is the failure to exercise slight care. See 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 10.01, at 124 (6th ed. 2012) (WPI) (negligence); WPI 10.07, at 132 (gross negligence).

The city contends there is insufficient evidence of gross negligence to send the issue to the jury.

The Washington Supreme Court has lamented both the elusive meaning of gross negligence and the persistent problem of whether to send the issue of gross negligence to the jury. Nist v. Tudor, 67 Wn.2d 322, 325, 407 P.2d 798 (1965). The general inclination is to leave the question to the jury when there is "substantial evidence of acts or omissions seriously negligent in character." Nist, 67 Wn.2d at 326.

Nist states that "gross negligence, being a form of negligence on a larger scale, must also, like ordinary negligence, derive from foreseeability of the hazards out of which the injury arises." Nist, 67 Wn.2d at 331. "In determining the degree of negligence, the law must necessarily look to the hazards of the situation confronting the actor." Nist, 67 Wn.2d at 331. In Nist, the hazard confronting the driver as she was trying to turn left was an oncoming truck. The court held the fact that the driver turned "suddenly into so obvious a danger" supplied sufficient evidence for the jury to find gross negligence. Nist, 67 Wn.2d at 332.

The city relies on Kelley v. Department of Corrections, 104 Wn. App. 328, 17 P.3d 1189 (2000), review granted, 144 Wn.2d 1021 (2001) (motion for voluntary withdrawal of review granted January 10, 2002). In Kelley, a man committed a sexual assault while out on community custody after pleading guilty to attempted rape. Kelley, 104 Wn. App. at 330-31. The victim sued the State for negligent supervision. Kelley, 104 Wn. App. at 329. This court affirmed the

grant of summary judgment to the State, concluding that the evidence fell short of showing gross negligence. Kelley, 104 Wn. App. at 338; see also Whitehall, 140 Wn. App. at 770.

Here, the city contends a jury could not rationally find gross negligence because the probation officer's level of supervision satisfied or exceeded the standard of care set by local court policies and procedures. As discussed above, that is a matter of factual dispute. Also, the trial court persuasively distinguished Whitehall and Kelley when noting that unlike in those cases, here there was a "direct correlation" between the allegedly inadequate supervision of Mullan and the danger reflected in his recent criminal activities. The probation officer was confronted with the arguably foreseeable hazard that Mullan would continue to drink and continue to drive under the influence. Because a jury could find that the probation officer breached her duty by failing to track the Snohomish County case and contact collateral sources, a jury could also find that the breach was a failure to use even slight care. Following Nist, we conclude the trial court did not err in allowing the issue of gross negligence to go to a jury.

CAUSATION

The city contends that even if the evidence supports gross negligence, the plaintiffs' claims must fail for lack of proximate cause. Proximate cause consists of cause in fact and legal causation. Hertog, 138 Wn.2d at 282. Cause in fact concerns "but for" causation, events the acts produced in a direct unbroken sequence which would not have resulted had the act not occurred. Hertog, 138

Wn.2d at 282. Proximate cause is generally a fact question for the trier of fact if reasonable minds could differ. See Hertog, 138 Wn.2d at 275.

The city contends a jury would have to engage in speculation to find: (1) that the probation officer would have learned from collateral sources enough information about Mullan's continued drinking and driving to justify asking the court to revoke his probation, (2) that the court would have held a contested hearing on allegations that Mullan was violating his conditions of probation, and (3) that the court would have found Mullan in violation and would have incarcerated him for a period including the day when he drove drunk and crashed into the Schulte family. For its analysis of causation, the city relies on Estate of Bordon v. Department of Corrections, 122 Wn. App. 227, 95 P.3d 764 (2004), review denied, 154 Wn.2d 1003 (2005).

In Bordon, the plaintiff, suing the State for negligently supervising a convict, did not submit evidence about when a violation report would have been filed, when it would have been heard, whether the violation would have been pursued or proven, whether the violation would have resulted in additional jail time, or whether that jail time would have encompassed the date of the plaintiff's injury. Bordon, 122 Wn. App. at 241. This court held that because the plaintiff did not present any evidence establishing a direct causal connection between the alleged negligence and the harm she suffered, the trial court erred when it denied the State's motion for judgment as a matter of law at the conclusion of the plaintiff's case. Bordon, 122 Wn. App. at 244.

In this case, the plaintiffs have presented evidence of the kind that was missing in Bordon. The Snohomish County court docket showing Mullan's drunken court appearance in that court on January 14, 2013, was there to discover if the probation officer had been tracking the case. Expert witnesses with experience in probation counseling testified that discovery of that incident would have resulted in an immediate violation report, a recommendation of significant jail time for Mullan and more intensive monitoring of his movements. With that information, a retired judge testified, the court would most likely have set additional review dates and additional monitoring conditions such as day reporting, daily portable breath test monitoring, or electronic home monitoring to make sure Mullan was compliant with his treatment program.

The evidence submitted by plaintiffs is adequate to support a rational jury in making a nonspeculative finding that, but for the city's failures in supervision, Mullan would not have been able to drive drunk on March 25, 2013. A jury could find that Mullan either would have been incarcerated on that date or at least would have been on an alcohol monitoring system. Because reasonable minds could differ, the question of cause in fact is for the jury.

The city also argues that the question of legal causation should be decided in its favor. Legal causation, an issue for the court to decide as a matter of policy, may be found lacking even if cause in fact is present when "the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998). "Legal causation is, among other

things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise." Schooley, 134 Wn.2d at 479. The city argues that making municipal probation departments liable for roadway tragedies caused by repeat drunk drivers will unduly strain municipal budgets and encourage courts to disband probation services altogether.

The city's argument on the lack of legal causation is foreclosed by Hertog, where the court rejected a similar argument. "Where a special relation exists based upon taking charge of the third party, the ability and duty to control the third party indicate that defendant's actions in failing to meet that duty are not too remote to impose liability." Hertog, 138 Wn.2d at 284. The Hertog court perceived that it was being asked to overrule Taggart v. State, 118 Wn.2d 195, 822 P.2d 243 (1992), and it declined to do so. Hertog, 138 Wn.2d at 284. See Taggart, 118 Wn.2d at 228 ("We do not believe recognizing that a parole officer's negligent supervision may be the legal cause of the injuries suffered by the victims of parolees' violent crimes will have an undue chilling effect upon parole officers' performance of their duties.")

IGNITION INTERLOCK DEVICE

One of the conditions of Mullan's sentence was to comply with "mandatory ignition interlock device requirements as imposed by the Department of Licensing." The probation officer gave Mullan information about contacting the Department of Licensing but did not verify that the device had been installed on Mullan's truck. Plaintiffs moved for partial summary judgment, requesting the

court to rule as a matter of law that the city's failure to verify installation was a breach of its duty to exercise slight care. The trial court denied the motion.

The plaintiffs ask this court to review and reverse this ruling as an error likely to be repeated on remand. RAP 2.4(a)(1). Because the plaintiffs, respondents on appeal, did not seek review of the decision denying their motion for summary judgment, we may reverse the trial court's decision only "if demanded by the necessities of the case." RAP 2.4(a)(2). Plaintiffs have not persuasively demonstrated necessity. The ruling is merely a denial of summary judgment and thus it remains subject to revision in the trial court as the case proceeds.

In summary, having reviewed the pretrial rulings the city has placed before us, and having considered the issues of duty, gross negligence, and causation, we conclude intervention by this court is not warranted. The denial of summary judgment is affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Jan, Jpt.

COURT OF APPEALS
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, Respondents, v. MARK W. MULLAN and JANE DOE MULLAN, husband and wife, Defendants, CITY OF SEATTLE, a municipal corporation, Appellant.	No. 72821-1-I PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party

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thereto; that on the 17th day of August, 2016 I caused to be served a true copy of the following documents:

1. Petitioner City of Seattle's Petition for Review; and
2. Proof of Service

per the parties' electronic service agreement, upon:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of August, 2016.

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