NO. 332012

IN THE
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

ESTATE OF VIOLA WILLIAMS,

Appellant,

v.

LOURDES HEALTH NETWORK, ET AL.

Respondents.

Appeal from the Superior Court of Washington
for Benton County

(Cause No. 14-2-00129-5)

REPLY BRIEF OF APPELLANT

REBECCA J. ROE, WSBA #7560
ANNE M. KYSAR, WSBA #28351
CARLA TACHAU LAWRENCE, WSBA # 14120 (Of Counsel)
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
206/622-8000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Table of Authorities, continued

Page

Table of Authorities, continued

Page

Statutes

Rules

Other Authorities

A. Summary Of Reply Argument

Contrary to respondents' claims, the record contains numerous questions of fact and evidence beyond a mere *prima facie* case that Benton and Franklin Counties' (collectively, the County) and Lourdes Health Network's (Lourdes) gross negligence proximately caused the murder of Viola Williams.[1]

First, respondents themselves defeat summary judgment by conceding Adam Williams' (Williams) Less Restrictive Alternative (LRA) should have been revoked, but blaming the other for the fact it did not occur.

Second, the record demonstrates *prima facie* causation (cause in fact), [2] which is virtually always a factual question for the jury. Both respondents had the authority to cause Williams' detention and placement in the hospital to stabilize him. Had either exercised their authority, Williams could not have murdered Viola Williams. Indeed, Lourdes PACT team members pleaded for revocation in the month before the murder, because of Williams' obvious deterioration and dangerousness. On January 16, 2012, Lourdes PACT Nurse Teresa Chandler wrote:

> How long are we going to let this go on before we revoke him? I thought early detention and intervention was our goal. He's getting so much worse.

---

[1] Appendix I is a list of the parties and actors in this case.

[2] This is the only prong of causation that respondents challenge.

CP 450. Eleven days and several opportunities for revocation later, Viola Williams was dead.

Third, gross negligence[3] is also ordinarily a jury question which cannot be decided as a matter of law unless reasonable minds can reach only one conclusion. That is not possible here. Determining where a tortfeasor's care falls on the spectrum between negligence and gross negligence depends on all the circumstances surrounding the actors. In defining gross negligence, courts balance the foreseeability of risks the defendants were charged to monitor against the degree of care they could have taken to prevent the risk. Superseding cause does not apply. Williams' conduct was well within the range of conduct reasonably foreseeable to respondents, as they were ordered to stabilize his mental health to keep him safe in the community.

Fourth, questions of fact on gross negligence are not eliminated by showing more than "no care" or adding up the number of contacts Lourdes had with Williams while purporting to monitor his compliance with the LRA plan. The factual record shows, and Lennox's expert testimony confirms, Lourdes and the County repeatedly and substantially breached their joint duty to closely supervise and monitor Williams' mental health, which duty was for the express statutory purpose of

---

[3] Gross negligence is the standard applicable under RCW 71.05.120 (immunity).

preventing him from harming others while living in the community.[4]

Respondents left Williams in the community, inexplicably believing, despite months of serious violations of LRA terms, that another admonition to comply was going to be effective, at the same time he was becoming more decompensated and dangerous. Their conduct falls substantially below ordinary care and patently lacks commonsense. Because at a minimum reasonable persons can differ, Lennox is entitled to have a jury find respondents' failure to revoke Williams was grossly negligent.

Viewing all the facts and reasonable inferences in favor of Lennox and against the County and Lourdes, genuine issues of material fact exist for trial as to whether the conduct of Lourdes or the County or both in failing to properly evaluate, detain, or revoke Williams was substantially below ordinary care, resulting in the murder.

B. Respondents' Claims That The Other Was Responsible For Revoking Williams' LRA Establish *Prima Facie* Gross Negligence By Each.

1. Respondents Agree They Had A Take-Charge Duty Over Williams.

The County and Lourdes do not dispute that they had an ongoing take-charge duty over Williams under the Involuntary Treatment Act

---

[4] *See* RCW 71.05.010 (Legislature intended the Involuntary Treatment Act (ITA) "to **protect public safety**"); RCW 71.05.012; CP 222 (Order of Involuntary Treatment, expressly stating Lourdes PACT team is to "monitor this order", including that Williams is to refrain from harming others); *e.g.,* CP 233, 238, 248.

(ITA), RCW Chapter 71.05, and the conditions of the LRA plan they jointly monitored from March 2011 until January 27, 2012.[5] This duty imposed on both respondents the responsibility to take reasonable precautions to protect against reasonably foreseeable dangers posed by Williams' dangerous propensities. *Petersen v. State*, 100 Wn.2d 421, 428-29, 671 P.2d 230 (1983); *Joyce v. State, Dep't of Corr.*, 155 Wn.2d 306, 310, 119 P.3d 825 (2005); *Taggart v. State*, 118 Wn.2d 195, 217, 822 P.2d 243 (1992); *Hertog v. City of Seattle*, 138 Wn.2d 265, 282-83, 979 P.2d 400 (1999); Restatement (Second) of Torts §§ 315, 319 (1965); Restatement (Third) of Torts §§ 41-43 (2012); App. Br., 27-28. Instead, they each contend the other was responsible for the decision not to revoke Williams in the face of his continuous violation of LRA conditions and the obviously dangerous deterioration of his mental health.

Lourdes argues that only the County Designated Mental Health Practitioner (DMHP) had the authority to detain Williams or revoke the LRA. Lourdes' Resp., *e.g.,* 6-8, 36, 39-42. This is both practically and legally inaccurate. Williams had already been determined twice to require hospitalization if he did not follow the conditions of his LRA. He demonstrated a clear inability to abide by the conditions as his mental state

---

[5] Without citation to authority, Lourdes urges the Court to "interpret" RCW 71.05.120 "as a stern gatekeeper," sympathizing with mental health professionals. This argument should be rejected as contrary to Washington law, including summary judgment principles. The issues do not require the Court to interpret statutes or conduct a gatekeeping analysis.

deteriorated, rendering additional directions to comply less likely by the day. The ITA statutes, court orders on LRAs, and protocols are all designed to allow immediate detention to stabilize a person such as Williams.

The State's DSHS Protocols for DMHPs provide that the DMHP may file a revocation of an LRA and order the patient detained relying "solely" on the outpatient case manager's determination. The DMHP needs only the case manager's notification that the patient has failed to comply with LRA conditions, or has experienced substantially deterioration and presents an increased likelihood of serious harm. CP 535. In this case, County CRU employees knew if a PACT team member recommended revocation, the CRU would revoke the individual, without the need to exercise discretion: "If the case manager requests revocation, then we revoke." CP 349. CRU would automatically detain the individual for a five-day period pending a court hearing. CP 354. "[T]here was an understanding" that CRU would revoke if the PACT team requested revocation. CP 365. Despite PACT team's awareness of this policy, no PACT team member ever made the call explicitly requested by staff to revoke Williams.

The County contends it was up to Lourdes to request revocation, and Lourdes failed to do so on the dates when County DMHPs saw Williams (Aug. 1, 2011, Jan. 25, 2012). County's Resp., *e.g.,* 13-15, 27,

37-38, 44 ("[i]t is uncontroverted" that if Lourdes had requested revocation, the County would have done it). This too is inaccurate. CRU applied the wrong standard in fulfilling their independent responsibility to determine whether Williams' LRA should be revoked. The DMHP had the authority to detain Williams under any one of four conditions: failing to comply with the LRA; substantial deterioration; substantial decompensation that can likely be reversed by further in-patient treatment; or posing a likelihood of serious harm. CP 535. Williams met every criteria.

The County and Lourdes' cross-allegations go to causation and foreseeability (scope of duty), both of which are questions of fact for the jury, not capable of resolution by the Court as a matter of law. Given respondents' own dispute over which of them was truly responsible for failing to revoke, this Court should reverse summary judgment dismissal.

2. Having Taken Charge Of Williams, Respondents Dispute Which Of Them Failed To Comply With Their Joint Duty Of Care.

- **August 1, 2011:** Kadlec hospital staff called the County CRU to evaluate Williams for detention. CP 342-43. The CRU contacted the Lourdes PACT. CP 339. PACT team member Kieffer reported she communicated with case manager Nurse Practitioner Michelle Aronow to get medication information to County DMHP Fordmeir. CP 315. Kieffer then left the hospital "as there was nothing I could do. D[ue] to his violent

behavior I would not even attempt to detain him, transport him, nor be in the same room alone with him". CP 315. Though obviously aware of Williams' dangerous and decompensated state, and having lost track of him in preceding weeks, no one on the PACT team requested revocation.

For his part, DMHP Fordmeir read the notes of Williams' history of noncompliance with medication, use of street drugs, and violence. CP 158. He knew or should have known Williams had violated several conditions of his court-ordered LRA plan. But despite the mandatory language of RCW 71.05.340(3)(b),[6] Fordmeir used initial involuntary detention criteria (RCW 71.05.150, .153, requiring imminent danger) instead of revocation criteria, which do not require imminent danger because the patient has been previously found to be a risk to himself or others. App. Br., 41-42; CP 543; DSHS Protocols CP 521, 525-26, 535.[7]

- **December 27, 2011:** Lourdes' PACT Nurse Chandler wrote in PACT team's daily log, **"Needs revoked."** CP 429. Lourdes' Nurse Aronow instead talked to Williams about his behavior. CP 431-32. Lourdes does not address this call for revocation in its Response, except to say that between 12/29/11 and 1/26/12, PACT team member Linda

[6] The parties refer to the statute then in effect, before amendment (eff. July 24, 2015).

[7] The County contends they had no duty on Aug. 1, 2011, because Kadlec was not the facility in RCW 71.05.340(3)(b). County Resp., 41. That is wrong, as evidenced by DSHS Protocols, CP 519-20, and RCW 71.05.020(16)(facility includes public hospitals).

Schroeder had 13 contacts with Williams. Lourdes' Resp., 9.[8]

- **January 6, 2012:** Lourdes PACT Nurse Cynthia Wallace observed that Williams' "paranoid delusions and his erratic behavior in meeting with" her showed he was **"so decompensated, he needed to be in the hospital."** CP 442-43.

- **January 16, 2012:** Lourdes' PACT Nurse Teresa Chandler begged Lourdes' PACT team leaders for the second time in a few weeks to revoke Williams' LRA. CP 450. Lourdes claims the PACT team "immediately acted on that concern" by contacting the County to request they evaluate Williams. Lourdes' Resp., 9-10. In other words, Lourdes defends on the ground that the decision was for the County.[9]

- **January 18, 2012:** Lourdes contends the PACT team met its duty by evaluating Williams on this date. Lourdes Resp., 10. Lourdes' Nurse Aronow wrote that if Williams' behavior continued, she would call the County CRU, because **the County CRU "are the ones to make the decision whether to put him back in the hospital."** CP 452-53.

In fact, she called the County CRU and spoke to DMHP Kathleen Laws. DMHP Laws claims Lourdes' Aronow "said there are no known

---

[8] Lourdes counts approximately 117 times the PACT team met with Williams from March 17, 2011-Jan. 26, 2012. Lourdes' Resp. 6. Lourdes cites no authority, and Lennox has found none, holding that quantity means quality, or a certain number of contacts avoids gross negligence as a matter of law.

[9] Lourdes' own expert, Russell Vandenbelt, M.D., agreed that by January 16, 2012, Williams met the criteria for detention. CP 423.

imminent danger issues at this time" and **Lourdes PACT "will monitor and contact CRU"** as needed. CP 89. Lourdes' Aronow disputes this, asserting that she related her concerns to DMHP Laws, including Williams's failure to take his medication, use of methamphetamines, and sexualized conduct. CP 459.

- **January 25-26, 2012:** Lourdes and the County provide two contradictory versions of events on these dates, each denying fault and claiming they met the standard of care. Both cannot be true. Only the jury, not the Court, can weigh credibility to find which version is false and who is liable.

Lourdes contends that when Williams returned to Lourdes' PACT office on January 25, Nurse Aronow "carefully evaluated" him and called the County CRU to request that they assess and decide whether to revoke him. Then, according to Lourdes, County DMHP Laws exercised the discretion she alone had not to revoke Williams. Lourdes' Resp., 10-14. In an attempt to corroborate Aronow's claimed revocation request, Lourdes implies DMHP Laws' paperwork shows she did such an "evaluation." But Laws clearly testified she completed that paperwork afterwards, back at her office, by reviewing existing files. CP 351-52.

Directly contradicting Lourdes, the County contends DMHP Laws would have acted on a request to revoke Williams, but that was not what Aronow asked. Instead, DMHP Laws testified she was asked to see

Williams at the PACT office while she was there to meet another client, and to remind Williams to follow the LRA. CP 350. Laws testified she was with Williams for five minutes to issue this reminder. She had not read the CRU file, did not interview Aronow, and did not know Williams' diagnosis, history of noncompliance and volatility, or the LRA conditions. CP 352. The County maintains the responsibility shifted to Lourdes to follow up with Williams. County Resp., 10.

The next day, January 26, Lourdes' Aronow called DMHP Laws after seeing Williams acting "bizarre." CP 656. **According to Lourdes,** DMHP Laws promised that if Lourdes wanted Williams revoked, the County would revoke him the following Monday (4 days later), "as he has been explained what is in the LRA." CP 65; CP 482. **According to the County,** Aronow merely thanked DMHP Laws for reminding Williams to follow his LRA and reported he returned that day for medication. CP 352.

The disputed issue of material fact for the jury is this: If Lourdes' Aronow asked the County for a revocation evaluation, giving DMHP Laws all the requisite information (including Williams' continuous LRA violations, decompensation and dangerousness), but the County declined to revoke, then a jury could find Lourdes could do nothing more, satisfied its take-charge duty, and the County's "evaluation," consisting of a five-minute reminder, was grossly deficient. But if a jury believed County DMHP Laws' testimony credible—that Lourdes' Aronow merely

asked Laws to remind Williams to follow the LRA,[10] and failed to convey critical information from Lourdes' own PACT team that Williams had drastically decompensated, desperately needed to be hospitalized, and was so dangerous that team members would not be in a room with him—then a jury would have little trouble finding Lourdes was grossly negligent.

In addition to the record precluding summary judgment, Lennox's expert, Matthew Layton, M.D., testified in detail that the Lourdes PACT team's acts and omissions severely violated the standard of care, commencing with misunderstanding Williams' participation in the PACT program as "voluntary", contrary to the LRA's strict conditions; improperly managing medications; ignoring the PACT team's knowledge that Williams was dangerous; failing to communicate with the County on every important point, including that Williams was violating all LRA conditions and was increasingly dangerous; and failing to request revocation by no later than January 6, 2012. CP 545-47; 397.

Dr. Layton also testified to the County's specific substantially more-than-negligent conduct in failing to stabilize Williams, failing to apply the proper criteria for revocation,[11] and ultimately failing to revoke

---

[10] *See, e.g.,* App. Br., 32-33 (LRA violations Lourdes should have conveyed to County).

[11] Aug. 1, 2011: "Fordmeir did not apply the criteria for revocation of a conditional release under a Less Restrictive Alternative but rather evaluated Mr. Williams as though he was not already subject to the Involuntary Treatment Act. The criterion to revoke a LRA does not require a showing of imminent danger. It only requires a showing there is an increased likelihood of serious harm." CP 543.

the LRA. CP 543-45; 396-99, 401.

Given Lourdes' and the County's belief that the other party was responsible for controlling Williams' behavior, together with all the evidence and inferences as well as the expert testimony, the trial court erred in concluding no reasonable person could find either or both were at fault for failing to take charge to prevent Williams from harming others.[12] The record and expert testimony provide more than *prima facie* evidence raising genuine issues of material fact that the County and Lourdes were grossly negligent and their gross negligence proximately caused the murder.

C. Where Co-Tortfeasors Claim The Other Was At Fault, Genuine Issues Of Material Fact Exist.

The County and Lourdes' cross-allegations that they were not at fault but only the other could have been responsible raise genuine issues of material fact to defeat summary judgment dismissal as to each. The plain language of CR 56(c) requires the Court to consider "all facts submitted and all reasonable inferences from the facts in a light most favorable to the non-moving party and the motion should be granted only if from **all the evidence** reasonable persons could reach but one conclusion." *Bader v.*

---

[12] Lourdes suggests *Volk v. Demeerleer,* 184 Wn. App. 389, 337 P.3d 372 (2014), *review granted,* 183 Wn.2d 1007 (2015), *oral argument* Nov. 17, 2015, may result in Lourdes having "no duty" here. This speculation should be disregarded. Lourdes admits *Volk* is inapposite because it was outside the ITA, since a private psychiatrist treated the patient on a "hit-or-miss" outpatient basis, completely unlike the court-imposed duty here.

State, 43 Wn. App. 223, 225, 716 P.2d 925 (1986) (emphasis added; internal quotations omitted).

> If reasonable minds can differ on facts controlling the outcome of the litigation, then there is a genuine issue of material fact and summary judgment is improper. ... Summary judgment is also improper if the issue at bar requires the weighing of "competing, apparently competent evidence," in which case this court will reverse and remand for a trial to resolve the factual issues.

Woods View II, LLC v. Kitsap Cnty., 188 Wn. App. 1, 19, 352 P.3d 807 (2015) (citation omitted).[13] The County and Lourdes' claims that the other should have revoked Williams certainly require weighing of contradictory testimony, defeating summary judgment.

Directly on point, *Bader* reversed summary judgment granted to a County mental health center for insufficiently supervising a mentally-ill patient. The underlying court order stated the patient was substantially dangerous to others, and records showed the County was aware he had violated the order's conditions. This demonstrated questions of fact as to the foreseeability of the patient's misconduct and what the County center should have done. *Id.* at 229. Here too, records show, and respondents knew or should have known, Williams had a history of becoming so ill

[13] A genuine issue exists "if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Keck v. Collins*, -- Wn.2d --, 357 P.3d 1080, 1086 (2015). The purpose of summary judgment is to reach "the truth ...not to cut litigants off from their right of trial by jury". *Preston v. Duncan,* 55 Wn.2d 678, 683, 349 P.2d 605 (1960). The evidence is sufficient for a reasonable jury to return a verdict for Lennox.

outside a structured environment that he could hurt people without warning. CP 206-10, 212-19, 225. Lourdes does not even address *Bader.*

D. Triable Factual Questions Exist As To Causation.

The County and Lourdes' arguments that the other was ultimately responsible here go towards cause in fact (the physical connection between an act and an injury), an element of proximate cause.[14] Cause in fact is usually a jury question; it may be determined as a matter of law only when reasonable minds cannot differ. *Hertog,* at 282-83;[15] *Petersen,* at 436.[16]

Reasonable minds can find a strong causal connection between the County's or Lourdes' misconduct (or both) allowing Williams to deteriorate, and the murder. Each respondent missed multiple

---

[14] Lourdes contends its conduct did not proximately cause the death because Williams "injured no one between January 6 and January 26." Lourdes' Resp., 36. This argument fails to recognize Lourdes' continuing series of grossly negligent acts and omissions, including its failure to report Williams' many LRA violations to the County, all clearly causally connected to the murder.

[15] In *Hertog,* the Court **rejected** the defendant City's argument that its counselor "could have done nothing to prevent" the crime because he had inadequate time to revoke probation. Instead, there was a material factual question whether the counselor sufficiently inquired about information that would have triggered revocation. *Hertog,* at 283. Lourdes' claim that it had no power to detain or revoke Williams is similarly insufficient to justify summary judgment dismissal as a matter of law, as is the County's contention that it would have revoked if Lourdes expressly asked them to.

[16] "[T]he question of proximate cause is for the jury, and it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court." *Id.* To be decided as a matter of law, the causal connection between the act and the injury must be so speculative and indirect that reasonable minds could not differ. *Binschus v. State, Dept. of Corr.,* 186 Wn. App. 77, 100-01, 345 P.3d 818 (2015), *review granted,* 357 P.3d 665 (Sept. 30, 2015) (internal quotations and citations omitted). Reasonable minds can differ here.

opportunities to meet their duty of care to stop Williams's downward spiral by hospitalizing him. They appeared to irrationally and unreasonably believe that one more reminder to follow the conditions or be revoked, issued to an increasingly psychotic and dangerous Williams, would result in compliance. A consideration of all the facts shows Viola Williams' death was the result of one cause: respondents' gross negligence. Respondents have no explanation for what happened here, apart from the fault of the other. Causation is not speculative in this case, and summary judgment should not have been granted as to either respondent.

Importantly, neither the County nor Lourdes addresses *Petersen,* the leading Washington case articulating the take-charge duty. In *Petersen* and in every case following it, the Washington Supreme Court rejected the same argument Lourdes and the County make—that some other entity was responsible for supervising or monitoring a mentally-ill patient. In *Hertog,* the City (through its probation counselor) and County (through its pretrial release counselor) both claimed they had no real control over the released probationer. The Court pointed out that this argument was carefully considered and rejected in *Taggart,* based on *Petersen.* When the defendant "determines or should determine that the patient presents a reasonably foreseeable risk of serious harm to others, the [defendant] has a duty to take reasonable precautions to protect anyone who might

foreseeably be endangered." *Hertog,* at 279 (internal quotations omitted); *Taggart,* at 218-19; *Petersen,* at 427-28.

The psychiatrist in *Petersen,* for example, knowing of the patient's dangerous proclivities, breached his take-charge duty by failing to petition the court for commitment or take other reasonable precautions to protect those foreseeably endangered by the patient's drug-related mental problems. *Id.* at 428-29. The State was liable for injuries the patient caused to Petersen.

Just like the psychiatrist in *Petersen,* who "had no authority to confine the patient without seeking a court order", the fact that the probation counselor in *Hertog* could not act on his own to revoke was "not dispositive on the issue of duty." *Hertog,* at 280. The counselor was clearly in charge of monitoring the probationer to ensure he followed conditions, and had a duty to report violations to the court. "[T]he 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." *Id.* at 284; *Taggart,* at 222. The relevant inquiry focuses on the relationship between the care manager and "the person posing foreseeable harm." *Hertog,* at 279, 288.

Here, both respondents had the requisite degree of control over Williams, because that was what the court, the statutes, and DSHS protocols required for Williams to remain in the community, closely

supervised by the County and Lourdes. *E.g.,* CP 206-25; RCW 71.05.340(3)(b); CP 521, 525-26, 535. Both respondents were ignorant of basic policies and principles of their duties. PACT team members insisted Williams' compliance with the LRA requirements was voluntary. CRU personnel were applying initial ITA criteria to Williams who had already been found to meet them. Because policies and protocols can show the standard of care, the jury can consider ignorance and/or violation of them as evidence of negligence. *Bishop v. Miche,* 137 Wn.2d 518, 522, 973 P.2d 465 (1999) (department manual required office to report violations to the court); *Adcox v. Children's Orthoped. Hosp. & Med. Ctr.,* 123 Wn.2d 15, 37-38, 864 P.2d 921 (1993) (violation of hospital policies may be considered negligence); *DeJesus v. U.S. Dep't of Vet. Affairs,* 479 F.3d 271, 286-88 (3d. Cir. 2007) (violation of hospital and statutory standards was gross negligence causing deaths).

In *Estate of Jones v. State,* 107 Wn. App. 510, 523-24, 15 P.3d 180 (2000), summary judgment was improper because the offender's escape and murder were "not wholly beyond the range of expectability."

> This court cannot say that Dodge's actions were so highly extraordinary or improbable as to be wholly beyond the range of expectability where Dodge had four burglary convictions and Dodge committed the rape and murder in the course of another burglary. The question of foreseeability is therefore a matter for the jury.

Id. Likewise, in *Binschus v. State, Dept. of Corr., at* 100-02, summary

judgment on causation "was improper because a jury could reasonably find that the counties proximately caused the victims' injuries because of their failure to properly evaluate and treat Zamora during his incarceration." Foreseeability of the danger to the victims is normally an issue for the jury, and can be decided as a matter of law only where reasonable minds cannot differ. *Binschus,* at 96; *Taggart,* at 224.[17] Summary judgment is equally improper here, since triable factual issues remain as to whether respondents' numerous breaches of their duty caused the foreseeable result that Williams would harm someone.

E. Gross Negligence Is Not Limited To Less Than "Slight Care."

The County and Lourdes focus exclusively on one part of the pattern jury instruction defining gross negligence—the failure to exercise "slight care". The trial court confined its analysis to the same phrase. VRP 11:24-25. From this overly-narrow literal reading of one phrase, respondents argue questions of fact as to gross negligence are eliminated by more than "no care." Their argument omits the rest of the instruction, which provides that gross negligence is "negligence which is substantially greater than ordinary negligence. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care." 6 *Wash. Prac.: Wash. Pattern Jury Instr., Civil,* WPI 10.07

[17] *See also Volk v. Demeerleer,* 184 Wn. App. 389, 337 P.3d 372 (2014) (reversing summary judgment dismissal), *review granted,* 183 Wn.2d 1007 (2015) (*oral argument* Nov. 17, 2015).

(2009).[18] *Bader* says nothing about slight care: "Gross negligence means negligence substantially and appreciably greater than ordinary negligence." *Id.* at 228.

In the leading case of *Nist v. Tudor,* 67 Wn.2d 322, 407 P.2d 798 (1965), and every case thereafter, courts have rejected respondents' "literal interpretation" of slight care to mean that "any care at all" negates recovery. *Id.* at 324. Instead, our courts are "inclined toward leaving the question of gross negligence to the jury." *Id.* at 326. "Circumstances surrounding the actors largely determine the quantum of care". *Id.* at 331. Gross negligence, like ordinary negligence, derives "from foreseeability of the hazards out of which the injury arises." *Id.; Bader,* at 228. These are all factual questions for the jury. *Id.; Nist,* at 326-32. In *Petersen,* the jury found the State's psychiatrist grossly negligent without any expert testimony because it was clear that the psychiatrist had actual knowledge of the patient's dangerousness. *Id.* 100 Wn.2d at 436-37.

To determine where a defendant's conduct falls on the spectrum between seriously negligent and grossly negligent, Washington courts balance (1) the risks foreseeable to the defendant against (2) the amount of care that would have prevented the risk:

> When ... the imbalance between the magnitude of the foreseeable risk and the burden of precaution becomes sufficiently large, that imbalance indicates that the actor's

[18] Despite all efforts to define the term, "it retains its amorphous quality." *Nist,* at 325.

> conduct is substantially worse than ordinary negligence. Moreover, when a comparatively slight burden of precaution is combined with the actor's actual knowledge of the risk, a finding of recklessness becomes appropriate, inasmuch as that combination demonstrates the actor's indifference to risk.

Restatement (Third) of Torts § 2, cmt. d (2010);[19] Restatement (Second) of Torts, § 500 ff. (1965); *Bader,* at 228-29; *Nist,* at 331; *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 87, 328 P.3d 962 (2014) (reversing summary judgment where defendants they first "took charge" of elderly juror, then locked him out in subfreezing temperatures, "increas[ing] the risk of harm to him"; juror died of hypothermia) (citing Restatement (Third) § 44); *Estate of Jones,* at 523-24 (balancing foreseeable risks of harm against defendant's failure to take precautions); *Lesley v. Dept. Soc. & Health Servs.,* 83 Wn. App. 263, 279, 921 P.2d 1066 (1996) ("whether the evidence establishes more than mere negligence is a jury question.").

DeJesus, is closely analogous. There, the Third Circuit affirmed the trial court's ruling that the VA "was grossly negligent in a number of ways", violating its statutory duty in treating a patient, resulting in the shooting deaths of four children and the patient's suicide. The VA missed "serious warning signs" and failed to commit or detain the patient though he met the statutory and hospital criteria. Plaintiff's expert testified to five specific breaches, including that "the person with the clinical

[19] "[T]he more "probable" the harm, ... the more likely is a finding that the differential between the magnitude of the risk and the burden of precaution is so great as to render highly blameworthy the failure to adopt the precaution." *Id.*

responsibility ... recognized the risk ... and then proceeded to do nothing about it." This went beyond mere carelessness or inadvertence. *Id.* at 286-88. These are "fact-intensive inquiries" requiring, *e.g.,* credibility determinations not appropriate on summary judgment.

Respondents' cases are distinguishable and do not eliminate triable factual questions here. In *Estate of Davis v. State, Dep't of Corr.,* 127 Wn. App. 833, 844, 113 P.3d 487 (2005), the officer had no indication of the offender's risks; unlike Williams, the offender did not have a "long history" with the officer or of violating plan conditions. In *Kelley v. State,* 104 Wn. App. 329, 17 P.3d 1189 (2000), the evidence did not support gross negligence for failing to arrest after a single police encounter more than two months before the offender assaulted plaintiff. The court expressly distinguished *Bader* and *Nist* as situations where, as in this case, "the defendant knew of the impending danger and failed to take appropriate action." *Id.* at 337. And in *Boyce v. West,* 71 Wn. App. 657, 666, 862 P.2d 592, 597 (1993), plaintiff's expert testimony did not support gross negligence. Lennox's experts provide factually detailed expert testimony demonstrating that the County and Lourdes were grossly negligent.[20]

---

[20] Respondents persuaded the trial court to count contacts as evidence of more than slight care. While they cite no authority for this proposition, every reported decision concerning a take-charge duty considers all facts in the parties' relationship. Respondents' mathematical formula is similar to what the County falsely accuses Lennox of arguing, "negligence plus negligence equals gross negligence." That is not Lennox's argument.

The evidence demonstrates that both Lourdes had overwhelming notice, and the County knew or should easily have known that Williams, a paranoid schizophrenic drug abuser under specific terms of a court-ordered LRA release plan, was at risk to harm himself or others if his care providers did not meet their statutory and court-ordered duty to closely supervise and take charge of him.[21]

F. Superseding Cause Does Not Apply In This Multiple-Defendant Indivisible-Injury Case.

Lourdes argues at length that the County's gross negligence in failing to revoke the LRA on January 25-26 was a superseding cause of Viola Williams' death, relieving Lourdes from liability as a matter of law. Lourdes' Resp. 36-42. This Court disposed of that argument in *Albertson v. State*, No. 45748-2-II, 2015 WL 6951209, at *5 (Wn. App., Nov. 10, 2015). A cause cannot be superseding if "the intervening act can reasonably be foreseen by the defendant; only intervening acts which are *not* reasonably foreseeable are deemed superseding causes." *Id.* "[I]f the likelihood that a third person may act in a particular manner is ... o**ne of the hazards which makes the [defendant] negligent**," that act, even if criminal, "does not prevent the defendant from being liable for the injury

[21] Lourdes' contention that gross negligence is never foreseeable completely misses the mark: rather, the foreseeability **to respondents** of Williams' harming others is at issue. Foreseeability of criminal conduct is almost always for the jury. *Estate of Jones*, at 523-24 (offender's actions were not "so highly extraordinary or improbable as to be wholly beyond the range of expectability"); *Wilbert v. Metropolitan Park Dist. of Tacoma*, 90 Wn. App. 304, 308, 950 P.2d 522 (1998) (same standard).

caused by the defendant's negligence." *Id.* (emphasis added; internal quotations and alterations omitted). In *Albertson,* the risk of child abuse was "precisely the kind of harm" that would ordinarily flow from the State's initial faulty investigation and harmful placement of the child back in the home where he was previously abused. The court of appeals reversed and remanded for a new trial.

Similarly, when a mentally-ill offender with a lengthy history like Williams enters the community under an LRA, he is absolutely at risk to harm others if not compliant with the plan conditions. Since respondents were charged with strict monitoring and revocation when it became necessary (as it did), the defense of superseding cause is not available to them. Likewise, in *Estate of Jones* and *Bader*, the courts could not conclude as a matter of law the offender's criminal conduct was unforeseeable to the defendants in charge of them, because that conduct was precisely the kind of harm that defendants were charged with preventing.

Moreover, it is axiomatic that "[t]here may be more than one proximate cause of the same injury." 6 *Wash. Prac., Wash. Pattern Jury Instr. Civ.* WPI 15.04 (6th ed.). If a defendant is found negligent, "it is not a defense that some other cause also have been a proximate cause."

> If the defendant's original negligence continues and contributes to the injury, the intervening negligence of another is an additional cause. It is not a superseding cause and does not relieve the defendant of liability.

Travis v. Bohannon, 128 Wn. App. 231, 242, 115 P.3d 342, 348 (2005);[22] *see, e.g., Hertog,* at 275-84, 287-90 (City probation counselor and County officer both had duty to monitor offender's compliance with conditions); *Estate of Jones,* at 523-24 (County, State, and community placement program operator had duty to supervise juvenile offender).[23]

G. "Exercise Of Judgment" And "Discretion" Do Not Apply.

The County and Lourdes each attempt to escape triable questions of fact by arguing they had discretion to exercise their judgment. This is incorrect, particularly on summary judgment. To the extent that mental health providers exercise their professional judgment in the context of their take-charge duty, their conduct is measured against the standard of care testified to by the experts.[24] The supplemental exercise of judgment instruction is not justified unless there is evidence that the provider complied with the standard of care, and only "when the doctor chooses between reasonable, medically acceptable options". *Fergen v. Sestero,* 182 Wn.2d 794, 803, 808, 346 P.3d 708 (2015). Respondents did not comply

---

[22] The only exception is when another cause was "the sole proximate cause of injury or damage to the plaintiff." *Id.* Lourdes is welcome to prove at trial that the County's gross negligence was the sole proximate in this case. On summary judgment, however, Lourdes' arguments merely raise triable factual issues for the jury to decide. Lennox contends both were at fault, and the jury will allocate the percentage for each entity from 0 to 100. RCW 4.22.070.

[23] *See also Lindquist v. Dengel,* 20 Wn. App. 630, 632-34, 581 P.2d 177 (1978), *aff'd,* 92 Wn.2d 257, 261-63, 595 P.2d 257 (1979) (tortfeasor liable for all foreseeable consequences of own negligence). The County's failure to detain Williams in August 2011 made subsequent violations highly foreseeable, requiring interventions and revocations respondents repeatedly failed to perform the next 5 months.

[24] In *Petersen,* for example, the court did not apply an exercise of judgment instruction to the psychiatrist's decision not to seek involuntary commitment.

with the standard of care. The only acceptable option was to revoke Williams by no later than Jan. 6, 2012. [25] Even Lourdes' expert agreed by Jan. 16.

H. On De Novo Review, This Court Considers The Layton Declaration.

On de novo review, this Court considers the stricken parts of Dr. Layton's declaration.[26] *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (appellate court examines "all the evidence presented to the trial court, including evidence that had been redacted"). Contrary to Lourdes' contention, the Court applies **de novo review**. *Folsom,* at 662-63; *Keck v. Collins*, -- Wn.2d --, 357 P.3d 1080, 1085 (2015). "[A]dmissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment." *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994) (foreseeability); *Lesley,* at 83 (caseworkers' actions were "not merely negligent"); ER 702-703.

Conclusion

Genuine issues of material fact exist precluding summary judgment.

---

[25] The scope of the take-charge duty rests on foreseeability, not whether the care provider exercised a discretionary judgment call. *Volk,* 184 Wn. App. at 419-20; *Petersen,* at 428 (following *Lipari v. Sears, Roebuck & Co.,* 497 F.Supp. 185, 194 (D.Neb. 1980).

[26] Contrary to Lourdes' misrepresentation, the trial court struck only the conclusions as to gross negligence in ¶¶ 7-11, and the sentence "Further..." in ¶12. VRP 12-13. The Court left all factual statements. VRP 13:17-18. Lennox appeals all of these rulings.

RESPECTFULLY SUBMITTED this 1st day of December, 2015.

SCHROETER GOLDMARK & BENDER

s/ Rebecca J. Roe

REBECCA J. ROE, WSBA #7560
ANNE M. KYSAR, WSBA #28351
CARLA TACHAU LAWRENCE, WSBA #14120 (Of Counsel)
Counsel for Appellant
Schroeter Goldmark & Bender
810 Third Ave., Suite 500
Seattle, WA 98104
Telephone: (206) 622-8000
Fax: (206) 682-2305
E-mail: roe@sgb-law.com, kysar@sgb-law.com,
carla@dactl.com

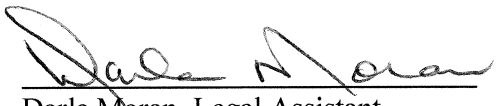
CERTIFICATE OF SERVICE

On the 23rd day of November, 2015, I caused to be served upon the following, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

West H. Campbell, WSBA #9049 Thorner Kenedy & Gano 101 S. 12th Ave. P.O. Box 1410 Yakima, WA 98907 *Attorney for Defendant Benton & Franklin County*	☐ Via Hand Delivery – ABC Legal ☒ Via U.S. Mail, 1st Class, Postage Prepaid ☐ Via CM/ECF System ☐ Via Overnight Delivery ☐ Via Facsimile ☒ Via Email
Jerome R. Aiken, WSBA #14647 Erin E. Moore, WSBA #44779 Meyer Fluegge & Tenney 230 S. Second St. P.O. Box 22680 Yakima, WA 98907 *Attorney for Defendant Lourdes Health Network*	☐ Via Hand Delivery – ABC Legal ☒ Via U.S. Mail, 1st Class, Postage Prepaid ☐ Via CM/ECF System ☐ Via Overnight Delivery ☐ Via Facsimile ☒ Via Email

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

DATED at Seattle, Washington, this 23rd day of November, 2015.



Darla Moran, Legal Assistant

APPENDIX 1

PARTIES AND ACTORS
LENNOX v. LOURDES HEALTH NETWORK, BENTON COUNTY, FRANKLIN COUNTY
No. 33201-2-III

PARTY/NAME	IDENTITY
Appellant/Plaintiff Sherrie Lennox	Personal Representative of the Estate of Viola Williams (decedent murdered at age 87 by grandson Adam Williams) Sherrie Lennox is Adam Williams's aunt, and sister of Adam's father Steve Williams.
Respondent/Defendant **Lourdes Health Network**, and its Program for Assertive Community Treatment **(PACT)** Lourdes PACT team members: • **Michelle Aronow**, ARNP, Lourdes PACT team prescriber • **Suzanne Kieffer**, PACT team chemical dependency case worker • **Linda Schroeder**, caseworker/vocational specialist • **Cynthia Wallace**, team member • **Theresa Chandler**, RN • **Monyay Green, Supervisor**	Respondent, outpatient care provider and co-monitor of Adam Williams's care under court-ordered Less Restrictive Alternative (LRA) plan, CP 221-25.
Respondent/Defendants Benton County and Franklin County, employer of Designated Mental Health Professionals (DMHPs) at Benton and Franklin County **Crisis Response Unit** (CRU) Benton-Franklin County Crisis Response Unit (CRU) members: • **Cameron Fordmeir**, DHMP who evaluated Adam at Kadlec Medical Center, Aug. 1, 2011; • **Kathleen Laws**, DMHP, who saw Adam for 5 (or 20-30) minutes on January 25, 2012, and spoke to Lourdes' Nurse Aronow on January 26, 2012. • **Gordon Cable, CRU Supervisor**	Respondent, co-monitor of Adam's LRA plan.

Adam Williams	Mentally-ill offender in custody under Involuntary Treatment Act at Eastern State Hospital until March 2011; Patient of Lourdes Health Network and Benton/Franklin County CRU, released into community under court-ordered Less Restrictive Alternative (LRA) plan, CP 221-25; Grandson of victim Viola Williams; Paranoid schizophrenic, history of methamphetamine and other drug abuse.