

No. 71147-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JANET RAE TIBBITS, individually  
and as guardian for JOSEPH TIBBITS,  
her minor son, and as attorney in fact for  
her daughter, MYCHELLE LEIGH  
MILES-TIBBITS, Appellant

v.

STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS, Respondent

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APPELLANT'S REPLY BRIEF

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2015 JUN 23 PM 2:57

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**1. ARGUMENT**

**A. Analysis of Quasi-Judicial Immunity and Gross Negligence Involves Two Related but Separate Issues of Transportation of Kevin Miles to King County for Treatment: one, DOC's Decision to Allow Out-of-Area Travel, and, two, DOC's Failure to Assess the Risks and Consequences of Unescorted and Unsupervised Travel.**

The parties to this appeal seem to have markedly different understandings about the issues that are properly before this Court. Undersigned counsel for Janet Tibbits (hereinafter "Tibbits") suggests respectfully that the Department of Corrections (hereinafter "DOC") is confused about the issue that drives this appeal and acknowledges that he may have contributed to some of that confusion by less than precise writing or oral advocacy at the hearing on DOC's motion for summary judgment. The problem seems to arise from DOC's treating the issue of its authorization of out-of-county travel as encompassing or including all issues related to that travel, including the means of travel and restrictions or limitations that could have, and according to Tibbits, should have been placed on it. Tibbits's focus now, and her allegations of gross negligence, relate to the latter issue.

DOC argues repeatedly in its opposition brief, in one way or another, that Tibbits admitted that DOC's decision to send Kevin Miles to King County for treatment was probably a quasi-judicial function but "now contends there was no evidence DOC made a decision to allow travel." DOC brief, p. 15, middle. The latter assertion is incorrect because it is incomplete. Tibbits admits DOC made a decision to allow travel but contends it did not make a decision defining the means and conditions of travel.

Reflecting another related area of confusion, DOC repeatedly cited Tibbits's Complaint to argue she had contended that allowing Miles to travel to King County was wrongful yet now acknowledges that decision was probably a quasi-judicial function. At the time the Complaint was filed, Tibbits did, in fact, believe the decision to allow travel to King County was negligent (actually grossly negligent) but also, as a separate matter, that allowing Kevin Miles to travel without escort or supervision was also grossly negligent. Tibbits was not aware when she filed her Complaint that DOC had a plausible reason, namely, the alleged unavailability of any treatment facility in Spokane County that was willing to accept Miles, for authorizing treatment in King County. Tibbits learned of that rationale during discovery depositions of Laura Burgor-Glass and

Todd Wiggs. DOC's assessment of the treatment options at that point appeared to justify application of the doctrine of quasi-judicial immunity under RCW 9.94A.704(11) with respect to the decision to send Miles to King County. However, Tibbits also discovered during those depositions that apparently no consideration was given to the risks and ramifications of allowing Miles to travel unescorted and unsupervised, which Tibbits believes was a critical shortcoming that should be evaluated apart from the broader decision to allow travel to King County. It appears that DOC believes that if the decision to authorize travel triggers application of immunity, any and all aspects of that travel, including the means of travel and limitations imposed on it or the absence of limitations, also fall within the scope of the immunity. Tibbits contends, however, that the decision to authorize travel to King County, if indeed protected under quasi-judicial immunity, can be justified only because Todd Wiggs seems to have considered the pro's and con's of sending Miles to treatment there, but the record indicates he failed to address the means and conditions of travel in any meaningful way and to assess the risks and consequences of allowing unescorted travel, and that failure makes quasi-judicial immunity unavailable to protect DOC in that regard.

Tibbits's opposition to DOC has thus evolved through discovery to focus only on the failure to assess how and under what conditions the travel should have been conducted, which as it turned out was, Tibbits contends, grossly negligent and proximately caused the harm suffered by Janet Tibbits and her children for which they seek damages in this case. Tibbits's position is that quasi-judicial immunity is inapplicable to the latter issue on two grounds: first, there was no meaningful evaluation of the risks and consequences of unescorted and unsupervised travel, and in the absence of such evaluation, the characteristics that would qualify for quasi-judicial action are lacking; and, second, that RCW 9.94A.704(11), the statute that establishes that setting, modifying, and enforcing conditions of community custody shall be deemed to be quasi-judicial functions, cannot apply because Todd Wiggs made no decision, that is, made no conscious choice about the means of travel or restrictions, if any, that could qualify as "setting, modifying, and enforcing," thus rendering the statutory provision inapplicable.

For purposes of DOC's motion for summary judgment, Tibbits does not have to prove that DOC should have ordered that Miles be escorted and otherwise supervised on his trip to King County, although she certainly believes that would have been appropriate. For purposes of

the motion, Tibbits is simply arguing that there is on the record thus far developed no evidence that Todd Wiggs ever considered the pro's and con's of unescorted travel or gave any attention to it and that DOC's failure to consider the risks and consequences of unescorted travel cannot be considered to have been a decision setting, modifying, or enforcing existing conditions, sufficient to bring DOC within the ambit of quasi-judicial immunity. In other words, for quasi-judicial immunity to apply to DOC, DOC had to have responsibly evaluated the method and conditions of transportation but failed to do so. It's not enough to argue, as DOC has repeatedly, that overall its officers acted responsibly and competently during the term of Kevin Miles's custodial supervision. It's of no comfort to Tibbits that DOC did its job satisfactorily most of the time, knowing that when it decided to allow Miles to travel out of Spokane to attend treatment in King County, it failed to consider the consequences of allowing him to do so without escort or supervision. Not only did that failure facilitate his appearance at Janet's door, but it also facilitated his becoming heavily intoxicated before forcing his way into her home. Consideration of the likelihood that he would seek to visit and/or harass, abuse, or threaten Janet and the likelihood that he would become intoxicated before doing so, given the chance, just as he had repeatedly

become intoxicated in violation of his conditions of supervision during his period of supervision in Spokane, could have prevented the harm that ensued.

The evidence on the record is that Todd Wiggs reviewed the file so superficially that he could not identify Janet Tibbits as the victim of Miles's prior obsessive and abusive behavior (CP 52, L. 11-14) or where, exactly, she lived on the "west side" (CP 52, L. 15-20), was not aware that she had complained to the victim liaison that she feared for her own life and the lives of her children based on Miles's past behavior, and was not aware of her complaints that Miles always found her when released from custody. Wiggs admitted that if he had known Miles was fixated on the victim and had demonstrated a desire to contact her, such knowledge would have influenced his decision about allowing Miles to travel to King County (CP 68, L. 20-25; 69, L. 1-21). He also acknowledged that he could not recall giving Miles any instructions before Miles left for King County (CP 63, L. 24-25). To ignore the means and conditions for transporting Miles to King County for treatment was indefensible in light of DOC's prior decision to escort him to Spokane when he was first placed in Spokane custody (CP 97, L. 16-19; 131-132) and its prior decision that Miles should be subject to "enhanced" supervision and

reporting requirements and was well-known as a supervisee of the highest risk (CP 60, L. 20-23), who posed a serious challenge to DOC and was, according to Wiggs, “capable of just about anything when it comes to criminal activity, burglary, robbery, assault” (CP 60, L. 17-19). DOC’s failure to impose conditions on Miles’s travel for the protection of Tibbits certainly justifies her assertions of gross negligence.

In support of its argument for the application of immunity, DOC cited on page 30 of its brief the *Bader* and *Walker* cases. DOC appears to be arguing that because the alleged wrongdoing in those cases was egregious and immunity was nonetheless applied to exonerate defendants, immunity should certainly apply in the instant case where DOC insists the wrongdoing was much less egregious. Tibbits believes DOC has missed the meaning of the cases it cites. In *Bader v. State of Washington, et al.*, 43 Wn. App. 223, 716 P.2d 925 (Div. Three 1986), a violent man, Morris Roseberry, diagnosed as a paranoid schizophrenic and manic depressive, was released following acquittal on the ground of insanity and later shot and killed a neighbor who had complained about him to the police. The claim was against several defendants, including psychiatrists or mental health providers appointed by the court in an earlier proceeding to render an advisory opinion to the court on the accused’s mental condition.

Acknowledging there, as in the instant case, that there were allegations of gross negligence and a defense of quasi-judicial immunity, the court recognized that those are distinct and separate issues and addressed only the immunity question. It ruled in defendant's favor on the immunity issue but only on the ground that appointed experts rendering advisory opinions to the court were "acting as an arm of the court and are protected from suit by absolute judicial immunity." 43 Wn. App. at 226, 716 P.2d at 927. No such connection between a court and DOC's negligent omission in this case (that is, failure to properly evaluate the consequences of allowing unescorted and unsupervised travel) can be demonstrated. And even if DOC could somehow argue that it was at the relevant time acting as an arm of the court, its employees did nothing affirmative on the relevant issue (there was no conscious assessment and choice or decision) to justify extension of immunity. In *Bader*, the experts actually evaluated Mr. Roseberry's condition and made recommendations to the court.

The facts were similar in *Walker v. State*, 60 Wn. App. 624, 806 P.2d 249 (Div. Two 1991), where a police officer was killed during a struggle with a violent offender who had been previously evaluated for mental competency at Western State Hospital but released on his own recognizance following trial pending sentencing. The personal

representative of the deceased police officer's estate sued the State for negligence in failing to inform the court that the offender was "substantially dangerous," in discharging him from the hospital, and in failing to petition the trial court to involuntarily commit him. The Court held that judicial immunity insulated Western State from liability for the first two causes, stating that the professionals at Western State had acted in association with the judicial function, citing *Bader* as dispositive and stating Western State "participated in a judicial proceeding" when it committed and evaluated the offender at the request of the trial court. 60 Wn. App. at 628, 806 P.2d at 251. Again, the instant case bears no such connection to judicial proceedings.

Interestingly, the *Walker* decision supports Tibbits's position that she is entitled to pursue a cause of action for negligence in this case and does not have to prove that DOC violated a specified existing condition of supervision. The court noted that the existence of a legal duty is an essential element in a negligence action, then stated that a "person has a duty to protect a third party from causing injury to another "where a special relationship exists between a defendant and either a third party or the foreseeable victim of the third party's conduct."” *Walker*, 60 Wn. App. at 629, 806 P.2d at 252, citing *Metlow v. Spokane Alcoholic Rehabilitation*

*Ctr., Inc.*, 55 Wn. App. 845, 849, 781 P.2d 498 (1989). The special relationship doctrine is still the law in Washington, as previously briefed and noted below, and establishes a duty by DOC to protect Janet Tibbits by virtue of having a special relationship with both Mr. Miles, due to its custodial and supervisory connection with him, and with Ms. Tibbits as a foreseeable victim of the supervisee's actions.

The value of the *Metlow* case, on the requirement of a custodial relationship, has been eviscerated by later case law, most notably *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), and later case law explaining its holding. *Taggart* specifically found that there is a cause of action for negligent supervision in the context of a special relationship, which exists in this case, and held that neither a custodial nor a continuous relationship is required to trigger the duty to protect others like Janet Tibbits.

In short, DOC cannot demonstrate on the basis of the record that it is entitled to quasi-judicial immunity because there is no credible evidence that Todd Wiggs's failure to consider conditions of transportation for Mr. Miles constituted setting, modifying, or enforcing conditions of supervision, even ignoring the lack of a connection to judicial proceedings that might independently support a claim of immunity. Once quasi-

judicial immunity, or judicial immunity, is ruled out, then Tibbits's claim of gross negligence must be evaluated on its own merits.

**B. Tibbits has a Valid Common Law Cause of Action for Gross Negligence.**

DOC argues in its opposition brief that there is no cause of action for its failure to set a specific condition of supervision, namely in this case the means by which Kevin Miles was to be transported to King County for treatment and the limitations, if any, that were to be imposed on him, but it does not cite any persuasive authority for that proposition, and it does not provide any reason for believing that a claim of negligence or gross negligence is not available to Tibbits. It is true that some of the relevant cases leave the impression that in the absence of existing conditions on travel subject to DOC's monitoring and enforcement, there can be no cause of action against DOC. But Tibbits respectfully submits that is not the law. Many cases, including the seminal case of *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), held that there is a cause of action against DOC or other State agencies and contractors premised on legal principles embodied in the Restatement (Second) of Torts §§ 315, 319 (1965). Those cases acknowledge that the State's abrogation of sovereign immunity subjects governmental entities to tort claims under common law

principles. See, e.g., *Joyce v. Department of Corrections, et al.*, 155 Wn.2d 306, 119 P.3d 825 (2005); *Bishop v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999); *Whitehall v. King County, et al.*, 140 Wn. App. 761, 765-766, 167 P.3d 1184, 1186 (Div. One 2007); *Kelley v. Department of Corrections*, 104 Wn. App. 328, 332, 17 P.3d 1189, 1192 (Div. Two 2000). Those cases adopt the holding of *Taggart* that where a special relationship exists between a governmental entity and a third party, or with an identifiable victim, even in the absence of a custodial relationship between the governmental unit and the third party, the government has a duty to protect the identifiable victim (or in most cases members of the public at large) from foreseeable harm at the hands of the third party. In *Bishop*, for example, the Supreme Court of Washington held that a county probation officer “owed a duty to exercise reasonable care to control Miche to prevent reasonably foreseeable harm to others resulting from his dangerous propensities.” 137 Wn.2d at 531.

**C. Tibbits Offered Substantial Evidence Sufficient to Support Her Allegations of Gross Negligence, But Because Such Evidence Raises Genuine Issues of Material Fact, Final Determination of Those Facts Should be Left to the Jury.**

DOC argues that this Court can determine on the basis of the record that it was not grossly negligent as a matter of law. Tibbits

strongly disagrees. Although the trial court's original order granting DOC's motion states that plaintiff's claims of gross negligence were dismissed with prejudice, that statement was based on no findings of fact and seems to have been made simply to clarify that the grant of DOC's motion meant dismissal of all claims, including the claims of gross negligence. DOC in its brief states that the trial court never reached the issue of gross negligence. DOC brief, p. 32. The Amended Order issued by the trial judge, which did include findings of fact and conclusions of law, contained no findings or conclusions related to gross negligence, which was never mentioned at all. Regardless, despite DOC's assertion that Tibbits offered no evidence of gross negligence in its supervision of Kevin Miles, such evidence was, in fact, offered, and there was ample evidence to support a finding of gross negligence (see below).

Despite case law that states a court can decide gross negligence on its own if reasonable minds could not differ, where reasonable minds could differ the questions should be resolved by the jury. *See, e.g., Estate of Bordon v. Department of Corrections*, 122 Wn. App. 227, 235, 239, 95 P.3d 764, 768, 770 (Div. One 2004); *Hungerford v. Department of Corrections*, 135 Wn. App. 240, 251, 139 P.3d 1131, 1136 (Div. Two 2006). Even the case law cited by DOC in its opposition brief supports

the view that gross negligence is a question for jury determination. In

*Bader*, the court stated the following:

Gross negligence means negligence substantially and appreciably greater than ordinary negligence....The term gross negligence to have practical validity should be related to and connected with the law's polestar on the subject, ordinary negligence....Gross negligence, like ordinary negligence, must arise from foreseeability and the hazards out of which the injury arises....Ordinarily, the question of negligence is one of fact for the jury to determine from all the evidence presented....The jury's function is also to decide the foreseeability of the danger....Additionally, proximate cause (cause in fact), that is, a determination of what actually occurred, is generally left to the jury.

43 Wn. App. at 228, 716 P.2d at 928-929.

DOC argues that Todd Wiggs made a reasoned, considered decision not to impose limitations or restrictions on Kevin Miles's travel to King County. Mr. Wiggs's own testimony does not support that inference, and, indeed, it raises genuine issues of material fact whether he even thought about how Miles would be transported (he said he assumed by Greyhound bus for some reason), much less about the consequences of his traveling without escort or supervision. In his testimony Wiggs emphasized that enrolling Miles in rehab in King County was critical because intoxication was the primary problem they needed to address (CP 56, L. 13-15), yet by allowing Miles to travel to King County without

escort or supervision, he made it possible for Miles to obtain alcohol and become very intoxicated before he knocked on Janet Tibbits's door. In his alleged review of Miles's file, Wiggs testified he had not identified the victim in whose favor numerous no-contact orders had been previously issued but testified he did know that she had declined to participate in the victim wraparound program, which he apparently determined was a reason not to worry about her safety when he released Miles to travel to the county where she lived. He apparently did not see reports in the record that Janet Tibbits feared for her safety, even her life, and the lives of her children, having reported clearly to Angella Coker, the victim liaison, that she felt Miles might kill them as part of a murder-suicide. Ms. Coker had duly reported her concerns to DOC (CP 249-252), and all of that information was presumably available to Mr. Wiggs when he authorized transportation for Mr. Miles.

In her opposition to DOC's motion for summary judgment, Tibbits included declarations from herself and from T. Michael Nault, an expert witness consulted by Tibbits's counsel. Tibbits's declaration, as well as the deposition testimony of Todd Wiggs, both a part of the record on appeal, provided substantial evidence raising genuine issues of material fact from which reasonable minds could conclude that DOC, acting

through Todd Wiggs, failed to exercise even ordinary care to protect Ms. Tibbits from Mr. Miles. Mr. Nault's declaration contains a summary of much of the relevant evidence offered by Tibbits and is instructive in a number of respects:

4. In reviewing the...materials, I was struck by the irrationality of the decision by Mr. Wiggs to allow Kevin Miles to travel to his assigned alcohol rehab facility in King County without escort or other supervision. In my opinion that decision was unjustifiable. I understand that for a period of years Mr. Miles had a history of violating no-contact orders issued in favor of Janet Tibbits, and she had expressed to the DOC victim liaison assigned to her, Angella Coker, her fear of Mr. Miles and belief he might attempt to kill her and her children as part of a homicide/suicide plan, if given the opportunity....The DOC, working in concert with King County authorities, saw to it that Mr. Miles was supervised and escorted from King County to Spokane to begin serving his community custody, but in the referenced materials I saw nothing indicating that Mr. Wiggs considered the steps taken to bring Mr. Miles to Spokane or gave any consideration to the risks of allowing him to travel unaccompanied, by Greyhound bus, back to King County in June 2009.

5. ....there is no evidence in Mr. Wiggs's deposition excerpts that he spent any time at all considering the possible adverse ramifications of allowing Mr. Miles to travel alone without supervision. Mr. Wiggs testified that he thought someone at the rehab facility planned to meet the bus at Seattle, but there is no other suggestion in the papers provided to me that there was, in fact, a plan for that to happen, and even if there was, it would have been foolish and dangerous to assume Mr. Miles could not have overcome that obstacle if he wanted to see Ms. Tibbits....

6. What makes Mr. Wiggs's decision even more troubling and unjustifiable in my opinion is that Kevin Miles was classified by the DOC as a "high violent" risk. Mr. Wiggs's deposition testimony indicates the Department classified all of the people under its supervision, and "high violent" was the category of highest risk to the public, out of the four categories used in the classification. Mr. Wiggs testified that he was aware of Mr. Miles's classification when he made the decision to allow his...transportation to Seattle. He also acknowledged that Miles was a very difficult supervisee, with repeated violations of the conditions of his custody, showing, as he said, the "challenge that we had with supervising Mr. Miles." (Wiggs Deposition, page 42, lines 8-9). When asked to defend his decision to allow unescorted travel by Mr. Miles to Seattle, Mr. Wiggs acknowledged that he would have considered it relevant to know if Miles was fixated on the victim (Janet Tibbits) or had exhibited any type of behavior to indicate he had any desire or intent of contacting her. Apparently, he failed to review the entire record, as the repeated violations of the no-contact orders in place certainly suggested Miles was intent on contacting her, despite his self-serving assurances to Laura Burgor-Glass that he had no interest in seeing Ms. Tibbits. The record of contacts attached to Ms. Coker's declaration indicates Mr. Miles had told DOC authorities in the past that he eventually wanted Janet back and intended to pursue contact with her and his daughter.

7. ....I am informed that when Mr. Miles knocked on Ms. Tibbits's door on the evening of June 12, 2009, he was intoxicated and forced his way into her home. Mr. Wiggs's testimony makes it clear that drinking was an activity that made Mr. Miles particularly "high risk," suggesting another reason why he should have been supervised between Spokane and arrival at the rehab facility.

8. For the foregoing reasons it is my opinion that the decision made by the Department, through Mr. Wiggs, to allow Mr. Miles to travel to King County by bus, unescorted and without a definitive plan for ensuring his safe delivery to rehab in Renton, was improper and unjustifiable, falling far below the standard of care the Department is expected to meet.

CP 274-277.

The issue of gross negligence, although briefed, was not the focus of this appeal because it was not addressed by the trial court's decision granting DOC's motion for summary judgment. The motion was filed more than four months before the discovery cutoff; while there is ample evidence of genuine issues of material fact on that issue already in the record, as noted above, Tibbits should be allowed to conduct further discovery on remand, and the issue should ultimately be resolved by the jury at trial.

## **2. CONCLUSION**

Tibbits respectfully submits that Todd Wiggs did not evaluate the means and conditions of travel for Kevin Miles at all, much less apply a judicious analysis of risks and consequences. He did not display the judgment that would characterize judicial action and invoke application of quasi-judicial immunity. Further, because there is no credible evidence on the record that he ever consciously considered the risks and consequences

of unescorted and unsupervised travel, he could not have set, modified, or enforced travel conditions when he authorized Detox to arrange transportation for Mr. Miles to King County.

Because DOC is not protected by quasi-judicial immunity, or any other immunity for that matter, Tibbits is entitled to her day in court on her claims of gross negligence, which are clearly allowed under Washington law, particularly under the *Taggart* decision and its progeny. The evidence offered to date is sufficient to support findings of gross negligence, but the case should be remanded for further discovery to allow development of additional evidence, and all questions relating to gross negligence should be determined by the jury at trial. If Tibbits does not have a right to have a jury assess DOC's failure to evaluate the means and conditions of transporting Kevin Miles to King County, the State's abrogation of sovereign immunity as described in *Joyce, supra*, really does not mean much.

Tibbits accordingly requests that the judgment entered in DOC's favor pursuant to the trial judge's decision granting DOC's motion for summary judgment be overturned and the case remanded to the trial court for further discovery and trial.

Dated this 23<sup>rd</sup> day of June, 2014.

LAW OFFICE OF JAMES F. WHITEHEAD

A handwritten signature in black ink, appearing to read "James F. Whitehead". The signature is written in a cursive style with a horizontal line underneath it.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 23<sup>rd</sup> day of June, 2014, I caused to be filed and served the foregoing Appellant's Reply Brief on the following persons:

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COURT OF APPEALS DIV 1  
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2014 JUN 23 PM 2:58