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NO. 71147-4-I

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**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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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Appellant Janet Tibbits appeals the dismissal of her negligent supervision claim against the Department of Corrections (“DOC”). She does not assert any acts of negligent *supervision* during the nine months her ex-boyfriend, Kevin Miles, was supervised by DOC in Spokane. In her complaint, Tibbits alleged negligence only in DOC’s “decision to allow him to travel” unescorted from Spokane County to King County to a substance abuse treatment facility.

DOC moved for summary judgment asserting that its decision to sanction Miles to in-patient treatment, and its decision to modify the conditions of supervision to permit travel out of county were quasi-judicial acts. The Honorable William Bowman correctly held that DOC was acting in a quasi-judicial capacity and thus was protected by judicial immunity when it modified Mr. Miles’ conditions of community custody and permitted him to travel out of county to enter an in-patient treatment facility. Tibbits argues, in hindsight, that the decision to allow him to travel out of county was a bad decision and thus it should not be protected by immunity.

Tibbits concedes that the decision to send Miles to in-patient treatment was a quasi-judicial function, yet argues there should have been additional conditions imposed. But, there is no legal cause of action for failure to set a particular condition of community supervision. The scope

of DOC's duty is to monitor conditions that do exist, not to set conditions that, in hindsight, would be preferable, otherwise liability would be limitless as there can always be an argument made that other conditions might have led to a different result.

Tibbits never alleged any violations of conditions that could have resulted in Miles' total confinement. She concedes that altering conditions of supervision is a quasi-judicial function, but then takes issue with the modified conditions. Tibbits asserts that when the department modified Miles' conditions, it should have required an escort. Yet, during the entire nine-month supervision period in Spokane when Miles was without an escort he made no efforts whatsoever to contact Tibbits. It is antithetical to the concept of "community" supervision to essentially require 24 hour-a-day supervision. Community supervision is not work release, and it is certainly not total confinement.

There is no authority to support Tibbits' contention that DOC is liable for failing to place further conditions on an offender. Even if DOC were found somehow to not have been performing a quasi-judicial function when it modified Miles' conditions, DOC would not be liable here, because there is no legal cause of action for negligent setting of conditions. Furthermore, as a matter of law, the legal standard applicable to DOC's supervision of the conditions of community custody is gross

negligence, which is the failure to exercise slight care, and Tibbits offered no evidence to support gross negligence. This Court should affirm.

## **II. RESTATEMENT OF THE ISSUES**

1. Did the trial court correctly determine as a matter of law that DOC was acting in a quasi-judicial capacity and was therefore protected by judicial immunity when it sanctioned Kevin Miles to in-patient alcohol treatment and modified the conditions of community supervision to allow him to travel unescorted out of the county to enter the treatment program?
2. Where Tibbits offered no evidence to show that DOC was grossly negligent in its supervision of Kevin Miles, should this Court affirm summary judgment on those grounds?

## **III. RESTATEMENT OF THE CASE**

The Spokane office of the Department of Corrections supervised Kevin Miles from September 2008 through June 2009. CP 97. During those months, Miles violated the conditions of his supervision several times as a direct result of his severe alcohol abuse problem. CP 98-99. As a result of each incident, DOC exercised its statutory authority to impose sanctions, either by requiring Miles to serve time in custody, or to adhere to treatment-related requirements. CP 98-102. After almost nine months of close supervision, DOC determined that an in-patient treatment facility that could handle both his mental health issues and alcohol abuse was necessary. CP 58; 101. The only available facility that could handle his co-occurring disorders was in King County. CP 58. At the time, Miles

was prohibited from leaving Spokane County as a condition of supervision. CP 200. After reviewing Miles' case file, and determining 1) that intensive in-patient treatment was Miles' best hope for success, 2) that Miles had never tried to contact the victim or leave Spokane during the nine-month supervision period, and 3) that the victim had declined to participate in DOC's victim services plan, DOC modified the terms of his community supervision to allow Community Detox Services of Spokane ("Detox") to arrange for him to travel to King County by bus. CP 51-59; 101.

Tibbits does not allege that DOC's actual supervision of Miles during the nine months was negligent; indeed, the undisputed record shows DOC had extensive contact with Miles, over and above the exercise of slight care required, and sanctioned him immediately after he committed any violation.<sup>1</sup> The only negligence she has alleged in her Complaint for Damages is "DOC's *decision to allow him to travel to King County.*" CP at 3 (emphasis added). This was clearly the type of decision modifying the terms of community supervision contemplated by RCW 9.94A.704(11) as a quasi-judicial function. Tibbits concedes both in the trial court and on appeal that this decision was quasi-judicial. CP 258; Brief of Appellant ("Br. Appellant") at 10, 12 ("the decision that Miles

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<sup>1</sup> Miles' numerous violations never involved any form of contact or attempted contact with Tibbits during the entire time he was supervised out of Spokane. His multiple violations all involved alcohol abuse and alcohol-related behaviors.

needed additional treatment in an alcohol rehabilitation program is the kind of decision that probably qualifies as a quasi-judicial function”).

Now she argues that the issue of whether or not DOC even made a decision is for a jury. But just on the face of the pleadings, and her responsive documents in the trial court, it is clear that there was no disagreement below, that the decision to allow Miles to travel to Seattle unescorted was a decision that was made in a quasi-judicial capacity, because it was an act that modified the conditions of supervision. The record is also clear that DOC engaged in a close review of Miles’ file before rendering that decision. DOC engaged in a quasi-judicial function and summary judgment was appropriate.

**A. Relevant History**

In 2005, Kevin Miles was convicted in King County of violating a No-Contact Order for having contact with Janet Tibbits. CP 105-10.<sup>2</sup> Miles was granted a Drug Offender Sentencing Alternative (“DOSA”), and sentenced to nineteen months in confinement and nineteen months of community custody. CP 108. Among other conditions, he was not allowed to use alcohol and was prohibited from contacting Tibbits. CP 109-10. Miles served the prison term from October 2005 until his release to King County in September 2006, (CP 160-66), where he was supervised through February

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<sup>2</sup> Miles had four prior felony convictions: two No-contact Order Violations (involving Ms. Tibbits), a Burglary in the 2nd Degree, and Malicious Mischief in the 2nd Degree. CP 112.

2008. CP 97. Miles was arrested and sanctioned on several occasions for violations involving alcohol, and he was arrested once for violating the Tibbits no-contact order on November 17, 2007. CP 97. Ms. Tibbits declined to assist in the prosecution of that offense. CP 97.

On September 25, 2008, Miles' supervision was transferred to Spokane County, his county of origin, for the remaining period of community custody. Laura Burgor-Glass was the Spokane-based Community Custody Officer ("CCO") assigned to his case. CP 96. Her supervisor, Todd Wiggs, was consulted numerous times during the period of supervision. CP 101-02. During the approximately nine months that Ms. Burgor-Glass was assigned to Mr. Miles, he gave no indication that he desired or intended to make contact with Ms. Tibbits; nor did he ever try to go back to King County, despite being free in the community and without escort in his daily activities. CP 54; 98. When Burgor-Glass asked about Ms. Tibbits, Mr. Miles' said he didn't know where she was, didn't want to be around her, and he had no intention of contacting her. CP 98. DOC's most prevalent concern during this entire nine months of supervision was Miles' persistent alcohol abuse, and the urgent need to get him effective treatment was viewed by DOC as essential as a matter of public safety. CP 21, 67-68.

**B. Tibbits Declines DOC Services and Safety Planning.**

DOC Community Victim Liaison, Angella Coker, was assigned to Miles' case in June 2008. CP 208. Ms. Coker spent several months trying to locate Ms. Tibbits in order to conduct the Victim Wraparound ("Wraparound") and implement safety planning.<sup>3</sup> CP 208. Several letters Coker sent to Tibbits were returned as undeliverable. CP 208. On August 29, 2008, Coker was finally able to reach Tibbits by phone. CP 208. Ms. Tibbits declined to participate in the Wraparound safety planning, but did state that she did not want Miles to live in Pierce County. CP. 208. She also discussed her concerns that Miles may attempt to kill himself in front of plaintiff or even attempt a "homicide/suicide." CP 249. Ms. Coker advised Tibbits to call the police if Miles did contact her, but Tibbits said she was not sure whether she would call the police if Miles showed up. CP 249. Coker invited Tibbits to call anytime she had additional concerns or questions about Miles' status, or if she changed her mind about DOC services. CP 209. Tibbits never called. Coker called Ms. Tibbits several times in September 2008 since she had not heard from Ms. Tibbits since their August 29, 2008 conversation. Ms. Coker again advised her to call the police if Mr. Miles attempted to contact her. CP 209.

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<sup>3</sup> A Victim Wraparound is a safety planning procedure that involves the victim, DOC, law enforcement and other community sources putting together a safety plan to minimize risk. CP 208.

On February 10, 2009, Ms. Coker conducted a review of her open cases and noted that she had not received a call or other request for services from Ms. Tibbits since September 2008. Given the passage of time, the file was closed as per standard practice. Ms. Coker made a note that safety planning services had not been completed on the case because Ms. Tibbits declined them. CP 210.

**C. Miles Was Closely Supervised and Sanctioned On Numerous Occasions During the Nine-Month Period of Spokane Community Custody.**

Between October 2008 and June 2009, Ms. Burgor-Glass had frequent contact with Mr. Miles. Although she sanctioned him numerous times for violating the conditions of supervision, Miles' violations during these nine months were chiefly alcohol-related, and none involved violating the no-contact order, despite Miles having both the means and ability to do so. CP 54, 98. Miles never tried to call Tibbits, nor did he ever try to leave Spokane and have in-person contact. *Id.* Miles first reported to the Spokane DOC field office on October 7, 2008, and Burgor-Glass performed a home visit on October 15, when she saw empty beer cans and Miles admitted to drinking alcohol. Burgor-Glass arrested him and sanctioned him to fifteen days in custody. CP 98-99.

Upon his release, Mr. Miles reported to the field office on October 30, November 3, and again on November 12, 2008. CP 99. On December 3, Burgor-Glass visited Miles at a local homeless shelter where

he was staying. He appeared to have been drinking alcohol, and as a consequence, Burgor-Glass and Miles entered a stipulated sanction agreement that required Mr. Miles to meet with other DOC staff to help him enroll in treatment and find housing. CP 99.

In January 2009, at the direction of Burgor-Glass, Miles began mental health treatment through Spokane Mental Health. On January 20, Burgor-Glass visited Miles during his appointment with Spokane Mental Health. Miles smelled of alcohol, so Burgor-Glass and Miles entered into a stipulated sanction agreement, which held he would be confined to an in-patient program if he failed to attend all treatment appointments. CP 99.

On February 3, Burgor-Glass spoke to Miles' mental health treatment provider who confirmed that he had attended all his treatment sessions. On February 17, Burgor-Glass had a field contact with Miles. Miles appeared sober and advised that he was attending mental health treatment. On February 24, Burgor-Glass again confirmed that Miles had attended all his treatment sessions. On March 12, Miles reported that he was attending his treatment sessions, and provided a urine sample that tested negative for drugs. CP 99-100.

On March 31, 2009, Miles was arrested for DUI. Burgor-Glass sanctioned him to serve thirty days in confinement. CP 100. While Miles was in custody, Burgor-Glass requested that he be accepted for an alcohol treatment evaluation by Detox, a facility that works with DOC to assist in

placing DOC supervisees into substance abuse treatment programs. CP 100. DOC frequently relies on assistance from Detox in cases like Miles. CP 101.

After his release from jail, Miles reported to the DOC field office on April 28 and then again on May 11 as directed. On May 27, Burgor-Glass attempted to visit Miles at the apartment complex where he was then residing, but he was not at home. Ms. Burgor-Glass attempted another home visit on May 28, 2009, and again Miles was not at home. CP 100.

On June 3, 2009, Ms. Burgor-Glass received a phone call from Miles' mental health counselor who advised that Mr. Miles was again in trouble for alcohol-related behavior. Burgor-Glass confirmed that Detox could take him, and she went to Mr. Miles' residence where he admitted to drinking alcohol. Burgor-Glass took Mr. Miles immediately to check-in at Detox. She advised him that she intended to recommend confinement as a sanction for this new alcohol violation, and gave him the choice to serve that confinement either in jail or in an in-patient treatment facility. Mr. Miles chose treatment. Burgor-Glass asked Detox staff to search for an available in-patient treatment facility that would accept Miles. CP 101. When an individual such as Miles is going directly from Detox into in-patient treatment, Detox arranges and coordinates transportation to the treatment facility, as was the case here. CP 101. Bed space in substance abuse treatment facilities is limited and in high demand. CP 101. Because

it is difficult to find bed space for individuals in need of treatment, it is important that Detox have the flexibility to transport individuals to treatment as soon as space in the facility is available. CP 101.

On June 12, 2009, after determining that no local facility could accept Miles, Detox staff member Lana Hughes called the DOC field office to advise that they had found a bed for Miles at Thunderbird Treatment Facility (“Thunderbird”) in Seattle. Hughes also called to ensure that the conditions of Mr. Miles’ supervision permitted him to go to an out of county treatment facility so Detox could send him directly there. CP 101.

Burgor-Glass was on a pre-planned leave of absence from the office, so Hughes spoke with her supervisor, Community Corrections Supervisor (“CCS”) Todd Wiggs. CP 61. Burgor-Glass had discussed Miles’ case with CCS Wiggs on many previous occasions. CP 101-02. Before approving Detox’s request to send him to another county, Wiggs reviewed Miles’s file. CP 67-68. Miles’ file showed that the case did not have a Victim Wraparound or safety plan. CP 51-53. Miles’ non-compliance issues had been caused by substance abuse, and did not involve victim contact. CP 68. Mr. Wiggs verbally approved permitting Mr. Miles to leave the county to attend in-patient treatment at Thunderbird because of the time-sensitive nature of bed space. CP 62; 67-69; 102.

On June 12, 2009, Kevin Miles violated the no-contact order and a condition of supervision by going to Ms. Tibbits' residence while Tibbits was home with her 13-year-old son. Tibbits did not call the police when Miles first arrived, nor anytime in the following days. Tibbits immediately left the home and went to a motel. CP 256, 271. On June 19, 2009, Tibbits called Coker and notified her that Miles was at her home. Coker advised Tibbits to call the police, and then notified Miles' CCO, who immediately secured a warrant for his arrest. Mr. Miles was apprehended June 20, 2009. CP 102.

#### IV. ARGUMENT

##### A. Standard of review.

On appeal from a summary judgment, this Court engages in a de novo review and makes the same inquiry as the trial court. *Walker v. State*, 60 Wn. App 624, 806 P.2d 249 (1991) citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Questions of law are reviewed de novo. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). Determination of immunity is a question of law reviewed de novo. *Bennett v. Williams*, 892 F.2d 822, 823 (9th Cir. 1989).

##### B. The Trial Judge Correctly Found That the Decision to Set or Not Set Conditions of Community Supervision Is a Quasi-Judicial Function Subject to Quasi-Judicial Immunity.

The Washington State Supreme Court has made clear that the Department of Corrections is immune from suit when the alleged

misconduct involves quasi-judicial conduct. *Taggart v. State*, 118 Wn.2d 195, 213, 822 P.2d 243 (1992). Immunity attaches to persons or entities who perform “quasi-judicial functions” that are so comparable to those performed by judges that it is felt they should share the judge’s absolute immunity while carrying out those functions. *Lutheran Day Care v. Snohomish Cnty.*, 119 Wn.2d 91, 99, 829 P.2d 746 (1992). Quasi-judicial immunity is absolute immunity. *Id.*

The essential question in cases applying the quasi-judicial immunity doctrine is whether the challenged actions were functionally similar enough to those performed by a judge to warrant the immunity. *Taggart*, 118 Wn.2d at 204-05. To determine if immunity applies, Washington courts will look to the function the person is performing, rather than to the person who is performing it. *Regan v. McLachlan*, 163 Wn. App. 171, 179, 257 P.3d 1122 (2011) (citing *Lallas v. Skagit Cnty.*, 167 Wn.2d 861, 865, 225 P.3d 910 (2009)). This analysis may require a court to examine the functions of the official as set forth in statute. *Kelley v. Pierce Cnty.*, 319 P.3d 74, 77 (2014) citing *West v. Osborne*, 108 Wn. App. 764, 772–73, 34 P.3d 816 (2001).

- 1. DOC’s Actions Were the Functional Equivalent of a Judge Sanctioning an Offender and Modifying The Conditions of Supervision.**

In addition to giving the trial court authority to impose conditions on offenders, the legislature expressly authorized DOC to “establish and

modify additional conditions of community custody[.]” RCW 9.94A.704(2)(a). The legislature recognized the judicial-like role DOC plays and has specifically defined these condition-setting functions as judicial: “In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.” RCW 9.94A.704(11). When an administrative action resembles judicial action, the rationale behind granting judges immunity—the need for independent and impartial decision making—applies with equal force. *Taggart*, 118 Wn.2d at 204-05.

DOC, through its agents, Burgor-Glass and Wiggs, was enforcing the conditions of Miles’ 2005 Judgment and Sentence when sanctioning Miles to a term of in-patient alcohol treatment. Prior to imposition of that sanction, Miles repeatedly violated the conditions requiring him to refrain from alcohol use. Ms. Burgor-Glass’ supervisor, Todd Wiggs, testified in deposition that:

We knew with Mr. Miles that we weren't going to have any success at mitigating the risk that he posed to the community if we didn't -- if he didn't deal with his substance abuse issue. So our number one goal with Mr. Miles had to be getting him into a chemical dependency treatment program as well as a mental health treatment program.

CP 57.

As for the decision to place Mr. Miles in a treatment center away from the Spokane area, Mr. Wiggs testified:

We could not get or -- any treatment program that provided a treatment regime that Mr. Miles needed that would accept him. We really needed for Mr. Miles a co-occurring disorders treatment program. That really addresses the chemical dependency and the mental health piece. We've got basically one treatment center here in Spokane that has the ability to provide services to offenders that are considered co-occurring disorder, and that's Pioneer Center East, and they would not accept him ... Because of the medication that he was on.

CP 58.

Despite Tibbits' complaint specifically alleging the *decision* to allow travel was bad (CP at 3), Tibbits now contends there was no evidence DOC made a decision to allow travel. The record refutes this contention. Mr. Wiggs described at length the numerous considerations that went into his decision. See CP 51-59. In particular:

[T]he decisions that are made as it relates to granting permission to travel, granting permission to contact specific people, those decisions are different if I know that there's -- that there's a victim wrap around that's been completed, that I know that there's a safety plan that's been developed, there's a specific victim identified that, you know, we have considered to be an eminent threat, that the offender poses an eminent threat against. *And so in Mr. Miles' case, there was no victim wrap around done, which when I looked at whether or not to grant him permission to attend treatment at Thunderbird*, I look at that and I look to see if there's any geographical restrictions that have been placed on him. I look at -- when we do that whole risk assessment, we look at what's been the offender's behavior since they've been on supervision? For nine months, Mr. Miles was on supervision before the treatment facility agreed to accept him into Thunderbird or until detox was able to get him into Thunderbird.

During those nine months, I look to see if there's been any behavior, any comments, any statements, anything on the part of Mr. Miles that would indicate that he has any intent or desire to have contact with the person he's not supposed to have contact with. ***And in my review of Mr. Miles' case, when I made the decision to allow him to go to Thunderbird, in that nine months, there was absolutely nothing that indicated to me that he posed a threat to anybody on the west side.*** We don't supervise, unfortunately, offenders 24/7. If Mr. Miles had any desire or intent on going to the west side and contacting the individual he was prohibited from contacting, he had the means to buy a bus ticket or a plane ticket and go to the west side at any time. He didn't do that.

CP 53-54. (Emphasis added.)

This evidence shows DOC's actions to be functionally similar to that of a judge. After nine months of repeated alcohol-related problems, CCO Burgor-Glass determined that imposing a sanction of in-patient treatment was appropriate. She had sanctioned Miles a number of times, assigned him a mental health counselor, helped him obtain housing, and yet he continued to be plagued by alcohol addiction. Her assessment that in-patient treatment was necessary, and her imposition of a sanction is exactly the type of review and order a judge would conduct. She was not simply carrying out supervisory directions; she was assessing the gravity of Miles' situation and making discretionary decisions in order to maximize the effect of community supervision.

CCS Wiggs was also acting as the functional equivalent of a judge when he made a discretionary decision to modify the conditions of

community custody to permit Detox to send Miles outside of Spokane County to the only available treatment facility. In the criminal justice realm, CrR 3.2(b)(2) authorizes judges to set travel restrictions as a condition of release. Just as a judge reviewing the case would have done, Wiggs considered the request from Detox to modify geographical restrictions and he reviewed the file for relevant facts. He balanced Miles' need for immediate intervention with his recent behavior under community supervision. CP 57-58. He determined that getting Miles into treatment immediately was of paramount importance, and consequently modified the conditions of travel specifically to the Thunderbird facility. CP 61. Wiggs was performing exactly the same type of function a judge does when setting travel restrictions, or conversely setting no limitations on travel.

DOC had authority to modify the conditions of Miles' supervision according to the plain language of RCW 9.94A.704(2)(a). These acts of condition modification and authorization of travel are distinct from basic supervision activities such as meeting with offenders, conducting home visits or investigating potential violations, to which judicial immunity does not attach. The trial court was correct in determining that DOC's actions here were quasi-judicial and thus judicial immunity was appropriate. The Legislature has indicated that these types of acts are quasi-judicial functions. RCW 9.94A.704(11). Arguments that DOC should have imposed a different

sanction do not eviscerate quasi-judicial immunity. Dismissal was required and the trial court should be affirmed.

**C. The Record Shows There Are No Disputes of Material Fact.**

On appeal Tibbits now asserts that the trial court erred in determining a genuine issue of material fact as to whether or not Wiggs made a decision to allow Miles to travel unescorted. Br. Appellant at 3. For Tibbits to now argue that this was an issue of disputed fact is belied by her complaint, her briefing, and her argument below. Tibbits agreed below that Wiggs made a decision authorizing unescorted travel in the trial court; indeed, this was the sole basis of her lawsuit. In her complaint, Tibbits asserts that DOC “breached that duty by allowing him to travel, unaccompanied, to King County.” CP 3. Furthermore, she alleged “DOC’s decision to allow him to travel to King County was grossly negligent.” CP 3. And finally she alleges gross negligence for, “[a]llowing Miles to travel to King County, especially unaccompanied or without conditions ... .” CP 3.

In her response to DOC’s Motion for Summary Judgment, she repeatedly confirms that DOC’s decision to allow Miles to travel unaccompanied is an undisputed fact. Notably, Plaintiff’s Statements of the Issues are clearly expressed as uncontested facts:

1. Can DOC’s decision to allow Kevin Miles to travel to King County on June 12, 2009, without escort or supervision, be deemed the exercise of quasi-judicial function ... .

2. Was DOC's decision to allow Kevin Miles to travel to King County on June 12, 2009, without escort or supervision, grossly negligent under the circumstances . . . .

CP 257.

Tibbits' response to the summary judgment also contains numerous references to these undisputed facts. See CP 256-62. Furthermore, in her Opening Brief, Tibbits concedes that DOC engaged in a quasi-judicial function when Wiggs determined that Miles could go to King County:

Although unwise in Tibbits' opinion, the decision that Mr. Miles needed additional treatment in an alcohol rehabilitation program is the kind of decision that probably qualifies as a quasi-judicial function. ***Mr. Wiggs apparently weighed the needs of the public and the supervisee and determined that treatment was needed*** and that the only viable option at the time was Thunderbird in King County.

Br. Appellant at 10 (emphasis added). Tibbits cannot now claim there are disputed issues of facts merely because she disagrees with the trial court's determination.

Wiggs was clearly acting in a quasi-judicial capacity when he engaged in this record review and decision-making process. Tibbits takes issue, however with the means of transport and argues that no thought was given to it. *Id.* While Tibbits acknowledges that Wiggs "weighed" the options, she ignores the other facts surrounding Wiggs' decision to modify the conditions. Wiggs testified at length about the thought that went into the

authorization for Miles to travel to the west side. CP 51-58; 61-63. Tibbits offered no evidence beyond speculation to refute Wiggs' testimony.

Burgor-Glass had already determined that the sanction would be inpatient treatment. CP 101. Burgor-Glass had already put Miles at Detox awaiting placement in an appropriate treatment facility. CP 101. Detox staff made the travel arrangements once placement was confirmed. CP 101. Detox staff Lana Hughes called Miles' CCO at DOC expressly to determine the conditions of supervision and if he was permitted to travel to Seattle. CP 101. Because Miles was restricted to Spokane County, Wiggs orally modified the conditions to allow Detox to send him to King County:

Q: So who actually made the decision to allow him a travel pass to the west side in June of 2009?

A: ... And on June the 12th, I believe it was, it was a Friday, according to the record, the staff member from detox called my office, because Laura was out, and asked if he could go to Thunderbird, and I granted the approval.

CP 61.

Wiggs also testified that because Miles had made no effort to contact Tibbits and his non-compliance had been substance abuse problems, they granted permission to attend the only treatment program they thought would work. CP 68. Wiggs testified that if Miles had contacted or attempted to contact Tibbits, they would have made a different decision. CP 69. Wiggs authorized travel to the treatment facility and nowhere else – a discretionary

decision reasonably linked to the goal of getting Miles' alcohol problem under control.

The goals intended by this sanction were to protect the community and attempt to facilitate Mr. Miles' future compliance with his community custody conditions. Wiggs' testimony clearly establishes that he was engaging in exactly the "quasi-judicial function" that modifying conditions of supervision entails. The decision to allow Miles' travel was reasoned, and intended to further the goal of community protection. But more importantly, it was a decision "setting, modifying, and enforcing conditions of community custody" and thus, regardless of how much Tibbits disagrees with it, it is an act that "shall be deemed a quasi-judicial function." RCW 9.94A.704(11).

**D. Tibbits Offered No Evidence To Rebut DOC's Proof.**

To rebut a prima facie showing in support of a summary judgment motion, the adverse party may not rest on allegations, but must set forth specific facts showing there is a genuine issue for trial or have the summary judgment, if appropriate, entered against him. CR 56(e); *see also LaPlante*, 85 Wn.2d 154, 531 P.2d 299 (1975); *Tobis v. State*, 52 Wn. App. 150, 758 P.2d 534 (1988). The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 612, 62 P.3d 470 (2003). Tibbits does not offer any facts to show that

DOC didn't make a decision to allow travel to a specific location for a specific purpose. Despite basing her lawsuit on her disagreement with DOC's decision to authorize unescorted travel, she merely offers speculation that this wasn't even a "decision" or, in the alternative, that it was a bad decision. This is not sufficient to defeat summary judgment on the basis of quasi-judicial immunity. She doesn't like the decision, but it was a decision modifying conditions of supervision nonetheless. It was an act that is functionally equivalent to that of a judge, and therefore covered by judicial immunity.

**E. The Legislature Has Already Indicated That DOC's Actions Are Quasi-Judicial.**

Tibbits argues that the trial court erred in determining that DOC's decision to modify Miles' conditions of community custody was a quasi-judicial function. In support, she cites case law that aids courts in determining *whether or not to apply* quasi-judicial immunity to an agency action when it is unclear if the action was merely administrative or supervisory. *Kelley v. Pierce Cnty.*, 319 P.3d 74 (2014) (court appointed guardian ad litem acting outside its court responsibilities was not acting in quasi-judicial capacity); *Lallas v. Skagit Cnty.*, 167 Wn.2d 861, 225 P.3d 910 (2009) (sheriff who was ordered to transport an in-custody prisoner by a judge was not performing a judicial function); *Joyce v. Dep't of Corrections*, 155 Wn.2d 306, 119 P.3d 825 (2005) (CCO monitoring

offender was not engaged in a judicial function); *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999) (probation officer monitoring compliance was not engaged in a judicial function.)

Tibbits relies on the *Taggart* test and its progeny to determine when an administrative act is functionally comparable to judicial action.<sup>4</sup> Br. Appellant at 12, citing *Taggart*, 118 Wn.2d at 205. She urges this court to review the record to determine whether or not DOC held a hearing, or applied objective standards or imposed adequate safeguards (Br. Appellant at 16-17). However, none of those challenged administrative actions involved a statute specifically deeming those acts to be quasi-judicial functions. The test to determine if an act is quasi-judicial is functional; i.e. is the act one performed by a judge. Here again, CrR 3.2(b)(2) specifically authorizes judges to set travel restrictions as part of the conditions governing pretrial release. When DOC performs the same function in setting or modifying the conditions of post-trial release it remains a quasi-judicial function. See RCW 9.94A.704(11). The performance of a quasi-judicial function, like a judicial function, is entitled to immunity. “Since we have determined that the Board's decision

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<sup>4</sup> The essential question in cases applying the quasi-judicial immunity doctrine is whether the challenged actions were functionally similar enough to those performed by a judge to warrant the immunity. *See, e.g.; Butz v. Economou*, 438 U.S. 478, 509, 513, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978); *see generally* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* 1057 (5th ed. 1984). When an administrative action resembles judicial action, the rationale behind granting judges immunity—the need for independent and impartial decision making—applies with equal force. *Taggart*, 118 Wn.2d at 204-05.

was quasi-judicial, we hold that the Board is absolutely immune for its release decision.” *Taggart*, 118 Wn.2d at 209. The trial court was correct in finding DOC had judicial immunity.

Nonetheless, a review of the record here clearly indicates that DOC did engage in a judicial-like process when it reviewed Miles’ file and made a determination to modify the travel restrictions imposed on Miles and authorized him to go to treatment in Seattle. As Tibbits concedes, Wiggs weighed the options: “And in my review of Mr. Miles' case, when I made the decision to allow him to go to Thunderbird, in that nine months, there was absolutely nothing that indicated to me that he posed a threat to anybody on the west side.” CP 54.

Tibbits does not claim that DOC failed to enforce existing conditions, or that DOC’s failure to monitor certain conditions resulted in Miles’ contacting Tibbits. Tibbits admits that the decision to modify the terms of community custody is covered by judicial immunity. Br. Appellant at 10. She also concedes that “the decision to allow Kevin Miles to obtain treatment in King County” is “probably” covered by quasi-judicial immunity. She asserts, however, that the “decision to allow him to travel to King County unsupervised” should not be covered by quasi-judicial immunity, in essence, because she believes it was a bad decision. Br. Appellant at 12-13. Whether it was a good decision or a bad decision is not the question before this Court. Whether or not it was a decision that set,

modified or enforced conditions of community custody, similar to what a judge does, and thus was a quasi-judicial function, is the only issue. There can be no doubt that Miles' conditions of community supervision were modified; the fact that he violated the new conditions is not the proper test.

**F. Wiggs' Modifications of the Conditions of Supervision Was a Quasi-Judicial Act.**

Wiggs was not engaging in ministerial acts of supervising an offender when he modified the conditions of Miles' supervision. He was performing a quasi-judicial act when he made a discretionary decision about changing Miles' conditions of supervision. This is precisely the quasi-judicial function the statute contemplates.

Tibbits compares DOC's actions here to those in *Lallas*, a case that is distinguishable on numerous grounds. First, *Lallas* was not a negligent supervision case and is not comparable. In *Lallas*, quasi-judicial immunity was denied to a sheriff's deputy who was directed by a judge to transport an in-custody prisoner from the courtroom to the jail. The prisoner escaped custody and injured a court employee who later sued. A case involving a prisoner who has escaped custody is very different from a case alleging negligence for community supervision. Here, Miles was not a prisoner in custody, but was being supervised in the community and had no requirement that he be escorted in his daily activities.

Secondly, in *Lallas*, the *act of transporting* the offender was denied immunity because it was not a judicial function. There was no discretion on the part of the sheriff, who was merely responding to the direction of the judge and acting in a ministerial capacity. *Lallas v. Skagit Cnty.*, 167 Wn.2d 861, 866, 225 P.3d 910 (2009). Since transporting prisoners is not a judicial function, the Court determined that immunity did not shield the deputy's actions. *Id.* at 866. Here, there was no condition requiring that Miles be escorted anywhere. Tibbits has not alleged that DOC negligently failed to enforce an existing condition, as she must in order to prevail in a negligent supervision case. See section 5 below. Thus, *Lallas* has no bearing on this case, because the act of following a judge's directive is a very different function than modifying conditions of supervision, which is a typical judicial function.

If CCS Wiggs had modified Miles' conditions of supervision and directed another CCO to transport Miles to King County, and that CCO failed to follow the directive, then *Lallas* might be relevant authority. *Lallas* does not hold the *act of modifying* the conditions is outside of immunity, but holds non-judicial functions are not entitled to immunity. *Lallas*, 167 Wn.2d at 866. Here, the only alleged negligence stems from the act of modifying the conditions, an action clearly deemed to be a quasi-judicial function. Parole officers are entitled to quasi-judicial immunity for functions performed as an integral part of judicial or quasi-judicial proceedings.

*Plotkin v. Dep't of Corrections*, 64 Wn. App. 373, 378, 826 P.2d 221 (1992).

**G. There is no Legal Cause of Action for Failure to Impose Certain Conditions**

Whether or not a duty exists is a question of law. *Hungerford v. Dep't. of Corrections*, 135 Wn. App 240, 256, 139 P.3d 1131 (2006). The duty to supervise is premised on “the failure to adequately monitor and report violations.” *Bell v. State*, 147 Wn.2d 166, 179, 52 P.3d 503 (2002) citing *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 283, 979 P.2d 400 (1999). Failure to seek a particular sanction is not an event for which DOC can be liable in tort. *Hungerford*, 135 Wn. App. at 255. Similarly, failure to impose a particular travel restriction is also not actionable, because there is no liability for failing to set conditions. DOC does not have any more liability for failing to impose a condition than a judge does. The duty is to control behavior through enforcement of *existing* conditions, and it is this that gives DOC authority to violate offenders; otherwise DOC would be violating the offender’s due process rights. Thus, if an offender had travel restrictions imposed as a condition of supervision and DOC had failed to monitor those conditions, then there might be a cause of action. See *Bell v. State*, 147 Wn.2d 166, 178-179, 52 P.3d 503 (2002) citing *Bishop v. Miche*, 137 Wn.2d 518, 525-526, 973 P.2d 465 (1999).

A plaintiff in a negligent supervision action must show not only inadequate supervision, but must also carry the burden to demonstrate the damage sustained by the plaintiff would have been avoided but for the inadequate supervision. *Bell*, 147 Wn.2d at 179. Tibbits needed to show Miles violated a condition of supervision, DOC failed to discover the violation, and the inadequate supervision was the proximate cause of Miles' violating the no-contact order. *Bell*, 147 Wn.2d at 183. She did not make this showing, but instead urges that DOC should be liable for not having imposed more conditions.

The theory of liability Tibbits proposes is limitless. With the benefit of hindsight, a plaintiff could always come back and claim DOC should have had more stringent conditions of supervision, like daily observation of an offender, or more polygraphs, or better and more drug testing – the list is virtually limitless. But, the scope of DOC's duty is governed by the conditions that do exist. *Bell*, 147 Wn.2d at 178-79 (state's liability stems from failure to adequately monitor violations of existing conditions.)

While there was a court-ordered no-contact order in place, there was no requirement that Miles be under 24-hour-a-day supervision, or that he be escorted around the community. During the nine-month period that Miles was supervised in Spokane he was unescorted in his daily activities, and he never tried to contact Tibbits. He never tried to call her, or travel to

Seattle as he easily could have done. Allowing him to travel to Seattle unescorted was wholly consistent with the nature of community supervision – he was and had been living on his own in the community. As soon as DOC knew that Miles violated the conditions, DOC had him arrested. Had Tibbits called the police when he first contacted her, he would have been arrested even sooner.

Failing to require an escort as a condition of supervision is not subject to tort liability because there is no legal cause of action for failure to add a specific condition. The dismissal should be affirmed.

**1. Assertions of Negligence Do Not Negate Quasi-Judicial Immunity.**

By statute, DOC is performing a quasi-judicial function when it sets, modifies, or enforces conditions of an offender's supervision. RCW 9.94A.704(11). Therefore, DOC's decision to sanction Miles to in-patient treatment is clearly protected by judicial immunity. The decision to modify the conditions of his supervision and allow him to return to King County for the specific purpose of attending an in-patient treatment program is also clearly protected activity. Tibbits tries to separate the result of this decision from the actual decision itself, and asserts that it is not covered by immunity because it was foreseeable that Miles would violate the no-contact order, thus allowing him to travel unescorted was "grossly negligent." Br. Appellant at 9-10.

A similar argument was rejected in both *Bader* and *Walker*. In both of those cases professional staff at state hospitals evaluated an individual and found him dangerous, yet recommended release to the court (*Bader v. State*, 43 Wn. App. 223, 226, 716 P.2d 925 (1986); *Walker*, 60 Wn. App at 628). The Court found judicial immunity applied in both cases.

In *Bader*, a violent offender was admitted to Eastern State Hospital (“ESH”) for a competency evaluation. *Bader*, 43 Wn. App. at 224. The report concluded that the individual was “a substantial danger to other persons and presents a likelihood of committing felonious acts jeopardizing public safety or security unless kept under further control ... .” *Id.* at 224. Yet, the recommended conditions of release were minimal: take prescribed medication, attend treatment, and not return to the home where the victim (his mother) lived. *Id.* at 225. The offender was ultimately released, and less than six months later he shot and killed a neighbor.

The plaintiff sued on the grounds that ESH was grossly negligent in recommending minimal conditions for release in light of the evaluation’s conclusion of the likelihood of felonious acts. *Id.* at 226.

The Court held judicial immunity protected ESH:

When psychiatrists or mental health providers are appointed by the court and render an advisory opinion to the court on a criminal defendant’s mental condition, they

are acting as an arm of the court and are protected from suit by absolute judicial immunity.

*Id.* at 226 (internal citations omitted.)

Similarly, in *Walker* a violent offender was admitted to Western State Hospital (“WSH”) for evaluation. Staff at WSH determined the individual was very dangerous, but competent to stand trial. When he returned to the county jail, WSH didn’t discharge him, and instead put him on administrative leave from the hospital. WSH also didn’t inform the trial court of the determination of dangerousness. After the individual pleaded guilty, the trial court released him pending sentencing and WSH discharged him. He ultimately assaulted a police officer responding to a call, and the officer’s weapon discharged killing another officer. The subsequent lawsuit alleged that WSH was negligent.

The doctrine of judicial immunity absolutely protects Western State from liability for failing to inform the court of its conclusion that Westmark was substantially dangerous and for discharging Westmark from the hospital because both acts were clearly connected to Western State’s participation in the judicial proceeding.

*Id.* at 628.

It is worth noting that in neither *Walker* nor *Bader* were the agencies protected by a statute expressly deeming certain functions quasi-judicial, but the court concluded that their roles in the judicial process were enough to warrant judicial immunity. Here, DOC is protected by the legislature’s express determination that setting or modifying conditions are

quasi-judicial acts. It is also worth noting in both of those cases the individual was in custody for a violent assault, and in the defendant's expert's opinion, (foreseeably) dangerous. Here, DOC's primary supervision problems with Miles had been alcohol abuse. While the State disagrees that it was foreseeable that Miles would violate the no-contact order as Tibbits contends, foreseeability is not the issue. The sole issue is whether or not DOC "set, modified or enforced" the conditions of community supervision, acts that are covered by judicial immunity. DOC's decision to modify the conditions restricting Miles' travel is statutorily defined as quasi-judicial and thus protected by immunity. The trial court's dismissal should be affirmed.

**H. DOC's Community Supervision of Kevin Miles Exceeded That Required by Law**

The trial court correctly ruled that DOC was protected by immunity, and thus never reached the question of gross negligence. This court can affirm summary judgment on any basis before the trial court. *State v. Carroll*, 81 Wn.2d 95, 101, 500 P.2d 115, 119 (1972). If the Court finds judicial immunity is not appropriate, this Court can still determine that DOC was not grossly negligent as a matter of law.

**1. Gross Negligence Standard**

Miles was on community custody and thus Tibbits must show DOC

was grossly negligent in their supervision.<sup>5</sup> The court determines as a matter of law whether alleged acts or omissions of the DOC in supervising an offender rise to the level of gross negligence. RCW 72.09.320; *Kelley v. State*, 104 Wn. App. 328, 332-333, 17 P.3d 1189 (2000); *Whitehall v. King Cnty.*, 140 Wn. App. 761, 770, 167 P.3d 1184 (2007). The Legislature dictates that liability for civil damages resulting from any act or omission in the rendering of community placement activities will not attach unless the act or omission constitutes gross negligence. RCW 72.09.320. The standard for gross negligence is defined as:

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

*Kelley*, 104 Wn. App. at 333 (citations omitted) (internal quotation marks omitted). A CCO's duty is not to take reasonable precautions to protect anyone who might foreseeably be endangered, but to refrain from gross negligence. *Id.* at 332-333; RCW 72.09.320. Here, DOC's decision to permit Miles to enter in-patient treatment was more than the exercise of

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<sup>5</sup> “‘Community custody’ means that portion of an offender's sentence of confinement in lieu of earned release time ... served in the community subject to controls placed on the offender's movement and activities by the department.” RCW 9.94A.030(5).

“slight care”, coupled with all of DOC’s efforts towards Miles, it was extensive care.

In *Kelley*, an offender was released into community custody after being incarcerated for attempted rape. *Id.* at 330. A condition of his release was compliance with a court-ordered curfew, requiring that he remain home between the hours of 11:00 p.m. and 7:00 a.m. *Id.* at 332. Ingalls met with his CCO twice per month at the DOC field office, but his CCO made only 14 out of 27 required field contacts required by DOC policy during eight months of supervision. *Id.* at 331. The CCO was on notice that the offender “may have” violated his curfew when he was detained by police outside a junior high school miles from his home. *Id.* at 330-331, 335. The CCO also failed to discover a previous curfew violation when he had been arrested for entering an occupied motel room. *Id.* at 331.

Approximately one month after his curfew violation, Ingalls picked up the plaintiff along the road, demanded sex, then assaulted her when she refused. *Id.* at 332. In affirming summary judgment for the DOC, the *Kelley* court held as a matter of law that the CCO’s conduct, though arguably negligent, did not rise to the level of gross negligence. *Id.* at 335. The court reasoned the CCO could have more carefully investigated the Ingalls’s violations, but the failure to more thoroughly investigate falls short of “negligence substantially and appreciably greater

than ordinary negligence.” *Id.* at 336. If the CCO had made no attempt to learn of the circumstances of the crime, a jury could find gross negligence. However, the CCO did investigate the circumstance, but failed to verify the actual time of the arrest. *Id.*

Similarly, in *Whitehall*, the court affirmed summary judgment in favor of the King County probation department because the plaintiff failed to produce evidence of gross negligence. *Whitehall*, 140 Wn. App. at 769-770. In *Whitehall*, the plaintiff was victim of a probationer who left an explosive at her front door. *Id.* The plaintiff alleged the probation department was negligent based on the probation officer’s failure to perform home visits or field contacts to ensure the probationer’s compliance with his conditions of probation. *Id.* In affirming summary judgment, the court concluded that such failures do not constitute gross negligence. *Id.* at 770.

## **2. No Evidence of Gross Negligence**

Plaintiff alleges that DOC should not have allowed Miles to travel unsupervised to King County to attend an alcohol rehabilitation program, given his prior criminal history that included violation of prior no-contact orders issued in favor of plaintiff. But none of his violations while under the supervision of Ms. Burgor-Glass related to his no-contact order or to Ms. Tibbits. CP 68-69; 98-100. Furthermore, Ms. Burgor-Glass routinely met with Miles in person, and Miles regularly reported as directed to the

DOC field office. Ms. Burgor-Glass also made home visits, conferred with Mr. Miles' treatment providers and monitored his progress with his alcohol and mental health issues. CP 98-100. When Mr. Miles used alcohol or committed other violations, he was sanctioned. CP 98-100. At no time during the entire nine-month period under the supervision of Burgor-Glass did Mr. Miles indicate any desire to contact Ms. Tibbits. CP 98.

In response to his condition violations for alcohol use, Ms. Burgor-Glass sent referrals to chemical dependency treatment centers and assisted Miles in seeking help for his alcohol addiction. After repeated conditions violations for alcohol use, on June 3, 2009, Ms. Burgor-Glass presented Miles with two choices: in-patient chemical dependency treatment or confinement. Miles chose treatment. That same day, Miles was admitted to a chemical dependency treatment facility (Detox) to assist in placement in an in-patient facility. Ultimately, the only available treatment center was not in Spokane and required travel. *Kelley* and *Whitehall* set the standard for gross negligence. Ms. Burgor-Glass and the rest of the Spokane DOC supervision team clearly exceeded it. CP 56. There is no evidence that DOC failed to exercise slight care in supervising the court's conditions for Miles's community custody. As a matter of law, DOC surpassed its legal duty and dismissal can be affirmed on these additional grounds.

## V. CONCLUSION

DOC sanctioned Kevin Miles to in-patient treatment for his numerous alcohol-related violations and modified the conditions of supervision to allow him to get to the only available treatment program. The trial court correctly held that DOC was acting in a quasi-judicial capacity and is thus protected by absolute judicial immunity when it performed this quasi-judicial function. Additionally, Plaintiff Janet Tibbits provided no evidence that DOC was grossly negligent. The record confirms that DOC exercised extensive care in its supervision of Miles. This Court should affirm.

**RESPECTFULLY SUBMITTED** this 23<sup>rd</sup> day of May, 2014.

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**DECLARATION OF SERVICE**

I declare that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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

DATED this 23 day of May at Seattle, Washington

Mary Harper  
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