

No. 35801-8-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

TERRY BUTLER, as Personal Representative of the Estate of MARVIN
HENRY SR., as Personal Representative of the Estate of KAREN
HENRY, and as Guardian of WILLIAM HENRY, a minor; and MARVIN
HENRY, JR.,

Plaintiffs/Appellants,

v.

THURSTON COUNTY; THURSTON COUNTY SHERIFF'S
DEPARTMENT; CRAIG J. EAGEN and JANE DOE EAGEN, husband
and wife,

Defendants/Respondents

**BRIEF OF RESPONDENTS
THURSTON COUNTY; THURSTON COUNTY SHERIFF'S
DEPARTMENT; AND CRAIG J. EAGEN AND JANE DOE EAGEN**

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I. INTRODUCTION

On December 4, 2001, Marvin Henry, an off-duty Thurston County Sheriff's Office corrections officer on paid administrative leave, murdered his wife in their home, and then committed suicide. The deaths left the Henry's children, Marvin, Jr. and William, parentless. The murder/suicide committed by Marvin Henry was a terrible tragedy that was suffered not only by his family, but also by his co-workers, his employer, and his friends.

Not born from this tragedy is any legal liability on the part of Marvin Henry's employer, defendant Thurston County Sheriff's Office ("TCSO") or his close friend and fellow corrections officer, defendant Craig Eagen. Plaintiffs/appellants claim TCSO and Officer Eagen are legally responsible for the deaths of Marvin Henry and Karen Henry because Officer Eagen returned Marvin Henry's personally owned handgun to him as a favor, so that Mr. Henry could qualify at the TCSO firing range on December 4, 2001. Mr. Henry later chose to use his handgun in committing the murder/suicide. Based on the uncontested evidence, no one at TCSO, including Officer Eagen, knew or should have known that Marvin Henry was incompetent on December 4, 2001 to possess his gun, or that he posed any danger to his wife or himself. *There is no evidence that Marvin Henry was actually incompetent, or that he*

was an actual and real danger to himself or others at any time before the murder/suicide. No reasonable person could have predicted or foreseen this tragedy.

TCSO and Officer Eagen owed no legal duty to Marvin Henry or his wife Karen, and their conduct does not support a negligence cause of action. The return of Marvin Henry's personally owned handgun is neither a cause in fact nor a proximate cause of either Karen Henry's murder or Marvin Henry's suicide. Appellants' negligence claim and respondeat superior claim were properly dismissed on summary judgment as a matter of law. The trial court's ruling should be affirmed on appeal.

II. STANDARDS OF REVIEW

When reviewing a summary judgment ruling, the appellate court undertakes the same inquiry as the trial court, considering all facts submitted and all reasonable inferences from those facts in the light most favorable to the non-moving party. *Grundy v. Thurston County*, 155 W.2d 1, 117 P.3d 1089 (2005). The appellate court will affirm the grant of summary judgment where reasonable minds can reach only one conclusion from the admissible facts. *Gausvik v. Abbey*, 126 Wn.App. 868, 107 P.3d 98 (2005).

Applying these and the following standards, the Court should affirm the summary judgment ruling.

A. Appellants Must Present Specific Facts Supported By Competent Evidence Establishing The Elements Required To Prove Their Negligence Claim.

On summary judgment, respondents as the moving party need only show that there is an absence of material fact to support appellants' claims. Because appellants ultimately bear the burden of proof at trial, to successfully oppose the motion they must present competent evidence to establish the existence of each element essential and required to prove their case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989). Appellants cannot rely on speculation or unsupported allegations, but rather must present specific and admissible facts to defeat summary judgment. *Seven Gables Corp. v. MGM/UA Entertainment, Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 752, 649 P.2d 836 (1982).

B. The Court's Function In Evaluating The Evidence on Summary Judgment.

Although this appeal involves a summary judgment motion, the appellate court (as was the trial court) is to weigh the admissible evidence in the record as follows:

- (1) **To decide if the evidence is material.** Does the evidence offered by appellants present a material fact that affects the outcome of the litigation? *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

- (2) **To assess the reasonableness of a proposed inference to be made from the admissible evidence.** Are the inferences that appellants argue should be made from the evidence reasonable? An inference is a process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted. *Fairbanks v. J.B. McLoughlin Co.*, 131 Wn.2d 96, 101, 929 P.2d 433 (1997).
- (3) **To determine duty, which is a question of law.** Whether Officer Eagen and TCSO owed a duty under the negligence claims is an issue of law for the Court. *Webstad v. Stortini*, 83 Wn.App. 857, 924 P.2d 940 (1996).
- (4) **To determine causation in a negligence action on the element of cause in fact.** Where (a) the material facts are not disputed, (b) the reasonable inferences are plain and inescapable, and (c) reasonable minds could not differ, causation can be decided as a matter of law by the Court on summary judgment. *Estate of Borden v. Dept. of Corrections*, 122 Wn.App 227, 239, 95 P.3d 764 (2004).
- (5) **To determine legal causation.** Legal causation is always a matter of law for the Court on summary judgment. *Kim v. Budget Rent-a-Car Systems, Inc.*, 143 Wn.2d 190, 204, 15 P.3d 1283 (2001).

This case was scheduled for a bench trial. *See* Appendix 1.¹

Where a case will be decided by bench trial, the court should weigh any disputed facts on summary judgment so long as credibility is not determinative of any inference raised by those facts. *TWA v. American*

¹ Appendix 1 contains Defendants' Designation of Clerk's Papers, and the referenced Scheduling Order and trial court docket. The record confirms that this case was scheduled for a bench trial as of the summary judgment hearing date. None of the parties filed a jury demand.

Coupon Exchange, Inc., 913 F.2d 676, 684 (9th Cir. 1990); *Shaw v. Lindheim*, 908 F.2d 531, 537 (9th Cir. 1990).

III. STATEMENT OF THE CASE

A. Marvin Henry's Employment By TCSO.

Marvin Henry was employed by TCSO as a corrections officer assigned to the Thurston County Jail. He was hired at TCSO by Deputy Chief Karen Daniels. Before his job with TCSO, Mr. Henry served in the U.S. Army, and worked part time for the Washington Department of Corrections at McNeil Island. CP 446-447 (Chief Daniels Dep. at 5:19-6:15).

TCSO did an extensive background check on Mr. Henry before offering him a job. This included interviews with military personnel, former employers and acquaintances; review of his military history; and review of any criminal history. Marvin Henry was a highly qualified applicant. He received favorable reviews from the military. He had a stellar background. He was of high integrity, with good communication skills. During his employment at the Thurston County Jail, Mr. Henry was well-liked by his coworkers and supervisors. He had a great sense of humor. He also got along well with inmates, and was adept at quickly diffusing bad situations that arose within the jail population. CP 451 (Chief Daniels Dep. at 22:18-25:22).

B. The Murder/Suicide of Karen Henry And Marvin Henry.

On December 4, 2001, between 2:00 p.m. and 2:19 p.m., Marvin Henry was at home alone with his wife, Karen Henry. Karen laid peacefully on the couples' sofa watching T.V. CP 783. Marvin Henry walked up to his wife, and shot her in the head. Soon thereafter, he dialed 9-1-1 at 2:18 p.m., telling the operator, "...I'm calling to tell you that I just murdered my wife and I am going too. You just have a nice day." CP 801. Marvin Henry then went to his bedroom. He laid down on his bed, and then shot himself.

The weapon used by Marvin Henry to kill his wife and then to commit suicide was his personally owned handgun. CP 786-788.

C. The Events Before The Murder/Suicide Involving Thurston County Sheriff's Office.

On December 2, 2001, Marvin Henry returned home after working the graveyard shift at the Thurston County Jail. He later received a call from Chief Daniels. Chief Daniels told Marvin Henry that he was being placed on paid administrative leave pending investigation of a complaint made by a female inmate. The inmate accused Mr. Henry of engaging in a sex act with her. Following standard procedures, Chief Daniels told Mr. Henry that pending the investigation, he was not allowed in the jail and was to be available by phone during normal business hours. CP 452-453

(Chief Daniels Dep. at 28:13-32:17). The restriction from entering the jail was solely to maintain the integrity of witnesses and evidence relating to investigation of the sexual conduct complaint. CP 453 (*Id.*, 30:8-11). Marvin Henry otherwise was authorized to fulfill other responsibilities as a corrections officer, including range qualification with his handgun. CP 472 (*Id.* at 106:8-109:5). When she placed Marvin Henry on paid administrative leave on December 2, 2001, Chief Daniels did not believe the inmate's complaint would be proven true. CP 458 (Chief Daniels Dep. at 51:9-13).

Two days later, on December 4, 2001, at around 11:55 a.m., Chief Daniels spoke with Marvin Henry. CP 457-458 (Chief Daniels Dep. at 49:22-53:23). In the call, he admitted to engaging in a consensual sexual act with the inmate. Chief Daniels' reaction was shock, because Mr. Henry's admission was totally unexpected. CP 458 (*Id.* at 51:21-22). Mr. Henry also said that he had consulted with a lawyer that morning.

Mr. Henry had a previously scheduled interview with TCSO Detective Cheryl Stines at 2:00 p.m. the afternoon of December 4. Det. Stines was investigating the inmate's complaint and potential criminal charges for custodial sexual misconduct. During their phone conversation, Chief Daniels told Mr. Henry that he needed to share his disclosure with Det. Stines. CP 458 (*Id.* at 53:5-10). Chief Daniels' ultimate reaction was

that the potential criminal consequences facing Mr. Henry were not a big deal, and that he would be able to work through the situation. CP 458 (*Id.* at 53:14-20).

Chief Daniels shortly thereafter called Marvin Henry again, and offered to attend 2:00 p.m. the interview with Det. Stines. Mr. Henry thanked Chief Daniels for her support, and said he would see her at the interview. CP 459 (*Id.* at 54:24-57:4).

As she promised, Chief Daniels went to Det. Stines' office around 2:00 p.m. for Mr. Henry's interview. CP 459 (Chief Daniels Dep. at 56:24-57:4). When Mr. Henry did not appear at 2:00 p.m., Detective Stines called him at home. Marvin Henry answered the phone and said he would be right in, that he was just waiting for his wife to come home. CP 460 (Chief Daniels Dep. at 58:16-60:24). Shortly after this phone call, Chief Daniels received word of the 9-1-1 call placed by Marvin Henry from his home, reporting that he had killed his wife. *Id.*

D. The Events Before The Murder/Suicide Involving Officer Craig Eagen.

Officer Craig Eagen was Mr. Henry's co-worker and close friend. CP 387 (Eagen Dep. at 26:6-28:19). On Sunday, December 2, 2001, Officer Eagen worked the day shift at the Thurston County Jail. While on duty, Officer Eagen learned that Mr. Henry had been placed on

administrative leave. On the way home from work, Officer Eagen stopped by the Henry home to check in on his friend, and to provide encouragement and support. CP 789-790.

On the afternoon of Monday, December 3, 2001, Marvin Henry called Officer Eagen at the Thurston County Jail. Mr. Henry asked Officer Eagen if he would not mind picking up his personally owned handgun from the locker they shared. The locker was used solely by Henry and Eagen. CP 788-790. Marvin Henry explained to his friend that he needed the handgun to qualify at the TCSO firing range on Tuesday December 4, 2001. CP 790. Officer Eagen agreed to perform the favor. When he ended his shift, Officer Eagen picked up Mr. Henry's gun out of their locker, and took it home, planning on delivering it to Mr. Henry sometime later the next day. CP 790-791.

On Tuesday, December 4, 2001, Mr. Henry called Officer Eagen at home at about 9:00 a.m. or 10:00 a.m. In a very regular tone, Mr. Henry inquired about his personally owned weapon and reminded Officer Eagen that he needed it to visit the range to fulfill the quarterly qualification requirement. CP 399 (Eagen Dep. at 76:4-24). No set time was arranged to drop off Mr. Henry's personally owned handgun. Officer Eagen said he would stop by the Henry home that afternoon on the way to a doctor's appointment. *Id.*

Around 1:00 p.m., Officer Eagen stopped by the Henry home. Marvin Henry was out in his front yard when he arrived. CP 401-402 (Eagen Dep. at 85:11-87:14). They waved at each other as Officer Eagen drove up. Mr. Henry said that he had an interview scheduled with Chief Daniels that afternoon, and promised to call Officer Eagen after the interview. *Id.* Officer Eagen then returned to Mr. Henry his personally owned handgun. *Id.* They said their goodbyes, and Officer Eagen drove off to his doctor's appointment, expecting a phone call from Marvin Henry later that afternoon. Officer Eagen saw nothing wrong with his friend, and left the Henry home thinking Marvin Henry was fine. *Id.*

E. Marvin Henry's Family Disavows Any Knowledge of His Incompetency or Capacity To Harm or Injure His Wife, Himself, or Anyone Else.

1. What Was Known of Marvin Henry By His Sister, Terry Butler.

Marvin Henry was as close to his sister, Plaintiff/Appellant Terry Butler, as anyone on this earth. This close relationship went as far back as their childhood, and continued until his death. CP 903-906 (Butler Dep. at 49:6-52:6); CP 948-949 (Ada Daniels Dep. at 17:1-18:16). As family friend Ada Daniels describes the relationship, "Terry could have been his sister, his mother, his friend, his person he could confide in, and he just loved her." CP 949 (Ada Daniels Dep. at 18:4-7). Marvin and Terry saw

each other frequently, and were on the phone together all the time. CP 907-909 (Butler Dep. at 54:2-56:24).

Ms. Butler is the one witness in this case who can best speak to Marvin Henry's demeanor, his relationship with his wife, and his lack of capacity to harm himself or others. She had face-to-face contact with her brother on December 3, 2001, the day before the murder/suicide. This is what Terry Butler has to say about her brother:

- Right up to the date of his death on December 4, 2001, Marvin Henry was a man of strong family values, a strong work ethic, he treated people very well, and was motivated to do nothing but good. CP 905-906 (Butler Dep. at 51:7-52:6).
- Terry Butler had no knowledge of any medical or psychological condition suffered by her brother Marvin Henry that would have led him to commit homicide, suicide, or to harm himself or others. CP 897-902 (Butler Dep. at 43:14-48:4).
- Within the Henry family, including parents and siblings of Mr. Henry, there is no family history of violence, suicide, self-inflicted injury, or any mental or psychological condition. CP 916-917 (Butler Dep. at 75:19-76:12).
- From what Marvin told his sister, as well as from what she observed herself, Marvin and Karen Henry had a good marriage. CP 920-921 (Butler Dep. at 82:15-83:21).
- Marvin Henry had frequently told Terry Butler that he loved his wife Karen very much, and cared about her a lot. CP 910-911 (Butler Dep. at 58:3-59:21).
- Terry Butler had no knowledge of any fights between Karen and Marvin Henry during their years of marriage, nor did she ever see them argue. CP 912-915 (Butler Dep. at 66:4-69:7).

- Until this lawsuit, Terry Butler had no knowledge that Karen and Marvin Henry had ever been in marriage counseling. CP 922, 939-940 (Butler Dep. at 108:19-21, 188:21-189:7).
- There was nothing that Marvin Henry ever said or did before December 4, 2001 (the date of the murder/suicide) that would have led Terry Butler to believe or conclude that her brother was capable of committing murder, suicide, harming himself, harming his wife, or harming any other person. CP 918-919 (Butler Dep. at 77:10-78:4).
- To this day, Terry Butler has no understanding as to why Marvin Henry killed his wife. Although she does not know why he killed himself, she thinks the reason may be because of “pride.” CP 936-938 (Butler Dep. at 159:8-161:16).
- Marvin Henry never revealed to his sister that he had been placed on administrative leave on December 2, 2001, or that he had any trouble at work. He had stopped by Terry Butler’s office on Monday, December 3, 2001, and invited her to lunch. She saw nothing unusual in his demeanor or his behavior. To Terry Butler, he appeared to be his “bubbly, normal,” “typically friendly” self. CP 923-927 (Butler Dep. at 130:16-134:1).

Terry Butler believes that her brother did not make the decision to kill himself until between 2:02 p.m. and 2:15 p.m. on December 4, 2001. CP 937 (Butler Dep. at 160:18-22).

2. What Was Known By Marvin Henry’s Oldest Son, Marvin Junior.

Mr. Henry’s son, Marvin Henry, Jr. confirmed that as of December 4, 2001, he had no knowledge that his father had any problems at work based on the family’s interaction at home. Marvin, Jr. saw his father the morning of December 4, 2001, before he left for school. Everything was

normal in the family and at home that morning, and there was certainly nothing unusual. In no way did Marvin, Jr. ever think that the tragic deaths of his parents would have occurred, either that day or any other day. CP 135-137 (Marvin Henry, Jr. Dep., pp. 68-70).

3. What Was Known By Marvin Henry's Brother-in-Law, Melvin Butler (Terry's Husband).

Melvin Butler (Terry Butler's husband) knew his brother-in-law Marvin Henry since high school, and in all those years there was never an indication that he may have suffered from any form of depression or other mental infirmity. Marvin Henry was not a violent person, either physically or verbally. Mr. Butler knew his brother-in-law was very close friends with Officer Eagen. He viewed the marriage between Marvin Henry and Karen Henry as a "loving relationship." To Melvin Butler, Marvin Henry "was a good man," "happy going," a "jokester," a "good guy." CP 144-156 (Melvin Butler Dep., pp. 40-45, 48-51, 72, 85-86).

F. The Marriage Counselor Seeing Marvin and Karen Henry Affirms Marvin Henry Did Not Show or Demonstrate Any Risk of Harm To Himself or His Wife.

Unknown to TCSO, Officer Eagen, or any other friends or family, Marvin and Karen Henry were in marriage counseling at the time of their deaths. Their marriage counselor was Judith Provasoli, whose professional experience included working with suicidal patients and those

capable of inflicting self-injury. CP 990-994 (Provasoli Dep. at 10:5-14:25).

Ms. Provasoli's last session with the couple was the evening of Monday, December 3, 2001, less than 24 hours before the murder/suicide. During that session, as well as two previous sessions in November, 2001, there was absolutely no indication to Ms. Provasoli that Marvin Henry would harm himself or his wife, let alone any indication that he was capable of murder/suicide or harming anyone. CP 995-1001, 1006 (Provasoli Dep. at 19:14-21:4; 42:19-43:12; 49:7-50:3; 55:7-55:24). By state law, Ms. Provasoli has a mandatory reporting obligation to alert appropriate authorities in the event a patient reveals or indicates he or she may harm themselves or another. Ms. Provasoli did not find any such reporting obligation arising in her sessions with the Henrys. CP 1009-1010 (*Id.* at 63:20-64:22).

During the December 3rd session, Ms. Provasoli recalls the Henrys sitting close together on the same small sofa, and expressing care and tenderness towards each other. CP 1008-1009 (Provasoli Dep. 62:7-63:19). At the end of that session, Marvin and Karen Henry were eager to continue their counseling. They scheduled their next visit with Ms. Provasoli for the following week, on Monday, December 10, 2001. Ms.

Provasoli fully expected to see the Henrys again in one week's time. CP 1005-1006 (*Id.* at 54:3-55:6).

The Henrys' counseling session the evening of December 3, 2001 is additionally significant in the following two respects. First, during the session, it came up that Marvin Henry was under investigation for sexual misconduct at work. One of the issues discussed was Karen Henry's strong desire to be supportive of her husband as he dealt with his employment situation. CP 1001-1004 (Provasoli Dep. at 50:4-53:15). Second, there was no indication during the session, or any previous session, that Karen Henry was fearful or felt threatened by her husband in any way. If Karen Henry had these feelings, it would have been a subject addressed during counseling. CP 1008 (*Id.* at 62:8-13).

Ms. Provasoli was both shocked and disturbed when she learned of the deaths of Karen and Marvin Henry a day or so later when reading a newspaper article. There was absolutely no indication to her that such a tragedy could happen. CP 1006-1007 (Provasoli Dep. at 55:25-56:12).

G. The Lawyer Who Met With Marvin Henry The Morning of December 4, 2001, Affirms That Marvin Henry Did Not Evidence Any Risk of Harm To Himself, His Wife, or Anyone Else.

At around 10:00 a.m. on December 4, 2001, Marvin Henry met with a criminal lawyer in Olympia, Charlie Williams. The meeting lasted

for about one hour. Mr. Williams found Mr. Henry to be well spoken and polite. CP 1014-1015 (Williams Dep. at 21:24-22:15). During the meeting, discussed were the potential criminal charges facing Marvin Henry for custodial sexual misconduct, and the possible penalties. CP 1015-1021, 1029-1031 (Williams Dep. at 22:19-26:7; 28:5-29:25; 58:6-60:9). Mr. Williams advised Mr. Henry to stop cooperating in TCSO's investigation of the sexual misconduct complaint. CP 1025-1028 (*Id.* at 51:5-54:22). Mr. Williams affirms that Mr. Henry's conduct and demeanor during their meeting did not indicate that he could or would harm himself or any other person. CP 1022-1024 (Williams Dep. at 34:10-35:14; 38:10-25).

A little over three hours after this meeting concluded, Marvin Henry and his wife Karen were dead. In his suicide note, Marvin Henry wrote:

"To my attorney Charles W. Williams. Thanks for the advice you gave me on 12/04/01, there's no other course but to do this."

CP 891 (Marvin Henry suicide note).

H. Summary: The Murder/Suicide Committed By Marvin Henry Was Not Foreseeable Nor Predictable By TCSO or Officer Eagen.

Defendants' suicidology expert, Paul G. Quinnett, Ph.D., routinely works with law enforcement agencies and the U.S. military on issues of

suicide intervention and prevention. Based on his extensive review of the record, Dr. Quinnett reached the following opinions:

- (1) The homicide of Karen Henry, and the suicide of Marvin Henry, were neither predictable nor foreseeable by the Thurston County Sheriff's Office, Officer Craig Eagen, or any other Thurston County personnel.
- (2) There were no warning signs or other indications presented by Marvin Henry that would have indicated or informed Thurston County Sheriff's Office, Officer Craig Eagen, or any other Thurston County personnel of a need to intervene or otherwise take action to prevent the murder/suicide involving Marvin and Karen Henry, or that he should not possess or have control of a firearm.
- (3) The only person who had any reasonable notice that Marvin Henry would commit suicide was his sister, Terry Butler, based solely on the telephone call Ms. Butler received from her brother around 2:00 p.m., approximately 20 minutes before his 9-1-1 call on December 4, 2001.

CP 566-67 (Quinnett Declaration, pp. 2-3).

Appellants assert that the murder/suicide was a "preventable tragedy." Appellants' Brief at 2. If that is true, the evidence points to only one person who might have been able to prevent the killings: Mr. Henry's sister, Terry Butler. Ms. Butler testified that she received a disturbing telephone call at her office from her brother at approximately 2:00 p.m. on December 4, 2001. CP 928-32 (Butler Dep. at 142:4-146:25). According to Ms. Butler, it was "...evident he was about to take his life for some reason." CP 930 (Butler Dep. at 144:7-11). The distance

between Ms. Butler's office and the Henry residence was a mile to a mile and a half. CP 909 (Butler Dep. at 56:8-10).

After receiving this disturbing call, Terry Butler immediately left her office, and drove straight to her brother's home. Her average rate of speed was 70 miles per hour, and the trip took three minutes. CP 932 (Butler Dep. 146:8-13). Ms. Butler testified she arrived at her brother's home at 2:05 p.m. based on the time of her brother's call, and the time it took to drive there. CP 935 (Butler Dep. at 149:1-24). Ms. Butler chose to drive to her brother's home, rather than calling for 9-1-1 assistance because "...it would take too much time to call 9-1-1. So I made the decision to go to him because he needed help and not call 9-1-1." CP 933-34 (*Id.* at 147:22-148:6). When she arrived at the vicinity of the Henry residence, already present were multiple Lacey Police cars and the Thurston County SWAT team. CP 942-45 (Butler Dep. at 249:1-252:25).

Marvin Henry did not dial 9-1-1 and report that he had murdered his wife until 2:18 p.m. CP 801. According to Ms. Butler, she was at the Henry residence by 2:05 p.m., at least thirteen minutes before Marvin Henry dialed 9-1-1. CP 935. The SWAT team did not arrive on scene until 2:45 p.m. CP 811. Ms. Butler is unable to explain the time discrepancies that are evident when comparing her deposition testimony to the timeline chronology established by the police investigation records.

IV. UNSUPPORTED FACTUAL ALLEGATIONS MADE IN APPELLANTS' BRIEF

Plaintiffs/appellants make a number of factual allegations that are neither supported by nor reasonably inferred from the record, including the following:

- (1) Appellants' Brief at 8-9: ***Plaintiffs allege that on December 3, 2001 Marvin Henry made an "unusual" request to his friend and locker mate, Craig Eagen, by asking for his handgun, so he could qualify at the TCSO range on Tuesday, December 4, 2001.***

There is no evidence that Marvin Henry's request for his handgun was "unusual." Range training was scheduled at the TCSO firing range for December 4, 2001. CP 788. The fact Marvin Henry was on administrative leave did not exempt nor preclude him from range qualification. CP 469 (Chief Karen Daniels Dep. at 95:13-25); CP 472 (Chief Karen Daniels Dep. at 106:8-109:5); CP 76 (McClanahan Decl., ¶¶4-5); CP 79 (Watkins Decl. ¶¶4-5).

- (2) Appellants' Brief at 9: ***Plaintiffs allege that at the time of Marvin Henry's administrative leave on December 2, 2001, TCSO had "exclusive custody and possession" of Mr. Henry's handgun. Plaintiffs allege that the handgun was "secured" within a locker at TCSO.***²

At no time was Mr. Henry's personally owned handgun "secured" by TCSO. CP 788, 790. Mr. Henry placed it in his personal locker shared with Officer Eagen before leaving work on December 2. *Id.*

TCSO had no reason to search Mr. Henry's locker or to have access to Marvin Henry's handgun for purposes of

² At page 15 of Appellant's brief, they also assert that TCSO officers on "suspension" generally have their duty weapons confiscated. The assertion is based on inadmissible testimony found in the Declaration of Ed Thompson, CP 298-301. The trial court struck that portion of Thompson's declaration from the summary judgment record. CP 20-22. That order has not been appealed.

investigating the custodial sexual assault allegation. It was neither evidence of nor relevant to the crime being investigated. CP 435, 439, 441-442 (Det. Stines Dep. at 55-56, 71-72, 81-82).

There was no reason for Chief Daniels or anyone else to give Craig Eagen clearance to return to Marvin Henry his personally owned handgun. CP 473 (Chief Daniels Dep. at 110:11-22). Marvin Henry had every right to possess his handgun. CP 131-132 (Chief Hansen Dep. at 39:9-40:19). Plaintiff's own expert, retired Bellevue Police Chief Donald Van Blaricom, confirms that at no time before his death on December 4, 2001 did Marvin Henry become ineligible to legally possess a firearm in the State of Washington. CP 528 (Van Blaricom Dep. at 136:4-137:19).

- (3) Appellants' Brief at 13-14: ***When Mr. Eagen visited Marvin Henry at his home on December 4, 2001, he observed "a number of unusual events."***

There is nothing in the record supporting this allegation. Officer Eagen never observed any "unusual events." Rather, he thought his friend Marvin was "fine." CP 402 (Eagen Dep. at 85:21-89:4). Marvin Henry never admitted his sex act with the inmate to Craig Eagen, nor did he tell Officer Eagen that "he was planning to present to the TCSO to accept responsibility for his actions and provide a statement." Mr. Henry only told Officer Eagen that he was going to go to an interview at the Thurston County Sheriff's Office, and that his wife Karen would be accompanying him. *Id.*; CP 791.

- (4) Appellants' Brief at 14: ***When Mr. Eagen met with Marvin Henry during the early afternoon of December 4, 2001, Mr. Eagen observed or knew the following: "...serious indications of emotionally [sic] instability, a volatile domestic relationship, ensuing arrest for a felony sexual act and depression...."***

There is nothing in the record to support the allegation that Officer Eagen knew of any emotional instability, volatile domestic relationship, or any depression involving Mr. Henry, or that he was going to be arrested.

- (5) Appellants' Brief at 11: ***Plaintiffs allege that TCSO was allowing Marvin Henry to turn himself in rather than be arrested the afternoon of December 4, 2001, for custodial sexual misconduct. Mr. Henry had an "appointment" to turn himself in at noon. Chief Daniels spoke with Marvin Henry at 11:55 a.m. and advised him to "come in and surrender himself."***

At no time did Chief Daniels advise Mr. Henry to come in and "surrender himself," nor was Marvin Henry going to "turn himself in that afternoon." There was no appointment at 12:00 noon. Mr. Henry had scheduled an interview at 2:00 p.m. with Detective Cheryl Stines, and that Chief Daniels had agreed to be present to support Mr. Henry. CP 459 (Chief Daniels Dep. at 54:24-57:4). Chief Daniels herself did not know of any plan to take Mr. Henry into custody or to arrest him. CP 459-60 (Chief Daniels Dep. at 57:19-25).

- (6) Appellants Brief at 12 and 28: ***When Officer Eagen arrived at the Henry house, "Mr. Henry had been consuming Crown Royal Canadian Whiskey," and was "actually intoxicated."***

In making these allegations, appellants rely solely on (1) the Lacey Police Report, which states that an open bottle of Crown Royal (375 ml.) was found in the Henrys' kitchen, and was one-third full, and (2) a toxicology report from the death investigation indicating some presence of alcohol in Marvin Henry's system at the time of death. CP 254, 279-280, 863. There is no evidence that Marvin Henry had consumed any alcohol ***before*** Officer Eagen had stopped by the Henrys' residence on December 4, 2001. There is no evidence as to how much alcohol Marvin Henry consumed, when he consumed it, or that Mr. Henry was ever impaired by any alcohol he may have consumed. ***Appellants offered no lay or expert testimony that would support any theory of alcohol impairment.***

V. ARGUMENT

To prove actionable negligence a plaintiff must establish (1) the existence of a duty owed by defendant to the plaintiff or its decedent, (2) a

breach of that duty, (3) injury, and (4) that the claimed breach was a proximate cause of the resulting injury. *Webstad v. Stortini*, 83 Wn. App. 857, 865, 924 P.2d 940 (1996).

Appellants failed to present any evidence to support a genuine issue of material fact supporting their negligence claim. As a matter of law, they failed to establish two key elements of their cause of action: (1) the existence of any legal duty owed by TCSO or Officer Eagen to Marvin Henry or Karen Henry, and (2) that any act or omission on the part of either TCSO or Officer Eagen was a cause in fact or proximate cause of the murder of Karen Henry, or Marvin Henry's suicide. Both the negligence claim and respondeat superior claim were properly dismissed with prejudice on summary judgment.

Appellants' assignment of error includes the trial court's dismissal of the respondeat superior claim. However, appellants' opening brief fails to support this assignment of error with any argument, including citation to legal authority and the record. Appeal of the respondeat superior claim dismissal is therefore waived. RAP 10.3(a)(5); *Couriche Canyon Conservancy v. Bosley*, 119 W.2d 801, 809, 828 P.2d 549 (1992); *Peter M. Black Real Estate Co., Inc. v. Department of Labor & Industries*, 70 Wn. App. 482, 854 P.2d 46 (1993).

As for the trial court's dismissal of the negligence claim on summary judgment, that ruling should be affirmed.

A. **Under General Negligence Principles, Thurston County And Officer Eagen Owed No Duty To Marvin Henry Or Karen Henry.**

The threshold determination in any negligence case is whether the defendant owed a duty of care to the plaintiff. The existence of a duty is properly determined by the court on summary judgment. "Whether a defendant owes a duty of care to a plaintiff is a question of law." *Webstad*, 83 Wn. App. at 865. When no duty of care exists, a defendant cannot be liable for negligence. *Id.*

As a general rule, a party does not have a duty to protect others from the criminal acts of a third party. *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 438, 874 P.2d 861 (1994). Similarly, the common law provides no general duty to protect others from self-inflicted harm, including suicide. *Webstad*, 83 Wn. App. at 866.

Appellants argue that respondents nonetheless owed a legal duty to prevent or avoid the murder of Karen Henry and the suicide of Marvin Henry under several limited exceptions to these rules. First, relying upon Restatement (Second) of Torts §§390 and 308, appellants argue that TCSO and/or Officer Eagen negligently "entrusted" Marvin Henry with his personally owned handgun, which he later consciously chose to use to

commit the murder/suicide. Second, relying on Restatement (Second) of Torts §§315 and 319, appellants contend that TCSO and/or Officer Eagen had a “special relationship” with either Marvin Henry or Karen Henry so as to impose an affirmative duty upon them to intervene, either to control Marvin Henry from harming his wife and himself, or to protect Karen Henry from harm from her husband. All of these liability theories fail.

A common and critical element in establishing a duty under §§308, 315, 319, and 390 is this: The actor (i.e. TCSO or Officer Eagen) knew, or reasonably should have known, that another party (Marvin Henry) posed a risk of harming either himself or others. There is no evidence to establish this critical element. There is no evidence that TCSO or Officer Eagen knew, or should have known, that Marvin Henry was capable of harming himself, his spouse, or any other person. *More important, there is no evidence offered by appellants that Marvin Henry was in fact incompetent.*

B. No Duty Based on Entrustment of Property To An Incompetent Person (Restatement (Second) of Torts §390).

Restatement (Second) of Torts §390 imposes a duty not to entrust property to *a known incompetent person* who would use that property in such a way so as to create an unreasonable risk of harm to himself or others:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a

manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Mele v. Turner, 106 Wn.2d 73, 76, 720 P.2d 787 (1986). Liability under §390 requires proof that property was supplied to an incompetent person; that the supplier of the property know the person to be incompetent; and that because of his or her incompetency, the person would use the property in such a manner so as to present an unreasonable risk of physical harm to himself or to others.

No admissible evidence exists to establish any of these requirements. There is no proof that at the time he had possession of his personally owned handgun on December 4, 2001, Marvin Henry was incompetent to have access to the weapon; that TCSO or Officer Eagen knew, or reasonably should have known, that Marvin Henry was incompetent; and because of any incompetency, respondents knew he would use his personally owned handgun in such a way as to create an unreasonable risk of harm to himself or to his wife Karen.³

Three cases explain the absence of §390 liability in this case. In *Pitts v. Ivester*, 171 Ga. App. 312, 320 S.E.2d 226 (Ga. Ct. App. 1984), a gas

³ Nor did the law impose upon Officer Eagen, when he returned Marvin Henry's personally owned handgun on December 4, 2001, a duty to inquire of Mr. Henry concerning his competency, particularly when he did not demonstrate any obvious physical or mental impairment. *Mele*, 106 Wn.2d at 77-78. See also, *Bryant v. Winn-Dixie Stores, Inc.*, 786 S.W.2d 547 (Tex. App. 1990).

station attendant fired a handgun at a customer's car after the customer had littered the premises with a discarded cup. The customer sued the gas station operator, his attendant, and the local sheriff, who had loaned the gas station operator the handgun used in the incident. The sheriff had loaned his personal handgun to the gas station operator to replace a gun that had been stolen from the gas station in an earlier burglary. The sheriff had known the gas station operator for ten years, and knew no facts indicating that the operator, or his employee, had ever used a gun in either a careless or reckless manner. The *Pitts* court dismissed the plaintiff's negligent entrustment claim under §390, there being no evidence that the sheriff knew or should have known the handgun he had loaned to the gas station operator would be used by an incompetent person in a manner causing an unreasonable risk of harm.

In *Bryant v. Winn-Dixie Stores, Inc.*, 786 S.W.2d 547 (Tex. App. 1990), the Texas appellate court found no liability on the part of a retail store operator when a sales person sold ammunition to a former mental patient, who later used the ammunition to murder four people. The sales clerk had no knowledge of the customer's mental health history. There was no evidence to support a finding that at the time of the sale, the mental patient acted unusually or in such a way to otherwise indicate his incompetency, or that he intended to use the ammunition to harm others.

In *Rains v. Bend of the River*, 124 S.W.3d 580 (Tenn. Ct. App. 2003), the parents of an underage buyer of ammunition, who later committed suicide, sued the seller of the ammunition for negligence based on Restatement (Second) of Torts §390. The *Rains* court held that the plaintiff's §390 claim should be dismissed for lack of proof that the seller should have suspected the minor was not competent to use the ammunition. 124 S.W.3d at 597.

1. **There Is No Evidence Marvin Henry Was In Fact Incompetent.**

The essential element of duty required appellants to first prove that Marvin Henry was in fact incompetent. Absent this proof, whether TCSO and Officer Eagen perceived Marvin Henry to be incompetent is irrelevant. Appellants offered no lay or expert testimony, or any other evidence, to prove Marvin Henry was incompetent. Conceding there was *no direct evidence* of incompetency, Appellants' brief at page 30 asserts that, based on the following "circumstantial evidence," "a reasonable person could conclude that Marvin Henry was in mental, emotional, and psychological crises...."

- *Marvin Henry was not allowed to enter his place of employment to personally retrieve his handgun.*
- *Marvin Henry called Officer Eagen "multiple times" within a short period for his personally owned handgun. (Actually, Marvin*

Henry called only two times, once on December 3, 2001, and then one other time a day later on December 4, 2001. CP 790-791.)

- *Marvin Henry's reason for obtaining his personally owned handgun to qualify was "pretextual."* (Actually, the undisputed evidence was that Mr. Henry was authorized to use the firing range while on administrative leave. *See, infra*, pp. 19-20; CP 400-401 (Eagen Dep. at 78:15-84:10).
- *Officer Eagen felt that there was "something not right with Marvin Henry."* (Actually, when Officer Eagen saw Marvin Henry on December 4, 2001, he thought his friend was "fine." CP 402 (Eagen Dep. at 86:1-87:14).

None of the allegations support an inference that Mr. Henry was in a "crisis mode" driving him to commit murder/suicide. Officer Eagen, Chief Karen Daniels, marriage counselor Judith Provasoli, criminal lawyer Charlie Williams, son Marvin Henry, Jr., and Marvin Henry's sister, Terry Butler, *all had contact with Marvin Henry less than 24 hours before the deaths.* They affirm that Marvin Henry was fully competent and did not pose a danger to anyone.

2. The Cases Cited By Appellants Do Not Support A Section 390 Claim Based On The Facts In This Case.

The cases cited by appellants do not support their § 390 claim. *Bernethey v. Walt Failor's, Inc.*, 97 Wn.2d 929, 653 P.2d 280 (1982), involved a wrongful death claim against a gun shop owner based on negligent entrustment under §390. It was alleged that the gun shop owner had allowed an obviously intoxicated person, Fleming, to obtain the rifle

used to fatally shoot his wife at a nearby tavern. The only issue on summary judgment was whether the gun shop owner should have known of Fleming's intoxication. The *Bernethey* court found material issues of fact as to whether the gun shop owner knew or should have known that Fleming was intoxicated or otherwise incompetent at the time he was given access to the rifle.

There was no factual dispute that Fleming had been drinking alcohol nearly non-stop during the 24 hours before his visit to the gun shop. A woman at the bar where Fleming had been drinking all day testified that, just before he procured the rifle, there was no question Fleming was intoxicated. Fleming left the bar at 6:30 p.m., and walked to the nearby gun shop. Fleming asked the shop owner to see a rifle for his son. The owner claimed that Fleming showed no symptoms of intoxication, except for a slight odor of alcohol. Fleming himself said, in contrast, that he remembers wetting his pants before entering the store, falling and staggering as he entered the store, and then having to rest his arms on the store counter in order to prop himself up. While the shop owner was completing paperwork for the sale of the rifle, Fleming grabbed the rifle and some ammunition from the counter, and walked back to the bar and shot his wife.

Bernethey involved a claim of incompetency based on acute intoxication. Here, appellants have not presented any evidence demonstrating that Marvin Henry was in fact intoxicated when visited by Officer Eagen on December 4, 2001, or that Officer Eagen (or anyone else) knew or should have known he was intoxicated. There is no proof that Marvin Henry had even consumed a drop of alcohol before Officer Eagen stopped by his home, let alone what amount of alcohol had been consumed by the time of his death or whether he was impaired by alcohol.

In *Tissicino v. Peterson*, 211 Ariz. 416, 121 P.3d 1286 (2005), a mother entrusted a gun to her son, which he used to accidentally kill another person. The *Tissicino* court held that there were genuine issues of material fact as to whether the mother should have known that her son was incompetent to have the gun based on §390:

Timothy's (the son) "constellation of characteristics" - alcohol abuse, mental impairment including cognitive dysfunction, and a prior accident with a gun - and Juanita's (the mother) undisputed awareness of them, together created a genuine issue of material fact on the question of whether Juanita (the mother) should have known that an unreasonable risk of physical harm would be created if she gave Timothy (her son) the gun.

121 P.3d at 1291. The mother's awareness of facts included the following:

- She had abused alcohol while pregnant with her son, creating a strong possibility her son suffered from fetal alcohol syndrome;

- Before the accidental shooting, her son had suffered head trauma from a serious automobile accident, and numerous motorcycle accidents;
- Her son had suffered learning disabilities throughout his school career, and was eventually placed in special education classes;
- Her son continually abused alcohol since age 14 and drank regularly at the time she had given him the gun;
- Her son had accidentally shot himself with a gun on a previous occasion.

Coupled with these facts, psychologists evaluating the son after the accidental shooting determined that he suffered from brain damage and cognitive disorders, had an IQ of 74, and his reading, spelling, and math skills were at a grade school level.

Unlike *Tissicino*, in this case there is no similar “constellation of characteristics” describing Mr. Henry, let alone any showing that Craig Eagen, TCSO, or anyone else interacting with Marvin Henry knew or should have known of any characteristics making Marvin Henry incompetent or otherwise a danger to himself or to others if in possession of a gun.

Finally, appellants cite *Kitchen v. K-Mart Corp.*, 697 S.2d 1200 (Fla. Sup. Ct. 1997), where the claimant was shot by her intoxicated ex-boyfriend, Knapp, shortly after he purchased a rifle from a local K-Mart store. Knapp testified that before he went rifle shopping, he had consumed a fifth of whiskey and a case of beer. After consuming alcohol

all day, Knapp went to his local K-Mart, where he bought a rifle and a box of bullets. Later that evening, he shot his ex-girlfriend with the rifle. At trial, Knapp had no recollection of what occurred in the K-Mart store when he purchased the rifle, and there was no other direct evidence regarding Knapp's behavior during the sale. Plaintiff did offer expert testimony that if Knapp had consumed as much alcohol during the day as he had testified, it would have been readily apparent to the K-Mart clerk selling the rifle that Knapp was intoxicated. The clerk who sold the gun testified that Knapp did not appear to be intoxicated. The clerk did testify, however, that although he asked Knapp to fill out a required federal firearms form, Knapp was unable to do so because his handwriting was illegible. The clerk had to start over and fill out a second, identical form for Knapp because he could not do it himself.

The facts here are clearly distinguishable. In *Kitchen*, there was foundational evidence that Knapp was actually impaired, through his own admissions concerning his alcohol consumption. This evidence was then supported by expert testimony that if Knapp had consumed the amount of alcohol he claimed, he would have been obviously intoxicated to the clerk. The clerk also testified that Knapp was unable to fill out the mandated federal form for the gun purchase, requiring the clerk to fill it out for him. This evidence was sufficient to create an issue of fact as to whether the

clerk knew, or should have appreciated, that Knapp was intoxicated and incompetent, and should not have been sold the rifle.

No evidence of incompetency is presented here. In fact, *the testimony of three experts in our record is to the contrary, i.e. no one could have known of any incompetency of Marvin Henry.* Respondents' suicide expert, Dr. Paul Quinnett has opined that *there was no indication, nor ability to predict on the part of defendants or anyone else, that Marvin Henry would commit a homicide or take his own life when given possession of his handgun on December 4, 2001.* Appellants' expert, retired Bellevue Police Chief Donald Van Blaricom testified that *at no time before his death did Marvin Henry become ineligible to legally possess a firearm in the State of Washington.*⁴ The Henrys' marriage counselor, Judith Provasoli, trained in dealing with persons at risk of suicide or infliction of harm to themselves or others, confirms that as of the time of the Henrys' deaths, *there was absolutely no indication, based on her professional training, that Marvin Henry posed a threat to his wife or himself.*

⁴ That would include RCW 9.41.080, which was relied upon by the plaintiffs in *Bernethey v. Walt Failor's, Inc., supra.* RCW 9.41.080 states:
No person shall deliver a pistol to any person under the age of twenty-one, or to one who he has reasonable cause to believe has been convicted of a crime of violence, or is a drug addict, an habitual drunkard, or of unsound mind.
97 Wn. 2d at 932-33.

C. **No Duty Based on Negligent Entrustment (Restatement (Second) of Torts §308).**

Negligent entrustment under Restatement (Second) of Torts §308 is defined as follows:

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct them self in the activity in such a manner as to create an unreasonable risk of harm to others.

To establish liability under §308, appellants must prove that (1) TCSO or Officer Eagen was the owner of the handgun used by Marvin Henry to cause injury to Karen Henry, and (2) at the time that TCSO or Officer Eagen “entrusted” the gun to Marvin Henry, they knew or should have known that he intended to use, or was likely to use, the gun to create an unreasonable risk of harm to Karen Henry or some other third party.

Negligence liability under §308 is limited, and significantly different from that based on §390 for two reasons. First, §308 does not apply where defendant is not the owner of the property, even though the defendant may have possessed the property at one time and then returned it to the owner who later uses the property to injure another. Neither TCSO nor Officer Eagen owned the gun used by Marvin Henry. The handgun was personally owned by Marvin Henry. Second, §308 applies only to injuries to third persons caused by the person in possession of the property. Section 308

does not apply to self-inflicted injury, and cannot provide a basis for liability for Marvin Henry's death by his own hand.

1. **Section 308 Does Not Apply Because Neither TCSO or Officer Eagen Owned The Handgun; Marvin Henry Owned The Handgun.**

Section 308 does not impose liability upon a defendant where the property at issue is owned by the person causing the injury. This is true even if the defendant at one time had possession of the property (e.g. as a bailee or as a family member) and later returns it to its owner who goes on to injure someone. The absence of liability exists, regardless of whether the actor knows the owner of the property may misuse it or otherwise cause harm to another. *See, Payberg v. Harris*, 931 P.2d 544 (Colo. App. 1996) (mother and step-father not liable under negligent entrustment for fatal shooting committed by their adult son using his personally owned rifle; the parents had stored the rifle for the son, and later returned it to him); *Todd v. Dow*, 19 Cal. App. 4th 253, 23 Cal. Rptr.2d 490 (1993) (shooting victim injured when shot by cousin, who was the owner of the weapon; cousin's parents not liable for negligent entrustment after they returned the rifle to their son after having stored it at their home); *Andrade v. Baptiste*, 411 Mass. 560, 583 NE.2d 837 (1992) (wife not liable under negligent entrustment to victim who had been shot by her husband; husband was the exclusive owner of the rifle that was stored in the family home, and the wife could not negligently entrust a

dangerous instrument to a person who owns that instrument already); *Mills v. Continental Parking Corp.*, 86 Nev. 724, 475 P.2d 673 (1970) (parking attendant not liable for negligent entrustment after returning vehicle to its obviously-intoxicated owner; the intoxicated owner later was involved in an accident injuring plaintiff).

Because the handgun here was personally owned by Mr. Henry, *even though he had used it in the course of his employment*, there is no liability of either TCSO or Officer Eagen under §308. This is explained in *Johnson v. Mers*, 279 Ill. App.3d 372, 664 NE.2d 668 (Ill. Ct. App. 1996). There, a law enforcement agency was found not liable for negligent entrustment when an off duty officer misused her personally owned service weapon to cause injury to her boyfriend. The couple had a fight at the boyfriend's home. During the fight, the off duty officer drew her gun, and while in a struggle, shot the boyfriend in the head. The *Johnson* court held that the duty officer's employer, the Island Lake Police Department, was not liable for her misuse of the firearm. The firearm was not owned by the Department, but had been purchased by the off duty officer. Because the employer did not have an exclusive right or superior right of control over the off duty officer's personally owned revolver, there was no entrustment of property actionable under §308. 664 NE.2d at 674.

A similar result is found in *Roberts v. Benoit*, 605 So.2d 1032 (La. 1992). In *Roberts*, a cook hired by a sheriff's office was later commissioned as a deputy, to enable him to receive state supplemental pay. The cook was allowed to purchase his own handgun for use in his role as a "commissioned deputy." While off duty, the cook drank alcohol with a friend, and later took out his handgun from an ankle holster and began playing with it. The cook passed the gun back and forth with his friend. While playing with the weapon, it was accidentally discharged, injuring the cook's friend. The *Roberts* court held that the sheriff's office was not liable for the friend's injury caused by the personally owned weapon, even though the sheriff's office had authorized him to possess the weapon.

Addressed later in Section V.E., even if TCSO did "own" Mr. Henry's gun, his use of the gun while off duty to commit a crime outside the scope of his employment does not impose liability for negligence. Under the circumstances, there is no cause in fact or proximate cause attributable to defendants.

2. Negligent Entrustment Under §308 Does Not Apply To Marvin Henry's Self-Inflicted Injuries.

There is no liability on the claim of negligent entrustment for Marvin Henry's suicide. Regardless of ownership, Section 308 does not apply to self-inflicted injury. *Stehlik v. Rhoads*, 253 Wis.2d 477, 645 N.W.2d 889

(2002); *Erickson v. Prudential Property and Casualty Ins. Co.*, 166 Wis.2d 82, 479 N.W.2d 552 (1991).

D. There Was Not A Special Relationship Between The Henrys And Thurston County or Officer Eagen So As To Impose A Duty Supporting A Negligence Claim.

Restatement (Second) of Torts §315 sets forth the requirements for establishing a “special relationship” duty:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless:

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right of protection.

Lauritzen v. Lauritzen, 74 Wn. App. 432, 438, 874 P.2d 861.

Neither TCSO nor Officer Eagen had a special relationship with Marvin Henry imposing upon them a duty to control his conduct to prevent harm to another (§315(a)). Nor did a special relationship exist between Karen Henry and any of the respondents such as to impose upon them an obligation to protect Ms. Henry from foreseeable physical harm from her husband (§315(b)).

1. **Defendants Had No Duty To Control Marvin Henry (Restatement (Second) of Torts §315(a)).**

For liability under §315(a), appellants must prove that TCSO and/or Craig Eagen had an affirmative “take charge” duty to control Marvin Henry’s conduct to prevent him from harming others, because they knew or should have known that Marvin Henry would likely cause bodily harm to others if not controlled. Restatement (Second) of Torts §319; *Bishop v. Miche*, 137 Wn.2d 518, 524, 973 P.2d 465 (1999); *McKenna v. Edwards*, 65 Wn. App. 905, 913, 830 P.2d 385 (1992). A “take charge” obligation only exists based upon a statute describing and circumscribing the actor’s power to act, or a court order. *Couch v. Washington Dept. of Corrections*, 113 Wn. App. 556, 564, 54 P.3d 197 (2002). Further, to impose a “take charge” obligation on the actor, the parties’ relationship under the statute or court order must be “definite, established, and continuing.” *Id.* at 564.

There was no court order directing either TCSO or Officer Eagen to “take charge” or otherwise control the conduct of Marvin Henry. Likewise, there was no applicable statutory obligation requiring any of the defendants to control Marvin Henry. And even if a court order or statute imposed a “take charge” obligation upon defendants, their duty to control Marvin Henry would arise only if defendants knew, or should have known, that Mr. Henry was likely to cause bodily harm to others if not controlled. *See*,

Couch, 113 Wn. App. at 567-569 (Department of Corrections obligation to supervise offender's payment of legal financial obligation (LFO) from prior felony conviction was not a "take charge" relationship so to impose duty to control offender to prevent his future crimes; DOC not liable for murder committed by offender while supervising his LFO obligation).

Appellants contend that Thurston County had "probable cause" to arrest Marvin Henry for custodial sexual misconduct on December 4, 2001, and the County's delay in making the arrest afforded Mr. Henry time to commit the homicide/suicide. The fact that Mr. Henry could have been charged and arrested for custodial sexual misconduct did not create a "take charge" duty under §§315 and 319.

Where an officer has legal grounds to make an arrest, he has considerable discretion to do so. *Donaldson v. City of Seattle*, 65 Wn. App. 661, 670, 831 P.2d 1098 (1992). Only if a specific statute mandates that an arrest be made does an officer have such a duty. *Id.* One such statute is the Domestic Violence Prevention Act (DVPA), Chapter RCW 10.99, discussed in *Donaldson*. Under the DVPA, a police officer responding to a domestic violence call shall make an arrest if the officer has probable cause to believe that a felonious domestic assault has occurred, and the assailant is present. In *Donaldson*, the Court of Appeals held that the City of Seattle was not negligent following the death of a girlfriend resulting from a fatal attack by

her boyfriend. The night before her death, Seattle Police officers had been called to the girlfriend's residence on a domestic violence complaint. The call was prompted by the boyfriend's threat to the girlfriend that "I'm going to kill you for ruining my life." Before police arrived, the boyfriend had left the area. Upon arrival, the police obtained a statement from the decedent, and searched the area but were unable to locate the boyfriend. The police officers offered to take the girlfriend to a shelter or to the home of a family member. She refused. The following morning the boyfriend returned to her home, and stabbed the decedent to death.

The *Donaldson* court held there was no special relationship duty owed by Seattle Police to the deceased girlfriend. There was no basis to arrest the boyfriend in response to the DVPA call. *See also, Bailey v. Town of Forks*, 108 Wn.2d 267, 737 P.2d 1257, 753 P.2d 523 (1987) (police could be liable for plaintiff's injuries caused by town police officer's failure to prevent a driver he knew to be heavily intoxicated from operating the vehicle; the police officer had a duty to enforce state statutes prohibiting drunk driving and requiring to immediately take into custody a publicly incapacitated individual; the injured woman alleged the officer had actual knowledge of the DUI statutory violations, and had failed to take mandatory corrective action, i.e. arrest the intoxicated driver).

Here, the statute governing the crime of custodial sexual misconduct did not require an immediate arrest of Marvin Henry. *See* RCW 9A.44.010, RCW 9A.44.160.⁵

2. **Defendants Had No Duty To Protect Karen Henry From Any Harm At The Hands of Marvin Henry, or To Protect Marvin Henry From Himself (Restatement (Second) of Torts §315(b)).**

There was no special relationship between defendants and Karen Henry that imposed upon defendants a duty to protect her from foreseeable harm presented by Marvin Henry. Appellants must show that TCSO and/or Craig Eagen was entrusted with Karen Henry's well being to protect her from her husband Marvin. *Webstad*, 83 Wn. App. at 869; *Lauritzen*, 74 Wn. App. at 439-441. Even if §315(b) could be construed to impose a special relationship duty to prevent a person (i.e. Marvin Henry) from harming himself, that duty is absent in this case.

TCSO had no "relationship" whatsoever with Karen Henry. As for Marvin Henry, TCSO's relationship with him was that of employer-employee. Marvin Henry's off-duty conduct, occurring away from the premises of his employer, was not enough to create a "special relationship"

⁵ The internal policies of TCSO concerning officers on paid administrative leave also did not create a "take charge" obligation. The policies did not require seizure of Mr. Henry's personally owned gun. Even if they did, internal policies and procedures cannot establish a legal duty for purposes of a negligence cause of action under §315 and §319. Because a policy directive does not have the force of law, it cannot impose a legal duty. *Joyce v. State Dept. of Corrections*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005). *See, also, Buczkowski v. McKay*, 441 Mich. 96, 490 N.W.2d 330, 332, n.1 (1992).

duty under the circumstances of this case. *Webstad*, 83 Wn. App. at 869-71 (no special relationship where girlfriend commits suicide in presence of boyfriend; even though boyfriend had been girlfriend's employer at one time, the parties' interaction on the night of the suicide was not employment related). *See also, Bartlett v. Hantover*, 9 Wn. App. 614, 620-21, 513 P.2d 844 (1973) (employer has duty to provide safe workplace for employee; employer has a duty to make reasonable provision against foreseeable dangers of criminal misconduct to which the employment exposes the employee). Marvin Henry's suicide (and his murder of his wife) did not occur in the workplace, nor was it work related. Nor did TCSO have a duty to protect its employee, Marvin Henry, from himself (suicide).⁶

Officer Eagen's relationship with Marvin Henry was that of a co-worker and friend. His relationship with Karen Henry was social only. As a co-worker, he had no "special relationship" duty owed to Marvin Henry outside of the workplace. His social relationship with both Marvin and Karen Henry likewise did not establish a special relationship duty for purposes of a negligence claim. *Webstad*, 83 Wn. App. at 869-72 (social relationships do not impose a special relationship duty); *Lauritzen, supra* (no

⁶ Appellants second cause of action asserted liability against TCSO based on negligent hiring, training, and supervision. These employer-employee based negligence claims were also dismissed on summary judgment. CP 25, 26, 28. The dismissal of these claims was not appealed, and is now final.

special relationship duty between spouses because of marriage, nor is a duty created between driver and passenger of car in a social setting).

Also, where there is a special relationship of entrustment to protect another, such a duty requires knowledge on the part of the defendants that a third party under their control presents a foreseeable danger of violence or harm to another. Only then is a duty imposed to take reasonable precautions to protect foreseeable victims endangered by the third party's violent tendencies. *Petersen v. State of Washington*, 100 Wn.2d 421, 428, 671 P.2d 230 (1983).⁷ Marvin Henry never revealed to TCSO or Officer Eagen, by his words, conduct, or deeds, that he posed a foreseeable threat to his spouse, let alone a foreseeable threat to himself.

Plainly, Karen Henry herself did not fear harm from her husband. She took a call at work from Marvin following his lawyer visit on December 4, 2001. Karen then called her boss, and made up a story that she needed to get home immediately because her son was ill at school. CP 789. Ms. Henry came home, apparently changed out of her work clothes, and then laid

⁷ Although not applicable here, under the special relationship exception to the public duty doctrine, a law enforcement agency may have a duty to protect a citizen where (1) there is contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official to protect or respond, which (3) gives rise to justifiable reliance upon the express assurances on the part of the plaintiff. *See, Cummins v. Lewis County*, 124 Wn. App. 247, 253, 98 P.3d 822 (2004), *aff'd* 156 Wn.2d 844 (2006). Karen Henry made no contact with TCSO concerning any threat posed by her husband, nor were any express assurances given by TCSO that it would protect Karen Henry from any violent action on the part of her husband.

down on the sofa to watch T.V., with her husband present a few feet away in the kitchen. CP 783-784. If Karen Henry had no apparent fear of her husband on December 4, 2001, how could TCSO or Officer Eagen foresee Marvin Henry would harm her?

E. Appellants Cannot Establish Cause In Fact or Proximate Cause Attributable To Any Act or Omission of Defendants

Even if appellants could demonstrate a duty on the part of respondents, and a resulting breach of that duty, any negligence on the part of TCSO and Officer Eagen was not the cause in fact or proximate cause of the death of Marvin Henry or Karen Henry. Their deaths were an *unforeseeable* consequence of any act or omission of the defendants.

Proximate cause consists of cause in fact and legal cause. *Estate of Borden v. Dept. of Corrections*, 122 Wn. App. 227, 95 P.3d 764 (2004); *Taggart v. State*, 118 Wn.2d 195, 266, 822 P.2d 243 (1992). “Cause and fact concerns the ‘but for’ consequences of an act. The act sets into motion a chain of events in a direct, unbroken sequence, and those events would not have resulted had the act not occurred.” *Taggart* at 226. While cause in fact is normally a question of fact for the jury, it may be determined as a matter of law if the facts are undisputed, the inferences are plain and inescapable, and reasonable minds could not differ. *Borden*, 122 Wn. App. at 239; *Kim v. Budget Rent-a-Car Systems, Inc.*, 143 Wn.2d 190, 203, 15 P.3d 1283 (2001).

Legal cause, on the other hand, “rests on considerations of policy and common sense as to how far the defendant’s responsibility for the consequences of its actions should extend.” *Kim*, 143 Wn.2d at 204. Legal cause is a question of law for the court. *Id.* The actions of TCSO and Officer Eagen were neither the legal cause nor the cause in fact of the murder/suicide of Karen and Marvin Henry.

1. Defendants’ Actions Were Not The Legal Cause.

The question of legal cause is necessarily “intertwined with the question of duty.” *Hertog v. City of Seattle*, 138 Wn.2d 265, 283, 979 P.2d 400 (1999). The proximate cause requirement insures that liability is limited to cover only those consequences which lie within the scope of the foreseeable risk for if people “...went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all.” *Sitarek v. Montgomery*, 32 Wn.2d 794, 802-803, 203 P.2d 1062 (1949). “If the defendant can foresee neither any danger of direct injury, nor any risk from an intervening force, he is simply not negligent.” *Id.* at 801-02.

Respondents’ legal responsibility did not extend to cover the unforeseeable, intentional acts of Marvin Henry. There is nothing that would have directed TCSO, Officer Eagen, or any other reasonable person to

foresee the murder/suicide of the Henrys, knowing what defendants knew or should have known.

2. Defendants' Actions Are Not The Cause In Fact of Any Injury.

The trial court properly determined, as a matter of law, that the conduct of TCSO and Officer Eagen was not the cause in fact of Marvin Henry or Karen Henry's death. Cause in fact does not exist if the connection between an act and the later injury is indirect and speculative. *Borden*, 122 Wn. App. at 240.

Instructive on the absence of causation is *Cygan v. City of New York*, 566 N.Y. Supp. 232 (Sup. Ct., 1991). In *Cygan*, the widow of a police officer who committed suicide sued the New York Police Department for her husband's death. The widow, who was herself a corrections officer, alleged that NYPD was negligent in allowing her husband to have access to his service weapon, which he used in the suicide. These are the facts in *Cygan*:

- In December, 1984, approximately 18 months before the suicide, the deceased police officer became paranoid and delusional, experiencing sleep disorders, drinking excessively, and having difficulty and stress in his marriage.
- The officer was referred to the Psychological Services Unit of the Health Services Division of the New York Police Department. The officer met with a senior psychologist, who had made a notation in his case notes recommending removal of guns from the officer's home because of the officer's delusional feelings and possible suicidal ideation.

- Following a final recommendation from the Police Department psychologist, firearms were removed from the officer's home for the purpose of his psychological evaluation, and he was also placed on restricted duty pending the results of evaluation. The officer complied and turned in his off-duty service revolver, a .22 automatic, and a shotgun. He was then placed on restricted duty where he was not required to carry a gun to perform his job.
- The officer also went through alcoholism counseling. The officer attended an alcoholism education program, which he successfully completed.
- A year after his first psychological evaluation, following assessment by other psychologists, a recommendation was issued by the Health Services Division of NYPD recommending restoration of the officer's guns to him, and approving his return to full, unrestricted duty. Following his return to active duty, the officer and his wife had several sessions of marital counseling offered through the Police Department's Health Services Unit.
- The suicide occurred five months after the officer returned to active duty and the restoration of his firearms. On June 9, 1985, the officer was off duty. He consumed several beers that day. The officer later became drunk at home. His wife went to bed alone after midnight, leaving her husband downstairs. During the night, she heard her husband shouting from downstairs "[t]his is for you, Marge," and the sound of a gunshot. The wife found her husband lying on the dining room floor, dead. He had shot himself in the head with his off-duty service revolver. The gun was one that had been taken from him by NYPD 18 months earlier.

Overturning a jury verdict in favor of the widow, the *Cygan* court dismissed the claims against NYPD, determining that the officer's suicide was not proximately caused by the Department's return of his service revolver. The *Cygan* court held that the officer's suicide was not a foreseeable consequence of NYPD's actions:

The specific question becomes whether the Department's return of decedent's guns under the facts and circumstances presented was a proximate cause of decedent's suicide and ultimately whether the suicide was foreseeable. Despite our sympathy for those who have suffered as a consequence of decedent's death, and the sparse law in this area, we must nevertheless respond in the negative.

566 N.Y. Supp. at 238. The *Cygan* court found that *at the time of the officer's death*, the record did not contain a scintilla of evidence either to indicate that decedent was suicidal or that the Department should somehow have anticipated that he was. The record also established that "...there was no reason for the Department to have reasonably anticipated that decedent was unfit to carry a gun, or that he would injure himself or anyone else."

566 N.Y. Supp.2d at 239. *See also, Bauer v. City of Chicago*, 137 Ill. App. 3d 228, 484 N.E.2d 422, 427-428 (1985) (summary judgment upheld dismissing claims against Chicago Police Department where a suspended officer killed one person and wounded another in a road rage incident; the omission of the City to obtain the officer's badge, identification card and shield at the time he was placed on suspension, although in violation of regulations, was neither the proximate nor legal cause of the injury suffered by the victims).

The same conclusion was correctly reached in this case by the trial court on summary judgment. There was no reason for TCSO or Officer Eagen to reasonably anticipate Marvin Henry would do any harm with his

personally owned handgun. The murder/suicide was not foreseeable by defendants. There was no causation to support appellants' negligence claim.

VI. CONCLUSION

The deaths of Karen Henry and Marvin Henry are tragic, but that tragedy does not support a baseless lawsuit against TCSO and Officer Eagen, Marvin Henry's friend and co-worker. The trial court properly dismissed appellants' negligence and respondeat superior claims in their first cause of action. That ruling should be affirmed.

DATED: August 27, 2007.

Respectfully submitted,



M. Colleen Kinerk, WSBA No. 7676
Bryan P. Coluccio, WSBA No. 12609
Attorney for Defendants/Respondents
Thurston County; Thurston County Sheriff's
Department; Craig J. Eagen and Jane Doe
Eagen

CERTIFICATE OF SERVICE

The undersigned certifies that on this day a true and correct copy of the foregoing was served on the party of record as stated below in the manner indicated:

Thomas B. Vertetis
Darrell L. Cochran
Gordon Thomas Honeywell
Malanca Peterson & Daheim LLP
1201 Pacific Avenue, Suite 2100
P.O. Box 1157
Tacoma, Washington 98401-1157

Via Hand Delivery on August 28, 2007.

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

DATED at Seattle, Washington on August 27, 2007.


Rosanne M. Wanamaker

FILED
BY
CLERK
JULY 27 2007
CLERK OF SUPERIOR COURT
COUNTY OF KING
WASHINGTON

APPENDIX 1

RECEIVED & FILED IN
CO. CLERK'S OFFICE

2006 MAR -2 P 1:48

JAS. W. CO. WA.
PAT SWARTOS, CO. CLERK

BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON
FOR MASON COUNTY

TERRY BUTLER, et al,)	
)	
Plaintiff(s),)	NO. 04-2-01099-7
)	
vs.)	ORDER SCHEDULING:
)	(1) DISCOVERY STATUS;
)	(2) TRIAL SETTING CONFERENCE;
)	(3) TRIAL DATES;
)	(4) PRETRIAL MANAGEMENT CONFERENCE;
THURSTON COUNTY, et al,)	(5) OTHER
)	
Defendant(s).)	[ORPTH/ORSTD/OR]
_____)	[Dates Calendared By: <i>g</i>]

A trial setting conference having been held on the 20th day of March, 2006, in this case; it is stipulated and ordered as follows:

1. CONFIRMATION OF CASE STATUS.

1.1 CASE AT ISSUE:

All parties have responded in this case, and it is ready for a trial setting.

This case is not at issue. The following parties need to respond prior to a trial date being assigned: _____

1.2 DISCOVERY:

Discovery is complete.

Discovery has been extended to the _____ day of _____, 20____, to include service of the resultant product upon opposing counsel as appropriate.

Parties to submit agreed order extending discovery and

Additional scheduling information on second page.

[] 2. ADDITIONAL TRIAL SETTING CONFERENCE. A trial setting conference is set for the _____ day of _____, 20____, at _____ a.m. Conference may be done telephonically. All parties wishing to participate by telephone must be on the line prior to calling (360) 427-8440.

[X] 3. TRIAL DATE. All civil trials are set secondary to criminal cases in the following order:

[X] ^{Co-Day} FIRST SET. 9 day of January, 2007, at 9.00 a.m. / ~~p.m.~~ through the 17 day of January, 2007.
Jury: [] No [] Yes [_____ - Person]
court will not convene on 1-15-07, which is a holiday
[] SECOND SET. _____ day of _____, 20____, at _____ a.m. / p.m. through the _____ day of _____, 20____.
Jury: [] No [] Yes [_____ - Person]
First Set Case: _____ Cause No. _____

[] 4. BRIEFING SCHEDULE. Dates to include service of the product on counsel as appropriate.

Plaintiff(s) brief filed by _____ day of _____, 20____.
Defendant(s) brief filed by _____ day of _____, 20____.
Plaintiff(s) reply filed by _____ day of _____, 20____.

[] 5. PRETRIAL MANAGEMENT CONFERENCE. A pretrial management conference is set for the _____ day of _____, 20____, at _____ a.m. Conference may be done telephonically. All parties wishing to participate by telephone must be on the line prior to placing the call to Judge _____ at (360) 427-8440.

[] 6. OTHER. This case has been set for a _____ before _____ on the _____ day of _____, 20____, at _____ a.m. / p.m.

[X] 7. *Court file does not contain a jury demand. If that is in error please provide a bench copy of the jury demand.*
ORDERED this 2nd day of March, 2007.
James A. Dwyer
P.O. Box "X"
Shelton, WA 98584

Judge/Court Commissioner/Court Administrator

I certify under penalty of perjury of the laws of the State of Washington that a conformed copy of this document was mailed/hand-delivered on 3-2-06 to the following individuals:
[Signed by Jim Dwyer on 3-2-06 at Shelton, WA]

ATTORNEY FOR PLAINTIFFS:
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CASE#: 04-2-01099-7 JUDGMENT# NO JUDGE ID:
 TITLE: TERRY BUTLER AS PERSONAL REP V THURSTON COUNTY ETAL
 FILED: 12/03/2004
 CAUSE: WDE WRONGFUL DEATH DV: N

RESOLUTION: SMJG DATE: 12/18/2006 SUMMARY JUDGMENT
 COMPLETION: JODF DATE: 12/18/2006 JUDGMENT/ORDER/DECREE FILED
 CASE STATUS: CMPL DATE: 02/09/2007 COMPLETED/RE-COMPLETED
 ARCHIVED:
 CONSOLIDIT:
 NOTE1:
 NOTE2:

----- PARTIES -----

CONN.	LAST NAME, FIRST MI TITLE	LITIGANTS	DATE
PLA01	BUTLER, TERRY (PERS REP)		
PLA02	HENRY, MARVIN SR		
PLA03	HENRY, KAREN		
PLA04	BUTLER, TERRY (GUARDIAN)		
MNR01	HENRY, WILLIAM		
MNR02	HENRY, MARVIN JR		
DEF01	THURSTON COUNTY		
DEF02	THURSTON COUNTY SHERIFF'S DEPT		
DEF03	EAGEN, CRAIG J		
DEF04	EAGEN, JANE DOE H/W		
ATP01	COCHRAN, DARRELL L.		
BAR#	22851		
ATP02	VERTETIS, THOMAS BRIAN		
BAR#	29805		
ATD01	KINERK, MARY COLLEEN	DEF 1,2,3	
BAR#	07676		
ATD02	KERR, STEVEN FREDERICK	DEF 1,2,3	
BAR#	31518		
ATD03	COLUCCIO, BRYAN PATRICK	DEF 1,2,3	
BAR#	12609		

----- APPEARANCE DOCKET -----

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
-	12/03/2004	\$FFR ATP01	FILING FEE RECEIVED COCHRAN, DARRELL L.	110.00
-	12/03/2004	CICS	CASE INFORMATION COVER SHEET	
1	12/03/2004	SM	SUMMONS	
2	12/03/2004	CMP	COMPLAINT	
3	12/17/2004	NTAPR ATD01	NOTICE OF APPEARANCE KINERK, MARY COLLEEN	
		ATD02	KERR, STEVEN FREDERICK	
4	01/13/2005	NTAPR ATD01	NOTICE OF APPEARANCE - AMENDED KINERK, MARY COLLEEN	
		ATD02	KERR, STEVEN FREDERICK	
5	01/24/2005	ORSSC	ORDER SETTING STATUS CONFERENCE	02-28-2005ST

-----APPEARANCE DOCKET-----

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
		ACTION	STATUS CONF; 3-01-2005 @ 8:45 AM	
		JDG02	JUDGE TONI A. SHELDON	
6	03/01/2005	STAHRG	STATUS CONFERENCE / HEARING	
-	03/01/2005	ORPTH	ORDER TO APPEAR PRETRIAL HRG/CONF	02-27-2006ST
		ACTION	TRIAL SETTING CONF; 3-2-2006	
		ACTION	@ 8:30 AM	
		JDG01	JUDGE JAMES SAWYER II	
7	03/29/2005	ANCC	ANSWER & COUNTER CLAIM	
8	10/25/2005	MTCM	MOTION TO COMPEL	
9	10/25/2005	DCLR	DECLARATION OF DARRELL COCHRAN	
10	10/27/2005	NTIS	NOTICE OF ISSUE	11-07-2005MT
		ACTION	DISCOVERY	
		ACTION	CONFIRMED/11-4-05/ KINERK	
		ACTION	CONFIRMED/11-3-05/ATTORNEY	
		ACTION	CONFIRMED 11-4-05 PER MS.KINERK	
11	10/28/2005	MTCM	MOTION TO COMPEL	
-	10/28/2005	CR	CERTIFICATE OF SERVICE	
12	10/28/2005	DCLR	DECLARATION OF COLLEEN KINERK	
13	10/28/2005	NTIS	NOTICE OF ISSUE	
			11-07-2005/MT FOR DISCOVERY	
-	10/28/2005	CR	CERTIFICATE OF SERVICE	
14	11/02/2005	RSP	RESPONSE/DEF'S TO MT TO COMPEL	
-	11/02/2005	CR	CERTIFICATE OF SERVICE	
15	11/02/2005	DCLR	DECLARATION OF COLLEEN KINERK	
15.1	11/03/2005	OB	OBJECTION / OPPOSITION/PLA'S/MT TO COMPEL	
15.2	11/03/2005	DCLR	DECLARATION OF DARRELL COCHRAN	
15.3	11/03/2005	DCLR	DECLARATION OF TERRY BUTLER	
-	11/03/2005	AF	AFFIDAVIT OF FAXED DOCUMENT	
16	11/04/2005	RPY	REPLY/DEF'S IN SUPPORT/MT TO COMPEL	
17	11/04/2005	DCLR	DECLARATION OF COLLEEN KINERK	
18	11/07/2005	ORDYMT	ORDER DENYING MOTION/PETITION	
19	11/07/2005	MTHRG	MOTION HEARING	
20	11/22/2005	AFSR	AFFIDAVIT/DECLARATION OF SERVICE	
21	11/22/2005	AFSR	AFFIDAVIT/DECLARATION OF SERVICE	
22	11/23/2005	OB	OBJECTION / OPPOSITION TO NOTICE OF DEPOSITION & SUBPOENA	
23	11/29/2005	AFSR	AFFIDAVIT/DECLARATION OF SERVICE	
24	11/29/2005	AFSR	AFFIDAVIT/DECLARATION OF SERVICE	
25	11/29/2005	MT	MOTION/PROTECTIVE ORDER/PLA'S	
26	11/29/2005	DCLR	DECLARATION OF THOMAS VERTETIS	
27	11/29/2005	MT	MOTION TO SHORTEN TIME/PLA'S	
28	11/29/2005	DCLR	DECLARATION OF THOMAS VERTETIS	
29	11/29/2005	NTIS	NOTICE OF ISSUE/11-30-2005	
			STRICKEN/11-29-05/VERTETIS	
30	11/29/2005	NTIS	NOTICE OF ISSUE/11-30-2005	
			STRICKEN/11-29-05/VERTETIS	
31	11/29/2005	ST	STATEMENT OF JAMES CONNOLLY	
32	12/05/2005	NTIS	NOTICE OF ISSUE	12-12-2005MT
		ACTION	ISSUE OF LAW	
-	12/05/2005	CR	CERTIFICATE OF SERVICE	
33	12/08/2005	WL	WITNESS LIST/PLA'S SUPPLEMENTAL	
-	12/08/2005	CR	CERTIFICATE OF SERVICE	

-----APPEARANCE DOCKET-----

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
34	12/08/2005	OB	OBJECTION / OPPOSITION/DEF'S	
35	12/08/2005	DCLR	DECLARATION OF BRYAN COLUCCIO	
36	12/08/2005	DCLR	DECLARATION OF CHIEF KAREN DANIELS	
37	12/09/2005	RPY	REPLY/PLA'S	
-	12/09/2005	CR	CERTIFICATE OF SERVICE	
38	12/12/2005	ORGMT	ORDER GRANTING MOTION/PETITION FOR PROTECTIVE ORDER/PARTIAL	
-	12/12/2005	ORDYMT	ORDER DENYING MOTION/PETITION IN PART/PROTECTIVE ORDER	
39	12/12/2005	SMJHRG	SUMMARY JUDGMENT HEARING	
40	12/14/2005	WL	WITNESS LIST/PLAINTIFF'S SUPPLEMENTAL DISCLOSURE	
41	12/15/2005	WL	WITNESS LIST/PLAINTIFF'S SUPPLEMENTAL	
42	01/04/2006	WL	WITNESS LIST/PLA'S SUPPLEMENTAL	
43	01/04/2006	LGS	LOG SHEET/PLA'S PRIVILEGE	
44	01/13/2006	OB	OBJECTION / OPPOSITION TO DEF'S RENEWED DEPOSITION SUBPOENA DUCES TECUM	
45	01/17/2006	WL	WITNESS LIST/DEF'S TRIAL	
-	01/17/2006	CR	CERTIFICATE OF SERVICE	
46	01/18/2006	WL	WITNESS LIST/DEF'S TRIAL	
-	01/18/2006	CR	CERTIFICATE OF SERVICE	
46.1	01/23/2006	LGS	LOG SHEET/PLA'S PRIVILEGE UPDATED	
-	01/23/2006	CR	CERTIFICATE OF SERVICE	
47	01/24/2006	AFSR	AFFIDAVIT/DECLARATION OF SERVICE	
48	01/24/2006	AFSR	AFFIDAVIT/DECLARATION OF SERVICE	
49	01/30/2006	MT	MOTION FOR RELIEF/PLA'S	
50	01/30/2006	DCLR	DECLARATION OF THOMAS VERTETIS	
51	01/30/2006	NTIS	NOTICE OF ISSUE	02-06-2006MT
		ACTION	MT FOR RELIEF/PLA'S	
52	02/02/2006	DCLR	DECLARATION OF COLLEEN KINERK	
53	02/02/2006	CR	CERTIFICATE OF SERVICE	
54	02/02/2006	OB	OBJECTION / OPPOSITION/DEF'S TO PLA'S MT FOR RELIEF	
-	02/02/2006	CR	CERTIFICATE OF SERVICE	
55	02/06/2006	HSTKPA	CANCELLED: PLAINTIFF/PROS REQUESTED	
56	02/07/2006	AFSR	AFFIDAVIT/DECLARATION OF SERVICE	
57	02/07/2006	AFSR	AFFIDAVIT/DECLARATION OF SERVICE	
58	02/21/2006	AFSR	AFFIDAVIT/DECLARATION OF SERVICE	
59	02/27/2006	MTCM	MOTION TO COMPEL PRODUCTION OF DISCOVERY RESPONSES	
-	02/27/2006	CR	CERTIFICATE OF SERVICE	
60	02/27/2006	DCLR	DECLARATION OF ERIK GROTZKE	
61	02/27/2006	NTIS	NOTICE OF ISSUE	03-06-2006MT
		ACTION	CONFIRMED / 3-3-06 / VERTETIS	
		ACTION	MOTION TO COMPEL	
-	02/27/2006	CR	CERTIFICATE OF SERVICE	
62	03/02/2006	DCLR	DECLARATION OF BRYAN COLUCCIO	
63	03/02/2006	OB	OBJECTION / OPPOSITION/DEF'S TO MT TO COMPEL	
-	03/02/2006	CR	CERTIFICATE OF SERVICE	
64	03/02/2006	ORSTD	ORDER SETTING TRIAL DATE	01-08-2007OS

-----APPEARANCE DOCKET-----

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
-	03/02/2006	ACTION EXWACT JDG01	6 DAY TRIAL; 1-9/1-17-07 EX-PARTE ACTION WITH ORDER JUDGE JAMES SAWYER II	
65	03/03/2006	RPY ATP01	REPLY COCHRAN, DARRELL L.	
66	03/06/2006	ORDYMT	ORDER DENYING MOTION/PETITION TO COMPEL PRODUCTION OF DISCOVERY RESPONSES	
67	03/06/2006	MTHRG	MOTION HEARING	
68	03/06/2006	MM	MEMORANDUM/DEF'S SURREPLY	
69	04/11/2006	MT	MOTION TO COMPEL COMPLIANCE	
70	04/11/2006	DCLR	DECLARATION -COLUCCIO RE: DEPOSITION	
71	04/11/2006	DCLR	DECLARATION -COLUCCIO IN SUPPORT OF MT TO COMPEL (232 PGS)	
72	04/11/2006	NT ACTION	NOTICE MT TO COMPEL; DISCOVERY/TO BE RENATED TO 5-1-06	04-24-2006MT
73	04/14/2006	NTIS ACTION ACTION	NOTICE OF ISSUE MOTION TO COMPEL DISCOVERY CONFIRMED/COLUCCIO/4-27-06	05-01-2006MT
74	04/27/2006	OB	OBJECTION / OPPOSITION/PLA'S TO MOTION TO COMPEL/SANCTIONS	
75	04/27/2006	DCLR	DECLARATION OF THOMAS VERTETIS	
76	05/01/2006	ORDYMT	ORDER DENYING MOTION/PETITION MT TO COMPEL	
77	05/01/2006	MTHRG	MOTION HEARING	
78	05/01/2006	DCLR	DECLARATION/SUPPLEMENTAL OF BRYAN COLUCCIO	
79	05/01/2006	RPY	REPLY/DEF'S IN SUPPORT OF MOTION TO COMPEL	
-	05/01/2006	AFSR	AFFIDAVIT/CERTIFICATE OF SERVICE	
80	05/08/2006	NT	NOTICE/CONFIRMATION OF FILING DOCUMENTS TO BE REVIEWED	
81	06/01/2006	DCLR	DECLARATION OF BRYAN COLUCCIO	
-	06/01/2006	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
82	06/01/2006	MT	MOTION/ORDER DIRECTING PRODUCTION DEF'S	
-	06/01/2006	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
83	06/01/2006	NTIS ACTION ACTION ACTION	NOTICE OF ISSUE DEF'S MT FOR ORDER DIRECTING PRODUCTION OF FILE MAINTAINED BY CHARLES WILLIAMS	06-12-2006MT
84	06/08/2006	OB	OBJECTION / OPPOSITION/PLA'S TO MT FOR ORDER DIRECTING PRODUCTION OF FILE MAINTAINED BY CHARLES WILLIAMS	
85	06/08/2006	DCLR	DECLARATION OF ERIK GROTZKE	
86	06/09/2006	RPY	REPLY/DEF'S IN SUPPORT/MT FOR ORDER DIRECTING PRODUCTION OF FILE	
-	06/09/2006	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
87	06/12/2006	HCNTCC ACTION	HEARING CONTINUED:CALENDAR CONFLICT DEF'S MT FOR ORDER DIRECTING	06-19-2006MT

-----APPEARANCE DOCKET-----

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
88	06/19/2006	ACTION ACTION ACTION ORGMT	PRODUCTION OF IFLE MAINTAINED BY CHARLES WILLIAMS/CONFIRMED BY BOTH PARTIES IN COURT/6-12-06 ORDER GRANTING MOTION/PETITION DEF'S MT DIRECTING PRODUCTION	
89	06/19/2006	MTHRG	MOTION HEARING	
90	06/27/2006	NTIS	NOTICE OF ISSUE 6-19-06/CALLED COLLUCCIO'S OFFICE TOLD TO DISREGARD/CG	
91	06/30/2006	ORSD	ORDER SEALING DOCUMENT #43	
92	07/26/2006	NTAPR ATD03	NOTICE OF APPEARANCE COLUCCIO, BRYAN PATRICK	
93	11/20/2006	DCLR	DECLARATION OF BRYAN COLUCCION IN SUPPORT OF DEFENDANTS' MT FOR PARTIAL SUMMARY JUDGMENT	
94	11/20/2006	DCLR	DECLARATION OF PAUL QUINNETT, PHD IN SUPPORT OF DEF MT FOR PARTIAL SUMMARY JUDGEMENT	
95	11/20/2006	DCLR	DECLARATION OF BRYAN COLUCCION IN SUPPORT OF DEF MT FOR PARTIAL SUMMARY JUDGMENT TO DISMISS PLAIN- TIF'S NEGLIGENCE CLAIM	
96	11/20/2006	MTSMJG	MOTION FOR SUMMARY JUDGMENT	
97	11/20/2006	DCLR	DECLARATION OF BRYAN COLUCCIO IN SUPPORT OF DEFENDANTS' MT FOR PARTIALSUMMARY JUDGMENT TO DISM IN SUPPORT OF DEFENDANTS' MT FOR PARTIAL SUMMARY JUDGMENT TO DISMISS PLAINTIFFS' CLAIM FOR NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS	
98	11/20/2006	MTSMJG	MOTION FOR SUMMARY JUDGMENT/DEF FOR PARTIAL SUMMARY JUDGMENT TO DISMISS PLAINTIFFS' CLAIM FOR NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS	
99	11/20/2006	DCLR	DECLARATION OF BRYAN COLUCCIO IN SUPPORT OF DEF MOTION FOR SUMMARY JUDGMENT FOR VIOLATION OF RCW 4.96	
100	11/20/2006	MTSMJG	MOTION FOR SUMMARY JUDGMENT/DEF FOR VIOLATION OF RCW 4.96	
101	11/20/2006	DCLR	DECLARATION OF BRYAN COLUCCIO IN SUPPORT OF DEF THURSTON COUNTY'S MOTION FOR PARTIAL SUMMARY JUDGMENT TO DISMISS PLAINTIFFS' CLAIM FOR NEGLIGENT HIRING, TRAINING AND SUPERVISION	
102	11/20/2006	MTSMJG	MOTION FOR SUMMARY JUDGMENT/DEF THURSTON COUNTYS PARTIAL SUMMARY JUDGMENT TO DISMISS PLAINTIFFS' CLAIM FOR NEGLIGENT HIRING	
103	11/20/2006	NTHG ACTION ACTION	NOTICE OF HEARING MT FOR SUMMARY JUDGMENT X 4 CONFIRMED 12-13-2006 BRIAN COLUCCIO	12-18-2006MT

-----APPEARANCE DOCKET-----

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
104	11/20/2006	NTHG	NOTICE OF HEARING	
		ACTION	SEE #103 ABOVE FOR DATE	
105	11/20/2006	NTHG	NOTICE OF HEARING	
		ACTION	MOTION FOR SUMMARY JUDGMENT	
106	11/20/2006	NTHG	NOTICE OF HEARING	
		ACTION	MOTION FOR SUMMARY JUDGMENT	
107	11/27/2006	DCLR	ERRATDECLARATION OF PAUL G QUINNETT PHD IN SUPPORT OF DEFENDANTS'S MOTION FOR PARTIAL SUMMARY JUDGEMENT	
108	12/04/2006	NT	DEF'S NT TO PLTFS - ER 904	
109	12/04/2006	NT	NOTICE TO ATTEND TRIAL (BUTLER)	
110	12/04/2006	NT	NOTICE TO ATTEND TRIAL (HENRY)	
111	12/07/2006	OB	OBJECTION / OPPOSITION/PLA'S TO DEF'S MT FOR PARTIAL SUMMARY JDGMT	
112	12/07/2006	DCLR	DECLARATION OF ERIK GROTZKE	
113	12/07/2006	OB	OBJECTION / OPPOSITION/PLA'S TO DEF MT FOR SUMMARY JUDGMENT RE PLA'S CLAIMS FOR NEGLIGENT INFLECTION	
114	12/07/2006	DCLR	DECLARATION OF THOMAS VERTETIS	
115	12/07/2006	OB	OBJECTION / OPPOSITION/PLA'S TO DEF MT FOR SUMMARY JDGMT RE COMPLIANCE WITH RCW 4.96	
116	12/07/2006	OB	OBJECTION / OPPOSITION/PLA'S TO DEF MT FOR SUMMARY JDGMT RE PLA'S CLAIM FOR NEGLIGENCE	
117	12/07/2006	DCLR	DECLARATION OF THOMAS VERTETIS	
118	12/08/2006	NTER	NOTICE RE: EVIDENTIARY RULE/PLA'S	
119	12/13/2006	MT	MOTION TO STRIKE/DEF'S & DISREGARD EDWARD THOMPSON DECLARATION	
-	12/13/2006	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
120	12/13/2006	DCLR	DECLARATION OF BRYAN COLUCCIO	
-	12/13/2006	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
121	12/13/2006	RPY	REPLY/DEF'S MEMORANDUM IN SUPPORT OF MT FOR PARTIAL SUMMARY JUDGMNT	
-	12/13/2006	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
122	12/13/2006	DCLR	DECLARATIONOF BRYAN COLUCCIO SUPPLEMENTAL	
123	12/13/2006	RPY	REPLY/THURSTON COUNTY'S RE MOTION FOR PARTIAL SUMMARY JUDGMENT	
-	12/13/2006	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
124	12/13/2006	DCLR	DECLARATION OF BRYAN COLUCCIO SUPPLEMENTAL/IN SUPPORT OF THURSTON COUNTY'S REPLY	
125	12/13/2006	RPY	REPLY/DEF'S RE MT FOR PARTIAL SUMMARY JUDGMENT TO DISMISS PLA'S CLAIM FOR NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS	
-	12/13/2006	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
126	12/13/2006	RPY	REPLY/DEF'S RE MOTION FOR SUMMARY JUDGMENT FOR VIOLATION	
-	12/13/2006	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
127	12/13/2006	DCLR	DECLARATION OF CAPTAIN BRAD WATKINS	

-----APPEARANCE DOCKET-----

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
			FAX COPY	
-	12/13/2006	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
128	12/13/2006	DCLR	DECLARATION OF UNDERSHERIFF NEIL MCCLANAHAN/FAX COPY	
-	12/13/2006	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
129	12/14/2006	RSP	RESPONSE PLA'S SUPP	
130	12/18/2006	RPT	REPORT/TOXICOLOGY REPORT	
131	12/18/2006	ORGSJ	ORDER GRANTING SUMMARY JUDGMENT	
132	12/18/2006	ORGMT	ORDER GRANTING MOTION/PETITION TO STRIKE	
133	12/18/2006	SMJHRG	SUMMARY JUDGMENT HEARING	
134	12/18/2006	OB	OBJECTION / OPPOSITION TO DEF'S ER 904 SUBMISSION	
135	12/18/2006	OB	OBJECTION / OPPOSITION TO DEF'S MT TO STRIKE DECLARATION OF EDWARD THOMPSON	
136	01/10/2007	NACA	NOTICE OF APPEAL TO COURT OF APPEAL	
-	01/10/2007	\$FFR	FILING FEE RECEIVED	250.00
137	01/10/2007	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
138	01/12/2007	TRLC	TRANSMITTAL LETTER - COPY FILED NACA/ORGSJ/AFSR TO COA	
139	02/09/2007	ORCR	ORDER CONFIRMING RULING/SUMMARY JUDGMENT ORDER OF 12-18-06	
-	02/09/2007	STP	STIPULATION	
-	02/09/2007	EXWACT JDG01	EX-PARTE ACTION WITH ORDER JUDGE JAMES SAWYER II	
140	02/20/2007	LTR	LETTER FROM CRT OF APPEALS	
141	03/19/2007	ST	STATEMENT OF ARRANGMENTS/COPY	
-	03/19/2007	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
142	03/19/2007	DSGCKP	DESIGNATION OF CLERK'S PAPERS/COPY	
-	03/19/2007	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
143	03/20/2007	LTR	LETTER RE CLERK'S PAPERS TO GORDON, THOMAS HONEYWELL ET AL	
144	04/11/2007	DSGCKP	DESIGNATION CLERK'S PAPERS-AMENDED	
145	04/20/2007	LTR	LETTER RE COSTS FOR CLERK'S PAPERS	
-	04/20/2007	\$CA	COSTS ASSESSED CLERK'S PAPERS	524.00
146	05/14/2007	NT	NOTICE OF FILING	
147	05/17/2007	VRPT	VERBATIM RPT TRANSMITTED	
148	05/18/2007	CLP	CLERK'S PAPERS SENT (COSTS RECVD FOR CLP & COPY FOR ATTORNEY)	

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