

NO. 37401-3-II

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

ROBIN and SUSAN BENSKIN, individually, and ROBIN BENSKIN,
as the Personal Representative for the ESTATE OF HEATHER
BENSKIN, JOSH MIHOK, TINA MARIE GOODFELLOW and
ROBERTA EVANS,

Appellants,

v.

CITY OF FIFE, FIFE MUNICIPAL COURT, FIFE PROBATION
DEPARTMENT,

Respondents.

BRIEF OF APPELLANTS

WIGGINS & MASTERS, P.L.L.C.

Kenneth W. Masters
WSBA 22278
Shelby R. Frost Lemmel
WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorneys for Appellants

PA 7-3-08

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
CLERK OF COURT
JULY 10 2008

TABLE OF CONTENTS

INTRODUCTION	1
ASSIGNMENTS OF ERROR.....	2
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
STATEMENT OF THE CASE	3
SUMMARY & ARGUMENT.....	7
A. Review is <i>de novo</i>	8
B. Genuine issues of material fact preclude summary judgment on whether Fife’s failure to protect the Benskins proximately caused Heather’s death.....	8
i. A massive amount of precedent supports the sufficiency of the Benskins’ causation evidence, but Fife mentioned none of it to Judge Serko.	8
ii. Like <i>Hertog</i> , <i>Joyce</i> counters <i>Fife’s</i> causation arguments.	15
C. If Fife had bothered to monitor Kim, he would have been incarcerated the morning he killed Heather Benskin.	19
D. The Benskins are not required to prove that supervision generally reduces recidivism, but they presented substantial evidence that Kim had previously responded well to close supervision and treatment, so a jury could reasonably find that if Fife had met its duty to protect the Benskins, Kim would not have reoffended while under Fife Probation’s supervision.	28
E. While it is true that Judge Ringus improperly suspended Kim’s sentence knowing full well that Fife Probation was a fraud, the Benskins’ actual argument is that Fife’s negligent failure to supervise Kim caused Heather Benskin’s tragic death.	33
CONCLUSION.....	35

TABLE OF AUTHORITIES

STATE CASES

<i>Bell v. State</i> , 147 Wn.2d 166, 52 P.2d 503 (2002).....	14, 16
<i>Berger v. Sonneland</i> , 144 Wn.2d 91, 26 P.3d 257 (2001)	27
<i>Bishop v. Miche</i> , 137 Wn.2d 518, 973 P.2d 465 (1999).....	
.....	12, 13, 14, 16, 22
<i>Estate of Bordon v. DOC</i> , 122 Wn. App. 227, 95 P.3d 764 (2004), <i>rev. denied</i> , 154 Wn.2d 1003 (2005).....	<i>passim</i>
<i>Couch v. DOC</i> , 113 Wn. App. 556, 54 P.3d 197 (2002), <i>rev. denied</i> , 149 Wn.2d 1012 (2003).....	22
<i>Hartley v. State</i> , 103 Wn.2d 768, 788, 698 P.2d 77 (1985).....	14
<i>Herring v. DSHS</i> , 81 Wn. App. 1, 914 P.2d 67 (1996)	26
<i>Hungerford v. DOC</i> , 135 Wn. App. 240, 139 P.3d 1131 (2006), <i>rev. denied</i> , 160 Wn.2d 1013 (2007).....	<i>passim</i>
<i>Hertog v. City of Seattle</i> , 138 Wn.2d 265, 275, 979 P.2d 400 (1999).....	8, 10, 11, 15, 27
<i>Estate of Jones v. State</i> , 107 Wn. App. 510, 15 P.3d 180 (2000), <i>rev. denied</i> , 145 Wn.2d 1025 (2002).....	25, 26
<i>Joyce v. DOC</i> , 155 Wn.2d 306, 119 P.3d 825 (2004)	<i>passim</i>
<i>Joyce v. DOC</i> , 116 Wn. App. 569, 75 P.3d 548 (2003), <i>aff'd in part & rev'd in part</i> , 155 Wn.2d 306 (2004).....	25, 26
<i>Merriman v. Toothaker</i> , 9 Wn. App. 810, 515 P.2d 509 (1973).....	26
<i>Palmer v. Massey-Ferguson, Inc.</i> , 3 Wn. App. 508, 476 P.2d 713 (1970).....	26

<i>Sandau v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992).....	10
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992).....	8, 9, 10, 16, 19
<i>Tyner v. DSHS</i> , 141 Wn.2d 68, 1 P.3d 1148 (2000)	13
<i>Tyner v. DSHS</i> , 92 Wn. App. 504, 518, 963 P.2d 215 (1998), <i>rev'sd</i> , 141 Wn.2d 68 (1999).....	13

DOCKETED CASES

<i>Benskin v. City of Fife</i> , Wash. State Court of Appeals No. 31523-8-II (Slip Op., Oct. 18, 2005), <i>rev. denied</i> , 158 Wn.2d 1003 (2006)	1
--	---

STATE STATUTES

RCW 3.50.340	25
RCW 46.65.070	17

RULES

CR 56(c)	8
ER 702.....	6
RPC 3.3(a).....	9

INTRODUCTION

This is the second appeal from summary judgments granted in this case. In the first appeal, this Court reversed the trial court's rulings that Respondent Fife enjoyed judicial immunity and that the Benskins¹ had failed to establish a duty. See Appendix A (*Benskin v. City of Fife*, Wash. State Court of Appeals No. 31523-8-II (Slip Op., Oct. 18, 2005), *rev. denied*, 158 Wn.2d 1003 (2006)). On remand to a new judge, Fife challenged the Benskins' causation evidence, yet it failed to disclose many material facts and much controlling law on proximate cause in its three cursory summary judgment motions. The new judge was badly misled.

As in the first appeal, numerous genuine issues of material fact on causation preclude summary judgment here. The Benskins provided a great deal of admissible evidence which, taken in the light most favorable to them, would permit a jury to find that Fife's admitted breach of its duty to protect them from this high-risk offender by supervising him caused Heather Benskin's death and the other plaintiffs' injuries. This Court should reverse and remand for trial so that the Benskins can put their long nightmare to rest.

¹ As in this Court's prior Opinion, we use "the Benskins" to refer to all of the appellants collectively.

ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment and in entering its summary judgment order dated November 3, 2007. CP 2494-97.
2. The trial court erred in denying reconsideration and in entering its order denying reconsideration dated February 8, 2008. CP 3052-54.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under a great deal of Washington Supreme Court precedent, did the Benskins present substantial evidence of causation precluding summary judgment, where Fife Probation did virtually nothing to supervise its probationer Kim, numerous experts declared that he was a known, foreseeable, high-risk DUI offender, and Fife admittedly breached its duty to protect the Benskins?
2. Did the Benskins present substantial evidence that Kim would have been in jail rather than killing Heather Benskin, where an earlier summary-judgment judge determined that Judge Allen's refusal to revoke Kim's probation due to Fife's own failure to notify him was not a supervening cause, experts opined that Kim would have been in jail when he killed Heather, and a jury could reasonably find that Kim's probation would have been revoked?

3. Does a plaintiff in a negligent supervision case have a duty to establish that supervision generally reduces recidivism? If not, did the Benskins proffer substantial evidence that *this* defendant had responded well to close supervision and did not reoffend, so if Fife had not breached its duty to supervise high-risk probationers like Kim, he would not have killed Heather Benskin?

4. Did the trial court improperly grant summary judgment on the basis that Judge Ringus is judicially immune, where he is not a defendant in this case and the Benskins argued only that as a *factual* matter he should not have placed Kim on probationary supervision when he knew that Fife Probation was a mere shell with no intent or ability to supervise him?

STATEMENT OF THE CASE

The Court's prior Opinion sets forth the underlying facts of this case, which are not repeated here. See App. A. Support for these facts is, however, in this appeal's record. Fife concedes both duty and breach pursuant to this Court's prior decision finding a duty and at least a question of fact on breach. CP 2438.

Fife's three summary judgment motions challenged causation. Because these motions focused solely on highly factual causation arguments, this brief addresses the relevant facts in

relation to the Benskins' response to each of the challenged summary judgment rulings. To avoid undue repetition, the relevant facts are not also set forth here, but record cites are included throughout the brief.

Two factual issues and one procedural issue must be addressed here, however. First, Fife brought these motions before a new judge (Judge Culpepper heard the motions reversed in the first appeal, while Judge Serko heard these motions). Yet Fife's summary judgment motions alleged a highly misleading version of the facts that is either directly contradicted by, or grossly misleading in light of, existing evidence that Fife failed to call to Judge Serko's attention. See CP 13-14. For instance, Fife asserted that "Kim was working and staying sober from the date of his release up until the accident on March 9, 2003." CP 13 (citing Kim's deposition).

Kim plainly was in denial. CP 2536. But it is remarkable that Fife would nonetheless ask Judge Serko to take Kim at his word without notifying her that Kim's former wife had previously sworn under oath that during his probation, Kim (a) was drinking to excess every day; (b) would engage in days of alcoholic binging; (c) regularly drove on a suspended license while drunk; (d) had no contact with probation officers; (e) never attended any of the

required treatment programs; and (f) used cocaine. CP 193-94, 788-90, 1961, 2097-99. This Court also noted that a witness said Kim was “in a ‘drunken stupor’” when he killed Heather Benskin. App. A at 5. And an expert also opined that Kim was drunk at the time. CP 874. At the very least, genuine issues of material fact exist as to whether Kim was “clean and sober” before he killed Heather Benskin and injured the other plaintiffs.

Second, Fife omitted evidence of Kim’s many probation violations, about which Fife Probation knew nothing. As this Court noted, Kim lost his license as a “habitual traffic offender” and “had a long history of alcohol-related driving violations and alcohol abuse.” App. A at 3. The municipal court ordered as follows (*id.* at 3-4):

The court suspended Kim’s license for three years. The court also ordered that Kim (1) could not drive without a license and insurance; (2) “[h]ave law abiding behavior” and “no similar incidents;” (3) not take mood altering substances without a prescription; (4) have no “alcohol/drug related offenses or non-prescription drugs;” (5) have no criminal traffic convictions; (6) not drive a motor vehicle if a blood or breath test “would result in a positive reading of alcohol or drugs [within] 4 hours of driving [*sic*]; and (7) “NOT refuse to submit” to a breath or blood test for alcohol. . . . Kim was also directed to file “monthly status reports (treatment)” and ordered to file with the court proof of an ignition interlock device after receipt of a valid driver’s license. . . . Finally, he was ordered to “REPORT TO THE FIFE MUNICIPAL COURT PROBATION WITHIN FIVE . . . WORKING DAYS TO MONITOR COMPLIANCE.”

As noted above, Kim's ex-wife swore that he violated each of these prohibitions during his probation. CP 2097-99. Kim was also ordered to have an ignition-interlock device (CP 218, Fife Muni. Cr. Order, attached as App. B) but was driving a new truck with no interlock when he killed Heather Benskin. CP 1147-51. Fife knew nothing about any of this. CP 696-700. Fife misled Judge Serko.

The procedural issue is that, as in the first appeal, Fife again raised an ER 702 challenge in the first of its three summary judgment motions at issue here, claiming that Benskin-experts William Stough and Dan Hall are not qualified to offer opinions on supervision and recidivism or that they are merely speculating. CP 18-21. The summary judgment order states that the trial court considered these expert declarations without limitation. CP 2494-95. This Court should so consider them.

In the first appeal, this Court held that Judge Culpepper's rulings declining to strike these same declarations were not an abuse of discretion. See App. A at 14-15. In any event, Fife has failed to cross-appeal the trial court's order stating that it considered these expert declarations without limitation. This Court should consider them, and all reasonable inferences from them, in the light most favorable to the Benskins. *Id.*

SUMMARY & ARGUMENT

Fife's three summary judgment motions challenged the Benskins' causation evidence. CP 12-21; 91-94, 96-98. The Benskins presented substantial evidence and argued that (a) had Fife Probation properly supervised and reported Kim's many violations, his suspended sentence would have been revoked and he would have been in jail when he killed Heather; (b) Kim responded well and did not reoffend during his prior supervisions and treatments, so a jury could reasonably find that if Fife had met its supervisory duties, then Kim would not have reoffended this time either; and (c) the Benskins are entitled to argue as a *factual* matter that because Judge Ringus knew Fife had no supervising probation department, he should not have suspended any of Kim's sentence, and again Kim would have been in jail.

Consistent with Fife's lack of candor to Judge Serko on the facts, its three summary judgment motions fail to even cite (much less distinguish) a striking amount of controlling authority in this jurisdiction. Many times our Supreme Court has found a question of fact on causation on less evidence than the Benskins presented here. The Court should reverse and remand for trial.

A. Review is *de novo*.

This Court reviews summary judgments *de novo*, under the usual standards. See, e.g., ***Hertog v. City of Seattle***, 138 Wn.2d 265, 275, 979 P.2d 400 (1999) (citing CR 56(c) and ***Taggart v. State***, 118 Wn.2d 195, 199, 822 P.2d 243 (1992)). These include that all facts and reasonable inferences are taken in the light most favorable to the Benskins. *Id.* Four of the affidavits supporting the Benskins' causation arguments are Appendices C - F to this brief.

B. Genuine issues of material fact preclude summary judgment on whether Fife's failure to protect the Benskins proximately caused Heather's death.

Fife's summary judgment motions generally claimed that its failure to supervise Kim did not cause this tragedy. See, e.g., CP 12. But numerous genuine issues of material fact preclude summary judgment on causation, which is generally a question for the jury. Simply put, a jury could reasonably find that had Fife met its duties, Kim would have been in jail or at least would not have been reoffending. The Court should reverse and remand for trial.

i. A massive amount of precedent supports the sufficiency of the Benskins' causation evidence, but Fife mentioned none of it to Judge Serko.

As noted, Fife failed in its duty of candor toward the tribunal. As relevant here, it failed to disclose and discuss a great deal of

relevant and controlling Washington Supreme Court authority. While Fife may have believed that opposing counsel would respond with these controlling authorities, such a belief does not absolve Fife of its ethical duty of candor at the outset.² Fife *never* addressed any of the following controlling authorities:

In the seminal *Taggart*, *supra*, the Court addresses causation in negligent supervision cases at pages 225-28, finding sufficient evidence of causation. Specifically, like Kim, the assailant in *Taggart* (Brock) had a long history of similar criminal behavior, often under the influence of alcohol. 118 Wn.2d at 199. Like Kim, Brock had previously responded well to supervision and treatment for his alcohol and drug abuse. *Id.* at 200. Like Kim, Brock spent time in a half-way house after his release. *Id.* And like Fife, Brock's parole officer utterly failed to supervise his alcohol use after his release into the community. *Id.* Although (unlike Fife) the *Taggart* parole officer met *weekly* with Brock, he (like Fife) failed to make any contacts with people close to Brock, who (like Kim's wife) would have said that Brock was drinking regularly. *Id.*

² See RPC 3.3(a) ("A lawyer shall not knowingly: . . . (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel").

In the companion case to *Taggart, Sandau v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), the assailant (Geyman) also had an extensive prior history of wrongdoing and alcoholism. 118 Wn.2d at 201. Like Kim, Geyman “was usually intoxicated when he committed his crimes.” *Id.* Unlike Kim, he had treatment prior to his release on parole. *Id.* But like Kim, Geyman was left wholly unsupervised for months at a time. *Id.* And unlike Fife, Geyman’s parole officer did finally try to contact a family member, who disclosed that Geyman was not complying with his parole conditions. *Id.* Also unlike Fife, that officer tried to take steps to bring Geyman under control, albeit too little too late. *Id.* at 202.

In both *Taggart* and *Sandau*, the State argued that its negligence did not “legally cause” the plaintiffs’ injuries. *Id.* at 226-28. Although the parole officers in those cases did *much* more than Fife in supervising their offenders, the Supreme Court refused to hold that the plaintiffs had failed to raise an issue of fact on causation. *Id.* The Benskins’ case should go to a jury.

In *Hertog, supra*, the GAL for a six-year-old girl raped by a probationer on pretrial release brought a negligence action against Seattle and King County. 138 Wn.2d at 269. The GAL alleged negligent supervision by the City’s probation counselor and the

County's pretrial-release counselor, who knew of the assailant's long history of offending while under the influence and need for close supervision. *Id.* at 270-71. Yet like Fife, his counselors left him relatively unsupervised for months before he committed the rape. *Id.* at 272-73.

The Superior Court denied the defendants' motions for summary judgment, and (on discretionary review) the Supreme Court affirmed. *Id.* at 274. Addressing causation, the Court rejected the City's argument that it did not cause the rape because the assailant used drugs and alcohol for only two weeks prior to the attack, so there was no time to prevent it. *Id.* at 283. Simply put, (as with Fife) if the counselor had monitored the parolee earlier, he could have discovered the lack of proper monitoring and other violations and could have sought revocation earlier, so an "issue of fact remains as to cause in fact." *Id.* As with Fife Probation,

the fact he did not actually know of probation violations does not answer the question whether he should have known of any such violations.

Id. Thus, where, as here,

a special relation exists based upon taking charge of the third party, the ability and duty to control the third party indicate that defendant's actions in failing to meet that duty are not too remote to impose liability.

Id. at 284. **Hertog** precludes Fife's causation argument.

In ***Bishop v. Miche***, 137 Wn.2d 518, 521-23, 528, 973 P.2d 465 (1999), as here, a drunk driver with a long history of DWI again drove drunk and killed someone. But unlike here, the ***Bishop*** parole officer (a) had the offender arrested when she learned he had outstanding warrants; (b) after his release, required him to attend AA twice a week, not drink alcohol, and submit to urinalysis tests, and she tried to get him into inpatient alcohol treatment; and (c) hauled him before the court when he again drove with a suspended license. 137 Wn.2d at 522-23. The officer informed the court of the offender's record and that he had attended AA "sporadically" and was scheduled to enter inpatient treatment three days later, but made no recommendation on revocation. *Id.* at 523. The court decided not to revoke, and the offender drove drunk and killed a child two days later. *Id.*

Bishop confirmed that a breach does not overcome a duty:

The duty of a county probation officer is not premised merely on the reporting of violations to the court, but rather on the *failure* to adequately monitor and report violations, thus failure to adequately supervise the probationer.

137 Wn.2d at 526 (emphasis original). While the Court had no trouble finding causation up until the district court's failure to revoke

probation, since the officer gave the court adequate information, the court's ruling broke the causal chain. *Id.* at 531.

Such a ruling is precluded here, of course, because the prior summary judgment judge (Judge Culpepper) rejected Fife's argument that Judge Allen's ruling broke the causal chain, and Fife neither appealed that decision, nor raised the issue again before Judge Serko, nor cross-appealed it here. See, App. A at 7, 14. Judge Culpepper correctly reasoned that a jury could reasonably find that Fife's negligent failure to notify Kim of the hearing caused Judge Allen not to issue a bench warrant, much less revoke Kim's probation. This ruling is the law of the case.

In *Tyner v. DSHS*, 141 Wn.2d 68, 71, 1 P.3d 1148 (2000), a father sued DSHS for its negligent investigation that resulted in depriving him of contact with his children for 4.5 months. DSHS argued that as in *Bishop*, the trial court's no-contact orders broke the causal chain. 141 Wn.2d at 82. Explaining *Bishop*'s focus on how parole officers "control[] the flow of information to the court" (*id.* at 83-84) the Court asked "whether the State has placed before the court all the information material to the decision the court must make." *Id.* at 83 (*quoting with approval Tyner v. DSHS*, 92 Wn. App. 504, 518, 963 P.2d 215 (1998), *rev'd*, 141 Wn.2d 68 (1999)).

Tyner further clarifies that **Bishop** “held that the district court’s action precluded the existence of cause in fact as a matter of law, in essence serving as a superseding intervening cause,” principally because the district court was aware “of all material information in the case at the time of its decision.” 141 Wn.2d at 85. Thus, “if all material information is presented to the judge, cause in fact will not be found if the complained of action is linked to the judge’s decision.” *Id.* at 86. Ultimately, however, “the question of materiality is a question of cause in fact, not legal causation.” *Id.* This is a jury question, unless reasonable minds could reach but one conclusion. *Id.* (citing **Hartley v. State**, 103 Wn.2d 768, 788, 698 P.2d 77 (1985)). **Tyner** concludes that where (as here) the party with a duty to report to the court fails to supply arguably material information, this question of fact must go to the jury, regardless of any supervening cause argument. *Id.* at 87-88. Fife had the duty to report, so **Tyner** requires a jury trial here.

In **Bell v. State**, 147 Wn.2d 166, 169, 52 P.2d 503 (2002), a woman abducted and raped by a parolee sued the state for negligent supervision. As here, corrections-expert William Stough testified that the offender violated parole on numerous occasions that his parole officers either should have known about, but did not;

or did know about, but failed to report to the court. 147 Wn.2d at 171-72. At trial, the State called a member of the Indeterminate Sentence Review Board, who testified that the violations Stough mentioned, even if reported, would not have resulted in revoking probation. *Id.* The jury found that the State negligently failed to reasonably supervise, but that this breach of duty did not proximately cause the injury. *Id.* at 175. Reiterating that causation is a question for the jury, the Supreme Court affirmed. *Id.* at 179. Causation remains a question for the jury in this case, too.

ii. **Like *Hertog*, *Joyce* counters *Fife*'s causation arguments.**

In *Joyce v. DOC*, 155 Wn.2d 306, 119 P.3d 825 (2004), after this Court both *affirmed* the introduction of Stough's testimony and rejected the State's causation arguments, the Supreme Court affirmed both of those decisions, albeit while reversing the verdict on an unrelated jury-instruction issue. On legal cause, the Court rejected the State's argument (very similar to *Fife*'s argument) that "even if it had properly monitored Stewart and reported violations to the court, it is unknown what action, if any, the court could have taken," so "any causal connection between breach of duty and *Joyce*'s death is too speculative." 155 Wn.2d at 321; *compare* CP 14-18. *Joyce* explains that this kind of argument simply misreads

Bishop and **Bell**. *Id.* at 321. While a decision by a fully-informed court may break the causal chain, where (as here) there is no fully-informed supervening act, the chain holds. *Id.* at 321-22.

Joyce thus holds that a municipality cannot escape liability for its negligent failure to supervise simply because it is “unknown what action, if any, the court could have taken” if properly apprised of probation violations. *Id.* at 321. **Joyce** answers any legal-cause inquiry in this case.

On cause-in-fact, **Joyce** reiterates that “[t]here must be a direct, unbroken sequence of events that link the actions of the defendant and the injury to the plaintiff.” *Id.* at 322 (citing **Taggart**, 118 Wn.2d at 226). But there (as here) the following factors were sufficient to take causation to a jury (*id.*):

- ◆ a known history of drug abuse;
- ◆ existing medical records explaining the risk;
- ◆ a known history of relevant illegal behavior;
- ◆ numerous unreported violations during probation; and
- ◆ Stough’s testimony that the offender would have been in jail if the violations were reported.

Each of these factors is present here. This Court recognized Kim’s long history of drug and alcohol abuse. App. A at 3. And Fife Probation was well aware that Kim had the propensity to drive

drunk – he was a five-time repeat DUI offender with 18 other convictions, “most of them related to driving.”³ CP 181, 168-72; App. A at 3. Expert Stough testified that given Fife Probation’s failure to supervise, “it was highly likely and exceedingly foreseeable that Kim would drink and drive and seriously hurt or kill a member of the community.” CP 188 (emphasis original).

Fife Probation also knew that Kim had a long history of alcoholism – its files included prior alcohol-dependence evaluations dating back to 1990, formally diagnosing Kim’s alcoholism. CP 169-70. The records are replete with warnings about Kim’s high-risk status. See, e.g., CP 1950-54 (review of medical/treatment records); 2021-87. The second alcohol evaluation “[s]pecifically stated [that Kim had] a ‘high likelihood of relapse or continued use without close monitoring and support.’” CP 170. Kim was previously placed on Antabuse, a drug “used as the last resort with severe alcoholic offenders,” which induces “violent[.]” illness if alcohol is consumed. CP 171. The most minor investigation – calling Kim’s then-wife – would have revealed that Kim was abusing

³ As this Court previously noted, in 1999 “the State Department of Licensing revoked Kim’s license for seven years as a ‘habitual traffic offender’ under RCW 46.65.070.” App. A at 3.

alcohol every day of his probation, using cocaine, and having “social problems” and “marital strife.” CP 193-94, 2097-99.

Yet (as in **Joyce**) Kim’s numerous probation violations went unreported. Kim violated his probation “in every way.” CP 193. In addition to drinking to excess daily and using cocaine, Kim drove while intoxicated, drove with a suspended license, purchased and drove a truck without an ignition-interlock device, failed to file monthly status reports, and failed to attend alcohol treatment or counseling. CP 193-94, 2097-99. In short, Kim knew that Fife Probation was not watching, so he did whatever he pleased. *Id.*

Also as in **Joyce**, there is expert testimony that Kim “would have been in jail” if Fife had reported his probation violations. 155 Wn.2d at 322. In fact, the causal chain is tighter here than in **Joyce**, in which expert Stough testified that the assailant would have been in jail prior to the accident if DOC had obtained a bench warrant. *Id.* Here, the trial court issued a bench warrant, but had to withdraw it because Fife Probation negligently failed to provide proper notice. CP 159. Kim more probably than not would have been in jail when he killed Heather Benskin, but for Fife’s negligent notice. *Id.*

The only difference between this case and **Joyce** is that the **Joyce** assailant served jail time for prior probation violations. 155 Wn.2d at 322. This does not distinguish **Joyce**, however, because Fife's own negligence prevented it from knowing of Kim's many probation violations. Thus, Kim served no jail time because Fife Probation utterly failed to monitor him for months. CP 658-59, 696-700, 2097-99. Fife should not benefit from its own negligence.

In keeping with its wholly misleading approach to this case in the trial court, Fife relied almost exclusively on **Hungerford v. DOC**, 135 Wn. App. 240, 139 P.3d 1131 (2006), *rev. denied*, 160 Wn.2d 1013 (2007) and **Estate of Bordon v. DOC**, 122 Wn. App. 227, 95 P.3d 764 (2004), *rev. denied*, 154 Wn.2d 1003 (2005). CP 93-94. It failed to even mention **Joyce**, much less **Taggart** and its progeny. *Id.* As discussed *infra*, **Hungerford** and **Bordon** are readily distinguishable. They cannot be applied in conflict with the Supreme Court's **Joyce** decision in any event. This Court should reverse and remand for trial.

C. If Fife had bothered to monitor Kim, he would have been incarcerated the morning he killed Heather Benskin.

As discussed above, causation presents genuine issues of material fact under **Taggart**, **Hertog** and **Joyce**. Argument § B,

supra. Fife Probation knew or should have known that Kim was a “chronic severe” alcoholic with a “prolific history” of DUIs and other driving offenses, including speeding, hit and run, and driving with a suspended license. *Compare* 155 Wn.2d at 322 *with* CP 169-72, 181, 1948, 1954. Kim violated his probation “in every way” from the day he was paroled to the day he killed Heather Benskin, and Fife failed to report these many violations. *Compare* 155 Wn.2d at 322 *with* CP 193, 2097-99. And as in **Joyce**, there is expert testimony that Kim would have been incarcerated when he killed Heather Benskin but for Fife’s negligence. CP 159.

Hungerford and **Bordon** are readily distinguishable. In **Hungerford**, the trial court ended active supervision and imposed Legal-Financial-Obligation (“LFO”) monitoring only, braking the causal chain. 135 Wn. App. at 246. But here, it is the law of the case that Judge Allen’s decision was not a supervening cause. *Supra*, Argument § B.

In **Hungerford**, convicted felon and misdemeanor Cecil Davis murdered Jane Hungerford-Trapp while DOC was supervising Davis’s LFOs. 135 Wn. App. at 245-46. In December 1992, Davis was put on probation for two years (suspending a one-year sentence) and ordered to pay restitution and court costs

(misdemeanor LFO). *Id.* at 247. Davis also had outstanding felony LFOs. *Id.* DOC reported that Davis failed to pay his misdemeanor LFOs in February 1995, and when he failed to appear to explain his failure to pay, the Superior Court issued an arrest warrant. *Id.*

On June 4, 1995, the police arrested Davis on the outstanding warrant for failure to pay his misdemeanor LFOs. *Id.* at 248.⁴ At a hearing the next day (June 5), the trial court found that Davis's failure to pay was not willful and extended his probation for misdemeanor-LFO monitoring only, releasing Davis on the misdemeanor, "meaning that his direct supervised probation was finished." *Id.*

The court again issued a bench warrant in December 1995, when Davis failed to appear for a misdemeanor-LFO review hearing, and the State obtained another arrest warrant in February 1996, when Davis failed to pay his still-pending felony LFOs. *Id.* Davis murdered Hungerford-Trapp on April 14, 1996; six days later, police arrested him on the two outstanding warrants. *Id.* at 249.

Hungerford-Trapp's brother claimed that DOC proximately caused her death, arguing that if DOC had reported Davis's

⁴ Davis was also arrested for domestic violence assault, but later found not guilty. 135 Wn. App. at 248.

probation violations at the June 5 hearing, then the trial court would have revoked Davis's probation and reimposed his misdemeanor sentence, in which case he would have been incarcerated when he murdered Hungerford-Trapp.⁵ *Id.* at 251. This Court rejected that argument, holding that the trial court "was already aware Davis had violated his probation conditions [when it] ended active supervision," a supervening act under ***Bishop***, cutting off DOC's liability. *Id.* at 252. In short, DOC had no ongoing duty to supervise Davis. *Id.*; see also ***Couch v. DOC***, 113 Wn. App. 556, 54 P.3d 197 (2002), *rev. denied*, 149 Wn.2d 1012 (2003) (LFO = no duty).

In *dicta*, the Court went on to say that Hungerford's claim would have failed even if he proved that the trial court would have imposed Davis's suspended sentence but for DOC's negligence, where there was no evidence that Davis would have been incarcerated when he reoffended. *Id.* at 253. Again, ***Hungerford*** is distinguishable. Davis would have to have served 314 days of his 317-day sentence to have been incarcerated when he murdered Hungerford-Trapp. *Id.* at 253. But with good-time credits, Davis

⁵ Davis's suspended sentence was 317 days and he killed Hungerford-Trapp 314 days after the June 5 hearing. *Id.* at 251.

served only 213 days (about 2/3), so this Court held that Hungerford failed to meet his burden. *Id.* at 253-54.

Here, however, even accounting for a maximum of good-time credits – which Fife concedes is 33% (CP 2443) – Kim would have been in jail long after he killed Heather Benskin. Judge Ringus suspended 155 days of Kim's sentence. App. B. If Judge Allen had revoked this suspended sentence, then Kim would have been in jail 103-04 days, until mid-May, two months after he killed Heather Benskin on March 9, 2003. And again, there is expert testimony that Kim would have been in jail when he killed Heather Benskin if Fife Probation had given proper notice of the review hearing scheduled less than a month earlier. CP 159.

Bordon is also readily distinguishable. There, DOC was supervising Richard Jones for several crimes when he drove drunk, crossing the centerline and killing Cynthia Bordon in April 1998. 122 Wn. App. at 231. Jones completed his prison time in November 1997, and reported to his Community Corrections Officer (CCO) as directed by his release order. *Id.* at 232-33. When Jones then twice failed to appear, his CCO informed his aunt (apparently residing at Jones's home) that if Jones did not appear the following day she would request a bench warrant. *Id.* at 233. Yet when

Jones failed to appear, his CCO transferred his case instead of filing a violation report. *Id.*

A Community Corrections Assistant (CCA) subsequently filed a violation report when Jones again failed to appear for intake. *Id.* at 233. The trial court issued two bench warrants, Jones was arrested, and DOC informed the court that Jones failed to appear, pay his financial obligations, or provide his address; but DOC failed to inform the court that Jones was arrested for driving without a license, also violating release conditions.⁶ *Id.* at 233-34. The court sentenced Jones to 15 days in jail and he was released 4 days before he killed Bordon. *Id.* at 234.

DOC's liability depended on Bordon proving that Jones would have received an additional 15-day sentence if DOC had reported the driving-condition violation. 122 Wn. App. at 241. But Bordon alleged only that "some violations' may be punishable with up to 15 days in jail," not the driving-condition violation. *Id.* Bordon failed to offer evidence that DOC would have pursued or proved the violation, when DOC would have filed the violation report, and when

⁶ The DWL violated release conditions stemming from an eluding conviction, while the other violations related to Jones's burglary and theft convictions. *Id.* at 233-34.

the court would have heard the violation report, and failed to offer testimony (“expert or otherwise”) that the court would have sentenced Jones to jail time or that Jones would have been incarcerated on the date of the accident. *Id.*

Here, however, the trial court could have reimposed Kim's 155-day suspended sentence. App. A at 3 n.7 (quoting RCW 3.50.340); CP 159. Fife Probation was already pursuing some of Kim's violations and it could have proved many violations using the abundant evidence that Kim was drinking and driving, failing to pursue treatment, failing to report during his entire probation. The court would have heard the violation reports in February 2003, but for Fife Probation's negligent failure to notify Kim. CP 159. And there is expert testimony here that Kim would have been incarcerated when he killed Heather Benskin but for Fife's negligence. *Id.*

On grounds that are also present here, the ***Bordon*** court distinguished both this Court's ***Joyce*** opinion, and also ***Estate of Jones***, which found sufficient causation evidence to survive summary judgment. 122 Wn. App. at 244 (citing ***Joyce v. DOC***, 116 Wn. App. 569, 594, 75 P.3d 548 (2003), *aff'd in part & rev'd in part*, 155 Wn.2d 306 (2004); and ***Estate of Jones v. State***, 107

Wn. App. 510, 519-20, 15 P.3d 180 (2000), *rev. denied*, 145 Wn.2d 1025 (2002)). As in **Joyce**, here there is “expert testimony that [Kim] would have been in prison but for” Fife Probation’s negligence. Compare **Bordon**, 122 Wn. App. at 244 n.50 (citing **Joyce**, 116 Wn. App. at 594) with CP 159. And as in **Estate of Jones**, here there is “factual evidence that the very nature of [Fife’s Probation’s] negligence” kept Kim out of jail, where Fife failed to provide Kim with proper notice, so Judge Allen could do nothing to bring him under control. Compare **Bordon**, at 244 (citing **Estate of Jones**, 107 Wn. App. at 519-20) with CP 159.

Judge Serko apparently accepted Fife’s misreadings of **Hungerford** and **Bordon**. See CP 3051 (judge’s letter stating Benskins’ evidence is speculative). But Fife’s arguments, if relevant, at most go to the weight of the evidence, not to its admissibility. See, e.g., **Palmer v. Massey-Ferguson, Inc.**, 3 Wn. App. 508, 511-12, 476 P.2d 713 (1970) (whether experts’ inferences are too remote goes to weight). Under Fife’s standard, many decisions would be called into question, such as this Court’s **Herring v. DSHS**, 81 Wn. App. 1, 18-19, 914 P.2d 67 (1996) (actuary’s speculation about damages “if” plaintiff never worked again held admissible); and its **Merriman v. Toothaker**, 9 Wn. App.

810, 814-16, 515 P.2d 509 (1973) (medical expert's "iffy" speculation about whether surgery would have been necessary held sufficient to establish causation where (as here) the expert said it was more likely than not). This Court should reject Fife's impossible-burden-of-proof causation claims because, taking all facts and reasonable inferences in the light most favorable to the Benskins, a jury could reasonably find causation here.

In any event, *Bordon* notes that "expert testimony is not always required." 122 Wn. App. at 244. Here, for instance, *Hertog* simply precludes Fife's causation argument. Argument § B, *supra*. Since Fife Probation took charge of Kim, its failure to protect the Benskins is "not too remote to impose liability" as a matter of law. *Hertog*, 138 Wn.2d at 284. This is sufficient to reverse.

Expert testimony also is not required because causation is "readily observable to laypersons." *Berger v. Sonneland*, 144 Wn.2d 91, 111, 26 P.3d 257 (2001). Here, lay evidence shows that Kim was drinking daily and driving throughout his probation because he knew that Fife Probation was not supervising him. CP 2097-99. Kim's former wife witnessed him "drinking alcohol in excess everyday" and frequently drinking and driving without a license during his probation. CP 2098 ¶ 4. Fife Probation never

came to the house, never called, never monitored Kim in any way. CP 2099 ¶ 7. Kim knew that his probation conditions prohibited him from drinking and driving, but he did so anyway because he knew that Fife was not supervising him (*id.*):

[Kim] continued to drink and drive . . . on a regular basis. [He] knew his license was suspended and that his probation rules stated that he was not supposed to drink alcohol or to drive, but he knew that no one from the City of Fife was enforcing those conditions so he drank alcohol everyday . . . and he drove on a regular basis while he was on probation. . .

In sum, if Fife had even minimally monitored Kim, it would have discovered numerous egregious probation violations. A jury could easily find that the court would have revoked Kim's suspended sentence if it knew that Kim was regularly driving without a license while intoxicated. Kim would have been in jail instead of killing Heather Benskin and maiming others. The Court should reverse and remand for trial.

D. The Benskins are not required to prove that supervision generally reduces recidivism, but they presented substantial evidence that Kim had previously responded well to close supervision and treatment, so a jury could reasonably find that if Fife had met its duty to protect the Benskins, Kim would not have reoffended while under Fife Probation's supervision.

Contrary to Fife's straw-man attack, the Benskins were not required to prove (and had never previously argued) that

supervision generally reduces recidivism. CP 16-18. Rather, the Benskins provided substantial evidence that Kim himself responded to proper supervision and treatment by not reoffending, so a jury could reasonably find that had Fife met its duties, Heather Benskin would still be alive. This is a genuine issue of material fact for a jury. The Court should reverse and remand for trial.

Fife's reliance on *Hungerford* is again misplaced. CP 16-18. *Hungerford* argued that if DOC had properly supervised Davis, then Davis would have been "rehabilitated" and would not have killed Hungerford-Trapp much later, after his supervision had ended. 135 Wn. App. at 251, 255. This Court rejected that argument for two reasons, neither of which is at issue here: (1) DOC has no duty to rehabilitate offenders; and (2) expert testimony on rehabilitation was speculative. *Id.* at 255-56.

Hungerford is inapposite – the Benskins never argued that Fife Probation had a duty to rehabilitate Kim. Rather, they argued that if properly monitored, Kim would not have driven drunk and killed Heather Benskin while under Fife Probation's direct supervision. This springs from Fife's duty to protect foreseeable victims through its take-charge special relationship with Kim, not

(as in *Hungerford*) some alleged duty to rehabilitate or guarantee the “future good behavior” of all offenders. *Id.* at 256.

This Court already resolved that Fife had a duty to supervise Kim; the evidence shows that supervision would have been effective. Expert William George explained that when Kim was closely monitored in the past, “he generally did well and had less likelihood of re-offense.” CP 1956. Under stringent supervision, Kim stopped drinking for “stretches of time,” regularly attended treatment, and received positive evaluations. CP 1957. For example, when Kim was in a two-year chemical dependency treatment program, wherein he was regularly assessed to determine whether he was maintaining sobriety, Kim “had the least amount of driving infractions and no driving while under the influence charges.” CP 1958 (emphasis George’s).

Experts Stough and Dan Hall concurred. Stough found a “direct correlation between Kim being closely monitored . . . and maintaining sobriety.” CP 171 ¶ 10. Hall summarized Kim’s positive response to proper supervision succinctly: “[w]hen he was supervised competently, he did not have new violations.” CP 159.

But Kim’s “pattern” includes “avoid[ing] accountability when constraints are lax.” CP 1956. When Kim was not monitored in the

past, “he relapsed into uncontrolled alcohol abuse and dependence and drove while intoxicated.” *Id.* He “exploit[s] the system to benefit his free-wheeling drunk driving excursions.” CP 1957. Given Kim’s historic response to proper supervision or, as here, a lack thereof, “[f]rom a foreseeability standpoint, Fife Probation’s complete lack of monitoring essentially guaranteed that Kim would again drink and drive.” CP 1958-59.

Kim’s behavior here was fully consistent with his well-established pattern: relapse, alcohol abuse, drunk driving. CP 1956. Fife Probation utterly failed to monitor Kim and he knew Fife was not watching, so he continued to drink and drive “on a regular basis,” killing Heather Benskin and maiming others. CP 2098 ¶ 7.

On this point too, this matter is nothing like *Hungerford*. There, this Court rejected generalizations about “experience and studies” showing recidivism lower in closely-supervised offenders, concluding that this failed “to suggest a causal relationship between supervision and recidivism.” *Id.* at 255. Judge Serko seems to have adopted Fife’s misuse of *Hungerford* on this point; although she considered the expert declarations, she found the Benskins’ arguments “speculative.” CP 2494-95, 3035-36, 3051.

But the expert testimony here is not based on “experience and studies,” but on Kim’s history of supervised release and treatment, demonstrating that he did not re-offend when properly monitored. *Compare* CP 159, 171, 1955-59. This is the “causal relationship” that this Court found lacking in ***Hungerford***. 135 Wn. App. at 255. ***Hungerford*** is thus distinguished. The Court should reverse and remand for trial.

In any event, even assuming *arguendo* that the Benskins had to prove that proper monitoring generally reduces recidivism, they put on evidence sufficient to create a question of fact for the jury. Leading up to trial, the Benskins’ attorney had been in contact with expert Robert Crutchfield at the University of Washington, who planned to release a study showing that proper monitoring and treatment reduces recidivism. CP 3096-97. On the Benskins’ motion for reconsideration, the trial court properly admitted the study as newly discovered evidence, where Crutchfield was not at liberty to testify about the study until it was released. *Id.*; CP 3053, 3229. Crutchfield opined on a more-probable-than-not basis that proper supervision and treatment significantly reduces recidivism. CP 3254, 3256. Crutchfield also concurred with the Benskins’ other experts that Kim’s reoffense is directly linked to Fife’s lack of and

poor supervision. CP 3256. Thus, even though the Benskins are not required to show that supervision generally reduces recidivism, they provided substantial evidence creating a genuine issue of material fact for the jury on this straw issue too.

E. While it is true that Judge Ringus improperly suspended Kim's sentence knowing full well that Fife Probation was a fraud, the Benskins' actual argument is that Fife's negligent failure to supervise Kim caused Heather Benskin's tragic death.

In response to Fife's motion for summary judgment seeking to preclude the Benskins from arguing that "Judge Ringus should have given Kim a longer sentence" (CP 2469-70) the Benskins stated, as a factual matter, that Judge Ringus knew that "Fife Probation" was meaningless, so he should have incarcerated Kim for his full 365-day sentence. CP 128-30. This is a truism – Kim should have been incarcerated, where Fife Probation was a mere shell with no means or intent to supervise Kim.

Fife admittedly failed to comply with ARLJ 11, setting the minimum standards for the operation of misdemeanor probation services. CP 657; *see also* App. A at 12-13. Judge Ringus, acting as the head of Fife Probation, has never worked as a probation officer or had any training as a probation officer. CP 643. Fife Probation has no policies or procedures to guide its probation

officers (CP 177-78, 651-52, 664-67, 709, 2106) and never trained or evaluated its probation officers (CP 654) or hired a consultant to do so. CP 655. As corrections-expert Hall put it (CP 160):

Fife Probation Department was a counterfeit organization; a fabrication. It was a pseudo probation department. It was a front organization w/no foundation, framing, walls, or interior. . . . It turned out to be a fiction from which the public still suffers today.

Fife Probation did not supervise Kim (CP 658-59) and had no real relationship with Kim from the time he was sentenced through the time he killed Heather Benskin. CP 659-60. Judge Ringus asserted that Fife Probation's purpose is "[t]o monitor compliance with suspended sentences" (CP 664), but he knew full well that Fife Probation never did so. CP 651-57, 664-68. As such, Kim's suspended sentence is simply a shorter sentence in the first instance. The cloak of judicial immunity does not make Fife's fraud any less outrageous.

But contrary to Fife's outrageous claim, the Benskins do not and have not ever argued that "a jury should find Judge Ringus negligent for not giving Kim a 365 day sentence." CP 2469. Judge Ringus is not even a defendant. The Benskins' argument is that Fife should be liable for fabricating a probation department and

sustaining the fraud that Fife Probation would supervise Kim. The Court should reverse and remand for trial.

CONCLUSION

The next greatest misfortune to losing a battle is to gain such a victory as this.

The Duke of Wellington (1769-1852), in S. Rogers, *Recollections* (1859)

One more such victory and we are lost.

Pyrrhus (319-272 B.C.) – after defeating the Romans at Asculum in 279.

The Court should reverse and remand for trial.

DATED this 3rd day of July, 2008.

WIGGINS & MASTERS, P.L.L.C.



Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

Attorneys for Appellants

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANTS** postage prepaid, via U.S. mail on the 3rd day of July 2008, to the following counsel of record at the following addresses:

Counsel for Respondents

Andrew G. Cooley
LAW OFFICES OF KEATING, BUCLKIN
& McCORMACK, INC.
800 5th Avenue, Suite 4141
Seattle, WA 98104-3189

Co-counsel for Appellants

Thaddeus P. Martin
Attorney at Law
4002 Tacoma Mall Blvd, Ste 102
Tacoma, WA 98409

FILED
COURT OF APPEALS
PACIFIC
CO. JUL - 7 AM 9:28
STATE OF WASHINGTON
BY _____



Kenneth W. Masters, WSBA 22278
Attorney for Appellants

APPENDICES TO BRIEF OF APPELLANT
Court of Appeals No. 37401-3-II

- Appendix A: ***Benskin v. City of Fife***, Wash. State Court of Appeals No. 31523-8-II (Slip Op., Oct. 18, 2005), *rev. denied*, 158 Wn.2d 1003 (2006)
- Appendix B: Order placing Kim under Fife Probation's supervision
- Appendix C: Declaration of Psychologist and Alcohol Expert William H. George
- Appendix D: Report of Dan Hall, Corrections Expert
- Appendix E: Declaration of Probation-Expert William Stough
- Appendix F: Affidavit of Min Chong Kim
- Statutes: RCW 3.50.340
 RCW 46.65.070

No. 31523-8-II

while under the influence (DUI) and first degree driving with a suspended license at the time of the collision.

On appeal, the Benskins contend that the trial court erred in finding (1) the municipal court order imposing Kim's probation created no duty; and (2) the probation department was judicially immune because it was acting as an arm of the court.²

The City cross-appeals contending that the trial court erred in refusing to strike various expert witness declarations and their attachments filed in opposition to the City's summary judgment motion.

We reverse. Based on the existence of facts indicating a "take-charge" supervisory relationship, the trial court erred in finding that the City's probation department owed no duty to the appellants. And the City's probation department is not immune from suit based on judicial immunity at common law or ARLJ 11.³

FACTS

KIM'S PROBATION

On January 27, 2002, Kim was charged with four violations in the Fife Municipal Court: the infractions of speeding and driving without proof of liability insurance and the criminal

² The Benskins also argue that a reasonable jury could find that the probation department's negligence was a cause in fact of their injuries, but the trial court did not reach that issue and we do not address it.

³ The Benskins also assert that a judge's refusal to issue an arrest warrant at Kim's February 12, 2003 probation review hearing based on Kim's failure to comply with probation conditions was not a superseding intervening cause because the judge's refusal to act was caused by the City's failure to notify Kim of the hearing. But the trial court actually denied the City's summary judgment motion on that ground and the City does not cross-appeal on that basis, so we do not address it.

offenses of driving under the influence⁴ and first degree driving while license suspended.⁵ On July 30, 2002, Kim pleaded guilty to DUI as a third offense.⁶

Kim had a long history of alcohol-related driving violations and alcohol abuse. For example, the 2002 Fife DUI was Kim's fifth since 1991. And in 1999, the State Department of Licensing revoked Kim's license for seven years as a "habitual traffic offender" under RCW 46.65.070.

Judge Kevin Ringus sentenced Kim to 365 days in custody but suspended 155 days of the sentence.⁷ For the remaining 210 days, Kim was to serve 120 days under Electronic Home Monitoring⁸ and 90 days in jail or at Progress House, a work release facility. Kim was also ordered to pay \$2,275 within 60 days. The court suspended Kim's license for three years. The court also ordered that Kim (1) could not drive without a license and insurance; (2) "[h]ave law abiding behavior" and "no similar incidents;" (3) not take mood altering substances without a prescription; (4) have no "alcohol/drug related offenses or non-prescription drugs;" (5) have no criminal traffic convictions; (6) not drive a motor vehicle if a blood or breath test "would result

⁴ RCW 46.61.502.

⁵ RCW 46.20.342(1)(a).

⁶ Former RCW 46.61.5055(3) (2003) (setting forth penalty schedule for violations of RCW 46.61.502 for individuals with more than two prior offenses in seven years).

⁷ "After a conviction, the court may impose sentence by suspending all or a portion of the defendant's sentence . . . and may place the defendant on probation for a period of no longer than two years and prescribe the conditions thereof." RCW 3.50.320. And under RCW 3.50.340:

Deferral of sentence and suspension of execution of sentence may be revoked if the defendant violates or fails to carry out any of the conditions of the deferral or suspension. Upon the revocation of the deferral or suspension, the court shall impose the sentence previously suspended or any unexecuted portion thereof. In no case shall the court impose a sentence greater than the original sentence, with credit given for time served and money paid on fine and costs.

⁸ Kim received credit for 32 days of home monitoring already served.

No. 31523-8-II

in a positive reading of alcohol or drugs [within] 4 hours of driving; and (7) "NOT refuse to submit" to a breath or blood test for alcohol. 1 Clerk's Papers (CP) at 38. Kim was also directed to file "monthly status reports (treatment)" and ordered to file with the court proof of an ignition interlock device after receipt of a valid driver's license. 1 CP at 38. Finally, he was ordered to "REPORT TO THE FIFE MUNICIPAL COURT PROBATION WITHIN FIVE . . . WORKING DAYS TO MONITOR COMPLIANCE." 1 CP at 38. Under the order, the court had jurisdiction over Kim for 60 months.

Kim entered Progress House on August 12, 2002, and was released on October 21, 2002. The City's probation department had little contact with Kim following his conviction. Rachel Brooks-Bailey, the City's only full-time probation officer, spoke with Kim once on the phone. But on January 13, 2003, Brooks-Bailey requested that the court conduct a probation review hearing because Kim had not complied with the conditions of his suspended sentence: "Kim has failed to provide proof of treatment and has not had direct contact with the probation department and failed to appear for a scheduled . . . appointment." 1 CP at 22. The probation department's request for court action noted:

Based on [Kim's] high risk to the community and lack of follow through with court ordered probation the following is recommended:

1. [Kim] provide proof of treatment within 30 days or serve the remainder of his sentence in jail.
2. [Kim] will provide proof of 5 sober support meetings per day [sic] until actively in treatment.
3. [Kim] will remain on Formal probation until his case is closed and pay any additional cost.

1 CP at 22.

A review hearing was set for February 12, 2003, but Kim did not appear. Judge Pro Tem Sandra Allen decided to issue a failure to appear bench warrant for Kim's arrest, but after

No. 31523-8-II

reviewing his file, she discovered that notice of the hearing had not been sent to Kim or his counsel. The court rescheduled the review hearing for March 12, a month later.

FATAL COLLISION

On March 9, 2003, three days before the rescheduled hearing, at approximately 1:49 A.M., Kim was driving the wrong way on the State Route 16 on-ramp from Interstate 5 in his 2003 Chevrolet Silverado pickup truck when he struck head-on a GMC Jimmy driven by Mihok. Twenty-four-year-old Heather Benskin, a passenger in Mihok's vehicle, died of injuries sustained in the crash.

Just before striking Mihok's vehicle, Kim had been involved in two other collisions on the same roadway. A witness, Gordon Bechtel, saw Kim's vehicle driving fast on westbound State Route 16. Bechtel heard a loud noise and saw Kim's truck spin across the road toward the left side and collide with a Chevrolet Lumina driven by Goodfellow. Kim's truck eventually came to a stop facing eastbound in the westbound lanes of State Route 16. Evans was also driving westbound on State Route 16 in a Jeep Wrangler. After witnessing Kim's first collision, she pulled her vehicle to the left shoulder. Kim's truck started forward and struck Evans's Jeep so hard it deployed the airbag. After this second collision, Kim got out of his truck and asked Evans if she was okay. Evans told Kim that she was not, but Kim got back in his truck and drove away, still traveling eastbound in the westbound lanes. Kim's truck then struck Mihok and Heather Benskin's GMC. After the collision with the GMC, Kim got out of the car and left the scene on foot. A witness who saw Kim get out of his car and flee the scene opined that Kim was in a "drunken stupor" at the time. 10 CP at 1807. Kim left his cell phone in his truck.

Kim contacted police approximately 31 hours after the collision.

LAWSUIT

On October 3, 2003, the Benskins sued Kim and the City. The Benskins asserted that the City's probation department had breached its duty to supervise Kim while he was on probation for his July 30, 2002 DUI conviction.

The City moved for summary judgment on November 20, 2003, submitting in support of its motion the declarations of Judge Ringus and Judge Allen. Judge Ringus, Kim's sentencing judge, is also in charge of the City's probation department. In Judge Ringus's deposition, he states that the function of the City's probation department is to "monitor compliance" with court-imposed conditions of a defendant's suspended sentence.⁹ 9 CP at 1682. Judge Ringus contrasted the City's probation department with the State Department of Corrections, which engaged in "probation supervision." 9 CP at 1682. According to Judge Ringus, the probation department "use[s] the resources . . . available to the Fife Municipal Court to see if someone is complying with conditions of a suspended sentence." 9 CP at 1681-82. Judge Ringus also stated in the deposition that he does not train the City's probation officers and that the City's probation department does not have any written policies or procedures.

The Benskins opposed the City's summary judgment motion and submitted documents including the expert witness declarations and their attachments of "corrections expert" Brian Bemus, "expert criminal profiler" Dr. Robert Keppel, and "corrections expert" William T. Stough. The City objected to this evidence and moved to strike portions of the declarations and the attached exhibits.

⁹ Judge Ringus noted that he did not personally monitor any probationers.

Following a March 5, 2004 motion hearing, the court denied the City's motion to strike but granted summary judgment on three out of the four independent grounds asserted at the oral argument:

First, with respect to Judge Allen being an intervening cause [in not issuing a warrant for Kim's arrest], I'm going to deny the summary judgment on that ground. . . .

[Second,] I believe in this case the Fife probation office does act as an arm of the court. [Benskin's counsel] says it's doing an executive function, but he also says it's established under ARLJ 11, which is a court rule directed to municipal courts. It's not an executive function in this case. It's a court function.

[Third is] whether Judge Ringus is . . . negligent in his duty as a judge, in not doing more or not having his probation clerks do more. . . . [H]e's immune from suit. The probation department . . . is an arm of the Fife Municipal Court . . . and is also cloaked in judicial immunity.

[Fourth,] the main reason I'm granting the motion for summary judgment is that I do not feel a special relationship was established here.

Report of Proceedings at 54-55. The trial court entered its written orders that same day.

The Benskins appeal the summary judgment and the City cross-appeals the court's denial of its motion to strike.

ANALYSIS

STANDARD OF REVIEW

In reviewing a trial court's grant of summary judgment in a negligent supervision claim, we make the same inquiries as the trial court, whether there are genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999) (citing CR 56(c) and *Taggart v. State*, 118 Wn.2d 195, 199, 822 P.2d 243 (1992)). In doing so, we consider facts and reasonable inferences from the facts in the light most favorable to the nonmoving party and review questions of law de novo. *Hertog*, 138 Wn.2d at 275.

DUTY BASED ON COURT ORDER (FIRST INDEPENDENT BASIS FOR SUMMARY JUDGMENT)

The Benskins contend that the trial court erred in determining that the City owed no duty to supervise because there was no special relationship formed between the probation department and Kim. They assert that the July 30, 2002 court order created such a relationship and imposed such a duty.

Here, the question is whether a “take-charge” or special relationship existed between the City’s probation department and Kim. In most cases, two of the most important features of such relationship will be (1) the court order that put the offender on the supervising officer’s caseload; and (2) the statutes that describe and circumscribe the officer’s power to act. *Couch v. Dep’t of Corr.*, 113 Wn. App. 556, 565, 54 P.3d 197 (2002), *review denied*, 149 Wn.2d 1012 (2003). Neither party asserts that a statute defines the relationship as in *Taggart*. But the Benskins argue that this case is no different than *Hertog*, which also involved a municipal probation department, and asserts the July 30, 2002 court order established a take-charge relationship and, therefore, a duty on the City’s part.

The following factors, taken in the light most favorable to the Benskins, suggest the existence of a take-charge relationship here. The Fife Municipal Court suspended Kim’s driver’s license for three years; among other things it ordered that Kim not drive without a license and insurance; that he file “monthly status reports” regarding his treatment; and that he “REPORT TO THE FIFE MUNICIPAL COURT PROBATION WITHIN FIVE . . . WORKING DAYS TO MONITOR COMPLIANCE.” 1 CP at 38. Probation officer Brooks-Bailey was aware that Kim

was not complying with the court order and sought revocation of Kim's suspended sentence at the February 2003 hearing. The probation department was acting to enforce the court order.¹⁰

Under the Fife sentencing court's order, and relying on our Supreme Court's *Taggart* decision as applied to a municipal probation department in *Hertog*, and a county probation department in *Bishop v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999), a jury could find that a special relationship had been formed. Under this special relationship, the probation department would owe a duty to protect the public from foreseeable behavior associated with the conditions of the order. These conditions were that Kim, a repeat DUI offender, provide proof of treatment and, essentially, refrain from driving. Because Washington law recognizes a duty to supervise parolees and those on probation under suspended sentences such as Kim's, summary judgment on the ground that no jury could find the City probation department had a special relationship with Kim and a duty to control his behavior was improper. *See also Joyce v. State*, ___ Wn.2d ___, 119 P.3d 825, 2005 Wash. LEXIS 789, *15 (Wash. 2005) (citing *Hertog* and *Bishop* with approval).

QUASI-JUDICIAL IMMUNITY FOR PROBATION DEPARTMENT AS "ARM OF THE COURT" (SECOND¹¹ INDEPENDENT BASIS FOR SUMMARY JUDGMENT)

Next, the Benskins assert that the trial court erred in ruling that the City's probation department enjoyed absolute immunity as an arm of the court. We agree.

Quasi-judicial immunity attaches to persons or entities that perform functions so comparable to those performed by judges that they ought to share the judge's absolute immunity

¹⁰ On the day of the hearing the court rescheduled the hearing after learning that the probation department had failed to notify Kim of this hearing.

¹¹ This is actually the third independent basis provided by the court, but we analyze the reasons in this order for the sake of clarity.

No. 31523-8-II

while carrying out those functions. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 99, 829 P.2d 746 (1992) (citing *Butz v. Economou*, 438 U.S. 478, 512-14, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)), *cert. denied*, 506 U.S. 1079 (1993). Quasi-judicial immunity is absolute immunity. *Lutheran*, 119 Wn.2d at 99 (citing *Babcock v. State*, 116 Wn.2d 596, 606-08, 809 P.2d 143 (1991)).

To be entitled to immunity, a government employee must establish three things. First, the employee must show that he or she performs a *function* which is analogous to that performed by persons entitled to absolute immunity, such as judges or legislators. Second, the employee must show how the *policy* reasons which justify absolute immunity for the judge or legislator also justify absolute immunity for that official. And third, the employee must show that sufficient *safeguards* exist to mitigate the harshness to the claimant of an absolute immunity rule. *See Lutheran*, 119 Wn.2d at 106 (citing *Butz*, 438 U.S. at 512-13).

In *Taggart*, our Supreme Court held that when a parole officer performs functions such as enforcing the conditions of parole or providing the Indeterminate Sentence Review Board with a report to assist the Board in determining whether to grant parole, the officer's actions are protected by quasi-judicial immunity. *Taggart*, 118 Wn.2d at 207. But when the officer takes purely supervisory or administrative actions, no such protection exists. *Taggart*, 118 Wn.2d at 213. And in *Hertog*, the court stated, "under *Taggart*, monitoring compliance with probation conditions is not protected by quasi-judicial immunity." 138 Wn.2d at 291. *Compare Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 86, 1 P.3d 1148 (2000); *Estate of Jones v. State*, 107 Wn. App. 510, 520, 15 P.3d 180 (2000), *review denied*, 145 Wn.2d 1025 (2002) (quasi-judicial immunity does not apply where the defendant county fails to adequately monitor and report probation violations or fails to provide all material information to the court).

Immunity is a matter of function, not form. The City points out that, like judges, the City's probation department does not investigate or monitor probationers.¹² Therefore, it argues, the City's probation department is judge-like and entitled to quasi-judicial immunity. But the City's argument ignores the functional test for immunity, which is the first inquiry under *Lutheran*¹³—monitoring probationers is not analogous to a judicial decision to place the defendant on probation or revoke probation and thus, it is not protected by quasi-judicial immunity. *Hertog*, 138 Wn.2d at 291; *see also Taggart*, 118 Wn.2d at 213 (no quasi-judicial immunity for supervisory or administrative actions by parole officers).

We also reject the City's argument that, because Judge Ringus administers the City's probation department, it is entitled to judicial immunity. First, we note that when a judge acts as the head of a probation department it does not mean that he does so in his judicial capacity. Being a probation department head is an essentially administrative role, and even where those duties are being performed by someone who also happens to be a judge, that fact does not transform those duties to judicial duties and the probation department does not enjoy judicial immunity for all its activities as a result. Thus, the trial court erred when it found that the probation department enjoyed quasi-judicial immunity for its actions in supervising Kim's court-ordered probation.

¹² The Benskins also argue that it is improper for the City to assert that the employees are essentially clerks who engage in mere administrative, not supervisory, functions especially considering that applying the title "probation officer" to these employees ensures that the City does not have to send money to the State for probation services under RCW 3.50.100.

¹³ 119 Wn.2d at 106 (citing *Butz*, 438 U.S. at 512-13).

JUDICIAL IMMUNITY UNDER ARLJ 11

The Benskins also contend that the trial court erred insofar as it granted summary judgment based on the probation department's immunity under ARLJ 11 because that rule does not create judicial immunity. Again, we agree.

RCW 10.64.120 authorizes ARLJ 11. It states:

(1) Every judge of a court of limited jurisdiction shall have the authority to levy upon a person a monthly assessment not to exceed one hundred dollars for services provided whenever the person is referred by the court to the misdemeanor probation department for evaluation or supervision services. The assessment may also be made by a judge in superior court when such misdemeanor or gross misdemeanor cases are heard in the superior court.

(2) For the purposes of this section *the office of the administrator for the courts shall define a probation department and adopt rules for the qualifications of probation officers based on occupational and educational requirements developed by an oversight committee.* . . . The oversight committee shall consider qualifications that provide the training and education necessary to (a) conduct presentencing and postsentencing background investigations, including sentencing recommendations to the court regarding jail terms, alternatives to incarceration, and conditions of release; and (b) provide ongoing supervision and assessment of offenders' needs and the risk they pose to the community.

(3) It shall be the responsibility of the probation services office to implement local procedures approved by the court of limited jurisdiction to ensure collection and payment of such fees into the general fund of the city or county treasury.

(4) Revenues raised under this section shall be used to fund programs for probation services and shall be in addition to those funds provided in RCW 3.62.050.

The rules referred to in RCW 10.64.120 were adopted as ARLJ 11 in 2001.¹⁴

¹⁴ When the new rule was first proposed, it was accompanied by the following comment:
The 1996 Washington State Legislature mandated that the OAC adopt rules relating to the operation of local misdemeanor probation departments. . . .

. . . .
[Under RCW 10.64.120] the OAC established the Misdemeanant Probation Oversight Committee in October 1996. . . . The statute requires the oversight committee to define a misdemeanor probation department and recommend a detailed list of qualifications for the position of probation officer.

. . . .
The rule defines a misdemeanor probation department based on the type of services offered. Misdemeanant probation departments vary tremendously in

Under ARLJ 11.1:

A misdemeanor probation department, if a court elects to establish one, is an entity that provides services designed to assist the court in the management of criminal justice and thereby aid in the preservation of public order and safety. This entity may consist of probation officers and probation clerks. The method of providing these services shall be established by the presiding judge of the local court to meet the specific needs of the court.

ARLJ 11.2 lists the qualifications and services provided by probation department personnel.

ARLJ 11.3 directs that statutory probation service fees are to be used for the provision of probation services.

But in his deposition, Judge Ringus states that the City's probation department does not comply with ARLJ 11. Because the City's probation department does not comply with the rule,

the types of services offered and the method of delivering those services. In recognition of this fact, the presiding judge of the local court is granted authority under the rule to determine what services will be offered and how they will be delivered. Nevertheless, a department is still required to structure its services so that it will assist the court in the management of criminal justice with the intent of aiding in the preservation of public order and safety.

The oversight committee acknowledged that staff with higher levels of training and education should perform certain types of services. To ensure that appropriately qualified staff performs probation services, the oversight committee has divided typical probation services into two categories: (1) professional, and (2) clerical. Under the rule, staff may only perform core services that they are qualified to perform. Although, the rule does not require misdemeanor probation departments to employ professional staff (i.e. a probation officer), probation departments organized without a probation officer would be limited under the rule to performing only clerical type services.

The Legislature specifically required the OAC to adopt rules, which set the training and education qualifications for probation officers. Once again, the detail in the rule is somewhat extensive; however, the detail is mandated. . . .

.....
In summary, the rule defines what constitutes a misdemeanor probation department under the statute. In addition, the rule establishes the types of services that may only be performed by professional probation officers, as opposed to clerical staff, and it establishes the education and training requirements for both probation officers and probation clerks.

4B KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE, ARLJ 11.3 history cmt. at 175-76 (6th ed. 2002).

No. 31523-8-II

the trial court erred in finding as a matter of law that the City enjoyed judicial immunity under ARLJ 11.¹⁵

CAUSATION IN FACT

Although the Benskins argue on appeal that a jury could reasonably find that the City's actions were a cause in fact of the injuries in this case, the trial court did not reach the issue and we decline to address it.

MOTION TO STRIKE EVIDENCE

We turn now to the City's cross-appeal. In its cross-appeal, the City asserts that the trial court erred in failing to strike the declarations of the Benskins' experts and the attached exhibits from its consideration at summary judgment (except for deposition testimony and curriculum vitae).

Under CR 56(e), affidavits supporting or opposing a summary judgment motion must (1) be made on personal knowledge; (2) set forth such *facts* as would be admissible in evidence; and (3) show affirmatively that the affiant is competent to testify to the matters stated therein. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

The City argues that these experts' declarations should be stricken under *Grimwood*, which sets forth a test for sufficiency of an affidavit in a summary judgment context, i.e., whether such an affidavit sets forth "material facts creating a genuine issue for trial": [first]

¹⁵ The duty announced in *Taggart* only arises after it has been shown that (1) the probation officer lacks absolute immunity, i.e., the officer's actions were not part of any judicial or quasi-judicial process; and (2) lacks qualified immunity, i.e., the officer failed to perform statutory duties according to procedures dictated by statute and superiors. 118 Wn.2d at 224. We note that the City may not claim its employees are entitled to qualified immunity here because it is undisputed that its probation department had no established procedures and, moreover, Judge Ringus stated that he did not train the probation officers.

No. 31523-8-II

does the affidavit state material facts, and [second,] if so, would those facts be admissible in evidence at trial.” 110 Wn.2d at 359.

In asserting that the “facts alleged” would not be admissible, the City questions the qualifications as experts of the individuals who submitted declarations. Under ER 702, a witness may testify as an expert if he or she possesses knowledge, skill, experience, training, or education that will assist the trier of fact. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611-12, 15 P.3d 210, *review denied*, 144 Wn.2d 1016 (2001). Qualifications of expert witnesses are to be determined by the trial court within its sound discretion, and rulings on such matters, including whether to grant summary judgment based on opinions of such expert witnesses, will not be disturbed except for a manifest abuse of discretion. *Orion Corp. v. State*, 103 Wn.2d 441, 462, 693 P.2d 1369 (1985).¹⁶ We note that the focus at summary judgment is on the facts averred within those declarations or affidavits, and the court here properly reviewed the declarations in the light most favorable to the non-moving party to determine whether such evidence created a material issue of disputed fact.¹⁷ Accordingly, the court did not abuse its discretion in refusing to strike the declarations of the Benskins’ expert witnesses or the police reports on which their opinion was based in consideration of the City’s motion for summary judgment.

¹⁶ The trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable reasons. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994); *Garcia v. Providence Med. Ctr.*, 60 Wn. App. 635, 642, 806 P.2d 766, *review denied*, 117 Wn.2d 1015 (1991).

¹⁷ Moreover, courts indulge in some leniency with respect to affidavits presented by the nonmoving party on a summary judgment motion. *Orion Corp.*, 103 Wn.2d at 462 (citing *Meadows v. Grant’s Auto Brokers, Inc.*, 71 Wn.2d 874, 879, 431 P.2d 216 (1967)).

The City also contends that the trial court erred in failing to strike as hearsay the bulk of the documents the Benskins submitted in opposition to the City's summary judgment motion.¹⁸ Hearsay alone is not competent evidence for summary judgment. CR 56(e); *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 878, 431 P.2d 216 (1967). But ER 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

See also Thornton v. Anest, 19 Wn. App. 174, 181, 574 P.2d 1199 (1978) (statements which formed the basis for an expert's opinion were admissible and were not hearsay). Here, the declarations of the Benskins' expert witnesses did no more than relate their training and specify the experts and information on which they relied in reaching their expert opinion. The reports were not offered for the truth of the matter asserted but only as the basis for the expert opinion stated in the declaration. *Group Health Coop. v. Dep't of Revenue*, 106 Wn.2d 391, 398-400, 722 P.2d 787 (1986); *State v. Martinez*, 78 Wn. App. 870, 878-81, 899 P.2d 1302 (1995), *review denied*, 128 Wn.2d 1017 (1996).

Next, the City argues that certain declarations and exhibits (such as those opining that Kim was intoxicated at the time of the accident) should be stricken because they are "immaterial" to a determination of the scope of judicial immunity, which was *the* issue on summary judgment. But the City's summary judgment motion also sought judgment on additional issues beyond judicial immunity: for example, it argued that no special relationship existed between the City and Kim and that the appellants had not shown cause in fact.

¹⁸ The City did not specifically identify the documents. Instead its motion requested the court strike everything except the depositions and curriculum vitae.

No. 31523-8-II

In sum, the City has not shown that the trial court abused its discretion in refusing to strike generally unspecified information including the experts in forming their declared opinions. Whether some of the challenged documents the experts relied on in forming their opinion would eventually be excluded from evidence at trial is a separate question not yet ripe for our review. *See Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 246-47, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005) (in negligent supervision action, trial court did not abuse its discretion by excluding expert testimony of former community corrections officer; testimony that convict would have been in jail on day of accident but for Department of Correction's negligence was beyond his expertise and speculative).

We reverse the summary judgment and remand for a trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

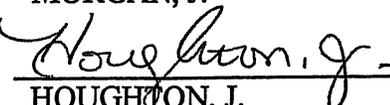


QUINN-BRINTNALL, C.J.

We concur:



MORGAN, J.



HOUGHTON, J.

FIFE MUNICIPAL COURT
 3737 PACIFIC HIGHWAY EAST
 FIFE, WASHINGTON 98424
 PHONE: (253) 922-6635
 FAX: (253) 926-5435

COURT ORDER

PROBABLE CAUSE

YES NO

Public Defender Appointed

DEFENDANT <u>Kim Jung</u>		BIRTHDATE <u>4-11-64</u>						
ADDRESS <u>Kim Jung</u>		CITY, STATE, ZIP <u>88 CR</u>						
CASE NO.	CHARGE (S)	AMENDED TO	DISPOSITION	JAIL TIME IMPOSED	JAIL TIME SUSPENDED	CREDIT FOR TIME SERVED	\$	CODES
<u>E15743</u>	<u>DUI</u>	<u>3rd offense</u>	<u>6</u>	<u>365</u>	<u>155</u>	<u>32</u>	<u>75</u>	<u>601</u>
<u>E15743</u>	<u>DUI 10</u>		<u>D</u>				<u>150</u>	<u>601</u>
<u>I31139</u>	<u>Spce</u>		<u>D</u>					
<u>I31139</u>	<u>LIAB</u>		<u>D</u>					

YOU MUST PAY Fine/costs of \$ 1775 by 600 at \$ 600 per month.
 Failure to appear or pay by the due date may result in the issuance of a bench warrant for defendant's arrest.
 Credit time served to fine/costs. Rate \$ 600 per day. Released Electronic Monitoring Alternative facility

YOUR JAIL STATUS Report to Fife Jail jail by 9 AM Flat Time Work Release
 Authorized Bail: \$ 600 Amount of bail Cash Only Cash/bond Defendant PR'd to 8:30 AM
 PR Terminated Bail Bond Exonerated/Reinstated Cash bail refunded to poster Retain \$ 600 cash bail as 600
 Jail sentence to run (consecutively) (concurrently) with other: Fife Municipal charges Charges with 600
 Jurisdiction until 600

THIS CASE CONTINUED with / without stipulation to facts sufficient and with / without finding until _____
 Upon compliance Dismissal Amended to _____
 Upon non-compliance Reading of Record and Sentencing

YOU MUST SURRENDER your driver's license immediately to the court. Surrendered Yes No Affidavit of Non-Surrender
 Your license is suspended for 3 days

YOU ARE ORDERED AS FOLLOWS:

- Do not drive without valid driver's license and insurance
- Have law abiding behavior Have no similar incidents
- No mood altering substances without a prescription
- Comply with terms and conditions of deferred prosecution
- Have no alcohol/drug related offenses or non-prescription drugs
- Have no criminal traffic convictions
- No contact with _____
- Have no hostile contact with _____

- DO NOT drive a motor vehicle if a test of your breath/blood would result in a positive reading of alcohol or drugs w/in 4 hours of driving.
- DO NOT refuse to submit to a test of your breath or blood to determine alcohol concentration upon the lawful request of a law enforcement officer.
- SOAP SODA (see map)
- No Contact Order ordered / recalled
- File monthly status reports (treatment)

YOU MUST COMPLETE THE FOLLOWING WITH WRITTEN PROOF TO THE COURT BY _____

- Obtain valid vehicle insurance
- Obtain a valid driver's license
- Defensive driving school Level 1 / Level 2
- Alcohol/Drug assessment and recommended treatment
- Alcohol/Drug Information School (ADIS)
- Anger management evaluation and recommended treatment
- Batterer's assessment and recommended treatment
- Consumer awareness program
- HIV testing at health department
- Mental health evaluation

- Community service _____ hrs. in lieu of \$ _____ fine/costs by _____
- Pay restitution: \$ _____ to _____
- Contact Allied Credit Co. and arrange a payment plan.
- Attend Alcoholics/Narcotics Anonymous meetings _____ per week
- Ignition Interlock device on non-commercial vehicles driven upon
- Victim Impact Panel DUI _____ DV _____ received upon
- Other conditions 2R monthly

Defendant shall return to court on _____ at _____ AM / PM for _____ (Transport on _____ if in jail.)
 Defendant need / not appear if in compliance

YOU MUST REPORT TO THE FIFE MUNICIPAL COURT PROBATION WITHIN FIVE (5) WORKING DAYS TO MONITOR COMPLIANCE.

St. P Det to serve 90 days
fail, upon only receive for CHN

I understand that if I fail to comply with all conditions of this order or fail to appear for any subsequent court hearing, the court may issue a warrant for my arrest, my drivers license may be suspended, and additional costs and/or jail time may be imposed. Any balance owing may be sent to a collection agency if I fail to pay as scheduled. I will notify the court of any change of address.

ONE IN OPEN COURT 7/30/02

[Signature]
 DEFENDANT

[Signature]
 JUDGE / COMMISSIONER

WHITE - Original

CANARY - Counsel

PINK-Defendant



03-2-11971-2 20540190 DCLR 02-23-04

FILED
IN COUNTY CLERK'S OFFICE
A.M. FEB 23 2004 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

ROBIN AND SUSAN BENSKIN, individually,
and ROBIN BENSKIN, as the Personal
Representative for the ESTATE OF HEATHER
BENSKIN, JOSH MIHOK, TINA MARIE
GOODFELLOW AND ROBERTA EVANS,

Plaintiffs,

vs.

CITY OF FIFE and JONG KIM and "JANE
DOE" KIM and the Marital Community
Composed Thereof,

Defendants.

NO. 03-2-11971-2

DECLARATION OF PSYCHOLOGIST
AND ALCOHOL EXPERT WILLIAM H.
GEORGE IN OPPOSITION TO CITY OF
FIFE'S MOTION FOR SUMMARY
JUDGMENT DISMISSAL

Hearing Date: March 5, 2004

WILLIAM H. GEORGE, PH., D. hereby declares as follows:

Expert's Background, Relevance of Expertise, and Exposure to Case Materials

1. I am currently employed as an Associate Professor at the University of Washington in the Department of Psychology, Seattle, Washington, where I have taught and conducted research since 1992. At the University of Washington I am also the Director of the Institute for Ethnic Studies and have been so since 1998. Prior to coming to the University of Washington, I was an Associate Professor of Psychology at the State University of New York

DECL. OF PSYCH. GEORGE - Page 1 of 20
[1252961 v9.doc]

ORIGINAL

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-6500 - FACSIMILE (253) 820-6568

1 at Buffalo from 1989 to 1992, and, prior to that I was an Assistant Professor of Psychology at
 2 Buffalo from 1984 to 1989. Attached to this Declaration as Exhibit 1 is a true and correct
 3 copy of my Vita which lists all of my work history, educational background, consultation
 4 experience, expert witness experience, awards and honors, other positions held, research
 5 conducted, grants received, publications, classes taught and committees and organizations of
 6 which I have been a part.

7
 8 2. As shown in my Vita, I have abundant experience in researching, teaching and
 9 publishing on the issue of alcohol use and its effects on antisocial behavior. Antisocial
 10 behavior includes driving while intoxicated. In addition to being an Associate Professor of
 11 Psychology, I am a licensed clinical psychologist in the state of Washington. During the last
 12 twenty years, I have conducted considerable research and received substantial research
 13 funding in the field of psychology. This funding has been obtained from federal and state
 14 agencies devoted to funding research investigations pertaining to psychology generally, to
 15 mental health issues, and to alcohol use and abuse, and alcohol's effect on antisocial behavior.

16
 17 3. Most of my research has been generally aimed at investigating links between
 18 alcohol consumption and various forms of antisocial behavior. My primary research interests
 19 include the effects of alcohol variables on various social problems, including alcohol and its
 20 effects on decision making, risk taking behavior and violence. The range of alcohol variables
 21 I have investigated include alcohol expectancies (e.g. endorsement of the belief that alcohol
 22 causes disinhibition), expectancy set (the effects of consuming beverages thought to contain
 23 alcohol), acute alcohol intoxication (a state of nonzero blood alcohol concentration), and
 24 alcohol social cues (knowledge that other people in the situation have been drinking alcohol).
 25
 26

DECL. OF PSYCH. GEORGE - Page 2 of 20
 [1252961 v9.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1167
 TACOMA, WASHINGTON 98401-1167
 (253) 820-8500 • FACSIMILE (253) 820-8565

1 I have investigated the effects of these variables on a range of responses. Individually and
 2 collectively these responses can be construed as undergirding sub-elements of anti-social
 3 behaviors, especially drunken anti-social behaviors. The range of responses I have
 4 investigated include:

- 5 • One's perceptions of one's own level of intoxication,
- 6 • One's perceptions of being disinhibited when intoxicated,
- 7 • One's perceptions of risk when intoxicated,
- 8 • One's willingness to engage in putting others at risk when
 9 intoxicated,
- 10 • One's willingness to engage in deviant or socially
 11 unacceptable behaviors when intoxicated, and,
- 12 • One's reactions to socially unacceptable behaviors when
 13 intoxicated.

14 4. My typical research projects involve analogue experiments conducted under
 15 highly controlled laboratory conditions, thereby permitting clear delineation of causation
 16 relationships. I have authored and co-authored numerous peer-reviewed scientific articles
 17 about these matters, which are listed on my curriculum vita.

18 5. Another aspect of my expertise is that I have been trained in addictive
 19 behaviors. During graduate school, I completed coursework on addictive behaviors. Later, I
 20 published book chapters about alcoholism and problem drinking. While on internship, I
 21 trained for six months on an Alcoholism Treatment Unit at Seattle Veteran's Administration
 22 Hospital. After graduation, I later undertook a post-doctoral fellowship at the UW Addictive
 23 Behaviors Research Center. Therefore, in addition to having expertise regarding the effects of
 24 acute alcohol intoxication, I also have expertise regarding the effects of chronic alcohol
 25
 26

DECL. OF PSYCH. GEORGE - Page 3 of 20
 [1252961 v9.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-8500 - FACSIMILE (253) 820-8565

1 intoxication, i.e. alcoholism. A particularly pointed focus of my addiction training, clinical
 2 experience, and scholarly writing has been relapse and relapse prevention. I have published
 3 several articles and book chapters about Relapse Prevention Theory ("RPT"). RPT explains
 4 the dynamics of the relapse process in addictive disorders and other habitual behavior
 5 problems and it offers guidance in how reduce the likelihood that relapse will occur.

6
 7 6. I also have experience working as a parole officer, which I did for two years in
 8 Illinois. In this capacity, I had caseload responsibility for paroled offenders housed in a
 9 halfway house or in the community. In this role, which is much like that of a probation
 10 officer, I was charged with monitoring parolees' compliance with release conditions set by the
 11 Department of Corrections and supervising their readjustment to the community at large. I
 12 was responsible for being aware when parolee was in noncompliance with his or her parole
 13 conditions and to initiate parole revocation proceedings under such circumstances. As such, I
 14 am very familiar with probation and parole monitoring and supervision, especially as it relates
 15 to offenders with substance abuse issues.

16
 17 7. I have reviewed extensive materials in this case. These materials include
 18 photographs by the Washington State Patrol of March 9, 2003 Accident Scene, photographs
 19 taken at Impound Yard of Mihok & Kim vehicle, complete criminal (district/superior and
 20 municipal) records of Jong Kim from 1990 through 2003; the Complaint for Damages, City of
 21 Fife's Summary Judgment Motion, City of Fife's Discovery Responses, the complete
 22 Washington State Patrol Report and Statements; scene diagrams, Fife Probation file regarding
 23 Jong Kim, Pierce County Probation File regarding Jong Kim, Sentencing Transcript of
 24 7/18/03, Tacoma Progress House Records, complete LESA Records and court files of Jong
 25
 26

DECL. OF PSYCH. GEORGE - Page 4 of 20
 [1252961 v9.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 420-6500 - FACSIMILE (253) 420-6565

1 Kim, and the complete Department of Licensing records of Jong Kim. I have also examined,
 2 treatment reports and substance abuse evaluations contain in the Pierce County Probation files
 3 - the chronological notes of the probation officers assigned to supervision of Mr. Kim. The
 4 court files include all of the court documentation on Kim and his offenses.

5 8. I am attaching to this declaration what I understand and have verified to be true
 6 and correct copies of the following exhibits obtained by subpoena, discovery and public
 7 record requests, which contained information that I specifically relied upon in formulating and
 8 making my expert opinions:
 9

10 a. Attached as Exhibit 1 to my Declaration is a copy of my
 11 Curriculum Vita, dated January 2004.

12 b. Attached as Exhibit 2 to my Declaration are Various
 13 Police records from the DUI arrest of Kim on January 27, 2002;
 and

14 c. Attached as Exhibit 3 to my Declaration are Jong Kim's
 15 Progress House Records for 2002;

16 d. Attached as Exhibit 4 to my Declaration is an Alcohol
 17 and Drug Evaluation on Jong Kim performed by Castele,
 Williams & Associates, a Washington State approved
 Treatment Agency;

18 e. Attached as Exhibit 5 to my Declaration is an Alcohol
 19 and Drug Evaluation on Jong Kim performed by Olympic
 Counseling Services, a Washington State approved Treatment
 20 Agency;

21 f. Attached as Exhibit 6 to my Declaration are various
 22 progress notes related to Jong Kim's addiction to Alcohol
 performed by Castele, Williams & Associates, a Washington
 23 State approved Treatment Agency;

24 g. Attached as Exhibit 7 to my Declaration are various
 25 progress notes regarding Jong Kim's addiction to Alcohol by
 The Skilled Helper, an alcohol treatment facility;

1 h. Attached as Exhibit 8 to my Declaration is an Alcohol
2 and Drug Evaluation on Jong Kim performed by The Skilled
3 Helper, an alcohol treatment facility;

4 i. Attached as Exhibit 9 to my Declaration is a Social
5 History performed on Jong Kim as part of a deferred
6 prosecution, which was done by Social Treatment Opportunity
7 Programs;

8 j. Attached as Exhibit 10 to my Declaration is a Diagnostic
9 Evaluation on Jong Kim performed by Olympic Counseling
10 Services, a Washington State approved Treatment Agency; and,

11 k. Attached as Exhibit 11 to my Declaration are various
12 City of Fife e-mails regarding Jong Kim, describing him as a
13 high risk offender.

14 9. Based on my expertise and my examination of the case materials, I am
15 able to form the opinions about six aspects of this case and will testify to the
16 same at trial:

- 17 1) Kim's acute alcohol intoxication,
- 18 2) Kim's history of chronic severe alcoholism,
- 19 3) Kim's history of driving while intoxicated,
- 20 4) Kim's reactions to strict/competent probation
21 monitoring/supervision protocols,
- 22 5) Kim's reactions to weak/lackadaisical probation
23 monitoring/supervision protocols, and,
- 24 6) Salient relapse dynamics.

25 Each aspect is addressed in turn.

26 Acute Alcohol Intoxication

10. It is well established that acute alcohol intoxication (excessive alcohol use)
increases the likelihood that a person will engage in risky behaviors – such as, drunk driving.

DECL. OF PSYCH. GEORGE - Page 6 of 20
[1252961 v9.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-6500 - FACSIMILE (253) 820-6563

1 Drawing on the firmly established fact that alcohol acutely impairs attention, cognition, and
2 information processing, these alcohol myopia theorists assert that an "alcohol myopia" occurs
3 for the intoxicated person who is conflicted about an instant opportunity to engage in risky
4 behavior. This myopia is characterized by a falsely simplified vision of reality where the
5 immediate impulses to indulge in desired behavior – driving in this instance involving Mr.
6 Kim– become accentuated and the more remote inhibitions against indulgence recede into the
7 background. As a consequence, the person can resolve the conflict by plunging ahead into
8 known unreasonably risky behaviors. Greater intoxication leads to greater myopia, which in
9 turn leads to greater likelihood of risky behavior. In short, according to alcohol myopia
10 theory, the intoxicated person is overly motivated by what he wants to achieve and – because
11 of alcohol impairment – he is insufficiently deterred by reasonable restraining factors.
12 Therefore, once intoxicated, a person is less likely to heed inhibitions concerning reasons for
13 not driving and more likely to follow his immediate impulses to drive and to drive in
14 uncontrollable and unreasonable manners. Based on Mr. Kim's substance abuse history, his
15 objective actions on the evening of March 9, 2003, the time of the collisions (last call/closing
16 time for bars) and the social factors going on in Kim's life, from a clinical psychological
17 perspective and on a more probable than not basis Kim was intoxicated at the time of the
18 collisions on March 9, 2003. In effect, Kim's immediate judgment was impaired by acute
19 intoxication. Consistent with this notion, it is evident that Kim was undeterred by caution the
20 night of these accidents. At each opportunity on March 9, 2003, Kim behaved in ways that
21 satisfied his own impulses and disregarded inhibition and the welfare of others, directly
22 consistent with the research on behaviors of drunk drivers. This was evident in his initial
23
24
25
26

DECL. OF PSYCH. GEORGE - Page 7 of 20
[1252961 v9.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-8500 - FACSIMILE (253) 820-8583

1 decision to drive, his continuation of driving after not one, but two accidents before striking
 2 the Mihok/Benskin vehicle and his multiple decisions to abscond after a traffic accident.

3 Defendant's History of Chronic Severe Alcoholism

4 11. Jong Kim, at the time of the vehicle collisions that are the subject of this
 5 litigation, suffered from chronic/severe alcoholism. According to substance abuse evaluations
 6 occasioned by DUI infractions, Kim was diagnosed officially as suffering from alcoholism in
 7 1991. Kim reported that he started drinking at age 18 and has experienced vomiting from
 8 alcohol. Attached as Exhibit 5 is a diagnostic evaluation of Kim related to his first DUI in
 9 this country, dating back to November 16, 1990. This occurred shortly after Kim immigrated
 10 to the United States from Korea. At the time of this first evaluation, Kim was only 25 years
 11 old and his drinking behavior was such that he met the diagnostic criteria for alcoholism
 12 based on the National Council for Alcoholism (published by the American Psychiatric
 13 Association). Specific symptomatology he exhibited at that time included tolerance to high
 14 blood alcohol levels (in excess of .17), attempts to control his drinking, loss of control over
 15 the amount of alcohol consumed, loss of control over his behavior while drinking, and
 16 numerous blackouts (forgetting activities that had occurred while intoxicated). The evaluator
 17 opined (employed by Olympic Counseling Services) at that time that Kim "should not be
 18 drinking in the future." His drinking during the index event, which occasioned the evaluation,
 19 had been extreme. Kim admitted to having four drinks in a short period of time and then
 20 passing out. After drinking enough to "pass out" at one bar, Kim then proceeded to attempt to
 21 drive to another bar. He was arrested in route and, upon being breathalyzed, exhibited a blood
 22 alcohol level of .20 (twice the then legal limit and 2.5 times the current legal limit). Given
 23
 24
 25
 26

DECL. OF PSYCH. GEORGE - Page 8 of 20
 [1252961 v9.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 620-6500 - FACSIMILE (253) 620-6505

1 that he had been unconscious for some time in the bar and that 45 minutes had elapse between
 2 leaving the bar and being breathalyzed, it is clear that his blood alcohol level had peaked
 3 above .20. This is an extreme level of intoxication. The scientific and clinical knowledge
 4 about alcoholism indicates that the usual pattern is for the addictive pattern of consumption
 5 and resultant negative consequences steadily worsens over time unless the individuals adopts
 6 abstinence from alcohol as a permanent lifestyle. It is clear that Kim did not adopt permanent
 7 abstinence. Therefore, he experienced a pattern of worsening alcoholism over a 12 year
 8 period between the 1991 diagnoses and the 2003 accident. This extensive downward
 9 progression is corroborated by additional alcoholism diagnoses applied to Kim in the
 10 intervening years.

12 12. In 1998 he was diagnosed – again occasioned by a DUI conviction – by an
 13 evaluator (employed by Castele, Williams, & Associates) of suffering from Alcohol
 14 Dependence (the more severe form of two alcohol addiction diagnoses available in the then
 15 current American Psychiatric Association's diagnostic nomenclature). Kim's symptomology
 16 at that time manifested ten signs consistent with the diagnostic criteria:

- 18 • increased tolerance,
- 19 • blackouts,
- 20 • impaired thinking,
- 21 • drinking despite legal problems caused by drinking,
- 22 • using alcohol to cope with stress,
- 23 • depression,
- 24 • lifestyle deterioration,

25
 26 DECL. OF PSYCH. GEORGE - Page 9 of 20
 [1252961 v9.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-8500 - FACSIMILE (253) 820-8566

- 1 • loss of control (over amount consumed and over
- 2 behavior while drinking),
- 3 • hangovers (and presumably withdrawal symptoms – a
- 4 key indicator of physical dependence), and
- 5 • relapse (failure to attain a sober lifestyle).

6 13. The events that occasioned the 1998 diagnoses are striking: Kim had received
 7 three DUI charges in a span of only 8.5 months: 6/19/97 (breath samples of .139 and .134),
 8 12/19/97 (breathalyzer data unavailable), and 2/26/98 (breath samples of .163 and .151).
 9 Ominously, in the last of these events, Kim exhibited hit-and-run behavior involving impact
 10 with three vehicles while extremely intoxicated and attempted to flee by resisting arrest (see
 11 reports by officers Billman and Brooks). The 1998 diagnosis shows clearly that, first, Kim
 12 had not achieved a stable long-term pattern of sobriety after the 1991 treatment interventions
 13 and, second, that his alcoholism had worsened in the interim seven years since the 1991
 14 diagnosis. Commensurate with this chronic deterioration, the 1998 evaluator recommended a
 15 more intense treatment regime (including a multi-phasic regime bolstered by a monitored
 16 Antabuse program) than had been recommended by the 1991 evaluator. In the subsequent
 17 interim between 1998 and the 2003 accident, it is clear that Kim continued his downward
 18 alcoholism spiral as he continued to fail at treatment and to accrue DUI infractions.

19
 20 14. At the time of the 2003 accident, Kim had a documented record of 12 years of
 21 severe alcoholism progressing negatively. Therefore, it is probable that – even when sober –
 22 Kim suffered from impaired thinking processes because of his long-term severe alcoholism
 23 and this impairment would be exacerbated by acute intoxication (which he on a more
 24 probable than not basis experienced at the time of the accident). Moreover, this long-term
 25 pattern of severe alcoholism and the intense physical dependence that is inherent would
 26 DECL. OF PSYCH. GEORGE - Page 10 of 20
 [1252961 v9.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-0500 • FACSIMILE (253) 820-6555

1 indicate that it would be very difficult for Kim to undergo long periods of time without
2 seeking acute intoxication. This latter indication, combined with the documentation that he
3 was not actively complying with the treatment mandate conditioned in his probation by the
4 Fife Probation department and the documentation that he fled the scene preventing collection
5 of breath sample data, further heightens the probability that he was acutely intoxicated at the
6 time of the accident on March 9, 2003.
7

8 15. Another documented alcoholism diagnosis in his record between the 1991 and
9 1998 diagnoses was provided in the July 14, 1997 alcohol evaluation. As part of this
10 evaluation, Kim was given three separate diagnostic inventories to establish his level of
11 chemical dependency, including the Revised Jellinek Questionnaire, the Washington Alcohol
12 Screening Inventory (WASI) and the CAGE. Kim was consistently profiled as an individual
13 in the Crucial Phase of chemical dependency (alcohol) as characterized by guilt, legal
14 problems, periods of abstinence, changing drinking patterns, self pity, geographical escape.
15 At that time, Kim was diagnosed with Middle Stage Alcoholic (SP-11). This diagnosis
16 reflects the Jellinek alcoholism typology rather than the official American Psychiatric
17 Association nomenclature. The Jellinek typology is noteworthy because it stresses the
18 progressive nature of alcoholism. It was noted in the evaluation that this disease is often
19 progressive and fatal, and characterized by impaired control over drinking, preoccupation
20 with alcohol, use of alcohol despite adverse consequences and distortions in thinking,
21 including denial. Kim was assessed as being in significant denial of his alcohol dependence,
22 which was verified in his clinical interview. Most importantly, it was especially noted that
23 with Kim's serious alcohol problem, without treatment and without close monitoring, there
24
25
26

1 was a high probability of future alcohol related offenses. Additionally, it was stated in this
 2 evaluation that there was a "high likelihood of relapse or continued use without close
 3 monitoring and support." It was further noted that Kim's environment was unsupportive of a
 4 sober lifestyle. See Ex. 8. This 1997 data point further illustrates the deteriorating trajectory
 5 of Kim's condition. Furthermore, it further establishes and demonstrates the remarkable
 6 visibility of his condition within the public record, which are available to everyday citizens.
 7 The City of Fife Probation Department especially had access to these public records from
 8 Pierce County District Court Probation upon request, especially because Fife Probation is a
 9 "sister" or related agency of Pierce County. Exhibit 11 demonstrates that the City of Fife
 10 probation officers were well aware that Kim was a high risk of harm in the community with
 11 regard to his drunk driving.
 12

13 Defendant's History of Driving While Intoxicated

14 Both the court records and the Department of Licensing records reveal the prolific
 15 history of Kim's driving infractions. His criminal history contains 10 infraction dates
 16 between 1990 and 2002. Often these dates reflect multiple infractions in the same citation or
 17 on the same date. Some citations include DUI and other infractions such as speeding
 18 (1/27/02), hit and run (2/26/98), driving with a suspended license (12/19/97). Other citations
 19 did not involve acute intoxication at all, but poor decision making: failure to stop (5/24/95),
 20 driving without insurance (3/23/95), driving without headlights (3/23/95), driving with license
 21 suspended (9/22/96). So prolific was his record of infractions that the Department of
 22 Licensing issued an order of revocation dated June 18, 1999 to revoke his privileges for a
 23 period of seven years and characterized him with the harshest label in its power to give,
 24
 25
 26

DECL. OF PSYCH. GEORGE - Page 12 of 20
 [1252961 v9.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-6500 • FACSIMILE (253) 820-6595

1 classifying Kim "as an habitual traffic offender." Thus, there was clear recognition by public
2 authorities that Kim's driving habits posed a threat to the community.

3 In March 2003, Kim was on probation as the result of another conviction for driving
4 while intoxicated on January 27, 2002, something that he had done consistently for many
5 years. See Exhibit 2. In this January 27, 2002 incident, Kim admitted to consuming 5 shots
6 of hard alcohol and beer with a friend at Silver Town Bar and was on his way to Emerald
7 Queen Casino in Fife, to consume more alcohol. See Decl. of Bob Keppel, Ex. 21 (DOL DUI
8 Arrest report of 1-27-02). Kim's coordination was poor, his eyes bloodshot and watery, his
9 skin was flush, the odor of alcohol was strong and it was obvious to the police officer that he
10 was intoxicated while driving. Id. Kim's BAC alcohol reading was .108, legally intoxicated.
11 Kim's history of drinking and driving, coupled with his alcohol dependence and social
12 problems made it extremely foreseeable, as predicted in his alcohol evaluations, that he would
13 again drink and drive if not closely monitored. Pursuant to the admissions in City of Fife's
14 own summary judgment materials and deposition testimony of Probation Officer Brooks-
15 Bailey, Kim was not monitored/supervised at all by the Fife probation department, let alone
16 closely monitored.
17
18

19 Defendant's Reactions to Monitoring/Supervision Protocol's

20 16. Kim was very familiar with the Court system with regard to saying the right
21 things and exhibiting the expected behaviors to manipulate those whose task it was to hold
22 him accountable. From a psychological research standpoint, this case can essentially be
23 viewed as a naturalistic experiment comparing how a serial drunk driver responds to close and
24 competent Probation monitoring as what occurred in Pierce County and how a serial drunk
25
26

DECL. OF PSYCH. GEORGE - Page 13 of 20
[1252961 v9.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-8500 - FACSIMILE (253) 620-4568

1 driver responds to no monitoring as what occurred with Fife Probation in the 6 months prior
 2 to March 9, 2003. When Kim was held accountable and closely monitored by probation
 3 departments or treatment agencies, he generally did well and had a less likelihood of re-
 4 offense, which is the primary goal of any probation department/treatment agency- i.e. prevent
 5 recidivism. When Kim was not monitored well or at all, he relapsed into uncontrolled alcohol
 6 abuse and dependence and drove while intoxicated. This is very obvious when reviewing the
 7 Progress House records when Kim was held strictly accountable, he did well. Ex. 3. When
 8 Kim was on electronic home monitoring by the Tacoma Federal Progress House County
 9 Release, he would test the limits of accountability to see what he could get away with, as he
 10 did on September 8, 2002. Id. Kim was supposed to be home, on home monitoring, but when
 11 the controller called to check his status Kim was not in his home. His wife stated that Kim
 12 was in the shower, however, Kim called back from a cell phone and admitted that he was not
 13 at home, but was out shopping. The home monitoring controller held Kim accountable and
 14 sent him back to the Progress House, revoking his social privileges. Id. The controller's
 15 impression was that Kim knew he was manipulating the system and he needed to be reigned
 16 in and held accountable. Id.

17
 18
 19 17. The above pattern is that Kim seeks to avoid accountability when constraints
 20 are lax but heeds to the control of authorities when constraints are more rigorous. As stated in
 21 previous alcohol evaluations, with close monitoring Kim represents a lesser risk to the
 22 community and when he was not closely monitored he represented a high/extreme risk to the
 23 community. This pattern supports the opinion that Kim, like most offenders on probation,
 24 regulates his behavior in tune with external constraints imposed by authorities. When
 25
 26

DECL. OF PSYCH. GEORGE - Page 14 of 20
 [1252961 v9.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 620-8500 • FACSIMILE (253) 620-8585

1 authorities are lax about monitoring Kim and holding him accountable, Kim seems to exploit
 2 the system to benefit his free-wheeling drunk driving excursions. During these times, he
 3 actively seeks to drink and drive as he pleases. Consistent with his criminal and substance
 4 abuse history, when Kim is not closely monitored, as he admittedly was not under Five
 5 Probation in the 6 months prior to the March 9, 2003 collisions:

- 6 > He drinks alcohol without limits and despite negative
- 7 consequences;
- 8 > He drives while intoxicated often and without restraint;
- 9 > He drives without a license and without insurance;
- 10 > He deceives authorities about his whereabouts and
- 11 activities;
- 12 > He acquires other vehicles when he cannot legally drive
- 13 them;
- 14 > He absconds from traffic accidents; and,
- 15 > He tries to resist arrest.

16 18. However, when Kim's feet are kept to the fire by authorities who monitor him
 17 closely and hold him accountable by imposing sanctions when he is noncompliant with rules
 18 and regulation, Kim behaves differently. Under these more stringent conditions, he succeeds
 19 in having stretches of time when he is not drinking; he attends treatment programs regularly
 20 and is evaluated positively by staff (see reports for treatment staff in 1992 and 1993; see
 21 Progress House reports). Attached as Exhibit 6 are monthly and bimonthly progress reports
 22 by Castele, Williams & Associates, an Alcohol Dependency Counseling Service, wherein
 23 Mr. Kim was enrolled in a two year chemical dependency treatment program and assessed
 24 regularly to determine whether he was maintaining sobriety, going to AA and participating in
 25
 26

DECL. OF PSYCH. GEORGE - Page 15 of 20
 [1252961 v9.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-8500 - FACSIMILE (253) 820-8585

1 alcohol treatment. I have attached progress reports from this agency from April 30, 1998
 2 through March 6, 2000. It is important to note that when Kim was held accountable in this
 3 intensive chemical dependency treatment program, he had the least amount of driving
 4 infractions and no driving while under the influence charges. This is the whole point of
 5 probation monitoring and why close monitoring was needed by the City of Fife in this case.

6
 7 19. The above points suggest a causal stream:

8 (a) If Kim is held accountable by competent probation
 9 monitoring services – which require;

10 (a-1) an ongoing determination about whether the
 11 probationer is in compliance with court ordered regulations
 12 concerning alcohol consumption, treatment attendance and
 13 compliance, and driving and

14 (a-2) require known contingent negative sanctions (such
 15 as probation revocation [thus incarceration]) for noncompliance,
 16 and,

17 (b) then Kim attends treatment and maintains his sobriety,

18 (c) then – in turn – he exhibits little or no incidence of drunk
 19 driving, and,

20 (d) as a consequence – his actual risk of harm to the community
 21 is minimized.

22 20. Based on the City of Fife's own admissions, the opposite occurred in this case.

23 Kim was not held accountable, he was not monitored, the probation officer never met with
 24 him or had any meaningful conversations with him, no one ever talked to his wife (a
 25 necessary collateral contact), he was never made to go to treatment, he was never given notice
 26 to come back to court and he was essentially not monitored or supervised in any respect for
 the six months prior to the March 9, 2003 collisions. From a foreseeability standpoint, Fife

DECL. OF PSYCH. GEORGE - Page 16 of 20
 [1252961 v9.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-6500 - FACSIMILE (253) 820-6565

1 Probation's complete lack of monitoring essentially guaranteed that Kim would again drink
2 and drive, as he did in this case.

3 Salient Relapse Dynamics

4 21. Research and theory about relapse has articulated a model that emphasizes two
5 points. First, the occurrence of a relapse is preceded by exposure to high risk situations –
6 trigger events. It is understood that these events are not universal, that is not all such events
7 trigger relapse in all alcoholics. Instead, each person has an individual high risk profile based
8 on his or her particular history of substance use. Also, a person's unique profile of trigger
9 events can be determined by examining his or her history of previous relapse and by
10 examining their history of substance use patterns. For example, someone who only drinks in
11 social settings is more likely to undergo post-treatment relapse in a social setting than when
12 alone. For this person, socializing is a trigger event in their unique profile of trigger events.
13 Second, exposure to a trigger event is more likely to lead to relapse if the person lacks an
14 effective coping response. For instance, a person who is tempted to drink when under stress
15 is more likely to relapse if he or she has not developed relaxation skills for stress reduction.
16 In the case of Kim, his record reveals that an important trigger event (social problem) for him
17 historically is marital strife and that he has not developed marital interaction skills for
18 effectively diffusing marital strife.
19

20
21 22. I reviewed several alcohol evaluations related to Mr. Kim. Exhibit 4 is an
22 alcohol evaluation of Mr. Kim performed at Castele, Williams & Associates on March 16,
23 1998. This evaluation was related to another DUI involving Kim, which occurred on
24 February 27, 1998. See Exhibit 4. Kim reported that although recently married he was
25
26

DECL. OF PSYCH. GEORGE - Page 17 of 20
[1252961 v9.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-8500 - FACSIMILE (253) 820-8505

1 experiencing marital difficulties due to his alcohol dependence. Id. In this evaluation, Mr.
2 Kim also reported a DUI in 1990 and two other DUI charges on June 12, 1997 and December
3 19, 1997. Kim admits that his relapses were mainly attributable to arguments and
4 disagreements with his wife, including admitted uncontrollable anger towards his wife, which
5 he would resolve by drinking and driving. Attached as Exhibit 8 is another Evaluation
6 performed by The Skilled Helper, a Certified Drug/Alcohol Treatment facility. This
7 evaluation was performed on July 14, 1997 and included commentary about the same DUI
8 charge on June 12, 1997. According to that report, Kim stated that on this date he had a
9 verbal fight with his fiancé (now his wife) and she left him, which he responded to by going
10 out and drinking, then driving while drunk. He was stopped for weaving in and out of traffic.
11 In the 1998 DUI charge, Kim, while driving drunk, was charged with Hit & Run for hitting
12 stopped vehicle. On the date of this evaluation, Kim admitted that he had been drinking for
13 15 years and stated that he could not maintain a sober lifestyle because he could not control
14 his temper with his wife without alcohol. Also, on the other hand, there is no evidence in his
15 record that Kim has sought to develop effective marital interaction skills or undergone marital
16 counseling.

17
18
19 23. The above points indicate that Kim drinks as way of coping with marital strife
20 and that he lacks adequate skills at coping effectively with marital strife. Ironically, the
21 treatment summaries reveal that much of his marital distress takes the form of his wife's
22 complaints about his drinking and the legal and financial burdens created by his drinking.
23 Thus, Kim uses alcohol to solve problems, but in reality, his drinking paradoxically causes the
24 problems that he then drinks to solve. Also, historically Kim often dealt with acute marital
25
26

1 distress by getting angry, drinking, and then driving while intoxicated. The salience of this
 2 pattern in his record indicates that an effective way to prevent relapse with Kim would
 3 involve monitoring his drinking, requiring him to seek alcoholism treatment, monitoring his
 4 treatment compliance, monitoring his level of marital strife, requiring him to seek martial
 5 counseling, and requiring him to seek anger management training. These conditions and
 6 insisting on his compliance with these conditions would have decreased the likelihood of
 7 Kim's relapse.
 8

9 24. Fife Probation, as with any probation department, should have been aware of
 10 Kim's social problems, his trigger points and should have maintained a critical collateral
 11 contact with his wife Min Kim. I have also reviewed the sworn Affidavit of Min Kim. Min
 12 Kim verifies much of the psychological factors at work in this case. Being that Jong Kim was
 13 not monitored by Fife Probation in the six months prior to March 9, 2003, according to Min
 14 Kim, Jong Kim was engaging in the exact activities predicted he would engage in years ago
 15 and commonly known if not closely monitored, including:
 16

- 17 ✓ Consistent daily and uninhibited use of alcohol;
- 18 ✓ Alcohol binges that lasted for days;
- 19 ✓ Driving while intoxicated on a regular basis;
- 20 ✓ Illicit drug use; and,
- 21 ✓ Driving a vehicle without a valid license.

22 25. Consistent with this whole case, Min Kim testified that she left Jong Kim
 23 because of his out of control drinking 2 days before the March 9, 2003 collisions. As with
 24 Kim's previous drunk driving escapades, the March 9, 2003 drunken driving collisions were,
 25 in part, predicated by Kim's wife leaving him because of his out of control drinking. These
 26

DECL. OF PSYCH. GEORGE - Page 19 of 20
 [1252961 v9.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 620-6500 - FACSIMILE (253) 620-6565

1 are all social problems that were readily knowable or known to Fife Probation. Jong Kim's
 2 history and lack of control coupled with Fife's complete lack of monitoring made the events
 3 of March 9, 2003 not only extremely foreseeable, but also expectant to Fife probation.

4 **Foreseeability of Subsequent Drunk Drinking**

5 26. Given all of the above considerations, it is my opinion on a more probably than
 6 not basis as a Psychologist with a specialty in alcohol abuse and antisocial behavior:

7 (1) That Kim was driving drunk at the time of the March 9,
 8 2003 collisions; and,

9 (2) That it was immensely foreseeable that without close
 10 and competent probation monitoring Kim would again drink
 11 and drive and endanger the lives of those in the community, as
 what did happen on March 9, 2003.

12 27. It is also my psychological opinion that given that the conditions of his court
 13 ordered supervision under probation stipulated that he attend alcoholism treatment, maintain
 14 law abiding behavior and that he refrain from consuming alcoholic beverages, it is evident
 15 that correctional authorities understood that this individual posed a heightened risk for driving
 16 drunk if not closely and competently monitored. The fact that Fife Probation, admittedly,
 17 failed to provide any monitoring of Jong Kim and also labeled Kim as a high risk to the
 18 community, it is more than evident that it was absolutely foreseeable that Kim would again
 19 drink and drive and put innocent citizens of the community at risk for injury and death.
 20

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

23 SIGNED this 16 th day of February, 2004.

24  2/16/04
 25 WILLIAM H. GEORGE, PH. D.,
 26

DECL. OF PSYCH. GEORGE - Page 20 of 20
 [1252961 v09.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-8500 - FACSIMILE (253) 620-8565

Report of Dan Hall, Corrections Expert

I retired from the Washington State Department of Corrections having worked there from 1973 until June, 2002. My experience ranges from work as a probation and Parole Officer II, Community Corrections Officer II and III supervising adult felons to a Community Corrections Supervisor I supervising a DOC field office with fifteen staff members in the Burien Field Office, and co-supervising the Metro Unit in downtown Seattle with a staff of 30 CCOs for the Washington State Department of Corrections. Attached as Exhibit 1 is a true and correct copy of my curriculum vitae. Since my retirement, I have been a drug and alcohol counselor working in outpatient settings performing drug and alcohol assessments, leading groups and providing one to one counseling. In that capacity, I have work with municipal and district court probation officers providing assessment results and status reports for those courts and probation officers on the compliance of probationers with conditions of treatment: attendance, group participation, and urinalysis results. I am also employed by Hall Correctional Consultants as a forensics consultant providing analysis and advice regarding the Washington State community corrections system since 2002.

I have completed a number of training courses while employed with the Department of Corrections and I worked as a lead Community Corrections Officer at the Northgate Department of Corrections Office from 1987 to 1996. I worked in a supervisory capacity from 1996 until the time of my retirement in 2002. I am very familiar with the procedures for handling offenders in work release facilities, offenders who are on community supervision and offenders who are on parole, both under the Sentence Reform Act (SRA) and the Offender Accountability Act (OAA.) I am also extremely familiar with the steps which should be taken by corrections professionals, and community corrections officers in the proper management and supervision of offenders who have committed crimes in this state and others. A brief synopsis of my background is attached, together with some additional background information.

I am very familiar with the procedures for handling offenders on probation, parole, community supervision and work release facilities. I am also extremely familiar with the steps that should be taken by a reasonably prudent probation officer in proper monitoring and supervision of criminal offenders who are out on community supervision and proper safety procedures which must be taken. I have been retained by the Robin and Susan Benskin, individually, and Robin Benskin, as the Personal Representative for the Estate of Heather Benskin, Josh Mihok, Tina Marie Goodfellow and Roberta Evans to review the records, testimony and files in this case and to testify regarding the standard of care of a probation officer supervising Jong Kim.

In my work as a probation and parole officer and corrections supervisor, I supervised or managed the supervision of individuals on probation from the court, parolees who were released from prison, and other community supervision offenders. I regularly supervised or managed the supervision of offenders who had committed offenses against a person, felony assaults, and many offenders were addicted to alcohol, such as Mr. Kim in this

case. I have received training on how to supervise such offenders. Part of this training was received at the Washington State Criminal Justice Training Center.

I have reviewed extensive materials in this case. These materials include the entire City of Fife Municipal Court files and Probation files regarding Jong Kim; including the notes of the probation officer assigned to supervision of Mr. Kim; the Pierce County Probation File on Jong Kim – including all of the court documentation on Kim and his offenses, depositions of Rachel Brooks-Bailey, Court Administrator Sally Dowty, Pro-Tem Judge Sandy Allen and Fife Municipal Court Judge Kevin Ringus. I have reviewed police reports, judgment and sentencing documents, psychological reports regarding Mr. Kim, and Fife Municipal Court Probation “draft” policies relating to this case and the monitoring of probationers. I have reviewed all briefs, court opinions related to the case.

In my review of this case, I noted the City of Fife Municipal probation department was set up under the authority of Judge Ringus. Judge Ringus ordered Kim to report to the Fife Municipal Probation department within five days. The department as construed by him had no policies or procedures, no formal training for its personnel, no guidance, and no expectations. It had a name and a probation officer who didn't know the job or do the job. After Kim did not report to the Fife probation department, he was in immediate violation for which there should have been consequences: sanctions such as jail time or revocation.

Fife Muni Probation Dept through its only probation officer, Brooks-Bailey, did not take charge of Kim; did not perform Probation Officer functions and duties, for instance: do an intake so Kim would know how often to report to the probation officer so she could competently follow his actions and monitor him, classify Kim according to risk, look at a criminal history, give Kim reporting instructions, let him know what the expectations of being on probation are, give him dead lines to be in treatment; in short, everything Pierce County Probation Department did to place Kim on “formal probation”. She didn't follow through with those normal and nominal tasks because there were no polices and procedures in place for the Fife Muni Probation dept. She wasn't trained to do those tasks and had no guidelines or a set of expectations to follow from the director of probation, her boss, Judge Ringus.

Probation Officer, Brooks-Bailey, did not monitor or track Kim following his sentencing. She had one phone call w/ Kim and what ever happened during that phone call was “lost in translation”, because Kim doesn't speak English well. Brooks-Bailey, probation officer, knew nothing about the psycho-social background of Kim which would have given her insight into the probation management of this case because she didn't attempt to get the information. This is a normal and expected activity for a probation officer to do. She wasn't trained to gather that information, she wasn't expected to perform that task, and had no guidance in doing her job. This is a typical task for a probation officer to perform in the normal course of their duties in my experience. Brooks-Bailey did not monitor any condition on the Court Order to see if Kim was in compliance which would have protected the public from Kim's terrible, escalating, and dangerous addictive behavior: operating a two ton weapon in a drunken state on Washington State highways.

Mr. Kim was a known habitual drunk driver and posed an enormous risk for absconding from accountability, treatment and probation supervision. All of this information was known or should have been known to the probation officer responsible for his monitoring and supervision, as they have a responsibility to be familiar with his file, substance abuse history and criminal history; in fact, Fife Probation had an obligation to investigate and discover this information.

Jong Kim was an offender whose criminal activity was directly linked to his alcohol use, and had been so for most of his life in this country. Mr. Kim had an extensive history of probation with Pierce County for previous alcohol related driving infractions which I have reviewed. When he was supervised competently, he did not have new violations. This information was readily attainable, yet no one from Fife Probation ever attempted to obtain this information. These records were also important to know and understand Kim's substance abuse and behavior history as it related to alcohol use and the information contained in the Pierce County files would have been very helpful to the probation officer if they had requested this information. Fife Probation did nothing to investigate Kim's criminal and substance abuse history, despite the ample public records on the tremendous risk he posed to the community.

I am very familiar with the standard procedures for handling offenders who are on probation. I am also extremely familiar with the steps that should be taken by a reasonably prudent probation officer in the proper management and supervision of offenders and proper safety procedures that should be taken. In my work as a probation and parole officer, corrections supervisor and drug and alcohol counselor, I have supervised or managed the supervision of individuals on probation from the court pursuant to suspended sentences. I have worked with chemically dependent people given treatment options by the court. I regularly supervised or managed the supervision of offenders who had committed drug or alcohol related offenses, many of them being offenders who were addicted to alcohol and had committed DUIs, such as Mr. Kim.

When Brooks-Bailey finally notices Kim has not complied w/ important conditions of his suspended sentence, she notifies the judge but no one else. Why, probably because the probation director, Judge Ringus, has no policy or procedures in place. Brooks-Bailey doesn't know she has to notify Kim, and Kim's attorney, and the prosecutor because she hasn't been trained. This is a normal function of any probation officer in my experience. Not notifying all parties when and where a hearing is taking place, falls way below the standard of care not only of probation officers, but for any legal proceeding I can think of in these United States. It is almost incomprehensible that could happen. Because there was not proper notification, Judge Allen, who was hearing the case on 2/12/03 for Judge Ringus, was forced to continue the hearing, withdraw her bench warrant order and not consider the revocation recommendation of the probation officer, Brooks-Bailey. Had there been proper notification for the 2/12/03 hearing it is more probable than not that Kim's sentence would have been revoked and Kim would have been locked up on 3/9/07 unable to drink, drive, murder and maim innocent people.

I have reviewed Brian Bemus' declaration in this case and I will testify in support of the opinions of Brian Bemus that the actions of the Fife Municipal probation department fell well below the standards of care for a department purporting to deliver supervision of a person placed on probation. In my 30 plus years of work in the corrections field as a probation officer, as a parole officer, as a supervisor for the Department of Corrections, as a drug and alcohol counselor working w/ municipal and district courts, I have never encountered such egregious disregard for the normal and expected practices for a probation department. After my review of the materials in this case, I was over come with a visceral reaction: the Fife Probation Department was a counterfeit organization; a fabrication. It was a pseudo probation department. It was a front organization w/ no foundation, framing, walls, or interior. It had no structure, no policies or procedures, but it had a name, a probation office, and under that name the care, the take charge relationship was established by a court order placing Kim on probation which created the expectation that Kim would be supervised, monitored, and watched and the public would be protected from him. It turned out to be a fiction from which the public still suffers today.

Dan Hall

9.9.2007



03-2-11971-2 20540224 DCLR 02-23-04

FILED
IN COUNTY CLERK'S OFFICE

A.M. FEB 23 2004 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

ROBIN AND SUSAN BENSKIN, individually,
and ROBIN BENSKIN, as the Personal
Representative for the ESTATE OF HEATHER
BENSKIN, JOSH MIHOK, TINA MARIE
GOODFELLOW AND ROBERTA EVANS,

Plaintiffs,

vs.

CITY OF FIFE and JONG KIM and "JANE
DOE" KIM and the Marital Community
Composed Thereof,

Defendants.

NO. 03-2-11971-2

DECLARATION OF PROBATION
EXPERT WILLIAM STOUGH IN
OPPOSITION TO CITY OF FIFE'S
MOTION FOR SUMMARY JUDGMENT
DISMISSAL

Hearing Date: March 5, 2004

WILLIAM T. STOUGH hereby declares as follows:

1. I am currently employed as a forensic consultant for Stough Corrections Consulting. This work involves, but is not limited to, providing advice and consultation regarding the Washington, Idaho, Alaska, Arizona and Montana State Corrections and parole/probation system, proper management and supervision of people who are involved in the system and the manner in which the system is designed to work. This work has also included providing advice and consultation regarding County probation services in

DECLARATION OF W. STOUGH - Page 1 of 38
[1252959 v7.doc]

ORIGINAL

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-8500 - FACSIMILE (253) 820-8585

1 Washington State, including King County District Court Probation Services and Pierce
2 County District Court Probation.

3 2. I have an extensive background with the Washington State Department of
4 Corrections. From 1970 to 1992, the Department of Corrections employed me as a
5 parole/probation officer, supervisor and a manager. This included work as a Community
6 Corrections Supervisor II, which is similar to the duties and responsibilities of Probation
7 Officers. I was involved in supervision of field offices and the largest state work/training
8 release facility of the Department of Corrections. I have compiled hundreds of hours of
9 training at the Washington State Criminal Justice Training Center along with training by the
10 National Institute of Corrections and post-graduate work at Seattle University Institute of
11 Public Service. This work has also included providing advice and consultation regarding
12 state, county and municipal probation services. I received my BA degree from Gonzaga
13 University and my Master's degree from Princeton Theological Seminary. I did post-graduate
14 work in corrections management at Seattle University's Institute of Public Service and the
15 National Institute of Corrections. I received training at the Washington State Criminal Justice
16 Center and taught classes at the Criminal Justice Center including instructional classes for
17 parole officers.

18 3. I chaired the Northwest Department of Corrections Safety Committee,
19 represented the Department of Corrections Regional Administrator on the King County Jail
20 Commission and chaired the statewide Department of Corrections Community Services Task
21 Force. A brief synopsis of my background is attached as Exhibit A, together with some
22 additional background information.
23
24
25
26

DECLARATION OF W. STOUGH - Page 2 of 38
[1252959 v7.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-8500 - FACSIMILE (253) 620-8666

1 4. I am very familiar with the procedures for handling offenders on probation,
 2 parole, community supervision and work release facilities. I am also extremely familiar with
 3 the steps that should be taken by a reasonably prudent probation officer in proper monitoring
 4 and supervision of criminal offenders who are out on community supervision and proper
 5 safety procedures which must be taken. I have been retained by the Robin and Susan
 6 Benskin, individually, and Robin Benskin, as the Personal Representative for the Estate of
 7 Heather Benskin, Josh Mihok, Tina Marie Goodfellow and Roberta Evans to review the
 8 records, testimony and files in this case and to testify regarding the standard of care of a
 9 probation officer supervising Jong Kim.

10
 11 5. In my work as a probation and parole officer and corrections
 12 manager/supervisor, I supervised or managed the supervision of individuals on probation
 13 from the court, parolees who were released from prison, and other community supervision
 14 offenders. I regularly supervised or managed the supervision of offenders who had
 15 committed offenses against a person, felony assaults, and many offenders were addicted to
 16 alcohol, such as Mr. Kim in this case. I have received training on how to supervise such
 17 offenders. Part of this training was received at the Washington State Criminal Justice
 18 Training Center.

19
 20 6. I have reviewed extensive materials in this case. These materials include the entire
 21 City of Fife Municipal Court files and Probation files regarding Jong Kim; including the notes
 22 of the probation officer assigned to supervision of Mr. Kim; the Pierce County Probation File
 23 on Jong Kim - including all of the court documentation on Kim and his offenses, depositions
 24 of Rachel Brooks-Bailey, Court Administrator Sally Dowty, Pro-Tem Judge Sandy Allen and
 25

26
 DECLARATION OF W. STOUGH - Page 3 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-8500 - FACSIMILE (253) 820-8568

1 Fife Municipal Court Judge Kevin Ringus. I have reviewed police reports, judgment and
 2 sentencing documents, psychological reports regarding Mr. Kim, and Fife Municipal Court
 3 Probation "draft" policies relating to this case and the monitoring of probationers.

4 7. It is important to note in this case that Jong Kim had a chronic and severe
 5 addiction to alcohol, including social dysfunction and decision making consistent with
 6 chronic alcoholism. His chronic/severe alcoholism was out of control. Kim consistently
 7 turned to alcohol to resolve his social problems, especially centering around his own marital
 8 difficulties due to his alcohol dependence.

9 8. According to Kim's previous alcohol evaluations there were several factors
 10 that indicated a serious problem with Kim's alcoholism, including:
 11

12 (1) Kim's alcoholism has psychologically intensified
 13 evidenced by his increased tolerance, lack of control, and
 14 personality changes while being intoxicated as well as being
 sober;

15 (2) Kim using alcohol to solve problems, but in reality, an
 16 abnormal physiological reaction is causing his increasing
 psychological and emotional problems;

17 (3) Kim indicates an impairment in the thinking process that
 18 leads from stress to unintentional intoxication- he needs
 intensive and comprehensive treatment;

19 (4) Kim has the following signs and symptoms of alcohol
 20 dependence, including: increased tolerance, blackouts/short
 21 term memory loss, impaired thinking, drinking despite legal
 22 problems, adjustment disorder, using alcohol to cope with
 stress, depression, lifestyle deterioration, loss of control,
 23 hangovers and relapse.

24 9. Jong Kim was formally diagnosed, under DSM IV, with Alcohol Dependence-
 25 303.90. In another alcohol evaluation performed on July 14, 1997, as a result of another DUI
 26 charge on June 12, 1997, Kim stated that on this date he had a verbal fight with his fiancé and

DECLARATION OF W. STOUGH - Page 4 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 620-6500 - FACSIMILE (253) 620-6566

1 she left him, which he responded to by going out and drinking, then driving while drunk.
 2 Kim admitted to and displayed the following symptoms of alcoholism and dependency:
 3 Increased of tolerance, significant denial, alcohol related legal problems, blackouts, arrests for
 4 intoxication, drinking in spite of consequences and reasons for drinking. According to this
 5 alcohol evaluation, Kim was formally diagnosed with Middle Stage Alcoholic (SP-11) and
 6 had an impaired control over drinking, preoccupation with alcohol, use of alcohol despite
 7 adverse consequences and distortions in thinking, including denial. It was specially noted that
 8 with Kim's serious alcohol problem, without treatment, there was a high probability of future
 9 alcohol related offenses without close monitoring. Specifically stated in this evaluation was
 10 the fact that there was a "high likelihood of relapse or continued use without close monitoring
 11 and support." Kim's first diagnostic evaluation for his first DUI in this Country, dating back
 12 to November 16, 1990, where he reported that he started drinking at age 18, tolerant to a
 13 Blood Alcohol Level in excess of .17 and was formally diagnosed with SP2 Alcoholism,
 14 303.91. It was also noted that Kim experienced attempts to control his drinking and loss of
 15 control over amounts consumed and loss of control over behavior while drinking, in addition
 16 to numerous blackouts. Kim was consistently profiled as an individual in the Crucial Phase of
 17 chemical dependency (alcohol) as characterized by guilt, legal problems, periods of
 18 abstinence, changing drinking patterns, self pity, geographical escape.

19
 20
 21 10. In another Diagnostic Evaluation of Kim dated October 11, 1991 from
 22 Olympic Counseling Services, Kim reported that on 5 occasions he had drank so much that he
 23 vomited, was diagnosed as a mid-stage alcoholic, SP2 Alcoholism, 303.91. I have reviewed
 24 monthly and bimonthly progress reports by Castele, Williams & Associates, an Alcohol
 25
 26

DECLARATION OF W. STOUGH - Page 5 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-8500 - FACSIMILE (253) 820-8508

1 Dependency Counseling Service, wherein Mr. Kim was enrolled in a two year chemical
 2 dependency treatment program from April 30, 1998 through March 6, 2000 and assessed
 3 regularly to determine whether he was maintaining sobriety, going to AA and participating in
 4 alcohol treatment. Kim was being monitored by Castele, Williams on an Antabuse Program.
 5 From my experience of many years supervising offenders with substance abuse problems,
 6 Antabuse is used as the last resort with severe alcoholic offenders who will not or cannot stop
 7 drinking. Kim was clearly in that category as determined by Castele, Williams and
 8 Associates and part of his treatment plan was to take Antabuse. If Kim consumed alcohol
 9 while on a monitored Antabuse program he would become violently ill. That is how it works
 10 and by all appearances when he was being carefully monitored, especially with the Antabuse
 11 medication, he committed the least amount of driving violations. It is important to note that
 12 when Kim was held accountable in this intensive chemical dependency treatment program, he
 13 had the least amount of driving infractions and no driving while under the influence charges.
 14 From a probation accountability standpoint, there was a direct correlation between Kim being
 15 closely monitored and held accountable by the program to going to treatment and maintaining
 16 sobriety and his actual risk of harm to the community being minimized.

17
 18
 19 11. Attached as Exhibit 7 are Skilled Helper Progress notes for Jong Kim from
 20 January 1992 through December of 1993. Again, Kim was held accountable, expected to
 21 attend treatment and support groups and held accountable when he did not do so. Kim did
 22 well during this period of accountability and had no driving infractions or driving while
 23 intoxicated charges during this time of heightened and actual accountability. Again, there was
 24
 25
 26

DECLARATION OF W. STOUGH - Page 6 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 620-6500 - FACSIMILE (253) 620-6566

1 a direct correlation between Kim being held accountable to sobriety and his risk of harm to
 2 the community being minimized.

3 12. Mr. Kim was a known habitual drunk driver and posed an enormous risk for
 4 absconding from accountability, treatment and probation supervision. All of this information
 5 was known or should have been known to the probation officer responsible for his monitoring
 6 and supervision, as they have a responsibility to be familiar with his file, substance abuse
 7 history and criminal history; in fact, Fife Probation had an obligation to investigate and
 8 discovery this information.

9 13. Jong Kim was an offender whose criminal activity was directly linked to his
 10 alcohol use, and had been so for most of his life in this country. Mr. Kim had a very
 11 extensive history of probation with Pierce County for previous alcohol related driving
 12 infractions, much of which time was spent avoiding accountability. I have reviewed Jong
 13 Kim' extensive probation history with Pierce County and it is important these records were
 14 readily available to the City of Fife Probation Department upon request, these records were a
 15 significant portion of Kim's criminal history. As shown by these Pierce County Probation
 16 records, (see exhibits 20, 21, 22 and 29 identified below), Kim had many previous probation
 17 violations which demonstrated his ability to manipulate and avoid accountability if not closely
 18 monitored. I cannot emphasize enough that this was information that was relevant and
 19 accessible to Probation Officer Brooks-Bailey before and while Kim was on probation with
 20 the Fife Probation. This information was readily attainable, yet no one from Fife Probation
 21 ever attempted to obtain this information. These records were also important to know and
 22 understand Kim' substance abuse and behavior history as it related to alcohol use and the
 23
 24
 25
 26

DECLARATION OF W. STOUGH - Page 7 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 620-6500 - FACSIMILE (253) 620-6565

1 information contained in the Pierce County files would have been very helpful to the
 2 probation officer if they had requested this information. Fife Probation did nothing to
 3 investigate Kim' criminal and substance abuse history, despite the ample public records on
 4 the tremendous risk he posed to the community.

5
 6 14. I am very familiar with the standard procedures for handling offenders who are
 7 on probation. I am also extremely familiar with the steps that should be taken by a reasonably
 8 prudent probation officer in the proper management and supervision of offenders and proper
 9 safety procedures that should be taken. In my work as a probation and parole officer and
 10 corrections manager/supervisor, I have supervised or managed the supervision of individuals
 11 on probation from the court pursuant to suspended sentences. I regularly supervised or
 12 managed the supervision of offenders who had committed drug or alcohol related offenses,
 13 many of them being offenders who were addicted to alcohol and had committed DUIs, such
 14 as Mr. Kim. I have also reviewed materials that I have possession of through my work as the
 15 liability expert in the *Hertog* case. I have reviewed the following case-specific materials: and
 16 I am attaching to this declaration what I understand and have verified to be true and correct
 17 copies of the following exhibits, which contained information that I relied upon in
 18 formulating and making my expert opinions:
 19

20 a. Attached as Exhibit 1 to my Declaration is my Resume
 21 and attachments;

22 b. Attached as Exhibit 2 to my Declaration is the Fife
 23 Municipal Court Order and Docket of July 30, 2002 sentencing
 24 Jong Kim for DUI, wherein the court ordered Kim to Probation
 25 for monitoring of various crime related prohibitions, (Also
 26 included is Defendant's Statement of Guilt);

c. Attached as Exhibit 3 are numerous case docket screens
 by Fife Municipal Court related to Jong Kim;

DECLARATION OF W. STOUGH - Page 8 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 620-8500 • FACSIMILE (253) 620-8505

- 1 d. Attached as Exhibit 4 are the Notes of Fife Probation
2 Officer Rachel Brooks-Bailey regarding Jong Kim for his
3 probationary period of July 30, 2002 through March 14, 2003;
- 4 e. Attached as Exhibit 5 is the Probation Violation Report
5 for Jong Kim, submitted to Fife Municipal Court by Rachel
6 Brooks-Bailey on March 14, 2003;
- 7 f. Attached as Exhibit 6 is the Electronic Home Detention
8 Notification of Client Status document for Jong Kim from June
9 28, 2002 through August 12, 2002;
- 10 g. Attached as Exhibit 7 are the Fife Police booking report,
11 personal recognizance form, bail agreement and release from
12 custody;
- 13 h. Attached as Exhibit 8 is the Review Hearing Report
14 filed January 13, 2003 by Rachel Brooks-Bailey;
- 15 i. Attached as Exhibit 9 is the Fife Municipal Court Notice
16 of Case Setting scheduling the February 12, 2003 review
17 hearing which was never sent to Jong Kim or his lawyer
18 Barbara Bowden, (also attached is a letter from Barbara
19 Bowden which states her address and phone numbers);
- 20 j. Attached as Exhibit 10 are various e-mail exchanges
21 between Probation Officer Rachel Brooks-Bailey and Court
22 Administrator Sally Dowty in December of 2002 and January of
23 2003 wherein Mr. Kim is described as a high risk;
- 24 k. Attached as Exhibit 11 is the police report of January 28,
25 2002, wherein he was arrested for DUI;
- 26 l. Attached as Exhibit 12 is the Notice of Case Setting for
March 12, 2003, wherein Fife set a review hearing for Kim,
which was 3 days after the March 9, 2003 collision;
- m. Attached as Exhibit 13 is "Probation Supervision Level
Questionnaire" and "Agreement" that was never done with Jong
Kim;
- n. Attached as Exhibit 14 is the Pierce County District
Court #1 Case History Report for Jong Kim;

1 o. Attached as Exhibit 15 are the Probation status reports
2 from Pierce County from April 3, 1998 through February 24,
3 2000;

4 p. Attached as Exhibit 16 are various status/chronological
5 notes related to Jong Kim while he was on probation with
6 Pierce County;

7 q. Attached as Exhibit 17 are various Pierce County
8 Probation Department's Supervision Level Questionnaires and
9 Risk Assessments that were completed on Jong Kim by Pierce
10 County;

11 r. Attached as Exhibit 18 are various Pierce County
12 Probation Department letters to Kim regarding missed
13 appointments by Jong Kim;

14 s. Attached as Exhibit 19 are various Pierce County
15 Probation Department's requests for interpreters for probation
16 meetings with Jong Kim and other correspondence regarding
17 Kim;

18 t. Attached as Exhibit 20 is a Pierce County Probation
19 Department's Violation Report for February 2, 1998 regarding
20 Jong Kim while he was on probation with Pierce County and
21 Addendum to Violation Report dated April 3, 1998;

22 u. Attached as Exhibit 21 is a Pierce County Probation
23 Department's Violation Report for August 11, 1998 regarding
24 Jong Kim while he was on probation with Pierce County;

25 v. Attached as Exhibit 22 is a Pierce County Probation
26 Department's Violation Report for May 5, 1999 regarding Jong
Kim while he was on probation with Pierce County;

w. Attached as Exhibit 23 is a Pierce County District Court
#1 Docket for Jong Kim;

x. Attached as Exhibit 24 are various Pierce County
Probation Department DUI/Physical Control Court Orders;

y. Attached as Exhibit 25 are various Pierce County
District Court Summons for Violation Hearings for Jong Kim;

DECLARATION OF W. STOUGH - Page 10 of 38
[1252959 v7.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-8500 - FACSIMILE (253) 820-8505

1 z. Attached as Exhibit 26 is the petition and order for
2 Deferred Prosecution for Cause 97-014788-3 wherein Jong Kim
3 admitted that he was an alcoholic;

4 aa. Attached as Exhibit 27 are various Pierce County
5 Consents for Records signed by Jong Kim for the purpose of
6 probation supervision by Pierce County;

7 bb. Attached as Exhibit 28 are Pierce County Probation
8 Department's Probation Reports and Letters from 1992-1003
9 probation monitoring;

10 cc. Attached as Exhibit 29 is Pierce County District Court
11 No 90-002780-8; 90-002780-7 Petition, Statement and Order of
12 Defendant on Petition for Deferred Prosecution for Jong Kim;

13 dd. Attached as Exhibit 30 are Plaintiff's First Set of
14 Discovery to Defendants and Answers Thereto and Defendants'
15 Responses to Plaintiff Roberta Evan's First Set of Discovery;

16 15. There is no question that Fife Municipal Court Probation Officer Rachel
17 Brooks-Bailey had an obligation to know her offender, meaning that Ms. Brooks-Bailey
18 should have known the complete criminal behavior history and substance abuse history of
19 Jong Kim. Based on my review of the exhibits and other documents, Kim had a long history
20 of alcohol related driving offenses, alcohol abuse, dangerous behaviors and absconding from
21 probation prior to his probation with Fife. Kim also admitted in many records accessible to
22 Fife Probation that he got intoxicated and drove when he had marital/relationship strife, which
23 is a part of his substance abuse history that Brooks-Bailey should have been aware of. This is
24 especially true when both case law and ARLJ 11 require probation officers to be aware of
25 offender's social problems and substance abuse history. Brooks-Bailey admits that she knew
26 little of Jong Kim's substance abuse history, which would have included the investigation into
behavioral problems, i.e. driving while intoxicated convictions, drugs and involvement in

DECLARATION OF W. STOUGH - Page 11 of 38
[1252959 v7.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-8500 • FACSIMILE (253) 620-8585

1 violent assaults. Kim historical information shows that when he was held strictly accountable,
2 he was less likely to get involved in alcohol related driving infractions.

3 16. Based upon my review of the testimony in this case, Fife Probation failed in
4 every respect to monitor Kim while on probation, including their failure to investigate,
5 discover or learn about Kim whereabouts and uncontrolled substance abuse and dangerous
6 activities in the community. It is clear that Officer Brooks-Bailey understood her obligation
7 to enforce the conditions of release, to prevent re-offense and to protect the public. Brooks-
8 Bailey gave absolutely no guidance to Kim, never regulated Kim' actions, and took no
9 affirmative actions to monitor/supervise Kim. Kim was ordered to submit to drug and alcohol
10 testing, treatment and assessments, yet Kim never did so and Brooks-Bailey never held him
11 accountable for doing so. First and foremost, Fife Probation had an obligation to and yet
12 failed to FASHION, DRAFT & UPDATE POLICIES AND PROCEDURES consistent with
13 the expectations of the probation field in Washington State. Fife Municipal Court Probation
14 Department had no written policy and procedures, documented organizational charts, mission
15 statements, goals and objective statements at the time Jong Kim was under the
16 supervision/monitoring of the Fife Municipal Court. Amazingly, Fife Probation still has no
17 policies or procedures. City of Fife states at page 9 of First Discovery to Defendants that
18 "There is no Fife Probation Department organizational chart." Also, Fife at P. 10 states
19 "Judge Ringus has not adopted any written policy or procedures for his probation
20 department."
21
22
23
24
25
26

DECLARATION OF W. STOUGH - Page 12 of 38
[1252959 v7.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-8500 - FACSIMILE (253) 820-8585

1 17. From both my corrections and consultation experience of over thirty years
 2 experience and a probation officer and manager and as an expert on over sixty corrections
 3 related lawsuits, I find this to be unfathomable, especially in light of:

4 a) The admission by Defendant Fife (page 11a of the First
 5 Discovery) that there have been at least 5 probation officers
 6 used by Fife Municipal Court in the last several years "who
 7 have focused on probation services," and

8 b) The admission by Judge Ringus that he has never even
 9 looked at draft policies for Fife Probation and still does not plan
 10 to draft any probation policies.

11 18. In his deposition at P. 21-22, Judge Ringus admits that the Fife Probation
 12 Department had no policies and procedures while Jong Kim was on probation and to this day
 13 has not policies and procedures. Put more directly, Fife has been providing probation services
 14 without policies and procedures prior to the time Jong Kim came onto probation, while Kim
 15 was on probation through March 9, 2003, and currently provides probation services without
 16 any policies and procedures. In the 60-plus cases that I have provided an expert opinion on
 17 and in all of the probation departments that I have consulted with, I have never heard of a
 18 probation department with absolutely no policies and procedures or mission statement.
 19 Perilously, in deposition (p. 38) Judge Ringus admits that he was "presented with a collection
 20 of the above-mentioned sample policies and procedures and "didn't do anything with them."
 21 Judge Ringus admits that (p.39) that he spent no time reviewing the sample policies, only
 22 looked at the cover sheet and then and filed them away. The only contact that Brooks-Bailey
 23 ever attempted with Kim was a meaningless and short phone call several months after Kim
 24 was already in the community unsupervised and consuming alcohol during all of his waking
 25 hours. This was a serious failure by Fife. Fife did not put any effort into monitoring Jong
 26

DECLARATION OF W. STOUGH - Page 13 of 38
 [1252959v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-6500 - FACSIMILE (253) 820-8505

1 Kim. In my expert opinion, it was Fife's failure to start monitoring Kim in the first month of
 2 his release that allowed Kim to abscond, start abusing alcohol again and ultimately fall back
 3 into recidivism of drinking alcohol and engaging in extreme and dangerous activities.
 4 Brooks-Bailey did nothing to attempt to locate or communicate with Kim once it was obvious
 5 he was again absconding, despite having access to information that would have led her to
 6 Kim, like the two collateral sources (Kim's wife and Kim's sister, both phone numbers are on
 7 Fife Court Documents) regarding Kim and his compliance with court ordered conditions.
 8 Instead of treating these collateral contacts seriously, Brooks-Bailey never attempted any
 9 communication with either. The fact that Fife eventually initiated a bench warrant 6 months
 10 after Kim's release did not release them from their obligation to supervise, monitor, locate,
 11 investigate, discover Kim, his whereabouts or his activities. This is especially true since Fife
 12 Probation failed to provide notice of the review hearing to Kim.
 13

14 19. It is also clear that Fife Probation failed to abide by the purpose, meaning and
 15 obligations of ARLJ 11, which gave municipalities direction in setting up misdemeanor
 16 probation departments in light of the *Hertog* and *Bishop* cases. (See Decl. of Justice
 17 Talmadge). In his deposition (p 27) Judge Ringus admits that he did not set up the Fife
 18 Probation system and department in compliance with the Administrative Rules for Courts of
 19 Limited Jurisdiction (ARLJ) 11. In deposition (p.47) Judge Ringus states that he does not
 20 know that one of the purposes of the ARLJ 11 was to require probation departments to
 21 structure its services so that it would assist the court in the management of criminal justice,
 22 with the intent of aiding in the preservation of public order and safety. (p 1-3).
 23
 24
 25
 26

DECLARATION OF W. STOUGH - Page 14 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-6500 - FACSIMILE (253) 820-6586

1 20. Fife Probation created and fostered a probation department with the opposite
2 intent of both the Hertog/Bishop line of cases and with ARLJ 11. Although Fife stated in
3 discovery that it was now working on drafts of probation policies, it is in fact not doing so.

4 21. Having reviewed the "draft" documents, it is quite apparent that the draft is
5 similar to other probation operations, most noticeably King County Municipal Court
6 Probation. Some of the "draft policies" that Judge Ringus states he never reviewed, include a
7 "Probation Philosophy", Training requirements, requirements for chronological records, an
8 intake procedure, violation and discharge report procedures, procedures for Pre-Sentence
9 Investigations, risk assessments, etc. It is both a shame and a direct rejection of ARLJ 11 and
10 the Hertog/Bishop requirements not to have any of these essential components necessary for
11 even the most basic, unsophisticated probation department. Such is a recipe for disaster when
12 dealing with an offender like Kim who was known to be a longstanding serious danger to the
13 public when he was intoxicated and behind the wheel of any vehicle. In the *Hertog* case I
14 opined that neither the city probation counselor nor the county pretrial counselor had taken
15 appropriate or adequate steps to protect the public from the foreseeable danger posed by the
16 man who eventually injured the plaintiffs in this case. I perceive the same failure in this case.
17 It is crystal clear that a man with Kim' history of alcohol related offenses, was capable of
18 hurting people and his documented dangerous behavior was behind the wheel. The Fife
19 Probation department knew this or should have known it. Brooks-Bailey at least noted the
20 high risk to the community that Kim represented.
21
22
23

24 22. As shown by Fife's Probation Department, without adequate mission
25 statements, goals and objectives, and appropriate policy and procedures relating to the
26

DECLARATION OF W. STOUGH - Page 15 of 38
[1252959 v7.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6505

1 enforcement of the Court's order and probation conditions, chaos rules. "Chaotic" is the best
 2 word I know of to depict Fife's terrible and complete failure to monitor offender Jong Kim
 3 while on probation at the time he killed Heather Benskin and injured many others. As
 4 alluded, I know of no other probation department that does not have at least a defined
 5 mission, goals and objectives, and policy and procedure. Washington State Department of
 6 Corrections, King County Probation, King County Juvenile Probation, Pierce County
 7 Probation, Seattle Municipal Probation Services, Phoenix, Arizona Probation Services, Alaska
 8 DOC, Idaho DOC, Montana DOC, all have these essential, basic components. All have
 9 structure. Fife Probation had nothing by way of structure. For Fife to have no more than a
 10 "Make up the probation department as you go along" process in existence at the time of
 11 Kim's probation and to not use any policies, even when provided to them, is preposterous.
 12 This is all the more so, since in deposition Judge Ringus testified that will not even use the
 13 "draft" policies provided to him. Judge Ringus (Dep. p 39) states:

14 They [draft probation policies and procedures] were in my tray
 15 for review . . . I just set them aside . . . and when asked if he
 16 reviewed them at all, stated "No."

17
 18 23. Jong Kim was a very dangerous escalating offender. Jong Kim had 5 prior
 19 DUIs and 18 convictions, most of them relating to driving, within the last 10 years (which is
 20 how long he was in this Country). The court and Fife's probation officer were fully aware or
 21 should have been aware of Kim's dangerous history and potential to injure the public if
 22 drinking and driving. Judge Ringus, in deposition (p, 23) indicates he knew Kim's criminal
 23 history:
 24

25 Q-What did you know prior to March 9th of 2003?

26 A-Whatever was printed on July 30th, 2002."

DECLARATION OF W. STOUGH - Page 16 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 620-8800 • FACSIMILE (253) 620-0505

1 23. On July 30, 2002, both the Judge and the probation officer knew that Kim had
2 5 previous DUI offenses. Probation Officer Brooks-Bailey, in her violation report on Kim
3 dated January 13, 2003 correctly referred to Kim as "HIGH RISK TO THE COMMUNITY."
4 In an e-mail to Court Administrator Sally Dowty on January 14, 2003 Bailey also states:

5 "The defendant will be going back to Court anyway, since he is HIGH RISK."

6 24. Ironically, the Probation Philosophy on page 1 of the "Draft Policies and
7 Procedures" state that "The Probation department provides two essential services to the court:
8 Presentence investigations and PROBATION SUPERVISION."
9

10 Such would be a good starting point as that is standard with probation departments.
11 From my many years of working as a parole and probation officer, supervisor, manager,
12 corrections consultant and expert on probation, it has always been my understanding that:

13 a) Probation officers supervise, or monitor the conditions
14 of the court, and,

15 b) Probation officers are expected to promptly report
16 violations of court ordered conditions or probation conditions to
17 the Court (or in some state jurisdictions, the parole board or
18 department hearing officer); and it is the expectation of the job
19 that offenders are held accountable.

20 25. As an experienced probation officer, supervisor and expert on probation, it is
21 and has always been my understanding that there is no distinction between "Probation
22 Monitoring" and "Probation Supervision"- they are one and the same. Probation is not what
23 Judge Ringus testified to in his deposition (p36-37), and Judge Ringus is completely wrong
24 and off the mark when he testified in his understanding of probation, stating that:

25 Monitoring by a probation division is using the resources that
26 we have available to the Fife Municipal Court to see if someone
is complying with the conditions of a suspended sentence. It is
far shy of supervision. We don't supervise at all.

DECLARATION OF W. STOUGH - Page 17 of 38
[1252959 v7.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-8500 - FACSIMILE (253) 620-6585

1 26. According to renowned national corrections expert, Richard P. Seiter, Ph.d, in
2 his seminal publication, *Correctional Administration, Integrating Theory and Practice* (2000
3 Prentice Hall P. 387):

4 “Probation officers supervise offenders with a suspended
5 sentence, monitoring their behavior in the Community and their
6 compliance with conditions of their probation....”

7 27. The American Heritage Dictionary defines “monitor” as “to keep watch over
8 and supervise. Webster’s New World Dictionary describes “monitor” as “watch over or
9 check on a person or thing.” From my years of corrections experience the two terms, monitor
10 and supervise, are completely interchangeable and in the corrections field have always been
11 considered to mean the same. As an expert on these cases, there is no distinction between
12 probation monitoring and probation supervision, as I testified in the *Hertog* case. Judge
13 Ringus, in his testimony, completely discounts the basic probation standards enumerated in
14 Taggart, Hertog, Bishop and ARLJ 11 that have had direct implications on the running of a
15 probation department. As I testified in *Hertog*, (*a case involving a municipal probationer*),
16 and later publicized by the Washington Supreme Court, reasonable precautions must be taken
17 by probation officers and probation departments to protect the public against reasonably
18 foreseeable dangers posed by the dangerous propensities of offender sentenced to probation
19 monitoring, (such as Kim). The standard of care and expectation is that probation conditions
20 are monitored and an offender’s violations of those conditions are promptly to be reported to
21 the Court. Consistent with probation field standards nationally and in Washington State,
22 ARLJ 11 and the statements of probation obligations mentioned in the Taggart, Hertog and
23 Bishop cases, Probation officers and Probation Departments are expected and obliged to use
24
25
26

DECLARATION OF W. STOUGH - Page 18 of 38
[1252959 v7.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-6500 - FACSIMILE (253) 820-6565

1 reasonable care in the following areas related to the standard of care for the provision of
 2 probation to offenders:

- 3 • Probation Officer are to provide guidance to those on
 4 probation and Departments should have policies
 5 enumerating how to do this;
- 6 • Probation officers are to meet face-to-face with probationers
 7 and also have other forms of contact, telephonic, with the
 8 purpose of determining whether the probationer is
 9 exhibiting law abiding behaviors and following the
 10 conditions of his or her sentence;
- 11 • Probation officers are to regulate a probationer's movement
 12 within the state;
- 13 • Probation officers are to monitor or supervise a
 14 probationer's progress with conditions while on probation;
- 15 • Probation officers are to implement, administer and enforce
 16 the terms and conditions of a probationer's sentence;
- 17 • Probation officers are responsible for knowing a
 18 probationer's criminal behavior history and substance abuse
 19 history;
- 20 • Probation officers are to affirmatively investigate a
 21 probationer's life to detect and be aware of noncompliance
 22 with conditions;
- 23 • Probation officers are to take action to control the conduct
 24 of probationers, predominately in the form of reporting to
 25 the court noncompliance with conditions;
- 26 • Probation Departments are to draft, promulgate and update
 policies and procedures for the supervision of probationers;
- Probation Departments are to train and supervise probation
 officers to ensure that they are monitoring probationers in
 compliance with department policies and procedures;
- Probation Departments are to conduct periodic case audits
 to determine whether the probation officer is monitoring

DECLARATION OF W. STOUGH - Page 19 of 38
 [1252959v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-6500 • FACSIMILE (253) 820-6505

1 offenders compliance with the court order pursuant to policy
2 and procedure;

- 3 • Probation Departments are to conduct performance
4 evaluations to ensure that Probation officers are competent;

5 28. With regard to the entire probation field expectations of both Probation
6 Officers and Probation Departments mentioned above, Fife's Probation Department and its
7 Probation Officer Rachel Brooks-Bailey breached the standard of care in each and every
8 respect with regard to the probation of Jong Kim. Judge Ringus, in his deposition (p 23)
9 indicates that the City of Fife Probation Department did not supervise Kim pursuant to the
10 expectations as stated in the above cases. This is disturbing. In *Hertog*, the State Supreme
11 Court case that I testified in, the Court especially set the standard for Municipal probation
12 supervision. In *Hertog*, the State Supreme Court concluded (page 18):

13 "We hold that municipal probation counselors, county pretrial
14 release counselors who have supervisory authority, and their
15 EMPLOYING AGENCIES have a duty to protect others from
16 reasonably foreseeable harm resulting from the dangerous
17 propensities of probationers and pretrial releasees under their
18 supervision."

19 29. In that case the Supreme Court (page 7) quoted my affidavit that "Hoover (the
20 Seattle Municipal Court Probation Officer) should have scheduled more face-to-face meetings
21 after probation revocation was denied, and should have verified the offender Krantz's
22 participation in treatment and compliance with probation conditions." In this case involving
23 probationer Kim, the actions and inaction of Fife Probation and its probation officer are
24 tremendously worse than in *Hertog*, as Probation Officer Brooks-Bailey failed even to have
25 ONE face-to-face meeting with Kim and had only a brief telephone contact with Kim, where
26 she did not even bother asking Kim a single question regarding his compliance with his court

DECLARATION OF W. STOUGH - Page 20 of 38
[1252959 v7.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-0500 • FACSIMILE (253) 820-0565

1 ordered conditions. Brooks-Bailey also, like Probation Officer Hoover, failed to verify Kim's
2 compliance with his probation conditions.

3 30. Unlike the probation officer in Hertog who sought to revoke the probation of
4 Probationer Krantz, Probation Officer Brooks-Bailey never sought to revoke the probation of
5 Jong Kim. Brooks-Bailey merely requested a review hearing on February 12, 2003, but
6 consistent with the "fly-by-night" operation that Fife Probation was running, fife Probation
7 failed to provide any notice to Kim or his attorney of the review hearing. Kim never showed
8 up to Court on February 12, 2003 because Fife Probation failed to provide any notice to Kim.
9 At the February 12, 2003 review hearing, pro-tem Judge Sandra Allen originally issued a
10 warrant, and then immediately cancelled the warrant on Kim after she learned that Fife
11 Probation never provided notice to Kim or his attorney. Pro-Tem Judge Allen testified that
12 she cancelled the warrant out of fairness because Kim deserved the opportunity to come to
13 Court and had not been given the opportunity. Regardless, Brooks-Bailey, like Hoover, still
14 was required to supervise Kim and hold him accountable to all of his conditions, before and
15 after the February 12, 2003 review hearing.
16
17

18 31. Unfortunately, Probation Officer Brooks-Bailey had no written expectations to
19 do anything because Fife Probation had no policies and procedures and the agency was not
20 even following the basic or core requirements of ARLJ 11; Fife Probation's failure to have
21 policies and procedures is obviously a breach of the standard of care for probation
22 departments and I have never heard or come across a probation agency that had absolutely no
23 policies and procedures. When asked in deposition (p43) whether Brooks-Bailey was ever
24 given any affirmative guidance as to monitoring probationers, Judge Ringus replied "No."
25
26

DECLARATION OF W. STOUGH - Page 21 of 38
[1252959 v7.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-8500 - FACSIMILE (253) 620-8565

1 Additionally he indicated he had no expectations of her with regard to monitoring offenders
 2 (same page). Finally (p 26 & 41) Judge Ringus indicated that prior to March 9, 2003, there
 3 was no training given to probation officers and (p 42) that there were never any risk
 4 assessments done on offenders. If that is true, then why even have a probation
 5 officer/probation department? The City of Fife did have a probation department, probation
 6 officers and provided probation services to sentenced offenders and received monetary benefit
 7 for doing so. The fact that Fife Probation failed to train its probation officers, had no
 8 expectations (written or otherwise) of its probation officers is obviously a breach of the
 9 standard of care for both probation departments and probation officers in Washington State.
 10

11 32. In *Hertog v. City of Seattle*, I testified (Declaration, page 2, "lines 18-24 and
 12 page 3, lines 1-2) to the similarities between municipal and state supervision of probationers:
 13 "an assessment of the risk of reoffending by the probationer is made." In addition, similar
 14 reporting requirements are imposed on the probationer whether or not he is under probation
 15 from the Seattle Municipal Court or a superior court. The function of the probation officer in
 16 the Seattle Municipal Court (and in Fife Municipal Court) is similar to the function of the
 17 probation or community corrections officer which is principally (1) enforcement of the
 18 conditions of probation or community supervision, and (2) preventing reoffense." Nothing of
 19 the sort was ever done with Kim by Fife Probation, which again is a breach of the correction's
 20 field standard of care.
 21
 22

23 33. In *Hertog*, Probation Officer Sid Hoover (deposition, page 26) testified "The
 24 only thing we do is monitor to ensure that they follow the conditions laid down by the judge."
 25 When asked about case management, he replied, p13 "(we) monitor the courts conditions, and
 26

DECLARATION OF W. STOUGH - Page 22 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 620-8500 - FACSIMILE (253) 620-8566

1 if not being adhered to, schedule a court review and write a revocation report." Hoover failed
 2 to do this, but he at least knew what he was supposed to have done. Brooks-Bailey had the
 3 same obligation as the probation officer in *Hertog*. The *Hertog* court also made the issue of
 4 power to arrest, moot. In *Hertog I* testified (Declaration P. 11) that "Based upon the failure of
 5 Probation Officer Sid Hoover to adequately supervise Barry Krantz while on release . . .
 6 Krantz was allowed to violate his probation and supervised release without recourse. As a
 7 consequence, he was foreseeably likely to re-offend in raping Sarah Hendricksen."
 8 Preventing recidivism is obviously the whole purpose being the provision of probation to
 9 those on probation in the community. This is done by holding offenders specifically
 10 accountable to the "crime-related" conditions of a suspended sentence by closely monitoring
 11 the probationer's compliance and reporting any non-compliance to the court. The more a
 12 probationer is closely and competently monitored on probation, the less foreseeable and the
 13 likelihood of re-offense and risk to the community the offender represents. Based upon
 14 Brooks-Bailey's failure to adequately monitor/supervise Kim and thereby allowing Kim to
 15 violate the conditions of his Court order without impunity, it was highly likely and
 16 exceedingly foreseeable that Kim would drink and drive and seriously hurt or kill a member
 17 of the community.
 18
 19

20 34. The probability that Kim would violate his probation was compounded
 21 because Brooks-Bailey did not know what she was supposed to do and was not held
 22 accountable. The standard in any probation operation is to at least have a job description.
 23 Not only was there no mission statements, policy and procedure, etc., the probation officer
 24 had no written concept of what a probation officer does and according to both Judge Ringus
 25
 26

DECLARATION OF W. STOUGH - Page 23 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-0500 - FACSIMILE (253) 820-0565

1 and Probation Officer Brooks Bailey, neither the Probation Department or the Probation
2 Officer followed the minimum or core requirements of ARLJ 11.

3 35. With regard to a probation officer's duty with regard to monitoring/supervising
4 offenders, it has always been my experience and understanding that judges expect probation
5 officers to enforce probation conditions and report violations of such court ordered conditions
6 to the court. Such is standard in the corrections field, since without doing the above,
7 probation is meaningless. A probation officers' obligation to monitor conditions and report
8 probation violations has always been a probationary function and not a judicial function.
9 Judges do not provide probationary supervision or monitoring, not in this case or any case. In
10 my experience, and based on the testimony in this case judges in general and Judge Ringus
11 specifically understand that their duties are not probationary monitoring/supervision services.
12 The following are a few case examples from depositions of various judges that I have been an
13 expert in:
14
15

16 In *Grissett v. King County District Court Probation*, District
17 Court Judge Delaurenti in Dep. (page 11) expects the probation
18 officer ("PO") to supervise whatever conditions the judge sets.
19 Once out of jail he expects the PO to do something. On page 16
20 he indicates that he expects the PO to take affirmative action in
21 the enforcement of conditions. There is a duty to monitor.

22 On page 23 Delaurenti states that he fully expects King County
23 Probation to set out and abide by the principles of Taggart. On
24 page 25 he states that probation policies are to follow the spirit
25 of Taggart. On page 30 he indicates that if the PO fails to
26 investigate if a probationer is compliant with the courts
conditions that would be a breach of care.

27 Also in *Grissett v. King County District Court Probation*, another judge, District Court
28 Judge Phillipson, page 31 of his deposition, states that he expects POs to find out if the
29 offender is in compliance with the conditions of the court and concurs with Delaurenti.

DECLARATION OF W. STOUGH - Page 24 of 38
[1252959 v7.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-8500 - FACSIMILE (253) 620-8586

1 36. From a correctional standpoint, there is nothing different about the
2 responsibilities of the Fife Municipal Court Probation Department and the Seattle Municipal
3 Probation Services, which states on its web site, 12-15-03, that:

4 The Probation Services is responsible for the monitoring of
5 Court ordered conditions and provides the court valuable
6 information such as offender compliance, problems, and/or
7 dismissals."

8 This is an example of the standard job of the probation officer. Material I referred to
9 as a consultant on Hertog also stated Seattle Municipal Court Probation's mission as follows:

10 The Seattle Municipal Court Probation Department operates
11 under the authority of the judges of the Municipal Court. The
12 Department's primary purpose is to hold offenders accountable
13 for their court ordered conditions.

14 37. For probation monitoring, the probation officer has always been answerable to
15 the judge as to holding offenders accountable to their court ordered conditions. Such is the
16 case with Fife's probation setup, with or without mission statements, policies and procedure,
17 absence of which breaches the field standard of care.

18 38. For another example, Renton Municipal Court's website states:

19 The Probation Officer-The Court has long used a PO to monitor
20 Defendant's after their conviction and sentencing.

21 From conversations with Renton staff I concluded that the Renton Probation Officers
22 monitor offenders for the benefit of the judge and the protection of the community. Pierce
23 County District Court probation has a statement of Mission that says:

24 The primary purpose of probation is to provide support services
25 to the judges of PC District Court. Goals and objectives are:

26 A. Provide the court with thorough, accurate and timely
reports,

DECLARATION OF W. STOUGH - Page 25 of 38
[1252959 v7.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-6500 - FACSIMILE (253) 820-6565

1 C. Hold offenders accountable.

2 Pierce County Probation also has an ethics statement "Staff will respect the right of
3 the public to be safeguarded from criminal activity."

4 39. For another example, King County District Court Probation, Policy 603 states:

5 Probation supervision is often ordered as part of a sentence.
6 The PO monitors Defendant's compliance with the sentence
7 imposed and tries to help the Defendant comply with the
8 conditions. The PO must immediately report to the court all
9 violations of the conditions of probation." "Our goal is to
10 provide the Defendant with an experience that will lessen the
11 likelihood of law violations in the future (recidivism) and help
12 reconcile the offender with the community.

13 A competent PO has the opportunity to accomplish this goal while still holding the
14 offender accountable to the court. In all probation cases, both nationally and in Washington
15 State, the probation officer monitors the offender for the benefit of the judge and the
16 protection of the community. Fife Municipal Court Probation Department's draft material
17 quotes King County District Court Probation word for word: "The goal of the Probation
18 Department is to provide the defendant with an experience that will lessen the likelihood of
19 law violations in the future and help reconcile the defendant with the community."
20 Unfortunately, Fife Probation never even considered this policy and never applied any
21 policies to Jong Kim nor apparently to subsequent offenders.

22 40. Again, it has always been the job of probation officers to monitor offenders for
23 the benefit of the judge and for the protection of the community. Nothing from the
24 affirmative obligations of probation officers in this regard makes their actions judicial in any
25 way because probation officer's full authority is to monitor compliance and report non-
26 compliance to the court. Probation officers do not have authority to change a probationer's

DECLARATION OF W. STOUGH - Page 26 of 38
[1252959 v7.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-6500 • FACSIMILE (253) 820-6568

1 sentence, to arrest a probationer, to order a probationer into custody, to order any additional
 2 fines or conditions or any other sort of actions that require judicial authority. If probation
 3 officers had such authority, then they would have the power of a judge and would not need to
 4 report violations to the Court.

5 41. Similarly, judges are not probation officers and do not provide probationary
 6 supervision/monitoring, as admitted by Judge Ringus in this case. Judge Ringus admits that
 7 he did not monitor or supervise offenders on probation, had nothing to do with offenders
 8 outside of the court room and did not even direct his probation officers with regard to
 9 probationary services outside the court room. In this case, any actions by judge Ringus as the
 10 default "administrator" of Fife Probation were not done in a judiciary capacity, but rather in
 11 the capacity as any administrator of a probation department, similar to that of King County
 12 District Court Probation where the presiding Judge is ultimate authority/administrator of the
 13 Probation Department. Unlike King County District Court Probation, which has policies and
 14 procedures, Fife Probation Department breached the standard of care for probation
 15 departments because it did not have any policies and procedures or any direction.
 16

17 42. I have carefully analyzed Judge Ringus deposition and declaration. Judge
 18 Ringus testimony in his declaration and in his deposition is confusing and contradictory in
 19 many respects. First, Judge Ringus states in Declaration. (p. 5, line 25) "Another way I
 20 monitor compliance with the conditions of a suspended sentence is by use of staff with the
 21 title, probation officer;" yet, on page 6 of his deposition at line 24 he states: "I do not put
 22 defendants on probation supervision." Another example of Judge Ringus' confusion is on his
 23 declaration at page 11, lines 18-22, "By imposing that condition, I did not impose any duty on
 24
 25
 26

DECLARATION OF W. STOUGH - Page 27 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-8500 - FACSIMILE (253) 820-8565

1 me or my staff to investigate or monitor his compliance".... and to further add to the
 2 confusion, on page 11, line 8 he states "I did not order 'full supervision' or 'active
 3 supervision.' I did not indicate that Kim (who had 5 DUIs, 18 convictions, and a 10 year
 4 criminal history) had to follow the probation department's rules and regulations"...and line 13,
 5 "I did not indicate that I or my staff would investigate Kim's compliance with these
 6 conditions." What this must say to the public is that the Fife Municipal Court and the
 7 probation unit, Fife Probation, have no intention of holding Kim and other offenders
 8 accountable, yet it has and continues to claim the financial benefits of placing offenders on
 9 probation monitoring through its legitimate probationary department. This lackadaisical and
 10 incompetent probation monitoring sent a message to the manipulative Kim that "no one was
 11 watching" and "I can do as I please." This is exactly what Kim did, according to the sworn
 12 testimony of his wife, while on probation with Fife Probation, Kim violated the conditions of
 13 his probation in the six months prior to March 9, 2003 in every way, including:
 14

- 15 > Drinking alcohol in excess everyday while on probation
 16 from July 30, 2002 through March 9, 2003;
- 17 > Frequented Korean bars to drink alcohol, including his
 18 favorite Korean bar named Coco located on South
 19 Tacoma Way in Tacoma, Washington;
- 20 > During the months of August 2002 through March 9,
 21 2003 (probationary months), regularly going on one or
 22 two day drinking binges where he would stay out
 23 drinking and not come home;
- 24 > Frequent social problems with wife due to Kim's
 25 drinking problem, in that his alcohol dependence and
 26 excessive drinking was the main source of marital strife;
- > While on probation with Fife Probation, Kim continued
 to drink and drive anyway on a regular basis;

DECLARATION OF W. STOUGH - Page 28 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-8500 - FACSIMILE (253) 820-8600

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- Kim, with a suspended license, knew that no one from the City of Fife was enforcing those conditions so he drank alcohol everyday and he drove on a regular basis while he was on probation;
 - No probation officer ever came to the house to check on Jong Kim or called the house to check on Kim;
 - Kim never met with any probation officer during his probation with the City of Fife;
 - During the probationary period, Jong Kim continued to drink alcohol uncontrollably and drive until the accident on March 9, 2003;
 - Kim failed, from August, 2002 through March 9, 2003, to attend any alcohol counseling classes and was not involved in any alcohol treatment programs; and,
 - While on probation with the City of Fife, Kim used illegal drugs, specifically cocaine.

13 See Declaration of Min Kim.

14 43. From my experience, offenders such as Kim are in the criminal justice system
 15 precisely because they cannot or will not place controls on themselves. This was obviously
 16 recognized by Kim's previous alcohol evaluations, wherein the evaluators appropriately state
 17 that unless Kim was monitored closely he would continue to drink and drive and endanger
 18 those in the community. Fife Probation Officer Brooks-Bailey, in fact, knew that Kim was a
 19 high risk to the community and in fact labeled him as such in court documents. Kim was also
 20 formally diagnosed with mid-stage alcohol dependence, which means that he was not able to
 21 control himself with regard to alcohol use unless specific accountability and close monitoring
 22 was placed upon him. Kim was and is a serious serial or repeat alcoholic offender. The court
 23 and probation conditions, enforced, are placed on a person such as Kim to exert control, and
 24 force the offender to treat his problems, and thus protect the public. This was not done in this
 25
 26

DECLARATION OF W. STOUGH - Page 29 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-8500 • FACSIMILE (253) 820-8568

1 case. Unenforced, a known practicing alcoholic drunk-driver offender such as Kim who uses
 2 vehicles as weapons, will quickly hurt someone. This is the essence of foreseeability. Fife
 3 probation did neither the public or Kim any favors by its lackadaisical approach to probation.
 4 The end result was the death of Benskin and near death of several other innocent victims
 5 while Kim was on his usual and expectant (without close monitoring) drunken rampage.
 6

7 44. I have come to learn from my own research that Judge Ringus is on the Board
 8 for Judicial Administration's Public Trust and Confidence Committee whose mission is "To
 9 achieve the highest level of public trust in the judicial system....aimed at achieving Trust and
 10 confidence in the Courts." I find this case and the probationary services provided by Fife
 11 Probation highly disturbing in every way. Fife probation literally is the antithesis of a
 12 probation operation that would produce "the highest level of public trust in the judicial
 13 system." The fact that Fife Probation had and has no mission, goals and objectives, policies
 14 and procedures at the time of Kim's probation or presently. Not only would any probation
 15 officer be completely confused and aimless without polices and procedures, such carries over
 16 to the probationer, himself, Mr. Kim. It is quite apparent that Kim was left with the distinct
 17 impression no one was watching, so he continued to drink, drive, and be a danger to the
 18 public-resulting in a death and serious injuries.
 19

20 45. The probation officer knew of his dangerousness, his criminal history and
 21 should have known, for example, that his behavior at Progress House even was not as
 22 exemplary as erroneously indicated. Contrary to the rosy picture Fife presents, for example
 23 (page 8a in First Discovery) as "an uneventful completion of work release," by Kim, Kim was
 24 infracted on 9-8-02 for "Deviating from His Authorized Itinerary" on a social outing. He was
 25
 26

DECLARATION OF W. STOUGH - Page 30 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-8500 - FACSIMILE (253) 820-8565

1 supposed to be on a social outing with his wife as a sponsor and was actually elsewhere. (see
 2 9-8-02 incident report by Chas Stewart). While this is an incident where no one got hurt, a
 3 judge or trained probation officer could see such behavior correlates with Kim's ten year
 4 history of devious, scofflaw and dangerous behavior. Having managed work release facilities
 5 for years, this was the kind of behavior that should have had consequences and apparently did
 6 not.
 7

8 46. For a defendant such as Kim, the expectations of him by the Fife Probation
 9 Department consequently were non-existent and for the citizenry, virtually no standard of care
 10 existed in Kim's alleged supervision. This was true not just because of a purported language
 11 impediment of Kim, but because no one held him accountable or even made the conditions
 12 clear. With an offender who has a proven history of dangerous behavior, 5 DUIs and
 13 numerous vehicular arrests, and who is identified by the Probation Officer as "high risk to
 14 the community" (see Violation Report by Brooks-Bailey 3-14-03), his feet should have been
 15 be held to the fire- he should have been held accountable. A probationer such as Jong Kim
 16 must be made to understand what is expected and be held to strict compliance. Despite Fife
 17 Probation's present attempt to create a fiction that Jong Kim was not on active probation
 18 supervision, it is clear throughout the documents and testimony in this case that Jong Kim was
 19 on probation monitoring/supervision with Fife Probation, which was in the business of
 20 providing probationary services. For example:
 21

22
 23 a) Kim's Court Order stated he "Must report to Fife
 24 Municipal Court Probation within 5 working days to monitor
 25 compliance." Yet, SJ p 11-12, Judge Ringus indicated he did
 26 not expect him to report to probation until he had completed
 EHM. (p. 11-12 SJ). Which is it? You cannot have it both
 ways. This was both confusing and contradictory and the wrong

DECLARATION OF W. STOUGH - Page 31 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-8500 - FACSIMILE (253) 620-8588

1 way for someone to start off on probation. My experience over
 2 the years is that it is imperative that instructions given to
 probationers be clear and to the point, and then enforced.

3 b) Kim's Court Order directly indicates Kim will be
 4 monitored as to compliance with the number of conditions set in
 5 the Court order yet, as indicated above, Judge Ringus says "I
 6 did not impose any duty on me or my staff to investigate or
 7 monitor compliance." "I did not indicate Kim had to follow the
 8 probation department's rules and regulations." Yet on p. 1,
 9 lines 24-27 of the SJ, there is the statement "THE SENTENCE
 10 WAS HANDED DOWN BY JUDGE RINGUS OF THE FIFE
 MUNICIPAL COURT. THEREAFTER, THE CONDITONS
 OF THE SUSPENDED SENTENCE WERE MONITORED
 BY JUDGE RINGUS AND HIS STAFF." It is clearly
 demonstrable by this statement that Kim was to be
 monitored/supervised.

11 c) Fife's comments on SJ page 23, lines 1-6, discounting
 12 generally accepted requirements of monitoring, i.e., investigate,
 13 evaluate, do not hold water. Nor does D's attempted
 14 distinction, when there is no distinction, between supervision or
 15 formal supervision and monitoring. Ringus' attempts to make
 16 such fictitious distinctions are completely out of line with
 17 standard probation practices. Monitoring is supervision, and
 18 supervision is monitoring, as indicated earlier. Moreover,
 19 Ringus' argument of immunity due to the probation officer
 20 being an extension of the "arm of the court" carries no weight
 21 or exclusive distinction when compared to Seattle Municipal
 22 Probation and the other courts noted earlier in this report. All
 23 probation officers are an extension of or "arm of the court" by
 24 the very nature of the work.

25 d.) Kim's Probation Agreement (or at least the form used)
 26 states "The court will keep informed of your progress
 THROUGH YOUR PROBATION OFFICER." 11 conditions
 are listed. The document also says "If you fail to comply with
 the requirements, you can be returned to court at any time."

47. In light of these documents, and the practices of other probationary
 departments in Washington State and in other states, Fife's argument denying a "Take
 Charge" or probationary relationship with Jong Kim (see SJ p. 21, etc.) fails in its entirety.

DECLARATION OF W. STOUGH - Page 32 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 820-6500 • FACSIMILE (253) 820-6568

1 Fife Probation took charge of the offender immediately after his sentence was handed down
2 on July 30, 2002 and the probation officer indeed performed actions taking charge of Kim, as
3 shown in her "Chronological Notes" wherein Brooks-Bailey recorded on July 30, 2002 the
4 following:

5 Defendant in court this date, has 5 DUI on record and one
6 possession charge, assault, etc. 155 days of jail time suspended
7 with credit for 32 days served. Defendant will serve 178 days,
8 must be on EHM at own expense by 9-4-02 or progress house
9 by 8-30-02. License suspended for 3 years, must have ignition
interlock for 24 months upon reinstatement. Needs Korean
interpreter for probation. RBB (Rachel Brooks-Bailey).

10 48. Despite Fife's current stance, it was quite clear that the probation officer
11 clearly understood that she was to monitor Kim for compliance with his court ordered and
12 signed crime-related conditions and that Kim was on active Probation. She also understood
13 that she had to monitor/supervise Kim, enforcing the court conditions, and reporting
14 violations back to the Court. That is the way it is supposed to work.

15 49. I would note that Brooks-Bailey is represented as the one and only designated
16 Fife Municipal Court Probation Officer. There is no question whatsoever that her designation
17 is that of Probation Officer and Fife even presents her as such to the public on its website
18 (<http://cityoffife.org>). In deposition (p 45) Judge Ringus points out that Brooks-Bailey is not
19 a "probation clerk," she is a probation officer "as defined by my court." She was charged
20 with supervising Kim on probation as the following documents show:

21 a) The Court Order of 7-30-02 signed by Judge Ringus
22 states" YOU MUST REPORT TO THE FIFE MUNICIPAL
23 COURT PROBATION WITHIN 5 WORKING DAYS TO
24 MONITOR COMPLIANCE." Plain and simple, Kim is ordered
25 in writing to report to the probation office(r) to have his

1 probation supervised/monitored. The one and only probation
2 officer at that time was Brooks-Bailey.

3 b) In that same Court Order of 7-30-02 which orders Kim
4 to report to the probation office are the words "I understand that
5 if I fail to comply with all the conditions of this order or fail to
6 appear for any subsequent court hearings the court may issue a
7 warrant for my arrest and jail time may be imposed." The
8 reasonable and understandable inference is that the probation
9 office is the entity enforcing compliance.

10 c) On both 1-13-03 and 3-14-03 Probation Officer Bailey,
11 as the designated Fife Municipal Court Probation Officer, writes
12 violation reports indicating in one report that Kim is HIGH
13 RISK and has committed several violations and in the second
14 report charges him with being IN GROSS VIOLATION OF
15 HIS COURT ORDERED PROBATION. The 3-14-03
16 Violation report is captioned at the top as PROBATION
17 VIOLATION REPORT. She notes "Should Mr. Kim be found
18 guilty in Superior Court he will be removed from Fife
19 Municipal Court Probation." Also on the 1-13-03 Probation
20 Report, Brooks-Bailey states "Mr. Kim will remain on Formal
21 Probation until his case is closed."

22 d) Two Fife Municipal Court Probation Agreement forms
23 are in the file material. Although unsigned, they obviously
24 relate to Kim and state the following: "The Court will be kept
25 informed regarding your progress THROUGH YOUR
26 PROBATION OFFICER."

e) On a document titled - Notes- there are 10 chronological
or log entries by Brooks-Bailey relating to Kim. These have to
do with his probation supervision. For example on 10-15-02
she notes "Notice mailed for D for appointment in December,
will need to set up an interpreter." On 12-23-02 she notes her
one and only contact, a telephonic contact with Kim "Spoke
with D. on phone this date."

50. These notes, which in effect are similar to what are considered "chronological
notes" or entries, are standard in a probation operation, further evidence that Kim was
supposed to be monitored and supervised by Fife Probation. The concept of chronological
notes is referred to in Fife's probation department "draft documents" and has always been

DECLARATION OF W. STOUGH - Page 34 of 38
[1252959v7.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-8500 - FACSIMILE (253) 820-8585

1 considered an integral part of probation supervision. Unfortunately in the supervision of Kim,
 2 these notes, or chronological entries, depict probation monitoring/supervision of Kim that fell
 3 well below the field standard of care in Washington, especially highlighted by the fact that the
 4 Probation Officer's one and only brief contact during the supervision period was a phone
 5 conversation in which the probation officer did not attempt to learn whether Kim had been
 6 compliant with his conditions.
 7

8 51. Because Kim was not supervised and monitored in the community, he began
 9 violating his probation conditions everyday by drinking alcohol everyday, going on drinking
 10 binges, driving while drunk, taking illegal drugs, not attending any AA meetings and not
 11 attending any inpatient treatment substance abuse programs. Kim was never compliant with
 12 his probation from the date of his sentence to the date of his arrest for vehicular homicide and
 13 Fife Probation did nothing about it. Brooks-Bailey never did anything to find out about
 14 Kim's compliance with conditions and never took any affirmative action to monitor/supervise
 15 Kim. Brooks-Bailey also admitted under oath that Fife failed to discovery that Kim was
 16 consuming alcohol daily, failed to discovery that Kim was not complying with any alcohol
 17 abuse programs, that he was driving, that he was driving drunk or taking illegal drugs, etc.
 18 Most disturbing, Brooks-Bailey did not, in fact, implement, administer or enforce the terms
 19 and conditions of Kim's probation in any respect. Brooks-Bailey never met with Kim after he
 20 was sentenced to probation monitoring on July 30, 2002, never met with Kim prior to his
 21 Sentence to go over his probation conditions, and never met with or had any substantive
 22 conversations with Kim at all. Because Kim was not supervised, based on his history of
 23 alcohol abuse and based on his previous alcohol evaluations it is clear that Kim quickly
 24
 25
 26

DECLARATION OF W. STOUGH - Page 35 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 620-8500 - FACSIMILE (253) 620-8686

1 relapsed into his pattern of excessive alcohol use and alcohol dependence. Since Fife
 2 Probation did not do its job, Kim went from July 2002 through March 9, 2003 (date of these
 3 collisions), drinking at bars or otherwise consuming alcohol and driving. It is my opinion that
 4 Jong Kim' involvement in the March 9, 2003 collisions was based on Fife Probation's failure
 5 to supervise him for his alcohol abuse and previous dangerous behaviors.
 6

7 52. There was a severe dearth of supervision of Brooks-Bailey by her supervisors.
 8 Brooks-Bailey and Ringus both admit that Brooks-Bailey had no case audits and no
 9 evaluations. This is beyond comprehension, and goes along with management's inability to
 10 grasp the realities of *Hertog/Taggart*. Nobody was watching Brooks-Bailey, and no one was
 11 watching the dangerous offender, Kim, and it was more probable than not that Kim would
 12 create more victims. The "rubber never met the road."
 13

14 53. Fife probation never used a risk assessment form to assess the risk that Kim
 15 represented, which is inconsistent with every other Probation department in this State and
 16 inconsistent with ARLJ 11. It is standard today for all corrections departments that I am
 17 aware to use some form of risk or risk/needs assessment tool. Ultimately, there is no question
 18 that Kim was supposed to be closely monitored on probation supervision under Brooks-Bailey
 19 because he clearly represented a high risk of harm to the community due to his criminal,
 20 behavioral and substance abuse history. Brooks-Bailey idea of probation
 21 monitoring/supervision, especially in light of the fact that she had no policies or procedures to
 22 go by, was to essentially not supervise probationer Jong Kim at all. It is quite evident she did
 23 not have any formal training by Fife Probation, which was essential because she had never
 24
 25
 26

DECLARATION OF W. STOUGH - Page 36 of 38
 [1252959 v7.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM, P.L.L.C.
 1201 PACIFIC AVENUE, SUITE 2200
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 620-6500 - FACSIMILE (253) 620-6565

1 worked as a probation officer before. Judge Ringus did not give any guidance to Fife
2 Probation or any probation officer with regard to the provision of probationary services.

3 54. I find Fife Probation's monitoring/supervision of Jong Kim to fall well below
4 the standard of care in every way for the probation field, both in Washington State and
5 nationally, as expressed throughout this opinion. Fife Municipal Court Probation, contrary to
6 any of the numerous corrections systems I have reviewed, operated in a way that was a
7 mockery of the meaning and concept of probation and because of the way in which it was set
8 up it posed a serious and foreseeable danger to the public. That foreseeable danger was
9 actualized in the death of Heather Benskin by an unsupervised and dangerous five time DUI
10 offender Jong Kim.
11

12 55. Based on all of this evidence, my vast experience on these issues and my
13 detailed work up of this case, it is my professional opinion that there was a complete failure of
14 probation monitoring/supervision or attempt at supervision of Kim by Fife Probation. Kim
15 was a proven dangerous offender especially when he drank, and Fife Probation knew it. It
16 was expected that Kim would be monitored/supervised upon his sentence. He was not. Kim,
17 even with his alcohol-saturated mind, perceived no one was going to supervise him. He was
18 right.
19

20 56. Fife Municipal Court Probation's supervision of Jong Kim is what I consider
21 to be an extreme example of substandard probation monitoring/supervision and a disaster. In
22 my opinion, based upon 30+ years of corrections experience, it certainly was foreseeable that
23 this unsupervised, untreated alcoholic criminal would create new victims.
24
25
26

DECLARATION OF W. STOUGH - Page 37 of 38
[1252959 v7.doc]

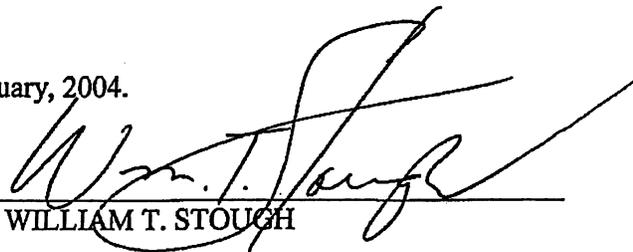
LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-6500 - FACSIMILE (253) 620-6505

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

57. It is my opinion that the Fife Probation Department's failure to properly monitor Jong Kim foreseeably and directly led to the collisions in this case.

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

DATED this 16 th day of February, 2004.


WILLIAM T. STOUGH



03-2-11971-2 20543835 AF 02-24-04

FILED
IN COUNTY CLERK'S OFFICE
A.M. FEB 23 2004 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

ROBIN AND SUSAN BENSKIN, individually,
and ROBIN BENSKIN, as the Personal
Representative for the ESTATE OF HEATHER
BENSKIN, JOSH MIHOK, TINA MARIE
GOODFELLOW AND ROBERTA EVANS,

NO. 03-2-11971-2

AFFIDAVIT OF MIN CHONG KIM

Plaintiffs,

vs.

CITY OF FIFE and JONG KIM and "JANE
DOE" KIM and the Marital Community
Composed Thereof,

Defendants.

I, MIN CHONG KIM, state the following is true and correct to the best of my
knowledge under the penalty of perjury:

1. I am making this affidavit of my own free will. I am over the age of 18 years
and competent to testify as a witness in this case.

2. I am married to Jong Hoon Kim. I am a Korean-American and my roommate
who is fluent in English, Christina Ladoux, assisted the entire time with interpretation services
in making this sworn affidavit.

AFF. OF MIN CHONG KIM - Page 1 of 4
[1254359 v05]

ORIGINAL

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-8500 - FACSIMILE (253) 820-6568

1 3. Jong Kim and I met in 1996 and were married on October 11, 1997. We lived
2 at 10714 17th Avenue S, #G, Tacoma, Washington. This was my second married and Jong's
3 first.

4 4. During my entire marriage with Jong Kim, including from July 30, 2002
5 through March 9, 2003, he had a severe drinking problem. I was unaware of his drinking
6 problem prior to our marriage and his family never informed me of his alcohol dependence.
7 During our entire marriage I observed Jong drinking alcohol in excess everyday that I saw
8 him, including during the time he was on probation from July 30, 2002 through March 9,
9 2003. He usually frequented Korean bars to drink alcohol and his favorite Korean bar was
10 named Coco and was located on South Tacoma Way in Tacoma, Washington.

11 5. During our entire marriage, which includes the months of August 2002
12 through March 9, 2003, he would regularly go on a one or two day drinking binges where he
13 would stay out drinking and not come home.

14 6. Jong's drinking problem caused a lot of problems in our marriage and was the
15 main source of marital strife. I had threatened to leave Jong on at least two occasions because
16 of his drinking. Finally, two days before the accident on March 9, 2003, I moved out from
17 our apartment because of Jong Kim's out of control, daily drinking and extreme alcoholism
18 and alcohol dependence.

19 7. Jong has been arrested at least five times for driving under the influence of
20 alcohol. He was on probation at the time of the accident with the City of Fife, but Jong
21 continued to drink and drive anyway on a regular basis. Jong knew his license was suspended
22 and that his probation rules stated that he was not supposed to drink alcohol or to drive, but he
23
24
25
26

AFF. OF MIN CHONG KIM - Page 2 of 4
[1254350 v05]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
1201 PACIFIC AVENUE, SUITE 2200
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6566

2098

Appendix F.

1 knew that no one from the City of Fife was enforcing those conditions so he drank alcohol
2 everyday that I observed him and he drove on a regular basis while he was on probation.
3 Based on my conversations with Jong and knowledge from living with him, no one from the
4 City of Fife monitored his probation and no probation officer ever came to the house to check
5 on Jong or called the house to check on Jong. Jong never met with any probation officer
6 during his probation with the City of Fife. Jong just continued to drink alcohol uncontrollably
7 and drive until the accident on March 9, 2003.
8

9 8. From August, 2002 through March 9, 2003, Jong did not attend any alcohol
10 counseling classes and was not involved in any alcohol treatment programs.

11 9. While on probation with the City of Fife, from August of 2002 through March
12 9, 2003, I also observed Jong use illegal drugs. On one night in particular, when Jong drove
13 home intoxicated and thought I was asleep, I observed Jong sniffing some white powder
14 cocaine.
15

16 10. Jong had a bad temper when he was drinking. He was like a "crazy man" when
17 he was drunk and I was afraid of him because his drinking was out of control near the time of
18 the March 9, 2003 accident, which is why I ultimately decided to leave him.

19 //

20 //

21 //

22 //

23 //

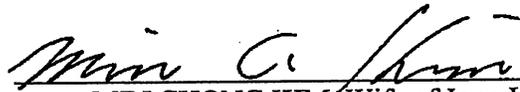
24 //

25 //

26 //

1
2 I MAKE THIS AFFIDAVIT UNDER PENALTY OF PURJURY UNDER THE
3 LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND
4 CORRECT.

5 Signed this 25 day of January, 2004, in Pierce County, Tacoma, Washington.

6
7
8 
9 MIN CHONG KIM, Wife of Jong H. Kim

10
11 STATE OF WASHINGTON
12 COUNTY OF PIERCE, to-wit:

13 I, a Notary Public in and for the above-named State and County, do certify that MIN
14 CHONG KIM signed this document after reviewing it carefully with an interpreter, Christina
15 Ladoux, of her own free will.
16

17 Dated 25 day of January, 2004 in Pierce County, Washington




Notary Signature
Notary Name: CAROLINE MERRYWEATHER
Residing in: PIERCE COUNTY
Commission Expires: May 13, 2006

46.65.070 Period during which habitual offender not to be issued license.

No license to operate motor vehicles in Washington shall be issued to an habitual offender (1) for a period of seven years from the date of the license revocation except as provided in RCW 46.65.080, and (2) until the privilege of such person to operate a motor vehicle in this state has been restored by the department of licensing as provided in this chapter.