

COURT OF APPEALS
DIVISION II

NO. 37401-3-II

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

STATE OF WASHINGTON
BY JW
DEPUTY

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.

REPLY BRIEF

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INTRODUCTION

The City's response is a remarkable exercise in evasion and maneuver. Rather than respond directly to the Benskins' arguments, the City recasts their arguments and discusses facts of no relevance here. This Court will study the record and recognize the City's claims for what they are.

A trial is plainly necessary here, as this Court held in rejecting Fife's prior summary judgment motions. This Court could not have meant that even though Fife breached its duty to supervise, nonetheless the Benskins have no legal recourse because Fife's negligence did not cause the Benskins any harm. Heather is dead because Fife failed to supervise Kim.

Many cases have held that where, as here, a defendant obviously breaches its duty to supervise an offender who then kills someone, causation is not too remote for liability to attach. The same is true here. The Benskins deserve a fair opportunity to prove their case. This Court should reverse and remand for trial.

REPLY RESTATEMENT OF THE CASE

As noted, Fife badly mischaracterizes the Benskins' arguments. For instance, Fife argues that in "Plaintiffs' first proximate cause argument, they argued that 'Fife Judge Ringus should have jailed Kim for the entire sentence . . .'" BR 3 (citing CP 128). But CP 128 is in the midst of the Benskins' statement of *facts* in the trial court. The same is true for the other portion that Fife quotes at CP 130-31. *Id.* The Benskins' *argument* does not begin until CP 136. As was repeatedly stated in the opening brief, these were not arguments, but rather factual assertions. It is misstatements like these by the City that led Judge Serko into error.

A second example is the City's assertion at BR 4 that "plaintiffs' second theory is that Judge Allen would have revoked Kim's suspended sentence if the probation violation hearing had been held on February 12, 2003." BR 4 (CP 145). This was not the Benskins' "second theory." Rather, their *first* legal theory begins on CP 136, in which they argued that because the original summary-judgment judge (Judge Culpepper) declined to strike any of the Benskins' expert testimony, and because this Court affirmed that ruling in its prior opinion, the City's arguments that Mr. Stough's declaration is not admissible are unavailing. CP 137-38.

The Benskins' *second* legal theory was that their expert Dan Hall is qualified to give opinions based on his nearly 30 years working as a community corrections supervisor and probation and parole officer. CP 138-41. His opinions – which Judge Serko did not strike – raise genuine issues of material fact on causation. *Id.*

The Benskins' *third* legal theory was that the City was in error in relying upon *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311 (9th Cir. 1995) because the Washington Supreme Court rejected *Daubert*, in favor of *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923), in *State v. Copeland*, 130 Wn.2d 244, 260-61, 922 P.2d 1304 (1996). CP 141-42.

The Benskins' *fourth* and final legal theory was that they had submitted overwhelming causation evidence and that the Washington Supreme Court has repeatedly concluded that causation in negligent supervision cases is a question for the jury. CP 142-46 (citing *Bell v. State*, 147 Wn.2d 166, 52 P.3d 503 (2002); *Tyner v. DSHS*, 141 Wn.2d 68, 1 P.3d 1148 (2000); and *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992)). CP 142. The Benskins also pointed out that only “in extremely rare cases can the foreseeability determination [within the causation issue] be taken away from the jury and decided as a matter of law.” CP 143.

The Benskins went on to discuss the many facts in the record raising an issue of fact on causation. CP 143-45. For instance, although Kim's probation conditions forbade him from consuming alcohol and required him to obtain treatment and not to drive after consuming non-prescription drugs and alcohol, he violated those conditions virtually every day of his so-called probation. CP 143. Had Fife adequately and properly supervised, Kim would have responded as he previously did and lived within the conditions. *Id.* But Fife failed to supervise him or to notify him of the hearing, which caused the hearing judge to withdraw her bench warrant, leading to Heather Benskin's death. CP 128, 143-44.

The Benskins went on in this vein to describe Fife's myriad failures to monitor, control or supervise Kim, including its so-called probation officer's failures to do anything to monitor Kim or bring him into compliance. CP 144. Finally, the Benskins distinguished ***Estate of Bordon v. DOC***, 122 Wn. App. 227, 95 P.3d 764 (2004), *rev. denied*, 154 Wn.2d 1003 (2005), and ***Hungerford v. State DOC***, 135 Wn. App. 240, 139 P.3d 1131 (2006), *rev. denied*, 160 Wn.2d 1013 (2007). CP 145-46.

As the Court can see by reading the record, ***none*** of the Benskins' arguments were as Fife characterizes them on page 9 of

its brief. Fife goes on from there through to page 14 of its brief stating the facts in the light most favorable to itself. While a jury might accept Fife's version of the facts, it is not likely to do so, and that is up to the jury in any event. This Court must take the facts in the light most favorable to the Benskins. As a result, this Court should disregard Fife's misleading statements.

REPLY RE ARGUMENT

Like its statement of facts, Fife's argument is merely an exercise in restating the Benskins' arguments as something they are not. The ancient stratagem of constructing a straw man to attack has not improved with age or repetition. The Court should focus on the arguments that the Benskins actually raised, reverse, and remand for a trial.

A. Review is *de novo*.

The Benskins' first argument was that this Court's review is *de novo*. BA 8. Fife has no response. Review is *de novo*.

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

The Benskins' second argument was that numerous genuine issues of material fact preclude summary judgment on causation because the jury could reasonably find that if Fife had not breached

its duties, Kim would have been in jail or at least would not have been reoffending when he killed Heather Benskin. BA 8-19. Causation is a question of fact, both normally and here.

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

Specifically, the Benskins noted the enormous amount of precedent supporting their causation arguments. BA 8-15 (citing *Taggart/Sandau, supra*; *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999); *Bishop v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999); *Tyner, supra*; *Bell, supra*; *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985)). The Benskins also discussed the Supreme Court's controlling decision in *Joyce v. DOC*, 155 Wn.2d 306, 119 P.3d 825 (2005). BA 15-19.

Fife finally responds to this massive amount of precedent at pages 31 and 32 of its 34-page brief. It misstates the cases, attempts to distinguish them on irrelevant grounds, and is generally evasive. As stated in the opening brief, this line of cases states unequivocally that causation is a question of fact for the jury in negligent supervision cases like this. Those decisions are controlling here.

2. *Joyce* – which Fife largely ignores – is controlling here.

Most tellingly, Fife largely ignores the Washington Supreme Court's decision in *Joyce*. The Supreme Court largely affirmed this Court's decision in *Joyce v. DOC*, 116 Wn. App. 569, 75 P.3d 548 (2003), *aff'd in part, rev'd in part*, 155 Wn.2d 306 (2005). Its decision finding causation is controlling here. BA 15-19.

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

The Benskins next explained why Kim would have been in jail rather than killing Heather Benskin if Fife had not breached its duty to supervise. BA 19-28. The Supreme Court's *Joyce* decision plainly supersedes *Bordon* and *Hungerford*, but the Benskins also distinguished those cases. BA 20-28. Finally, even Fife's misreadings of those cases go to solely the weight of the evidence and no expert testimony is necessary to establish that Kim was violating his probation every day, so causation is not too remote. BA 26-28; *accord*, *Hertog*, 138 Wn.2d at 284.

As in the trial court, practically all of Fife's briefing is focused on *Bordon* and *Hungerford*. See BR i, 8, 11, 19, 22-29, 32. It serves no purpose to again rehash the reasons that those cases are distinguishable and *Joyce* is controlling. The Court will read the cases and see the truth.

- D. **The Benskins are not required to prove that supervision generally reduces recidivism, but they presented substantial causation evidence that supervision would have stopped *Kim* from reoffending.**

The Benskins next explained that under the evidence, when Kim was closely monitored in the past, he did well and had a much lower likelihood of reoffense, had the least amount of driving infractions and no driving under the influence charges, and even maintained his sobriety. BA 28-33. Unlike the plaintiff in *Hungerford*, the Benskins have never argued that Fife had to rehabilitate Kim, only that Fife had to supervise him. This Court has already found that Fife had that duty and that sufficient evidence showed its breach of that duty to carry this case to a jury. Fife's argument is simply that even though there is a duty and a breach, there is no remedy. This the Court should reject.

Fife's only response to the Benskins' real arguments is to mischaracterize them by taking them wholly out of context and misstating them. See, e.g., BR 9-14. Fife's repetition of its inaccurate statements does not increase their accuracy. The Court should reverse and remand for trial.

E. As a factual matter, Judge Ringus improperly suspended Kim's sentence, knowing full well that Fife's probation was a fraud, but the Benskins' actual argument is that Fife's negligent failure to supervise Kim caused Heather Benskin's tragic death.

The Benskins' final argument was that, *as a factual matter*, Judge Ringus knew that "Fife Probation' was meaningless, so he should have incarcerated Kim for his full 365-day sentence," but be that as it may, Fife's negligent supervision caused Heather's death. BA 33-35. Fife's response continues its misdirected attack, again claiming that the Benskins argued that "Fife Judge Ringus should have jailed Kim for the entire sentence . . ." BR 33 (again citing the fact section in the Benskins' response to summary judgment at CP 128). This is simply not true.

This Court has already determined that Fife is not entitled to judicial immunity. Yet Fife continues to assert judicial immunity for its decisions to perpetrate its "Fife Probation" fraud on the people of Washington. Since Fife is not judicially immune as a matter of law, a jury may reasonably hold Fife responsible for its negligence. This Court should reverse and remand to permit a jury to make that determination.

F. Fife's new arguments on appeal are neither preserved nor relevant.

The bulk of Fife's response brief is an exercise in irrelevancy. See BR 14-31. It simply does not matter what other ways the Benskins may or may not have been able to prove Fife's negligence. Certainly, there are many cases in which plaintiffs might use many different kinds of evidence to prove their claims, but their counsel's job is to make choices based on the existing evidence. Here, the strongest evidence is that (a) Fife provided absolutely no supervision for Kim, (b) when Kim was supervised he did not reoffend, and (c) Fife's breaches of its duty to supervise Kim thus are not too remote to attach liability to Fife under a long line of controlling cases. That is a decision for a jury to make. This Court should reverse and remand for trial.

Fife also makes a very vague allusion to some unspecified aspect of some unidentified constitution. BR 29-31. This boils down to repeating Fife's false claim that the Benskins are arguing about whether supervision generally reduces a recidivism. Again, the Benskins' claim is that real supervision would have reduced *this* offender's likelihood of reoffense to practically zero. But in any event, the Benskins did put on evidence contradicting Fife's

evidence on the recidivism issue in response to Judge Serko's erroneous ruling. See BA 32-33. Again, this merely creates questions of fact.

Moreover, this Court will not consider new arguments raised for the first time on appeal when reviewing a summary judgment. See RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court"). Since a great deal of what Fife argues in its responsive brief was not raised before Judge Serko, this Court should not consider it.

CONCLUSION

The most essential gift for a writer is a built-in, shock-proof
**** detector.

Hemingway (quoted in *The Paris Review*, Spring 1958)

Let the punishment fit the crime.

Cicero (*De Legibus* bk. 3, ch. 20)

[The U.S. will fall] like an over-ripe fruit into our hands.

"*Lenin*" (no respectable source will confirm this – or the Lenin "quote" in the respondent's brief – as genuine; see the first quote above).

For the reasons stated above, this Court should reverse and remand for trial.

DATED this 20th day of November, 2008.

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Court of Appeals
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