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NO. 41576-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARILYN R. GUNTHER, Appellant,

v.

WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, Respondent

OPENING BRIEF OF APPELLANT

Marilyn R. Gunther, Appellant
and Attorney for Appellant
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WSBA #27797

11/27/11

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I. ASSIGNMENTS OF ERROR

The trial court erred in granting summary judgment and dismissing Appellant's complaint.

Appellant assigns error to the trial court's findings that the State was not negligent and the Appellant's acts were the sole cause of her accident. The findings are set out in full in the argument

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the Appellant's evidence, taken most favorably to Appellant as the non-moving party, raised genuine issues of material fact regarding the elements of parties' negligence, cause, proximate cause, and damages?

Was Appellant entitled to have those elements decided by a jury?

Did the trial court err in finding that the State was not negligent as a matter of law?

Did the trial court err in finding that Appellant assumed the risk of taking a drop-curb ramp to the sidewalk when the bicycle lane ended and the portion of the road that was previously the bicycle lane immediately transferred to a right turn only motor vehicle traffic lane with no warning to yield to bicycles, no warning that bicycles might be on that portion of the roadway, no warning that the drop-curb driveway was not safe for ordinary bicycle transition to the sidewalk?

Was the court's order dismissing the case on the basis that Appellant assumed the risk erroneous as a matter of law?

Did the court err in dismissing Appellant's complaint?

Did the court err in hearing the motion for summary judgment in Appellant's absence when the matter had been special set to a later time?

Was Appellant denied due process because of the early hearing?

III. STATEMENT OF FACTS

Description of the accident locale:

The accident subject of this appeal occurred in Port Townsend, Jefferson County, Washington, approximately one-tenth of a mile southwest of the ferry dock. CP 70. State Route 20 (SR 20) traverses through the city and at the site of the accident ran northeast/southwest. CP 118. At that point, and for several miles preceding that point, SR 20 is sufficiently wide for two lanes of motor vehicle traffic each way. CP 120-124, 63-66. However, SR 20 was reduced to one lane each way for motor vehicles and the outside lane in each direction was paint-striped for bicycle traffic. Id. Just southwest on SR 20 before the scene of the accident, the painted bicycle lane angled to the curb and stopped and right where it stopped, painted dash lines indicated a second motor vehicle lane. CP 120, 64-66. No signs were posted where the painted bicycle lane ended and vehicular traffic began that

instructed either vehicle drivers or bicycle riders what action to take. CP 133(H-5-c), 63-65.¹

The surface of the asphalt roadway was crowned from the curb to the middle of the road, obscuring any accurate estimate of how far above the roadway the top of the curb or drop-curb was. The curb itself appeared to be a standard four and one-half inches from roadway to top, but actually was over six inches high just before the recess drop-curb at the scene of the accident. CP 134. The drop-curb differential appeared to be approximately one inch from roadway to top but was actually over two and one-half inches from roadway to top. CP 135.

From the sign stating that the bicycle lane was ending, approximately a thousand feet before the scene of the accident, the sidewalk curb was interrupted only four times, once just after the sign for a building driveway (CP 122), a second time for a roadway (CP 124), a third time for another roadway just before a restaurant (CP 61-62), and fourth, the access road behind the restaurant. CP 63,130(H-2). Until the fourth curb interruption, the sidewalk was considerably narrower than at the scene of the accident. CP

¹ Two signs were posted; one was white-on-green that showed a ferry symbol, the second one was red-on-white that said 'no parking anytime.'

122,124. Vegetation also overgrew onto the sidewalk, making it appear too narrow for safe bicycle riding. CP 61-65, 130. Just after the third curb interruption the vegetation continued approximately sixty feet and then was cleared; a metal rod fence was erected. CP 64-66. That metal fence ran on the land side of the sidewalk uninterrupted from where the bicycle lane began the taper to the curb all the way to the entrance to the ferry dock.

There was no apparent reason for the drop curb where the accident occurred other than to permit bicyclists access to the sidewalk since the sidewalk itself was recessed with yellow painted lines marking that recess, there was no driveway, and no motor vehicle could go anywhere if it turned there due to the fence obstructing any passageway. CP 66-67.

Description of the accident:

On July 24, 2006, while sightseeing, Appellant had been riding her bicycle with a companion at Fort Casey. (Collectively Appellant.) CP 10-11,101-02,112. Shortly after noon, they took their bicycles on the ferry from Fort Casey to Port Townsend to look over the waterfront and vacation facilities there. CP 112.

After sightseeing along the entire waterfront, both northeast and southwest of the ferry dock, Appellant began the return to the ferry dock. CP 112-13. Approximately a thousand feet before the ferry dock and where the

ferry dock was not visible, Appellant observed the sign, although partially obstructed by foliage, that stated "[bicycle symbol] lane ends." CP 113,122. She began looking for a safe way to exit the roadway to the sidewalk. CP 113-14. However, approximately another sixty feet ahead was another sign, black on yellow, that said bikes were on the road. CP 113,122,124. The painted bicycle lane continued uninterrupted. CP 113,124,61,63-65. Appellant continued in the painted bicycle lane. Id.

At the roadway to the restaurant parking lot, Appellant observed the driveway, the ramp to the sidewalk, but also observed a tree at the side of the restaurant that partially blocked the sidewalk. CP 61-62. The painted bicycle lane continued and Appellant stayed in that lane of the roadway.

At the access lane behind the restaurant, Appellant was faced with broken concrete, rocks, holes, and other unsafe conditions for utilizing that curb interruption to access the sidewalk. CP 114. Appellant continued on in the painted bicycle lane looking for a method to exit the roadway. Id. There was no other curb interruption to permit her to do so until the painted bicycle lane tapered to the curb, the motor vehicle lane commenced, a large sign was painted on the roadway with a right turn arrow and the word "ONLY." Id. Cars were pulling into that new right lane that replaced the bicycle lane and appeared to be oblivious to bicycles therein. Id. Appellant looked for signs

to give her direction but there were none. CP 114-15.

The curb interruption was within twenty feet of the end of the bicycle lane and appeared safe. CP 114-15,66-67,131. In the split second she had to make a decision, Appellant observed her companion, who was in front of her, take the curb and keep going. CP 114. She also did observe that there appeared to be a slight differential that she would have to 'jump' but it appeared to be no more than one inch and she had jumped a one inch-plus curb earlier in the day when she was in the downtown area of Port Townsend to the northeast of the ferry dock. CP 114,132.

As Appellant 'jumped' the drop-curb differential to SR 20, she felt her front wheel catch the curb and follow it to the left. CP 115. Her forward momentum carried her to the right on to the sidewalk. Id.

Appellant was seriously injured. She had difficulty breathing, had remnants of broken teeth in her mouth, was bleeding, and could not push herself up with her left hand/arm. Appellant's companion stopped and returned to Appellant to assess the damage. He then called 911 and the police and the paramedics came to provide aid. CP 133.

Appellant suffered serious and life-threatening injuries, including a lacerated liver and kidney, smashed/broken left hand and arm, severely lacerated right hand and little finger, multiple lacerations and bruises to her

arms, legs, face, and torso, three broken teeth, and other miscellaneous injuries. CP 4. She was taken to the hospital in Port Townsend where tests were run. Due to the lacerated liver and kidney, she was placed on a helicopter transport to Harborview Hospital. Id. Some of Appellant's injuries are permanent. Id.

After investigation, Appellant duly filed a tort claim with both the State of Washington and Jefferson County. The City of Port Townsend, being less than 22,500 population at the time, had no responsibility for the condition of SR 20 or the curb area thereon. CP 229-43.

After 60 days elapsed with no favorable response, Appellant filed and served her complaint with summons to recover damages for her personal injuries. CP 1-5. Appellant's complaint sought compensation for injuries, pain and suffering past and future, loss of work and ability to work, medical and dental expenses past and future, costs of suit, and such other and further relief as may be just. Id. Appellant signed the complaint and swore to the facts set out in it under penalty of perjury, making the complaint itself a factual declaration.

The State appeared and answered the complaint. CP 6-9. The State admitted proper jurisdiction, venue, and that Appellant duly filed a tort claim with the State. CP 6-7. Otherwise the State denied explicitly or on

information and belief the allegations of the complaint. Id. The State did plead affirmative defenses: denied proximate cause, alleged contributory fault of Appellant, that the State acted in reasonable exercise of judgment and discretion such that any alleged negligence was neither tortious or actionable, stated Appellant failed to mitigate, and that damages/injuries may have been proximately caused by the City of Port Townsend. CP 6-8. The State asked for dismissal of the complaint, costs, and reasonable attorneys' fees. CP 8.

Some discovery was engaged in, including depositions of Appellant and the companion she was riding bicycles with, requests for medical records, and interrogatories to Appellant. On August 17, 2010, the State filed its motion for summary judgment. CP 10-18. That motion was accompanied by a declaration of Assistant Attorney General (AAG) Kenneth Orcutt, the State's attorney. CP 19-60. The motion for summary judgment was also supported by a declaration of William Riley. CP 70-73. Mr. Riley stated he was formerly employed as an Olympic Region, Area 3, Maintenance and Operations Superintendent with the Washington State Department of Transportation. Id. Mr. Riley provided a description of the area where the accident subject of this lawsuit occurred, with a photograph. Id.

The State's motion for summary judgment was based on the allegation that Appellant assumed the risk of riding her bicycle on SR 20 in the City of Port Townsend and exiting to the sidewalk at an "open and obvious" dangerous site.

Appellant duly filed her response to the Motion for Summary Judgment with attachments that included her detailed declaration and exhibits. CP 100-11,112-244. In her response, Appellant requested a three month CR 56(f) continuance to permit additional discovery. CP 100,103.

The hearing was scheduled for September 17, 2010. CP 74-75. At the hearing on September 17, 2010, visiting Judge Kenneth Williams granted a six week continuance to November 5, 2010 (9/17 RP 2-9), and special set the hearing for 2:00 p.m. CP 245.

At the hearing on November 5, 2010, Judge Craddock Verser called the case at 1:00 p.m., and discovered the Appellant was not present. 11/5 RP 2-3. Judge Verser allowed an additional ten minutes for Appellant to arrive and when she did not, heard the case in her absence, granted the State's motion for summary judgment, and dismissed Appellant's complaint. 11/5 RP 4-5. Neither Judge Verser nor the appearing Assistant Attorney General were present at the September 17, 2010 hearing when the visiting judge special set the matter for a later time; that special setting was not captured on

the record but was noted on the minute entry. 9/17 RP 1, 11/5 RP 1; CP 245.²

Appellant timely appealed. CP 253-56.

IV. SUMMARY OF ARGUMENT

The state admits that it owed a duty to Appellant who was riding her bicycle on a State Highway in a city of less than 22,500 population. CP Where the State owed a duty to Appellant, 'assumption of risk' is not a viable defense because (1) there was not a contractual relationship between Appellant and the State, (2) the nature and extent of the State's duty to Appellant is a jury question, (3) whether the State breached its duty to Appellant is a genuine factual issue.

The 'assumption of risk' affirmative defense to that duty is actually a form of contributory negligence which has been changed by the legislature to comparative fault. RCW 4.22.020. Comparative fault is also a jury question because unless it is absolute as a matter of law, it is a question for the jury as to "how much" contributory fault is attributable to the Appellant. One-hundred percent is the only percentage that would relieve the State of

² Plaintiff arrived at the court a few minutes past 1:30 p.m. for the 2:00 p.m. hearing. The proceedings were over and opposing counsel had departed.

liability and that generally cannot be decided as a matter of law but must be scrutinized under the totality of the existing circumstances at the time of the accident - a scrutiny that is a factual issue for the jury. RCW 4.22.070.

In this case, questions for the jury include: Did the State create a hazardous condition at an obvious ramp site from the highway to the sidewalk? Was the State mandated by the MUTCD to either repair the drop-curb so that it was safe or post a sign that it was not safe? Was the State mandated to post a sign to motor vehicles to 'yield to bicycles' who chose to remain on the roadway? Should the State have placed a bicycle symbol sign on the pavement of the newly established second lane for motor vehicles now that the painted bicycle lane had ended? Was Appellant faced with an emergency situation not of her own making with vehicles moving into her lane without restriction, a dip in the pavement surface that obscured the visual of the excessive differential between highway surface and drop-curb to sidewalk? Did the paving of the highway surface negligently and unreasonably increase the road/drop-curb differential and create a drop-curb that was more than double the allowable height differential? If so, there are genuine factual issues for the jury and summary judgment is improper.

V. ARGUMENT

Standard of Review:

An order granting summary judgment is reviewed de novo. The reviewing court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The appellate court examines the pleadings, affidavits, and depositions before the trial court and 'takes the position of the trial court and assumes facts, as well as all reasonable inferences, most favorably to the nonmoving party. *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)). Appellant herein is the nonmoving party. Thus, all facts and reasonable inferences must be viewed in the light most favorable to her. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 487, 834 P.2d 6 (1992). Summary judgment is proper if the record before the trial court establishes 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' CR 56(c). If reasonable minds can differ, the question of fact is one for the trier of fact, and summary judgment is not appropriate. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)(citing *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975)). In tort actions, issues of negligence and causation are questions of fact not usually susceptible to summary judgment. *Id.* Whether a condition is inherently dangerous or misleading is generally a question of fact. *Owen v. Burlington Northern and*

Santa Fe Railroad Company, 153 Wn.2d 780, 108 P.3d 1220 (2005), (citing *Leber v. King County*, 69 Wash. 134, 124 Pac. 397 (1912) and other cases).

Basis of lawsuit:

The elements in this negligence lawsuit are duty, breach of duty, proximate cause, and damages.

The State owed a duty to Appellant:

It is undisputed that Appellant was riding her bicycle in the painted bicycle lane on SR 20 through the City of Port Townsend on July 24, 2006. The State does not deny that it created the bicycle lane, painted the stripe to delineate it from the lanes for motor vehicles, and thus invited Appellant to utilize that bicycle lane for her transportation.

The State is the agency assigned the duty to create the highways of this State. The state's duty is to exercise reasonable care in creating and maintaining its roadways in a condition that is reasonably safe for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845, 851-52 (2002). The State is also responsible to create and maintain the curbs adjacent to the state highways. Chapter 47.24 RCW, WAC 468-18-050, CP 234.

Approximately 150 feet southwest of the ferry terminal on northeast bound SR 20, the State created hazardous conditions for bicycles:

- The painted bicycle lane tapered to the curb and ended with no where for bicycles to go except into motorized traffic or onto the sidewalk;
- At that point the previous one-lane for motor vehicles northeast bound, SR 20 was re-marked for two-lanes of motor vehicle traffic;
- The previously existing uninterrupted curb that had no access for bicycles to exit the road to the sidewalk tapered down four inches to what is known as a drop-curb, appearing as a ramp to the sidewalk right where the bicycle lane ends;
- The highway asphalt paving is convex across the highway, creating a two and one-half inch differential between the top of the asphalt where it meets the drop-curb;
- The convex nature of the paving obscures the true differential until within one to three feet of the drop-curb;
- No sign was posted within 600 feet that the painted bicycle lane was actually ending;
- No sign was posted advising bicyclists that two motor vehicle lanes traffic started right at the point the painted bicycle lane ended.
- No sign was posted that gave any instruction to bicyclists what course was safe to take, merge with motor vehicle traffic or exit to the sidewalk;
- No sign was posted to motor vehicles that bicycles would or could be in their new lane of travel;
- No sign was posted to motor vehicles that they had to yield to bicycles.

When Appellant approached the end of the bicycle lane, she observed motor vehicle traffic hurrying to the ferry rapidly moving into the newly created second lane, which was marked as a right turn only lane.

Under those circumstances, Appellant alleged that she was faced with an emergency with no instructional or informational signs posted by the State. Should she stay on the roadway and place herself in extreme jeopardy from motorized traffic where the right turn lane left no room for bicycles? Should she exit to the sidewalk at the drop-curb that appeared from her viewpoint to have an approximate one-inch differential from the pavement? NEITHER!

Appellant demonstrated to the trial court that the State did not follow the adopted Manual of Uniform Traffic Control Devices (MUTCD). RCW 47.36.020; WAC 468-95-010. The trial court record included pertinent parts of the MUTCD, including the preamble that set out identification of the four categories of applicability of directions contained therein.

"Standard" is identified as:

--a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device. All standards are labeled, and the text appears in bold type. The verb shall is typically used. Standards are sometimes modified by Options.

CP 150.

"Guidance" is identified as:

--a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate. All Guidance statements are labeled, and the text appears in unbold type. The verb should is typically used. Guidance statements are sometimes modified by Options.

CP 152.

"Option" is identified as:

--a statement of practice that is a permissive condition and carries no requirement or recommendation. Options may contain allowable modifications to a Standard or Guidance. All Option statements are labeled, and the text appears in unbold type. The verb may is typically used.

CP 152.

"Support" is identified as:

--an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition. Support statements are labeled, and the text appears in unbold type. The verbs shall, should, and may are not used in Support statements.

CP 152.

MUTCD 2003 Edition - Revision 2, page I-1, I-3.

Part 9 of the MUTCD is entitled Traffic Controls for Bicycle Facilities. CP 178-208.

The State is mandated by the MUTCD to post signs on state highways in situations where the traveling public must have guidance. In this case, the roadway marking configuration itself was improper and the required signs were non-existent. According to the MUTCD, a right-turn-only motor traffic lane must not be on the left side of a bicycle lane:

MUTCD Section 9C.04 "Standard . . . A through bicycle lane shall not be positioned to the right of a right turn only lane."

CP 201.

Likewise, the MUTCD gave the State guidance about positioning of signs in situations similar to what faced Appellant in this case.

MUTCD Section 9C.04 "Guidance: When the right through lane is

dropped to become a right turn only lane the bicycle lane markings should stop at least 100 feet before the beginning of the right turn lane. Through bicycle lane markings should resume to the left of the right turn only lane."

CP 201.

In this case, the lane change markings were placed simultaneously. The bicycle lane end was not 100 feet in advance, no signs were posted, and no re-direction markings were placed to direct through bicycle traffic to the left of the right turn only lane. CP 120,133. The State failed to follow the MUTCD, and particularly where the State had created a drop-curb that was dangerous but not discernable until right at it, and it invited bicyclists to move from the roadway to the sidewalk to avoid the problem bicyclists faced when their painted lane ended.

In the case of *Owen v. Burlington Northern and Santa Fe Railroad Company*, 153 Wn.2d 780, 108 P.3d 1220 (2005) our Supreme Court stated:

The Court of Appeals quickly and appropriately disposed of Tukwila's primary argument that it did not owe any duty to the Nelsons. *Owen v. Burlington N. Santa Fe R.R., Inc.*, 114 Wn. App. 227, 232-33, 56 P.3d 1006 (2002). After noting that a municipality's duty to maintain its roadways reasonably safe for ordinary travel is owed to all persons, whether fault-free or negligent, *id.* (quoting *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)), the appellate court held evidence of the Nelsons' negligence does not 'excuse the City from its duty' and does not 'justify the order of dismissal.' *Owen*, 114 Wn.App. at 233. The Court of Appeals also reasoned that the MUTCD [footnote omitted] imposed duties upon Tukwila, *Owen*, 114 Wn. App. at 234-35, and held that Owen had raised an issue of material fact with respect to Tukwila's duty under the MUTCD, reasoning that 'a reasonable jury could conclude {based upon the evidence in the record} that unusual circumstances

were present at the crossing, requiring more than normal signage and warnings to prevent motorists from being trapped in the path of an approaching train.' Id. at 238. Accordingly, the order dismissing Owen's claims against Tukwila was reversed. Id. at 242. *Owen*, 153 Wn.2d.

In addition to the mandate to follow the MUTCD, the State is required to act reasonably. The State failed to do so. In *Kitt v. Yakima County*, 93 Wn.2d 670, 611 P.2d 1234 (1980), our Supreme Court cited *Schneider v. Yakima County*, 65 Wn.2d 352, 397 P.2d 411 (1964) that found the County negligent as a matter of law for its failure to conform to the uniform state standards [of the MUTCD]. Appellant in *Kitt* prevailed at trial on that basis but was reversed by the Court of Appeals. Our Supreme Court reinstated the verdict stating, "The Court of Appeals erroneously interpreted the guidelines for use of the crossroad sign to allow use of the sign in circumstances other than those for which it is specifically prescribed."

Assumption of Risk is for the jury:

In the case here for review, the defendant's answer claimed contributory fault of Appellant pursuant to Chapter 4.22.RCW. CP 7. No mention is made in defendant's answer of "assumption of risk."

Assumption of risk takes four related but different approaches, (1) express assumption of risk; (2) implied primary assumption of risk; (3) implied reasonable assumption of risk; and (4) implied unreasonable

assumption of risk. *Alston v. Blythe*, 88 Wn.App. 26, 32, 943 P.2d 692 (1997); *Gregoire v. City of Oak Harbor*, Docket No. 81253-5 Supreme Court of Washington, slip op. 9-10 (copy attached).

The defendant's motion for summary judgment herein does not allege that Appellant expressly consented to relieve defendant of its duty so (1) does not apply. The general rule is that (2), (3), and (4) are questions for the jury unless reasonable minds cannot differ. In particular, (3) and (4) are classified as a form of contributory negligence governed by the statute on comparative negligence, chapter 4.22 RCW. *Gregoire v. City of Oak Harbor*, sl.op.pg.10; *Alston*, 88 Wn.App. at 32, (citing *Scott v. Pacific West Mt. Resort*, 119 Wn.2d 484, 497, 834 P.2d 6 (1992) and *Leyendecker v. Cousins*, 53 Wn.App. 769, 774-75, 770 P.2d 675 (1989).)

Therefore, the remaining prong, (2) implied primary assumption of risk, sometimes called *volenti non fit injuria*, is the one at issue here.

Implied primary assumption of risk starts with an analysis of a duty owed to Appellant by the defendant. If that form of assumption of risk exists, it operates to negate defendant's duty. The court in this case viewed the evidence most favorably to the defendant rather than to plaintiff, found that plaintiff consented by assumption of risk and negated defendant's duty to Appellant as a matter of law, and dismissed the case. That determination

was error.

The trial court found:

But the duty told by the State is to exercise ordinary care to keep the public ways in reasonably safe condition for ordinary travel, and there simply isn't any indication that the State of Washington at this particular, I guess recess and the curb in the city of Port Townsend was in any way not an unreasonable safe condition. There's no indication that the existence of the curb and the way it was was, you know, the proximate cause of an accident to Ms. Gunther, decided that she was going to try to, to use the phrase "jump the curb," go over the curb and get on the sidewalk. That was certainly no negligence on the part of the State of Washington that would have caused her to have to go over the curb to get on the sidewalk. That was a choice she made.

11/5 RP 4-5.

The trial court apparently determined that the state was not negligent as a matter of law. That finding was error in view of the evidence produced by Appellant that defendant failed to comply with the mandatory standards contained in the MUTCD for pavement markings changing the lane configurations abruptly, lack of mandatory cautionary and information signs, and leaving an unreasonable pavement/drop-curb differential at the place where the pavement markings literally forced or at least invited Appellant to move to the sidewalk or face the peril of being hit by a car that was given Appellant's former lane and not instructed to yield to bicycles or even informed that bicycles might be in the roadway.

The trial court's finding that Appellant by primary implied

assumption of risk as a matter of law relieved the state of its duty to keep the highway in reasonably safe condition for ordinary travel, ignored the allegations of and evidence produced by Appellant. Appellant showed that she was faced with an emergency, created by the defendant's negligence in failing to follow the mandates of the MUTCD to post proper signs or install proper pavement markings. Such failure on the part of defendant is usually negligence as a matter of law. *Kitt v. Yakima County*, 93 Wn.2d 670, 611 P.2d 1234 (1980); *Schneider v. Yakima County*, 65 Wn.2d 352, 397 P.2d 411 (1964). CP 106-108.

Where a right turn only lane was created for motor vehicles, the bicycle path ended simultaneously therewith rather than the required 100 feet previous, no warning sign was posted for bicyclists prior to the site, no warning or information signs were posted at the cite for motor vehicles to "yield to bicycles," no directional arrows were there to allow through bicycles travel space to the left of motor vehicles in a marked right turn only lane, and pavement markings were contrary to the MUTCD, Appellant demonstrated the State's negligence as a matter of law, if the evidence is analyzed in the light most favorable to Appellant as the non-moving party, as the trial court must. *Id.* The trial court's summary judgment finding that the State was not negligent as a matter of law was reversible error.

In early years, Washington State courts recognized three distinct defenses in lawsuits for personal injuries: assumption of risk, *volenti non fit injuria*, and contributory negligence. The defense of contributory negligence was changed in April, 1973, to comparative negligence. Former RCW 4.22.010, Laws of 1973, 1st Ex. Sess., ch. 138, SS 1, p. 949. The statute has since been superseded by the adoption of comparative fault in Laws of 1981, ch. 27, and strengthened in 1993 by adoption of RCW 4.22.070.

See *Jay v. Walla Walla College*, 53 Wn.2d 590, 335 P.2d 458 (1959), in which a chemistry student at Walla Walla College sued the college for failing to provide adequate fire-fighting equipment. He sustained serious injuries that resulted from an explosion that occurred while he was assisting other students in attempting to extinguish a fire in a chemistry laboratory that had been caused by a chemistry experiment being conducted by other students. Chemical fires at the college were a frequent occurrence. The laboratory where the fire and resultant explosion occurred had one five-pound carbon dioxide fire extinguisher that had been emptied in extinguishing two previous fires and had been left in the hallway. Although there were five fire extinguishers in the basement of the building where the fire and explosion occurred, they had not been recently inspected or maintained. The extinguisher being used by other students when the

plaintiff entered the laboratory had been secured from another room.

The cause of action was tried to a jury. Verdict was entered for the plaintiff and the college appealed, claiming it was not negligent and that the student assumed the risk.

The appellate court held that the facts established prima facie negligence on the part of the college. As to assumption of risk, the appellate court stated:

The doctrines of contributory negligence and assumption of risk are closely related. Contributory negligence sounds in tort and implies the failure of the plaintiff to exercise due care, while assumption of risk rests in contract and negatives liability without reference to the fact that plaintiff may have acted with due care. *Walsh v. West Coast Coal Mines*, 31 Wn.2d 396, 197 P.2d 233 (1948); 38 Am. Jur. 847, SS 172.

We have held that the doctrine of assumption of risk applies in those cases where there is a master-and-servant or some similar relationship. *Nelson v. Booth Fisheries Co.*, 165 Wash. 521, 6 P.2d 388 (1931).

The appellate court then held that the student was more properly denominated as a business invitee because there was no evidence of a master-and-servant contract, citing *Grove v. D'Allessandro*, 39 Wn.2d 421, 235 P.2d 826 (1951); *Kalinowski v. Young Women's Christian Ass'n*, 17 Wn.2d 380, 135 P.2d 852 (1943). Therefore, the defense of assumption of risk did not apply. However, the college also urged that the doctrine of *volenti non fit injuria*, closely associated with assumption of risk, applied to

bar recovery because the student knew of and appreciated the danger of his own actions. When the student voluntarily entered into a known danger, the *volenti no fit injuria maxim* dictates that he would have to abide the consequences, even if another party is negligent. *Ewer v. Johnson*, 44 Wn.2d 746, 270 P.2d 813 (1954). However, the rule is an affirmative defense, subject to examination as to whether the actor was faced with an emergency. In *Jay v. Walla Walla College*, the appellate court held that whether an emergency existed that would excuse the student's entry into a known danger was properly submitted to the jury.

As to contributory negligence of the student, the *Jay* appellate court also determined that it was a factual issue for the jury to determine under the facts presented at a trial.

Since *Jay* was decided, Washington State abolished contributory negligence as a complete bar to recovery for personal injuries. RCW 4.22.070.

The affirmative defense of assumption of risk started in the master/servant relationship. Our supreme court analyzed the doctrine and dispensed with it in the case of *Siragusa v. Swedish Hospital*, 60 Wn.2d 310, 373 P.2d 767 (1962). After a full analysis of the history and application of assumption of risk, which was generally applied in the workplace, the court

stated:

The time has now come, therefore, to state unqualifiedly that an employer has a duty to his employees to exercise reasonable care to furnish them with a reasonably safe place to work. We now hold that if an employer negligently fails in this duty, he may not assert, as a defense to an action based upon such a breach of duty, that the injured employee is barred from recovery merely because he was aware or should have known of the dangerous condition negligently created or maintained. However, if the employee's voluntary exposure to the risk is unreasonable under the circumstances, he will be barred from recovery because of his contributory negligence. Knowledge and appreciation of the risk of injury, on the part of the employee, are properly important factors which should be given weight in the determination of the issues of whether the employer is negligent in maintaining the dangerous condition and whether the employee is contributorily negligent in exposing himself to it.

Siragusa, 60 Wn.2d at 319.

Since the decision in *Siragusa*, most appellate review is from jury trials rather than summary judgment motions. In *Feigenbaum v. Brink*, 66 Wn.2d 125, 401 P.2d 642 (1965), our Supreme Court again analyzed whether the assumption of risk doctrine was applicable where Appellant knew of slippery steps but chose to fill his arms with firewood and fell when he proceeded down them to his residence. Our supreme court held that it "is not here applicable." Our Supreme Court went on to state that:

Subsequent to the *Siragusa* case, we abolished the doctrine of assumption of risk in a relationship other than that of master and servant. *Engen v. Arnold*, 61 Wn.2d 641, 379 P.2d 990 (1963). *Feigenbaum*. 66 Wn.2d at 129-30.

The supreme court went on to adopt the reasoning of the *Siragusa* and *Engen* cases, holding that "the doctrine of assumption of risk is not here

applicable" and whether plaintiff used the stairs in a reasonably prudent manner "is factual determination for the trier of facts." *Feigenbaum*, 66 Wn.2d at 130, 131.

More recently in the case of *South v. A.B.Chance Company*, 96 Wn.2d 439, 635 P.2d 728 (1981), the United States District Court for the Western District of Washington certified a question to the Washington State Supreme Court:

"In a strict liability cause of action to which the new comparative fault statute (S.B. 3158) [Laws of 1981, ch. 27] is not applicable, does a finding that plaintiff assumed the risk of accident bar the plaintiff's recovery or does assumption of risk operate only as a damage-reducing factor?"

Our supreme Court answered:

"The answer is that assumption of the risk operates as a damage-reducing factor rather than a complete bar to a plaintiff in a strict liability cause of action."

South v. A. B. Chance Company, 96 Wn.2d at 440.

See also *Hogenson v. Service Armament Co.*, 77 Wn.2d 209, 461 P.2d 311 (1969)(In order to have a jury consider his defense of volenti non fit injuria, a defendant has the burden of presenting evidence that the plaintiff knew of the specific character of the risk.); *Lyons v. Redding Construction Co.*, 83 Wn.2d 86, 515 P.2d 821 (1973); *Kirk v. WSU*, 109 Wn.2d 448, 746 P.2d 285 (1987)(A plaintiff's voluntary choice from several alternatives to encounter a known risk may serve to reduce his recovery,

even if the choice is reasonable, but such assumption does not immunize the defendant from liability for injuries caused by his own tortious conduct.); *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 440 P.2d 834 (1968)(There must be a reasonable alternative to the action taken by a plaintiff, and if faced by an emergency the plaintiff's behavior may be excused. If plaintiff established that there was no reasonable alternative or that he was faced with an emergency, it undercut the "knowledge" and/or "voluntariness" of his "consent" to expose himself to any danger.)

In the case of *Dorr v. Big Creek Wood Products*, 84 Wn.App.420, 927 P.2d 1148 (1996) the Court of Appeals on appeal following a jury trial analyzed the issue of primary implied consent and stated:

Trial courts are rightfully wary of requests to instruct the jury on implied primary assumption of the risk. That doctrine, if not boxed in and carefully watched, has an expansive tendency to reintroduce the complete bar to recovery into territory now staked out by statute as the domain of comparative negligence. In most situations, a plaintiff who has voluntarily encountered a known specific risk has, at worst, merely failed to use ordinary care for his or her own safety, and an instruction on contributory negligence is all that is necessary and appropriate. But implied primary assumption of the risk does occupy its own narrow niche.

Dorr, 84 Wn.App. at 425-26.

The evolution of assumption of risk, as set out above, comports with the most current statute regarding comparative negligence, RCW 4.22.070 that reads:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or the payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

RCW 4.22.070(1).

Although the State had a mandatory duty to properly mark pavement and post signs, even without such a specified duty, the State had to act reasonably in making roadways safe for ordinary travel, including

pedestrians and bicyclists. See *Chen v. City of Seattle*, Division One Court of Appeals Docket No. 62838-1-I, CP 214-227, in which the trial court granted the city's motion for summary judgment. In reversing, the appellate court stated:

The city argues that Chen can prevail only if she shows that a particular physical defect in the crosswalk itself rendered the crosswalk inherently dangerous or inherently misleading or if she shows that the city was in violation of a statute, ordinance, or regulation concerning maintenance of the crosswalk. The implication of the city's argument is that a trier of fact may not determine, based on the totality of the circumstances, that the city breached its duty of care unless one of these two conditions is satisfied. In effect, the city argues that the scope of its duty to Liu extended only to eliminating actual physical defects or to taking action expressly required by a statute, ordinance, or regulation. The city is incorrect on both accounts. CP 220.

The Court of Appeals concluded that:

Viewed in the light most favorable to Chen as the nonmoving party, the evidence raises genuine issues as to whether an unsafe condition existed and whether the city breached its duty of care. Therefore, the city was not entitled to summary judgment. CP 227.

Like the holding in *Chen*, the State owed a duty to Appellant herein, only Appellant herein was able to show both the existence of an unsafe condition and violation of a statute or regulation. The State was not entitled to summary judgment.

Most recently is the decision in *Gregoire v. City of Oak Harbor*,

supra, in which our supreme court determined that it was for the jury to decide whether the State owed a duty to a prisoner who committed suicide while in jail to protect him from harming himself. After analyzing the four facets of assumption of risk, the court held that:

The trial court erred by allowing Oak Harbor, a municipality that was sued for failing to carry out its duty to provide for the health, welfare, and safety of an inmate, to raise the complete defense of implied primary assumption of risk. In the case of inmate suicide, we find the implied nature of the purported assumption of risk markedly inappropriate. Allowing Oak Harbor to invoke assumption of risk effectively eviscerated the city's duty to protect inmates in its custody. The jail cannot cast off the very duty with which it is charged through a violation of that duty.

Gregoire, sl.op.pg.12-13.

Like the inmate in *Gregoire*, and the plaintiffs in the cases cited, for the trial court to have found the doctrine of primary implied assumption of risk against Appellant here, eviscerated the State's duty to follow mandated rules in making highways, including bicycle lanes, reasonable safe for ordinary travel.

The evolution of the doctrine of primary implied assumption of risk³ (volenti no fit injuria), as set out above, and the totality of the situation

³ See *Dorr v. Big Creek Wood Products*, 84 Wn.App. 420, 431, 92 P.2d 1148 (1996), "Implied primary assumption of risk also is based on consent, but without 'the additional ceremonial and evidentiary weight of an express agreement.' The elements of proof are the same." *Kirk v. Washington State University*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987)(quoting W.Keeton, et al., *Prosser and Keeton on Torts*, Sec. 68 p. 496 (5th ed. 1984)).

Appellant faced with only seconds or less to assess that situation and decide what to do, are genuine issues of fact for the jury that cannot be decided as a matter of law but must be submitted to the jury after a full trial.

Taking the facts most favorably to Appellant herein, she was faced with an emergency by being forced out of her lane by non-yielding motor vehicles, and she did not know of the dangerous condition of the drop-curb until after the fact. Therefore did not voluntarily subject herself to it. CP 114-15. Furthermore, when Appellant was faced with an emergency with no reasonable alternative, she believed that to remain in traffic under the circumstances was to unreasonably risk being hit by a car or truck. CP 114.

The trial court erred by holding as a matter of law that Appellant's conduct excused the defendant from its own negligence in violating the requirements and suggestions of the MUTCD.

The trial court erred by holding as a matter of law that Appellant's conduct excused the defendant from its own negligence in violating the requirements and suggestions of the MUTCD. Summary judgment in this case must be reversed and remanded for trial.

VI. CONCLUSION

The trial court was required in this summary judgment motion to view the evidence most favorably to plaintiff, which it did not do.

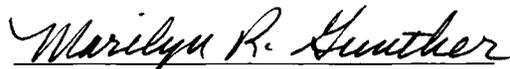
The State is responsible for a State Highway surface and curbs when

it proceeds through a city with less than 22,500 population, and has a duty to persons like Appellant who use that highway to keep it safe for ordinary travel. The State breached that duty by failing to follow the mandates and directions of the Manual of Uniform Traffic Control Devices (MUTCD).

The State's failure to properly mark the pavement at proper distances and to post mandated signs was negligence as a matter of law. The trial court erred in determining as a matter of law that the State was not negligent. Whether that negligence was the proximate cause of the accident constitutes a genuine disputed question of fact for determination by the jury. Whether Appellant was also negligent, which she denies under the circumstances she was faced with at the time, was a genuine factual issue for the jury under RCW 4.22.070 that precludes summary judgment. The State admits that Appellant was seriously injured. Appellant's lawsuit should proceed to trial.

For all these reasons, summary judgment was erroneous, must be reversed, and remanded for trial.

Respectfully submitted this 18th day of April, 2011.



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MAJORITY OPINION:

Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 81253-5
Title of Case: Gregoire v. City of Oak Harbor
File Date: 12/02/2010
Oral Argument Date: 05/26/2009

SOURCE OF APPEAL

Appeal from Island County Superior Court

02-2-00360-0

Honorable Alan R Hancock

JUSTICES

Barbara A. Madsen Dissent in part Author
Charles W. Johnson Signed Lead Opinion
Gerry L. Alexander Dissent Author
Richard B. Sanders Lead Opinion Author
Tom Chambers Concurrence Author and signed lead opinion
Susan Owens Signed Dissent in part
Mary E. Fairhurst Signed Dissent
James M. Johnson Signed Dissent in part and signed dissent of Alexander, J.
Debra L. Stephens Signed Lead Opinion

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

)
TANYA GREGOIRE, guardian for)
the person and estate of BRIANNA) No. 81253-5
ALEXANDRA GREGOIRE, a minor,)
and as personal representative for)
EDWARD ALBERT GREGOIRE,) En Banc
deceased,)
)
Petitioner,) Filed December 2, 2010
)

v.)
)
 CITY OF OAK HARBOR, a)
 municipal corporation,)
)
 Respondent,)
)
 RICHARD WALLACE, and his)
 marital community; BENJAMIN)
 SLAMAN, and his marital)
 community; JOHN DYER and his)
 marital community; RAYMOND)
 PAYEUR and his marital community;)
 STEVEN NORDSTRAND and his)
 marital community; WILLIAM)
 WILKIE, and his marital community,)
)
 Defendants.)
)

SANDERS, J. - Shortly after police arrested Edward Gregoire (Gregoire), he displayed a range of unstable behavior, including thrashing

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violently, tussling with officers, crying, making irrational statements, and asking officers to shoot him. Roughly half an hour after transporting Gregoire to the Oak Harbor jail, officers found Gregoire hanging by his neck from a ventilation grate. Gregoire died soon thereafter. Tanya Gregoire (Ms. Gregoire), personal representative of Gregoire's estate, sued Oak Harbor for negligence in his death.

During a jury trial, the court read instructions on assumption of risk and contributory negligence, over plaintiff's objections. The jury found Oak Harbor negligent, but that its negligence was not the proximate cause of Gregoire's death. On appeal the Court of Appeals affirmed the trial court, holding the jury instructions did not prejudice Ms. Gregoire's case. We now reverse the Court of Appeals. Because jailors owe a special duty of care to their inmates, jury instructions regarding assumption of risk and contributory negligence are inappropriate in cases of inmate suicide.

Factual and Procedural History

In December 1995 Washington State Trooper Harry Nelson arrested Gregoire on outstanding misdemeanor warrants. After handcuffing Gregoire, Nelson placed him in a patrol car for transport to the Oak Harbor jail. During transport Gregoire kicked and kned the protective shield between the front

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and rear seats of the patrol car. Between violent bouts, Gregoire descended into despondency, at one point condemning his friends because, "I take one step forward and my friends take me two steps back." Concerned that Gregoire might return to violence at the jail, Nelson called dispatch to have another officer meet the patrol car there. State Trooper Scott Wernecke waited outside.

When the patrol car arrived at the jail, Nelson unbuckled Gregoire's seat belt, allowing Gregoire to step out of the patrol car. As Nelson bent down to retrieve Gregoire's hat from the car's passenger compartment, Gregoire broke free and ran from the troopers. Nelson grabbed Gregoire's shirt, tearing it, and Gregoire fell to the ground. Nelson and Wernecke forcibly restrained him. Gregoire reportedly screamed, "Why don't you just shoot me, please just shoot me," as the troopers carried a writhing Gregoire into the jail. Clerk's Papers (CP) at 628. Oak Harbor Police Officer William Wilkie aided the troopers by fetching plastic flex cuffs to restrain Gregoire's legs. Wernecke struck Gregoire on the thigh with his collapsible baton to halt Gregoire's kicking. Inside the jail, officers strapped Gregoire into a restraint chair in a holding cell. Over the next few minutes, Gregoire reportedly calmed down enough for officers to unstrap him from the restraint chair and remove the flex cuffs. They

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transported Gregoire to a regular cell.

Jail officials did not administer any mental or physical health screening before leaving Gregoire alone in the cell. Minutes later a jail official observed Gregoire crying. Approximately 10 minutes after the official saw Gregoire crying, an officer found him hanging from a bed sheet strung through the cell's ventilation grate. The officer called for help using the jail intercom and panic alarm. The officer ran to his desk to get a key to Gregoire's cell and a pair of scissors to cut him down. Several Oak Harbor police officers responded to the alarm. One called for an ambulance on his radio. Two responding officers checked Gregoire's pulse and breathing, but observed neither. None of the officers administered CPR (cardiopulmonary resuscitation), even though it had been 5 to 10 minutes since Gregoire was last seen alive in the cell. When paramedics arrived, they detected warmth in Gregoire's body, and began CPR. After 15 or 20 minutes, the paramedics noticed a faint carotid pulse. CPR continued for approximately 25 minutes as paramedics transported Gregoire to the hospital. At the emergency room, doctors designated Gregoire's condition a "premorbid state." Doctors pronounced Gregoire dead shortly thereafter.

In 1998 Ms. Gregoire, acting as guardian ad litem for Gregoire's minor

child, Brianna Gregoire, and as personal representative of Gregoire's estate,

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brought suit in the United States District Court for the Western District of Washington. Ms. Gregoire asserted three civil rights claims, under 42 U.S.C. § 1983, and state law claims of negligence and wrongful death against the City of Oak Harbor and the various individual officers and jailors who interacted with Gregoire. On October 5, 2001 Judge Lasnik dismissed Ms. Gregoire's section 1983 and punitive damages claims, as well as the negligence claims against Nelson and Wernecke. Judge Lasnik declined to dismiss the remaining state law claims, ruling the parties had not substantively addressed the issue of supplemental jurisdiction. On May 6, 2002 Judge Lasnik declined to exercise supplemental jurisdiction and dismissed without prejudice the remaining negligence claims.

On May 30, 2002, Ms. Gregoire filed suit in Island County Superior Court, alleging wrongful death, state constitutional violations, civil rights claims, and negligence. Judge Alan R. Hancock dismissed the federal claims based on res judicata and dismissed the state constitutional claims for lack of a private cause of action. On June 12, 2003 Judge Hancock issued a letter decision denying Oak Harbor's motion for summary judgment on the remaining negligence claims.

In May 2006, a jury trial commenced before Judge Hancock on the

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wrongful death claim. Ms. Gregoire contended Oak Harbor negligently failed to satisfy its duty to protect Gregoire. Over Ms. Gregoire's objection, the trial court allowed Oak Harbor to assert affirmative defenses of assumption of risk and contributory negligence¹ and instructed the jury on those theories. Oak Harbor also defended on two different proximate-cause theories, one of which rested on the affirmative defenses.

On May 31, 2006, the jury returned a verdict for Oak Harbor, finding that the city acted negligently, but its negligence was not a proximate cause of Gregoire's death. Ms. Gregoire appealed the verdict to the Court of Appeals, Division One, which affirmed. Ms. Gregoire argued that where a special relationship creates a special affirmative duty of care, assumption of risk does not apply. The Court of Appeals agreed the custodial relationship between jailor and inmate constitutes a special relationship but rejected the claim

¹ Before April 1, 1974 contributory negligence was a complete bar to plaintiff's recovery in Washington if the damage suffered was considered partly the plaintiff's fault. See Laws of 1973, 1st Ex. Sess., ch. 138, § 1, codified at RCW 4.22.010,

repealed by Laws of 1981, ch. 27, § 17; *Godfrey v. State*, 84 Wn.2d 959, 961 n.1, 530 P.2d 630 (1975). But this State, like most others, has abolished this doctrine and adopted a comparative fault scheme. In 1981, Washington embraced its current contributory fault scheme of apportioning damages between a negligent plaintiff and a negligent defendant. Laws of 1981, ch. 27, § 8, codified at RCW 4.22.005. We use the term "contributory negligence" in this opinion for consistency with the given jury instructions and in reference to the decedent's alleged own negligence, not to the now-superseded doctrine.

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because Ms. Gregoire had not cited authority for the proposition that assumption of risk does not apply. *Gregoire v. City of Oak Harbor*, noted at 141 Wn. App. 1016, 2007 WL 3138044, at *4 (citing *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978)).

Ms. Gregoire filed a motion for reconsideration, which the Court of Appeals denied. She then petitioned this court for review, which we granted to determine whether the trial court erred by instructing the jury on assumption of risk and contributory negligence defenses in a case alleging negligent failure to prevent an inmate's suicide while in jail custody. *Gregoire v. City of Oak Harbor*, 164 Wn.2d 1007, 195 P.3d 86 (2008). We answer in the affirmative. When a special relationship forms between jailor and inmate, sparking a duty for the jailor to protect the inmate from self-inflicted harm, the defenses of assumption of risk and contributory negligence are inappropriate. In a claim of negligence stemming from inmate suicide, giving these instructions necessarily results in prejudicial error. We reverse the Court of Appeals and remand for a new trial consistent with this opinion.

Standard of Review

We review jury instructions de novo, and an instruction containing an erroneous statement of the law is reversible error where it prejudices a party.

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Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). Jury instructions are sufficient if "they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). The court reviews a challenged jury instruction de novo, within the context of the jury instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006).

ANALYSIS

I. Jailors owe inmates an affirmative duty, which cannot be nullified by an inmate assuming the risk of death by suicide. Washington courts have long recognized a jailor's special relationship with inmates, particularly the duty to ensure health, welfare, and safety. In *Kusah v. McCorkle*, 100 Wash. 318, 325, 170 P. 1023 (1918), this court acknowledged that a sheriff running a county jail "owes the direct duty to a prisoner in his custody to keep him in health and free from harm, and for any breach of such duty resulting in injury he is liable to the prisoner or, if he be dead, to those entitled to recover for his wrongful death." The duty owed "is a positive duty arising out of the special relationship that results when a custodian has complete control over a prisoner deprived of liberty." *Shea v.*

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City of Spokane, 17 Wn. App. 236, 242, 562 P.2d 264 (1977), *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978); see also *Caulfield v. Kitsap County*, 108 Wn. App. 242, 255, 29 P.3d 738 (2001). In *Shea*, which involved a municipal jail, the court noted this duty of providing for the health of a prisoner is nondelegable. 17 Wn. App. at 242.

The legislature has subjected municipal jails to regulation and public duty. Local governments operating jails must adopt standards "necessary to meet federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff. . . ." RCW 70.48.071. Administrative regulations require Washington jails to perform suicide screening and suicide prevention programs. See former WAC 289-20-105, -110, -130, -260 (1981). In jury instruction 13, the trial court recognized Oak Harbor's "duty to provide for the mental and physical health and safety needs of persons locked in the jail." CP at 39. Oak Harbor did not object to the instruction.²

We have recognized that "the general rubric 'assumption of risk' has not signified a single doctrine but rather has been applied to a cluster of different concepts." *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987). Four varieties of assumption of risk operate in Washington: (1)

2 "[J]ury instructions that are not objected to are treated as the properly applicable law for purposes of appeal." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

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express, (2) implied primary, (3) implied unreasonable,³ and (4) implied reasonable assumption of risk. *Id.* The first two types, express and implied primary assumption of risk, arise when a plaintiff has consented to relieve the

defendant of a duty - owed by the defendant to the plaintiff - regarding specific known risks. Id. The remaining two types apportion a degree of fault to the plaintiff and serve as damage-reducing factors. Id. at 453-54, 457-58; Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 497-99, 834 P.2d 6 (1992). Express and implied primary assumption of risk share the same elements of proof: "The evidence must show the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk." Kirk, 109 Wn.2d at 453. Implied primary assumption of risk is a complete bar to recovery for the risk assumed. Dorr v. Big Creek Wood Prods., Inc., 84 Wn. App. 420, 425, 927 P.2d 1148 (1996). Here, the trial court instructed the jury on the elements of implied primary assumption of risk,⁴ permitting Oak Harbor to assert the complete

3 "[I]mplied unreasonable assumption of risk is subsumed under contributory negligence and should be treated equivalently." Kirk, 109 Wn.2d at 454.

4 Jury instruction 6 stated, "Defendant further claims that Mr. Gregoire was contributorily negligent and assumed the risk of death when he hanged himself, and therefore his own conduct was the sole proximate cause of his death." CP at 32; see also CP at 46 (Jury Instruction 20) ("It is a defense to an action for wrongful death that the decedent impliedly assumed a specific risk of harm."); CP at 47 (Jury Instruction 21) (instructing jury that to establish assumption of risk, Oak Harbor had the burden of proving (1) Gregoire had knowledge of the specific risk associated with hanging himself; (2) he understood the nature

defense. We note that the trial court confusingly instructed the jury that Gregoire's assumption of risk would relieve Oak Harbor of its duty of care, but subsequently instructed jurors on how to apportion fault if they concluded Gregoire assumed the risk. See CP at 46-47 (Jury Instructions 20-21).

Whether jury instructions regarding assumption of risk and contributory negligence apply to suits alleging negligence in jail suicides is a matter of first impression for this court. Other jurisdictions have tackled assumption of risk comprehensively on similar facts, and we find the reasoning from the Indiana Supreme Court persuasive. In *Sauders v. County of Steuben*, 693 N.E.2d 16, 19 (Ind. 1998), the court refused to apply assumption of risk and contributory negligence in a jail suicide case to "completely obviate the custodian's legal duty to protect its detainees from that form of harm." The *Sauders* court relied, in part, on the Seventh Circuit Court of Appeal's reasoning in *Myers v. County of Lake*, 30 F.3d 847, 853 (7th Cir. 1994). In *Myers*, which involved a juvenile delinquent's custodial suicide attempt, the court stated that "[a] duty to prevent someone from acting in a particular way logically cannot be defeated by the very action sought to be avoided." *Id.*

[fn 4 cont'd] of the risk; (3) and he voluntarily chose to accept the risk and impliedly consented to relieve Oak Harbor of its duty of care; and then instructing the jury on how to apportion comparative fault).

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This court has analyzed express releases seeking to immunize a defendant for negligent breach of a duty imposed by law and found that these violate public policy. See *Wagenblast v. Odessa Sch. Dist.* No. 105-157-166J, 110 Wn.2d 845, 758 P.2d 968 (1988) (invalidating on public policy grounds preinjury releases required of students as a condition for participating in interscholastic athletics); *Vodopest v. MacGregor*, 128 Wn.2d 840, 913 P.2d 779 (1996) (invalidating on public policy grounds preinjury releases to the extent they exculpate medical research facilities for negligence in performance of research). In *Wagenblast* we recognized courts "are usually reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to rid themselves of that obligation by contract." 110 Wn.2d at 849. It flows logically that this court is even more reluctant to allow jailors charged with a public duty to shed it through a prisoner's purported implied consent to assume a risk, especially in a context where jailors exert complete control over inmates.

The trial court erred by allowing Oak Harbor, a municipality that was sued for failing to carry out its duty to provide for the health, welfare, and safety of an inmate, to raise the complete defense of implied primary assumption of risk. In the case of inmate suicide, we find the implied nature of

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the purported assumption of risk markedly inappropriate. Allowing Oak Harbor to invoke assumption of risk effectively eviscerated the city's duty to protect inmates in its custody. The jail cannot cast off the very duty with which it is charged through a violation of that duty.

II. Jailor's special duty to inmates includes protecting against suicide, to which contributory negligence cannot be a defense

In jury instruction 19, the trial court stated, "Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed." CP at 45. Instruction 6 provided, "Defendant further claims that Mr. Gregoire was contributorily negligent and assumed the risk of death when he hanged himself, and therefore his own conduct was the sole proximate cause of his death." CP at 32. The trial court also instructed the jury that Oak Harbor bore the burden of proving "the negligence of Mr. Gregoire was the proximate cause of his own death and of any damage to his estate and damage to his daughter, Brianna

Gregoire, and was therefore contributory negligence." CP at 35 (Jury Instruction 9).

As outlined above, jailors have a special relationship with inmates, creating an affirmative duty to provide for inmate health, welfare, and safety.⁵

⁵ Courts in other jurisdictions have extended prison authorities' duty to protect inmates from harm to include a prisoner's own self-destructive acts. See, e.g., *Hayes v. City of Des Plaines*, 182 F.R.D. 546 (N.D. Ill. 1998) (applying Illinois law) (noting law enforcement

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In other special-relationship contexts, Washington courts have found this duty extends to self-inflicted harm. In *Hunt v. King County*, 4 Wn. App. 14, 22-23, 481 P.2d 593 (1971), the Court of Appeals upheld a negligence verdict against a hospital for failure to protect a patient from attempted suicide. The Hunt court indicated:

Such a duty [to safeguard] contemplates the reasonably foreseeable occurrence of self-inflicted injury whether or not the occurrence is the product of the injured person's volitional or negligent act. . . . Any other rule would render the actor's duty meaningless. The rule would in the same breath both affirm and negate the duty undertaken or imposed by law. The wrongdoer could become indifferent to the performance of his duty knowing that the very eventuality that he was under a duty to prevent would, upon its occurrence, relieve him from responsibility.

Id. In a case involving a school district, we recently held the defense of contributory negligence is inappropriate against a 13-year-old student in a tort action for sexual abuse by her teacher. *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 71, 124 P.3d 283 (2005). In the case of suicide, a similar principle applies to the jailor-inmate relationship, even when the inmate is not a minor. Once a jailor forms a special relationship with an inmate, contributory

[fn 5 cont'd] owes a general duty of care to those arrested and incarcerated, including protecting prisoners from self-injury or self-destruction, under the circumstances of the particular case); *Maricopa County v. Cowart*, 106 Ariz. 69, 471 P.2d 265 (1970) (holding juvenile detention home officials must exercise such reasonable care and attention as a juvenile's mental and physical condition, if known, may require).

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negligence cannot excuse the jailor's duty to protect the inmate, even from self-inflicted harm. To hold otherwise would gut the duty.⁶

In cases of jail suicide, other jurisdictions agree the existence of a duty to protect should forgive the injured party's alleged contributory negligence. Again, in *Sauders*, the Indiana Supreme Court said,

custodial suicide is not an area that lends itself to comparative fault analysis. As already noted, the conduct of importance in this tort is the custodian's and not the decedent's. Further, it is hard to conceive of assigning a percent of fault to an act of suicide. . . . A comparative balance of "fault" in a suicide case would seem to risk random "all or nothing" results based on a given jury's predilections.

693 N.E.2d at 20.7 Similarly, the Oregon Court of Appeals rejected contributory negligence as a defense to an attempted jail suicide, concluding that "the acts which plaintiff's mental illness allegedly caused him to commit suicide

6 The concurrence/dissent claims *Hunt*, 4 Wn. App. 14, and *Christensen*, 156 Wn.2d 62, do not apply. Concurrence/dissent at 7. While there is no silver-bullet case in our jurisprudence that resolves this matter of first impression, *Hunt* and *Christensen* make the best analogy to the facts before us. In contrast the concurrence/dissent's reliance on *Yurkovich v. Rose*, 68 Wn. App. 643, 847 P.2d 925 (1993), and *Pearce v. Motel 6, Inc.*, 28 Wn. App. 474, 480, 624 P.2d 215 (1981), is misplaced because those cases - both from the Courts of Appeal - involve noncustodial relationships.

Concurrence/dissent at 5-6. While we note the obvious differences between "custody" in schools, mental hospitals, and jails, *Christensen* and *Hunt* present much closer similarities to the instant matter than do *Yurkovich* and *Pearce*. We do not contest that contributory negligence has a time and place in our courts; however, that time and place does not include suicides of jail inmates.

7 *Sauders* mentions "all or nothing" results "based on a given jury's predilections" only to call attention to a jury's likelihood of assigning 100 percent fault to the suicide victim and none to the jail - leaving the plaintiff with zero damages. 693 N.E.2d at 20. The concurrence/dissent misinterprets this statement as a statutory bar to recovery. Concurrence/dissent at 11-12.

were the very acts which defendant had a duty to prevent, and these same acts, cannot, as a matter of law constitute contributory negligence." *Cole v. Multnomah County*, 39 Or. App. 211, 592 P.2d 221, 223 (1979) (citing *Vistica v. Presbyterian Hosp. & Med. Ctr. of S.F., Inc.*, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967); *Hunt*, 4 Wn. App. 14). The Oregon court noted that even if the plaintiff was not mentally ill, or if corrections officials were reasonably unaware of any illness, for defendants to prevail they would have to prove they were not negligent, not that plaintiff was contributorily negligent. *Id.*

More recently, the Supreme Court of Minnesota held that a jury should not

determine, compare, or apportion fault on the part of an inmate who committed suicide while in custody because of the duty owed to protect him from self-inflicted harm. *Sandborg v. Blue Earth County*, 615 N.W.2d 61, 65 (Minn. 2000). The Sandborg court reasoned:

"The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability cannot relieve him from liability. . . . To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity." *Id.* (quoting Restatement (Second) of Torts § 449 cmt. b (1965)).⁸

⁸ The court stressed this principle was not equivalent to imposing strict liability on

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We find the reasoning from the above-referenced opinions persuasive. The trial court erred by instructing the jury on contributory negligence because the injury-producing act - here, the suicide - is the very condition for which the duty is imposed. The jail's duty to protect inmates includes protection from self-inflicted harm and, in that light, contributory negligence has no place in such a scheme.

The concurrence/dissent cites *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257, 753 P.2d 523 (1987), to assert contributory negligence should apply unless the plaintiff shows the jail assumed the inmate's duty of self-care. Concurrence/dissent at 6.9 *Bailey* does not apply to the facts of this case. *Bailey* discusses exceptions to the public duty doctrine, not contributory negligence. We have described the public duty doctrine to require "for one to recover from a municipal corporation in tort it must be shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is

[fn 9 cont'd] a defendant's because the plaintiff must still prove the jail breached a reasonable standard of care. 615 N.W.2d at 65. Disallowing the defenses of contributory negligence and assumption of risk does not result in strict liability for jails because inmates must still establish the jail negligently performed its duty.

⁹ The concurrence/dissent invents a three-prong test to determine whether Oak Harbor assumed Gregoire's duty. See concurrence/dissent at 6. It offers no accurate support for this test, which is contained nowhere in *Bailey*.

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duty to no one)." *Bailey*, 108 Wn.2d at 265 (quoting *J&B Dev. Co. v. King County*,

100 Wn.2d 299, 303, 669 P.2d 468 (1983), overruled on other grounds by Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1988)). Under Bailey, if no duty "run[s] to the injured plaintiff from agents of the municipality," there is no liability at all. Id. at 266. The concurrence/dissent states: "Unless the plaintiff establishes an assumption of his duty of self-care, a jury should not be foreclosed from considering comparative fault." Concurrence/dissent at 7. In other words, if the plaintiff does not show that the jail assumed the duty of self-care, the jury can entertain comparative fault. That is wrong, even under Bailey. Bailey says that if the plaintiff does not show that the jail assumed the duty of self-care, the plaintiff cannot sue at all. Bailey's test does not permit comparative negligence; it serves as a wholesale bar to recovery. Bailey's all-or-nothing approach does not apply. Moreover, while I do not subscribe to the concurrence/dissent's view that contributory negligence applies unless the plaintiff proves that the jailor assumed the inmate's duty of self-care, that duty would nonetheless be assumed through constructive notice in jail suicides generally - and certainly for Gregoire, who asked officers to shoot him. Jail suicides are hardly infrequent events. They are eminently foreseeable, if not expected. Corrections employees are fully

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aware of the propensity of prisoners to take their own lives. Reams of literature have been written on the topic. For example: "Suicide is often the single most common cause of death in correctional settings. Jails, prisons and penitentiaries are responsible for protecting the health and safety of their inmate populations, and the failure to do so[] can be open to legal challenge." World Health Org., Preventing Suicide in Jails and Prisons 1 (2007). "[P]re-trial detainees have a suicide attempt rate of about 7.5 times, and sentenced prisoners have a rate of almost six times the rate of males out of prison in the general population." Id. at 3.

Here, the jury found that Oak Harbor negligently failed to fulfill its duty to protect Gregoire. However, the jury concluded that the city's negligence was not the proximate cause of Gregoire's death. It seems likely the jury reached this verdict because the trial court described contributory negligence in a way that bore directly on proximate cause, an issue with which the jury struggled.¹ Jury instruction 6 read, "Defendant further claims that Mr. Gregoire was contributorily negligent and assumed the risk of death when he hanged himself, and therefore his own conduct was the sole proximate cause of his death." CP at 32. Instruction 19 added, "Contributory negligence is

¹ During deliberations, the jury requested clarification from the court on the definition of proximate cause. CP at 55.

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negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed." CP at 45. The interplay between these instructions¹¹ supports the finding that if Gregoire assumed the risk of death and contributed negligently when he hanged himself, his conduct became the sole proximate cause of his death. It follows that the given instructions would lead jurors to the inevitable conclusion that Gregoire's own conduct was the sole proximate cause of his death. These instructions absolve Oak Harbor of its duty, and any action against the city would necessarily fail. This result is unsupportable from a policy perspective, but also because the instructions did not properly inform the jury of the applicable law. Oak Harbor had a specific duty to protect Gregoire from injuring himself, and both contributory negligence and assumption of risk defenses must yield to that affirmative, nondelegable duty.

Conclusion

When a special relationship forms between jailor and inmate, sparking a duty for the jailor to protect the inmate from self-inflicted harm, the defenses of assumption of risk and contributory negligence are inappropriate. Giving these jury instructions in a negligence action arising from inmate suicide necessarily

¹¹ We consider the instructions as a whole, including the relationship between them, as the jury was charged with doing. See Jackman, 156 Wn.2d at 743.

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results in prejudicial error.

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We reverse the Court of Appeals and remand for a new trial consistent with this opinion.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

Justice Charles W. Johnson

Justice Debra L. Stephens

Justice Tom Chambers

Opinion Information Sheet

Gregoire v. City of Oak Harbor

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MADSEN, C.J. (concurring/dissenting) -- I agree with the lead opinion's assumption of risk analysis, but write separately to clarify that, depending on the facts, a trial court commits no error when it instructs the jury to apply comparative negligence to instances of jail suicide. A jail has a duty to provide health screenings and health care if necessary, and to protect an inmate from injury by third parties and jail employees, but it has no freestanding duty to prevent inmate self-inflicted harm. That duty arises only when specifically articulated by law or if the jail affirmatively assumes the inmate's duty of self-care. Even if this duty arises, it would not necessarily eliminate the inmate's duty of self-care. In instances where both parties have duties, comparative negligence may apply. Only when the plaintiff can prove that the jail assumed the inmate's duty of self-care does comparative negligence become inappropriate.

Discussion

The relationship between a jailor and an inmate is a "special relationship."

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Caulfield v. Kitsap County, 108 Wn. App. 242, 255, 29 P.3d 738 (2001) "Special relationships are typically custodial or at least supervisory, such as the relationship between doctor and patient, jailer and inmate, or teacher and student.").

Because there is a special relationship, there is some duty on the city of Oak Harbor's part. The lead opinion's mistake is to imply that merely finding a "special relationship" is sufficient to impose the specific duty to prevent suicide. This oversimplifies the analysis. A "special relationship" does not mean that the defendant owes the plaintiff every conceivable duty. As the court noted in Caulfield, the special relationship exception "do[es] not create new duties or eliminate recognized duties." *Id.* at 251 (citing *Meaney v. Dodd*, 111 Wn.2d 174, 178, 759 P.2d 455 (1988)). Indeed, each type of "special relationship" has a certain nature and scope from which

specific duties are derived. See Caulfield, 108 Wn. App. at 255 (nature of special relationships between a county and "[p]rofoundly disabled" "vulnerable client[s]" creates a different duty of care than the special relationship between a hotel and guest).

In Washington, the duties of a jailer to an inmate (as of the time of Gregoire's arrest) derived from two sources: the Restatement (Second) of Torts and local administrative regulations.¹ Restatement (Second) of Torts § 314A

¹ The Washington Administrative Code originally listed jail operating procedures, including health screening and healthcare provision duties, but this code was obsolete by the time of Gregoire's arrest, after the legislature directed cities and towns to adopt their own jail operating standards. Former WAC 289-20-105, -110, -130 (1981), decodified by Wash. St. Reg. 06-14-008 (June 22, 2006); RCW 70.48.071 (requiring local cities and counties to promulgate their own jail operating standards). Jury instruction 14 lists the

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(1965); Clerk's Papers (CP) at 40 (Jury instruction 14 listing "Washington State administrative regulations applicable to the Oak Harbor City Jail"). Taken together, these sources imposed a duty on the jail to screen for mental illness and provide emergency medical care but did not impose a duty to prevent self-inflicted harm. Washington's treatment of suicide as a volitional act supports this distinction between these duties. Cf. Webstad v. Stortini, 83 Wn. App. 857, 866, 924 P.2d 940 (1996) (stating suicide is a volitional rather than a negligent act).

Jury instruction 14, which was given in this case, correctly lists the administrative regulations applicable to Oak Harbor Jail. CP at 40. The duties of Oak Harbor Jail include (a) required screening for mental illness of all prisoners upon admission to the jail and (b) 24 hour access to emergency mental illness care or other medical care. *Id.* The regulations also require the jail to ensure that each shift include one person trained in cardiopulmonary resuscitation (CPR) and one person trained in receiving screening. *Id.* The instructions do not mention a specific duty imposed on the jail to prevent self-inflicted harm.

Restatement (Second) of Torts states: "One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a . . . duty to the other" "to take reasonable action (a) to protect them against unreasonable risk

[fn 1 cont'd] applicable administrative regulations. Clerk's Papers (CP) at 40.

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of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others." Restatement (Second) of Torts § 314A(4), (1). Comment d clarifies that the scope of risk a custodian must protect against includes "the actor's [i.e., the custodian's] own conduct, or the condition of his land or chattels," and "risks arising from forces of nature or animals," "from the acts of third persons [regardless of intent]," "from pure accident," or "from the negligence of the plaintiff himself." *Id.* cmt. d.

Notably, the scope of the Restatement as explained in comment d makes no mention of intentional self-inflicted harm, only negligent self-inflicted harm. In Washington, suicide is not considered negligence, but rather volitional conduct. "Suicide is 'a voluntary willful choice determined by a moderately intelligent mental power[,] which knows the purpose and the physical effect of the suicidal act.'" *Webstad*, 83 Wn. App. at 866 (alteration in original) (internal quotation marks omitted) (quoting *Hepner v. Dep't of Labor & Indus.*, 141 Wash. 55, 59, 250 P. 461 (1926)).

The Court of Appeals adopted section 314A of the Restatement (Second) of Torts in *Shea v. City of Spokane*, 17 Wn. App. 236, 241-42, 562 P.2d 264 (1977), *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978), which held that a city has a nondelegable duty to provide medical care to a prisoner in custody. The duty to render medical aid is derived from the "special relationship" of custody that deprives the prisoner

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of liberty and the opportunity to seek medical aid independently. *Shea*, 17 Wn. App. at 242 (citing Restatement (Second) of Torts § 314A(4) (1965)).

In interpreting the Restatement, this court has clarified that the mere existence of a special relationship does not make the defendant a guarantor of the plaintiff's safety. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 203-04, 943 P.2d 286 (1997) (interpreting Restatement (Second) of Torts § 344, including comments d and f limiting scope of the duty). Indeed, every person has a duty to use reasonable care for his or her own health and safety. Charles J. Williams, *Fault and the Suicide Victim: When Third Parties Assume a Suicide Victim's Duty of Self-Care*, 76 Neb. L. Rev. 301, 305 n.20 (1997) (citing 57A Am. Jur. 2d Negligence § 843 (1989)). Thus, in the ordinary case, the jail and the inmate both have duties and their respective fault should be apportioned by the jury through the comparative negligence doctrine. Only proof that the defendant assumed the plaintiff's duty of self-care should foreclose comparative negligence.

This conclusion is born out in our state's case law. For example, *Yurkovich v. Rose*, 68 Wn. App. 643, 847 P.2d 925 (1993), involved a negligence action against a bus driver and school district by the parents of a 13 year old girl who was killed

crossing a highway shortly after exiting a school bus. The Court of Appeals recognized a special relationship and found "school bus operators owe child passengers a duty of the highest degree of care consistent with the practical operation of the bus." *Id.* at 648 (citing *Webb v. Seattle*, 22 Wn.2d 596, 602, 157

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P.2d 312 (1945)). Although the bus driver owed a duty, and through his negligence created the risk of harm, the court nevertheless approved instructions that included contributory negligence. *Id.* at 656. The court reasoned that the plaintiff still owed a duty of self-care that neither the school district nor the bus driver assumed.

Similarly, *Pearce v. Motel 6, Inc.*, 28 Wn. App. 474, 480, 624 P.2d 215 (1981), involved a negligence action against a motel owner brought by a guest who slipped on the shower floor. The Court of Appeals recognized that innkeeper-guest relationships create specific duties to guests regarding unsafe conditions on the premises. *Id.* at 479. However, reasoning that motel owners do not guarantee their guests' safety, the Court of Appeals found that comparative negligence applies because it takes into account the two separate duties: of the motel owner to his guest and of the guest to himself or herself. *Id.* at 480.2

Whether the defendant jail has assumed the inmate's duty of self-care is generally a question of fact. To prove a defendant assumed an inmate's duty, a plaintiff must prove the defendant (i) had custody of the inmate, (ii) had knowledge, actual or constructive, of the inmate's self-destructive tendencies, and (iii) either expressly or implicitly assumed the inmates's duty of self-care. See *Caulfield*, 108 Wn. App. at 255 (custodial relationship between jailer and inmate);

2 The lead opinion complains about my reliance on *Yurkovich* and *Pearce*, saying that they do not concern custodial relationships. They do, however, concern special relationships and application of comparative fault and contributory negligence principles.

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Shea, 17 Wn. App. at 242 (duty of jail to render aid is derived from special relationship of custody and includes duty to provide medical care); *Bailey v. Town of Forks*, 108 Wn.2d 267, 268, 737 P.2d 1257, 753 P.3d 523 (1987) (discussing duty arising from special relationship in context of governmental defendant); Restatement (Second) of Torts § 314A cmt. e (regarding the duty arising out of a special relationship, "[t]he defendant is not liable where he [or she] neither knows nor should know of the unreasonable risk"); 57B Am. Jur. 2d Negligence § 857 (2004) (regarding the duty of self-care in context of contributory negligence, "the standard of conduct to which the actor must conform for his or her own protection is that of a reasonable

person under like circumstances"). Unless the plaintiff establishes an assumption of his duty of self-care, a jury should not be foreclosed from considering comparative fault.³

The lead opinion relies heavily on *Christensen v. Royal School District No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005), and *Hunt v. King County*, 4 Wn. App. 14, 22-23, 481 P.2d 593 (1971), two cases in which defendants in special relationships did assume the plaintiff's duty of self-care, making comparative fault

³ The lead opinion misstates the standard that I propose when it says that under my view the inmate's duty of self-care would "be assumed through constructive notice in jail suicides generally." The lead opinion says that jail suicides are not infrequent and are foreseeable, if not expected. Lead opinion at 18. The lead opinion's rewording of the analysis should be seen for what it is, an attempt to alter my proposed three-part test into a single pro forma inquiry, concluding with automatic constructive notice, and therefore duty, in virtually all cases. Such a meaningless inquiry does not accord with the concept of comparative fault and contributory negligence as set forth in our statutes and with my proposal that the defendant prove that the jail assumed the duty of self-care.

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inappropriate. However, both of these cases involve unique circumstances not relevant here. Specifically, the *Christensen* holding was unique to sexual abuse. The court held that children, as a matter of public policy, have no duty to protect themselves from sexual abuse by teachers. *Id.* at 67, 69-70. Policy considerations involving sexual abuse of a child in the public school context do not apply in this case.

The second case, *Hunt*, involved the special relationship between a mentally disturbed patient and a closed psychiatric hospital. As noted by the lead opinion, the *Hunt* court held "the scope of duty owing by the hospital to its patients includes the duty to safeguard the patient from the reasonably foreseeable risk of self-inflicted harm through escape." *Id.* at 20. However, in explaining the duty owed, the *Hunt* court pointed out that every duty necessarily has a scope. The *Hunt* court contrasted the limited scope of a driver's duty to obey traffic laws, which does not include a duty to protect from self-inflicted harm (other than by "irresistible impulse"), to the broad scope of a psychiatric hospital's duty to prevent volitional self-inflicted injury. *Id.* at 21-22 (citing *Vistica v. Presbyterian Hosp. & Med. Ctr. of S.F., Inc.*, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967)).

Both *Hunt* and *Vistica* involved cases of a hospital psychiatric ward taking custody of a mentally disturbed patient for the purpose of treatment. In both cases, a concerned parent informed the hospital of the patient's strong desire to escape

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regardless of physical harm an attempted escape might cause, and in both cases, hospital staff expressly assured the parent that preventative measures would be taken. Hunt, 4 Wn. App. at 17; Vistica, 67 Cal. 2d at 467-68. Even where a hospital had not expressly made such assurances, the nature of a psychiatric hospital may in some cases imply that the hospital takes custody of the patient with the primary purpose being treatment and prevention of self-inflicted harm. For these reasons, the defendants' assumption of the plaintiff's duty of self-care in Hunt and Vistica accords with the nature of the special relationship between the psychiatric ward of a hospital and a mentally disturbed patient.

In contrast, treatment and prevention of self-inflicted harm are not generally the purpose of incarceration. Moreover, although regulations require at least one person per shift on jail staff to be familiar with basic health requirements, such as mental and physical screening procedure and basic CPR, jail staff are not required to be mental health experts. CP at 40.4 In contrast, psychiatric ward hospital staff are highly trained to recognize and prevent self-destructive behavior. As such, hospital staff can be expected to meet the higher standard of care of a health care professional. RCW 7.70.040(1); Adair v. Weinberg, 79 Wn. App. 197, 202 n.2, 901 P.2d 340 (1995) (citing Harris v. Robert C. Groth, M.D., Inc., 99 Wn.2d 438, 442-43, 663 P.2d 113 (1983)). In sum, the scope of the duties owed by a jailer to an inmate are not sufficiently similar to psychiatric ward-patient relationship to

4 The jury was instructed to this effect in instruction 14.

find that the jail assumed the inmate's duty of self-care.

Other jurisdictions and sources have also recognized that not all defendants in a special relationship assume a plaintiff's duty of self-care and thus agree that contributory negligence can be appropriate in instances of suicide.

In *Champagne v. United States*, 513 N.W.2d 75, 80 (N.D. 1994), the Supreme Court of North Dakota reasoned that whether a psychiatric hospital assumes a mental patient's duty of self-care is not a forgone conclusion, but instead depends upon the capacity of the patient. The court used a sliding scale analysis in which "[t]he worse the suicidal patient's diminished capacity, the greater the medical provider's responsibility." *Id.* at 81. Where the patient retained sufficient capacity, comparative fault analysis remained appropriate. *Id.*

Similarly, in *Molton v. City of Cleveland*, 839 F.2d 240, 247-48 (6th Cir. 1988), the Sixth Circuit Court of Appeals upheld a contributory negligence jury instruction in the case of a jail inmate suicide, concluding the facts provided sufficient evidence to

support the jury's finding of the inmate's contributory negligence. *Id.* at 248.

The lead opinion relies heavily on statements from other jurisdictions to support its assertion that applying contributory negligence to inmate suicide would effectively "gut" the jail's duty to prevent inmate self-inflicted harm. However, this conclusion does not follow. First, as discussed above, the jail has no specific duty to prevent an inmate's self-inflicted harm, so this duty cannot be "guttled."

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Second, the application of comparative fault will not absolve the jail of meeting its duties toward prisoners. The purpose of comparative negligence is to apportion the liability between two parties who both violated their duties. See RCW 4.22.005, .070. In the face of contributory negligence, a jail must still pay for its fair share of liability for any negligent departure from its duties. This is in contrast to primary assumption of risk, the application of which would completely bar a plaintiff's claim.

Finally, the lead opinion's heavy reliance on cases from Indiana and Minnesota is misplaced. These jurisdictions have different liability rules that cause contributory negligence to operate more like Washington's primary assumption of risk doctrine. The harsher operation of the doctrine in these jurisdictions makes contributory negligence less appropriate in Indiana or Minnesota than it is in Washington.

For example, the lead opinion cites *Sauders v. County of Steuben*, 693 N.E.2d 16, 20 (Ind. 1998), in which the Indiana court explained that comparative fault analysis is not appropriate to custodial suicide because it "would seem to risk random 'all or nothing' results based on a given jury's predilections." However, the Indiana court characterized its own holding as follows:

[W]e hold that the decedent's act of suicide cannot be the basis for a finding of contributory negligence or incurred risk that would bar a plaintiff's claim for wrongful death of an inmate. To permit the suicide (or attempted suicide) to constitute a bar to recovery would eliminate altogether a claim for breach of a custodian's duty to take reasonable steps to protect an inmate from harm, self-inflicted or

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otherwise.

Id. at 17 (emphasis added). The "all or nothing" "bar to recovery" result the Indiana court feared was a result of that jurisdiction's Tort Claims Act and case law in which any amount of contributory negligence completely bars recover against government defendants. *Id.* at 18 (citing Ind. Code § 34-4-16.5-1 et seq. (1993); *Town of Highland v. Zerkel*, 659 N.E.2d 1113, 1120-21 (Ind. Ct. App. 1995)). In this context,

contributory negligence would "gut" a jail's duty. This is in contrast to Washington's pure comparative fault law, which allows a plaintiff to recover from a defendant regardless of the ratio of fault. RCW 4.22.005, .070. In our quite different context, comparative fault will not bar recovery, risk an "all or nothing" result, or gut the jail's duty.⁵

Similarly, the lead opinion also cites language from *Sandborg v. Blue Earth County*, 615 N.W.2d 61, 65 (Minn. 2000) (quoting Restatement (Second) of Torts § 449 cmt. b), in which the Minnesota court concludes application of comparative

5 The lead opinion contends that I have misinterpreted *Sauders'* statement about "all or nothing" results as a statutory bar to recovery. Lead opinion at 15 n.7. The lead opinion fails to understand that, as the court in *Sauders* expressly stated, because the defendant in the case was a government entity, the action was covered by the Indiana Tort Claims Act. "[U]nder the Tort Claims Act, as at common law, both contributory negligence and incurred risk operate to bar a plaintiff's recovery against government actors." *Sauders*, 693 N.E.2d at 18 (emphasis added). Thus, as I explain, under Indiana law, the "all or nothing" "bar to recovery" result of which the Indiana court spoke was in reference to the fact that any contributory negligence on the plaintiff's part would absolutely bar any recovery. Therefore it would, as I explain, "gut" a jail's duty. Contrary to the lead opinion's erroneous assessment, the Indiana court's reference was not to the possibility that a jury might assign 100 percent of the fault to the plaintiff, lead opinion at 15 n.7, but to the possibility that a jury might assign any fault.

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fault "would be to deprive the [inmate] of all protection and to make the [jail's] duty a nullity." However, as the Respondent points out, Minnesota is a modified comparative fault jurisdiction "barring recovery to a plaintiff who's [sic] fault is determined to be greater than the fault of the person from whom recovery is being sought." Resp't's Suppl. Br. at 14-15 (citing Minn. Stat. § 604.01). In contrast to Washington's pure comparative fault statute, Minnesota's modified comparative fault increases the likelihood that a plaintiff's claim would be barred despite a jail's violation of its duty, thus gutting the jail's duty.

Differences in the law of these jurisdictions undercuts the lead opinion's reliance on *Sauders* and *Sandborg*.

Conclusion

Both jail officials and Gregoire had duties -- to provide for health and safety, and of self-care, respectively -- and absent proof that the jail assumed Gregoire's duty of self-care, the trial court on remand should be free to consider whether to instruct the jury on comparative fault.

AUTHOR:

Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Susan Owens

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Justice James M. Johnson

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Opinion Information Sheet

Gregoire v. City of Oak Harbor

Dissent by Alexander, J.

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ALEXANDER, J. (dissenting) -- The lead opinion does not mention that the jury in this case never reached the questions of whether Edward Gregoire was contributorily negligent or assumed a risk of harm. In my view, it was unnecessary for the jury to do so because it found that the city of Oak Harbor's negligence was not a proximate cause of Mr. Gregoire's death. That being the case, even if we assume that the trial court's instructions on contributory negligence and assumption of risk were erroneous, their submission to the jury was harmless error.¹ See Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 *Gonz. L. Rev.* 277, 304 (1995/96) (erroneous instruction "[c]ured by the [j]ury's [v]erdict" is harmless); see, e.g., *Miller v. Great N. Ry.*, 105 *Wash.* 349, 354, 177 *P.* 799 (1919) (erroneous contributory negligence instruction was harmless where jury's verdict ruled out any finding of negligence against defendant); *Faust v. Benton County Pub. Util. Dist. No. 1*, 13 *Wn. App.* 473, 477-78, 535 *P.2d* 854 (1975) (erroneous *res ipsa loquitor* instruction was harmless where jury found plaintiff was not contributorily negligent); *Okkerse v.*

I, nevertheless, agree with Chief Justice Madsen's discussion of comparative negligence and her opinion that on remand the trial court should "be free to consider whether to instruct the jury on comparative fault." Concurrence/dissent at 13.

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Westgate Mobile Homes, Inc., 18 Wn. App. 45, 566 P.2d 944 (1977) (refusal to instruct on negligent misrepresentation was harmless where jury found defendant not liable for misrepresentation).

Tanya Gregoire's guardian ad litem and the estate of Edward Gregoire endeavor to get around this obvious problem by claiming that the jury instructions on contributory negligence and assumption of risk probably influenced the jury's decision on proximate cause. I fail to see how such a conclusion can be reached, particularly where, as here, the jury was properly instructed on proximate cause,² answered a special verdict question about proximate cause, and did not reach the special verdict question about contributory negligence.

Given these facts, one can only speculate as to what influenced the jury's determination that the city's negligence was not the proximate cause of Mr. Gregoire's death. We should not engage in such speculation. See *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003) ("The individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict." (quoting *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632

² The proximate cause instruction initially given by the trial court was Washington Pattern Jury Instructions: Civil 15.01. Clerk's Papers (CP) at 43; 6 Washington Practice: Washington Pattern Jury Instructions: Civil 15.01, at 181 (5th ed. 2005) (WPI). Upon receiving a request from the jury for a clearer definition of proximate cause, the trial court provided WPI 15.01.01 to the jury. CP at 55; 6 WPI 15.01.01, at 185. Our court did not grant review on the issue of whether the proximate cause instructions given by the trial court were erroneous. Supreme Court Order, *Gregoire v. City of Oak Harbor*, No. 81253-5 (Wash. Sept. 3, 2008) (granting review "only on the issue of whether the trial court erred in instructing the jury as to contributory negligence and assumption of risk"); Pet. for Review at 1.

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(1988))). I would, therefore, affirm the Court of Appeals.

AUTHOR:

Justice Gerry L. Alexander

WE CONCUR:

Justice Mary E. Fairhurst

Justice James M. Johnson

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

MARILYN R. GUNTHER,)	
)	
Appellant,)	No. 41576-3-II
)	
vs.)	
)	CERTIFICATE
WASHINGTON STATE)	OF SERVICE
DEPARATMENT OF)	BY MAILING
TRANSPORTATION,)	
)	
Respondent.)	
_____)	

I hereby certify that I served a true copy of the Appellant's
Opening Brief and this Certificate of Service by Mailing to opposing
counsel at their correct address, by first-class mail, postage fully prepaid,
on April 22, 2011.

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