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No. 58544-4-I

**DIVISION ONE
WASHINGTON STATE COURT OF APPEALS**

**TANYA GREGOIRE, as guardian *ad litem* for
BRIANNA ALEXANDRA GREGOIRE, and as
PERSONAL REPRESENTATIVE FOR THE
ESTATE OF EDWARD ALBERT GREGOIRE**

Appellant,

vs.

CITY OF OAK HARBOR, a Municipal Corporation,

Respondent.

REPLY BRIEF

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COURT OF APPEALS
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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
	A The Record Is Sufficient For This Review.....	1
II.	REPLY AND REBUTTAL Re TRIAL COURT ERRORS..	1
	A The Court Erred in Instructing the Jury on Comparative Fault	1
	B. Trial Court Erred On Instructing on Assumption of the Risk.....	7
	C. The Instruction on Proximate Cause Was Error.....	12
	D. Juror Misconduct - Juror No. 5 Should Have Been Questioned or Removed.....	13
	E. Juror 12 Should Have Been Excused for Cause .. .	21
III.	CONCLUSION	24

TABLE OF AUTHORITIES

Washington Cases

	Pages
<u>Allison v. Dep't of Labor & Indus.</u> , 66 Wn. 2d 263, 401 P.2d 982 (1965).	20
<u>Christensen v. Royal School Dist.</u> , 156 Wn. 2d 62, (2005)	5-6
<u>Dorr v. Big Creek Wood Products, Inc.</u> , 84 Wn. App. 420	7
<u>Favors v. Matzke</u> , 52 Wn. App. 789, 770 P.2d 686, 689 (Div I 1989).	1
<u>Gordon v. Deer Park Sch. Dist.</u> 414, 71 Wn. 2d 119, 426 P.2d 824 (1967).	20
<u>Hill v. Cox</u> , 110 Wn. App. 394, 41 P.3d 495 (Div. III 2002)	21
<u>In Re Personal Restraint of Lord</u> , 123 Wn. 2d 296 (1994)	17
<u>Robinson v. Safeway Stores, Inc.</u> , 113 Wn.2d 154, 776 P.2d 676 (1989).	16, 20
<u>Sandborg v. Blue Earth County</u> , 615 N.W. 2d 61 (2000)	2-3
<u>Scott v. Pacific West Mountain Resort</u> , 119 Wash.2d 484, 834 P.2d 6 (1992).	7-8
<u>State v. Cho</u> , 108 Wn. App 315 (2001)	13, 19-20
<u>State v. Johnson</u> , 155 P.3d 183 (2007).	16-17
<u>Thomas v. French</u> , 99 Wn.2d 95, 659 P.2d 1097 (1983)	1
<u>Thompson v. King Feeds & Nutrition service, Inc.</u> , 153 Wn.. 2d 447, 105 P.3d 378 (2005).	1

Federal Cases and Cases from Other States

	Pages
<u>McDonough Power Equip., Inc. v. Greenwood</u> , 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984).	16
<u>Sauders v. County of Steuben</u> , 693 N.E. 2d 16 (Ind. 1998).	2

Statutes, WAC's And Other Citations

RCW 4.44.170(2)	21, 23
<i>Restatement (Second) of Torts § 452</i>	2, 3
<i>Restatement (Second) of Torts § 449,</i>	4, 12
WAC 289-20-105	5, 8-9
WAC 289-20-220	5, 8-9
WAC 289-20-138	5, 8-9

I. INTRODUCTION

A. The Record Is Sufficient For This Review.

The City of Oak Harbor contends that because there is no transcript of the trial testimony the Court cannot determine whether the instructions complained of were appropriate, Respondent's Brief. RAP 9.2 specifically requires that if a party maintains that a part of the transcript is needed that party may obtain additional parts of the record and request that the other party pay for them. Favors v. Matzke, 52 Wn. App. 789,794, 770 P.2d 686, 689 (Div I 1989). Respondent City of Oak Harbor did not obtain or request that Appellant obtain any additional parts of the record.

II. REPLY AND REBUTTAL REGARDING TRIAL COURT ERRORS

A. The Court Erred in Instructing the Jury on Comparative Fault

This Court reviews jury instructions *de novo*. Thompson v. King Feeds & Nutrition service, Inc., 153 Wn. 2d 447, 453, 105 P.3d 378 (2005). If an instruction contains an erroneous statement of the applicable law that prejudices a party, it is reversible error. Thompson 153 Wn. 2d at 453, 105 P.3d at 378. Error is prejudicial if it affects or presumptively affects the outcome of the trial. Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983)

In some special relationship cases comparative fault will be applicable. Usually both a plaintiff and a defendant have separate duties to prevent harm to the plaintiff. Because both parties breached their duties, their fault can be compared.

However, there are special relationships and there are exceptional relationships under the law. Sandborg v. Blue Earth County, 615 N.W. 2d 61, 64 (2000). In an exceptional relationship—as in the case *sub judice*—there can be no comparative fault.

“Custodial suicide is not an area that lends itself to comparative fault analysis. —[T]he conduct of importance in this tort is the custodian’s and not the decedent’s.—[I]t is hard to conceive of assigning a percentage of fault to an act of suicide. The suicide can be viewed as entirely responsible for the harm, or not relevant at all to an assessment of a custodian’s breach of duty. 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.” Sauders v. County of Steuben, 693 N.E. 2d 16, 20 (Ind. 1998).

The *Restatement (Second) of Torts* § 452 recognizes that where a duty—in its entirety—has been shifted to a third person, the original actor is relieved of liability for the result that follows from the operation of his own negligence. “The shifted responsibility means in effect that the duty,

or obligation, of the original actor in the matter has terminated, and has been replaced by that of the third person. Because the original actor is relieved of his duty in these extraordinary circumstances, he can have no fault to be compared.” Sandborg v. Blue Earth County, 615 N.W. 2d 61, 64 (2000); *Restatement (Second) of Torts* § 452, cmt.d (1965).

In Sandborg the Supreme Court of Minnesota held that a jury should not determine, compare or apportion fault on the part of a detainee who committed suicide while in custody because of the duty owed to the detainee to protect him from self inflicted harm. 615 N.W. 2d at 65.

The Supreme Court of Minnesota was clear to explain that this was **not** the imposition of **strict liability** as the plaintiff would still have to prove that the jail breached the reasonable standard of care that it owed to the detainee. *Id.* [emphasis added] And in fact, the Island County jury in this case has determined that the City of Oak Harbor did breach the standard of care regarding failure to have a suicide prevention plan with procedures and training.¹ Failing to have standard

¹ The jury entered a verdict that the City was “negligent” as to plaintiff’s contentions set forth in the instructions as follows:

Plaintiff claims that the defendant was negligent on one or more of the following respects: (1) Failing to have a suicide prevention plan with procedures and training for its officers and jailers; (2) failing to have a written standard operating procedure for officers to book and screen new inmates coming to the jail and failing to conduct receiving screening of Mr. Gregoire;

receiving screening procedures; failing to conduct receiving screening of Mr. Gregoire; admitting Mr. Gregoire to the jail rather than an appropriate facility; placing him in a cell with a sheet, leaving him unobserved; and failing to initiate CPR. The Island County jury returned a verdict of “Yes” on the question of whether the City was “negligent” as defined in the instructions. CP 21.

“... [W]here the jailer has a duty to protect a detainee from self-inflicted harm and fails to fulfill that duty, it does not make sense to offset the jailer’s fault by comparing the decedent’s fault for inflicting the harm that the jailer had the duty to prevent”.

Sandborg, 615 N.W.2d at 65.

The Court’s reasoning was also based, in part, on *Restatement (Second) of Torts* § 449, cmmnt. b (1965).

“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

cont. (3) admitting Mr. Gregoire to the Oak Harbor City Jail rather than sending him to Whidbey General Hospital or the Island County Jail or some other appropriate facility; (4) placing Mr. Gregoire in a cell with a sheet and leaving him unobserved; and (5) failing to initiate CPR for Mr. Gregoire immediately, thereby reducing his chance of survival. Plaintiff claims that one or more of these acts or omissions was a proximate cause of the death of Mr. Gregoire, and damage to his estate and to his surviving daughter, Brianna Gregoire.

Jury Instruction No. 6. CP 32

protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity. “ 615 N.W. 2d at 65.

In the case *sub judice* the duty was clear and was clearly assumed. The jury found that City of Oak Harbor violated that duty (CP 21), but the trial court also instructed the jury on comparative fault. There was a statutory duty to do receiving screening, and there was notice of behavior that warranted evaluation for suicide but instead Eddie Gregoire was placed alone and out of sight in an unmonitored cell with the means to commit suicide— a regular bed sheet and a strong metal overhead vent to tie it to— provided to him by the City of Oak Harbor. (CP 32) Under these circumstances, affording the City of Oak Harbor a defense of comparative fault is illogical and thwarts the public policy which requires receiving screening and training.²

This reasoning of the Restatement and Sandborg is in accordance with the Washington Supreme Court’s recognition in Christensen v. Royal School Dist., 156 Wn.2d 62, 70 (2005) that the defense of contributory negligence should not be available to a school district where a student has a sexual relationship with a teacher because a school has a special relationship with students in its custody and a duty to protect them from reasonably anticipated dangers. Further the

² WACs 289-20-105; 289-20-110; 289-20-130

relationship is mandatory with the school substituting as a parent. In other words this is an exceptional relationship where the defendant cannot avail itself of comparing fault for the very duty it was charged to prevent.

The relationship between a student and a school while similar to that of a detainee and a jail is less "special". A student can move about freely, go home, call for help, and leave the school at the end of the school day. But under the exceptional relationship between the detainee and the jail, the detainee is restrained and under the complete and total control of the jail twenty-four hours a day.

In Christensen the school district and the principal argued that their alleged negligence should be compared to the plaintiff student's conduct because the intentional conduct of the teacher was not relevant as to any negligence on their part. 156 Wn. 2d at 69. The Supreme Court rejected this argument because "the District and [the principal's] failure to supervise and control [the teacher's] intentional conduct is central to [their] duty to protect [the student]" *Id.*

Likewise the City of Oak Harbor had a duty to perform receiving screening (Instruction No.14, CP 40) and to supervise and care for mental and physical health of Mr. Gregoire (Instruction Nos. 13 & 14,

CP 39 & 40) and to administer CPR; Instruction 14 (CP 40). Thus, no comparative fault charge is appropriate.

The trial court erred in its comparative fault instruction and for this reason alone should be reversed

B. Trial Court Erred On Instructing on Assumption of the Risk

The trial court gave an Instructions No. 20 and No. 21 on “implied primary assumption of the risk” CP 46-47 This was reversible error. The trial court cited as authority in giving this charge Dorr v. Big Creek Wood Products, Inc., 84 Wn. App. 420, 927 P.2d 1148 (1996). In proper cases, the affirmative defense of implied primary assumption of the risk remains viable in Washington as a complete bar to a plaintiff’s recovery, even after the adoption of comparative negligence. Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 495-99, 834 P.2d 6 (1992).

“Implied primary assumption of risk arises where a plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks.” *Id.* at 497.

“A number of Washington cases are in agreement with Dean Prosser, that primary implied assumption of the risk remains a complete

bar to recovery. This is because primary assumption occurs when the plaintiff has impliedly consented to assume a duty. If the defendant does not have the duty, there can be no breach and hence no negligence.” 110 Wn.2d at 494-498.

“As Dean Prosser explains, primary implied assumption of risk should continue to be an absolute bar after the adoption of comparative fault because in this form it is a principle of ‘no duty’ and hence no negligence, thus negating the existence of any underlying cause of action.” *Id.* at 498.

Mr. Gregoire’s case is not a proper case for application of implied primary assumption of the risk. For it to be applicable in this case one must conclude that Mr. Gregoire impliedly took over the statutory and common law duties of the City Jail, that he knowingly waived the “special relationship” duties owed to him and his family. However, since the jail’s duties by statute include mental health “receiving screening” and “training in receiving screening” and provision of Cardio Pulmonary Resuscitation and first aid³ those duties could not be knowingly assumed by an untrained, suicidal and later comatose inmate. The “knowledge” element, at least, is missing by definition.

³ WAC 287-29-105, 289-20-110, 289-20-130; Instruction 14; CP 40.

The City of Oak Harbor contends that Mr. Gregoire “impliedly consented” to relieve the City of Oak Harbor of the common law and statutory duties to prevent the risk of attempted suicide. In other words Mr. Gregoire must have the same knowledge as the City of Oak Harbor and with that knowledge- both actual and subjective- he must have decided that the City of Oak Harbor need not carry out its statutory duties to do receiving screening regarding his mental health; nor to provide him a safe or monitored cell; nor to deny him the obvious means to commit suicide; nor to observe or monitor him. More extreme, the City contends he assumed the duty of the City to provide him, while comatose and suicidal, with immediate CPR and first aid. The problem is, how could he know what the City of Oak Harbor knew about the tendency of inmates to become suicidal, or the state law requirements to do mental health receiving screening in a jail WAC 289-20-105, 110, or to provide CPR, WAC 289-20-130. Further even if he knew, how could he negate the very duty the City had to protect him against self inflicted harm? So, to apply assumption of risk, there would have to be proof that Mr. Gregoire had an appreciation and knowledge of the risks of incarceration, of what screening would disclose about his suicidal/ impulsive state of mind, agree that the City could be relieved from the common law and statutory duties to protect him from committing

suicide, and further know that if he attempted suicide, they would not act to resuscitate him.

The legal fiction of such an assumption fails again since Mr. Gregoire does not have the capacity to choose the conditions of his incarceration, nor the training of his jailers. He is being held, not voluntarily, but against his will and without any ability to affect the conditions of his incarceration.

In a case of jail suicide, the court's assumption of risk instruction simply and directly negates its negligence instruction and turns the duty owed to inmates like Mr. Gregoire on its head. It simply defies logic and defies statutory and common law. It defies public policies mandating suicide prevention programs in jails to address a leading cause of death in custody.

A detainee, involuntarily confined in a jail – where the government assumes complete control and responsibility over the person – cannot be deemed to assume the risk that statutory duties will not be carried out, that he will not be screened or monitored, that he will be suicidal and given the instruments of suicide and left alone to carry it out. If an inmate who becomes suicidal, assumes the risk and duty owed by the jailer to prevent him from committing suicides, then there simply is no duty. The trial court should be reversed.

C. The Instruction On Proximate Cause Was Error

The Instructions given did not allow for the jury to hold the City of Oak Harbor responsible for the results of their negligence – which the jury found. Instruction 6, CP 32, Instruction 17, CP 45, Instruction 18, CP 44. Oak Harbor staked its entire defense on there being “only one proximate cause” of Gregoire’s death, his suicide.⁴

The Instruction initially given stated that the term proximate cause means a “cause which in a direct sequence unbroken by any new independent cause.” CP 43

The jury then asked for a clearer definition of proximate cause, CP 55, and the court gave an instruction with an additional hurdle: “[a] cause of an event is a proximate cause if it is related to the event in two ways: (1) the cause produced the event in a direct sequence unbroken by any new independent cause, and (2) the event would not have happened in the absence of the cause. There may be more than one proximate cause of an event.” CP 55

The problem is that in this kind of special relationship case, the jail’s breach of duty is not the direct cause; the jail’s breach of duty in a

⁴ Instruction No. 6: 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 32

failure to protect against the direct cause. This Instruction leads the jury to see any jail suicide as a new and “independent cause” that breaks the chain of causation. By these instructions on proximate cause, the special relationship duty owed by the City of Oak Harbor to Mr. Gregoire and his daughter, is completely negated, by the very act the City had a duty to protect against. Further, plaintiff should not have to prove that a jailer’s conduct “caused” the suicide.

“If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortuous, or criminal does not prevent the actor from being liable for harm caused thereby.” 2 Restatement Torts, 2d, § 449, p. 482.

Therefore given the three choices under Washington law, though not perfect, WPI 15.02, CP 13, at least would have allowed the jurors a view that “cause” could be found based on the kind of negligence at issue in this case, breaches of a special relationship duty, which were substantial factors, the breach of which would be a substantial factors in the suicide of Eddie Gregoire. Gregoire’s counsel asked the court to give this instruction from the outset. CP 7-8, 13. The court reaffirmed its rejection of 15.02 WPI, VRP 330:16-24.

D. Juror Misconduct – Juror No. 5 Should Have Been Questioned or Removed.

Juror 5 (prospective juror number 13) should have been questioned or removed on Plaintiff's request to the court, and the failure to do so requires reversal. (VRP 338:10-13). On the facts of this case, Juror #5's bias is "conclusively presumed" State v. Cho, 108 Wn. App. 315, 320 (2001)

During voir dire Juror 5 failed to say anything regarding his views of suicide despite a plethora of questions from both counsel. He clearly had passionate beliefs about suicide and about recent dealings with it and yet said nothing

The record on voir dire is replete with questions by counsel for Gregoire and counsel for the City of Oak Harbor regarding suicide :

So in this case we have to talk about suicide and from the questionnaires its clear that we have very wide ranging views of suicide and what either has meant in our lives, many of us have experience with it, many of us have friends who have experience with it and we also have strong feelings about it from religious teachings, philosophy, and legal approaches to it. So I would like to start the discussion about suicide by asking about—if there's anyone who could share a personal experience of someone you know of even in your own family – I know this is asking a lot of you to share—who could talk to us about an experience related to suicide or ways to prevent suicide?

VRP 95:19-25, 96:1-7)

Now some of you in your questionnaires indicated that you have strong feelings about suicide as being something immoral or against religion or ethics. How many people have that kind of a feeling? I want to just get an idea.

VRP 149:17-21

Okay. And when we talk about suicide being a – something immoral or something that is a sin, for you does that imply that a person makes a conscious choice to take his life ?

VRP 150:21-24

...Is there anyone else that still feels that suicide regardless of the circumstances would be sinful or immoral?...

VRP 152:15-17

...[A]nyone who still holds a firm view that it is a choice that the person needs to be held accountable or that it is immoral?

VRP 155:19-22

Is there anybody else who would have questions that would need to be answered in order to know how your religious feelings about suicide would impact your being a juror?

VRP 156:21-24)

And if there was an impulse that clicks in as opposed to a conscious decision, how does that relate to whether it is a sin or immoral? Does that make a difference? Anybody have a feeling about that?

VRP 151:13-17

“I’m trying to get a general sense of whether the subject of suicide, which, obviously, is an unpleasant subject, and whether the subject of an autopsy associated with that and whether those subjects are going to cause anyone really some personal discomfort just for whatever in your life experience?”

VRP 110:13-18

How many here that mentioned an involvement with relatives or family members that committed suicide if you had known about it who here would have done something about it?

VRP 180:1-4

Is there anyone else who—I really appreciate your being candid with us about that—who would not be able to consider that someone other than the person who took their life in a jail could be responsible for that death? Is there anybody? Let me say it again.

Is there anybody who could not open their mind to the possibility that someone other than the person who took their life in a suicide could be responsible because of not having prevented it? Take a minute with that. It’s okay. If you don’t understand it, please ask me to clarify.

VRP 234:4-15

Well, let me just ask it this way: Could you imagine that anyone other than the person themselves who takes their life in a jail could be responsible for anything that contributed to that suicide?

VRP 235:9-13

Is there anyone who is not able to consider that someone other than the person who commits suicide could be responsible for that death?

VRP 238:9-11

Division II recently dealt with the issue of juror misconduct in State v. Johnson, 155 P.3d 183 (2007). In Johnson the defendant was charged with, among other things, attempted rape. During voir dire the trial court posed the following question to the venire panel: “whether they ‘or a family member or a relative or a close friend ever had a similar experience with this type of case... Have your [sic] or a family member or a relative or a close friend had a personal experience with a sexual assault case?” 155 at 185-186.

Juror “B” did not respond. Juror “B’s” daughter had been the victim of date rape. 155 P.3d at 185

The Court of Appeals reversed the trial court’s denial of a motion for a new trial. In so ruling the court outlined the test from McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). Succinctly stated, in order to obtain a new trial, a party must show that a juror failed to honestly answer a material question on voir dire and then show that a correct response would have provided a valid basis for a challenge for cause. McDonough, 464 U.S. at 555, 104 S.Ct at . 845. *But see* Robinson v. Safeway Stores, Inc., 113 Wn.2d 154 (1989) (False answer during voir dire on material issue warrants new trial where litigant denied opportunity to determine to excuse juror with

peremptory challenge); In Re Personal Restraint of Lord, 123 Wn.2d 296 (1994) (False answers during voir dire require reversal only if accurate answers would have provided grounds for challenge for cause), clarified, 123 Wn.2d 737.

The Johnson court then noted that had juror “B” answered the voir dire questions truthfully, the defendant “could have pursued the matter to examine whether to excuse [the juror] for cause or at least ask her whether she could refrain from discussing her personal experiences during deliberations.” Johnson, 155 P.3d at 186-187.

In the case *sub judice*, as outlined above the issue of suicide was asked about numerous times yet Juror 5 said nothing. Nevertheless it is clear from his blog⁵ that he held very strong views that were at the forefront of his mind as he had been dealing with the issue with young people just a few weeks before trial.

While Johnson further dealt with the issue of juror “B” revealing her experience in jury deliberation, Gregoire never got that far, as the trial court in the case *sub judice* would not question Juror 5 at a time when it was most appropriate –before there had been a verdict.

Juror 5’s blog of April 29, which is just one month prior to the day of our voir dire, May 30, 2006.

⁵ Supplemental Designation of Clerk’s Papers, Docket #141; (Appendix A)

"I am really pissed off right now. I want to punch something and scream every cuss word I can think of. Yet here I sit at my laptop trying to figure out how I am going to handle all of these emotions"

and

"Last weekend was spent comforting, counseling, consoling and confronting hurtful and damaging theology concerning suicide that made a bad situation even worse."

(CP 2179)

Yet on his questionnaire, Juror 5 responded, "No" as to whether he had "strong feelings, one way or the other, about suicide." CP 129

He also responded as follows on the questionnaire:

Have you, any family members, or close friends ever been depressed or suicidal? "No" CP 130

Have you lost anyone close to you due to suicide? "No" CP 130

At a minimum having just "confronted" "hurtful and damaging theology regarding suicide" Juror 5 had strong views about suicide. Yet despite the numerous questions asked in voir dire regarding suicide, he remained silent.

Further consider his blog of May 29:

"I still cannot talk about it, but later this week when I can, I am going to have lots and lots to say to you lawyers who keep coming to this blog everyday. That's right, I know.:"

(CP 2177)

What is it that Juror 5 has to say? To whom is he referring?

While Juror 5 related nothing about his views on suicide, he did say in voir dire that he could be open minded. (VRP 222- 226)

How could an impartial person, following the court's instructions, in this situation not have said something about their views on suicide. He did not on the written questionnaire, nor in open court.

A person's beliefs play a strong role in what they consider justice. There can be no doubt that a person's religious beliefs play an important role in how they view justice. If a potential juror fails to relate their beliefs as to suicide when others are responding, then a presumption arises that they are not being candid or forthcoming, are not honestly participating in the voir dire process, as to strongly held views, and how they would view the evidence.

"In cases that involve a juror's alleged concealment of bias in voir dire, the test is 'whether the movant can demonstrate that information a juror failed to disclose in voir dire was material, and also that a truthful disclosure would have provided a basis for a challenge for cause' State v Cho, 108 Wn App 315, 321 (2001)

The trial court when confronted with evidence that Juror 5 concealed strongly held beliefs and emotions about suicide and theology of suicide, refused Appellants' request to question or remove Juror 5. VRP 338:10-13. This was reversible error. While the trial court has

discretion it cannot abuse its discretion. These unusual material facts, require a new trial.

“A juror’s misrepresentation or failure to speak when called upon in voir dire regarding a material fact constitutes an irregularity affecting substantial rights of the parties. When the failure to respond in voir dire relates to a material question the appropriate remedy is to grant a new trial.”

Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 159,776 P.2d 676 (1989) quoting Gordon v. Deer Park Sch. Dist. 414, 71 Wn. 2d 119,122, 426 P.2d 824 (1967).

If a juror knows that disclosure is the appropriate response to the court’s and/or counsel’s questions, then bias is conclusively presumed.

Cho, 108 Wn. App. At 328. Whether the juror’s bias actually affected the verdict is irrelevant. Allison v. Dep’t of Labor & Indus., 66 Wn. 2d 263,265, 401 P.2d 982 (1965).

Juror 5 represented to the court in writing in the jury questionnaire that he had “No” strong feelings one way or the other about suicide. He did not respond to the plethora of questions by both counsel regarding suicide even when posed as to religious beliefs. Yet a reasonable interpretation of his blogs say he did hold very strong beliefs as to suicide and theology at the time of voir dire.

Likewise he communicated on his blog about the case during the deliberation, expressing that he had “plenty” to say to the lawyers. An

unbiased juror would have said something under these circumstances in voir dire.

If Juror 5 had revealed his bias on the questionnaire or during voir dire, counsel for Gregoire could have inquired further and have challenged his selection for cause. See RCW 4.44.170(2) (actual bias consists of "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the case impartially and without prejudice to the substantial rights of the party challenging"). Again, reversal is required for this additional reason.

E. Juror 12 Should Have Been Excused For Cause

First, this issue is preserved as Plaintiff's cause challenge was denied, no peremptory challenge was used on this juror and she sat on the jury. (VRP 254:12-18). State v. Fire, 145 Wn.2d 152, 159, 34 P.3d 1218 (2001); Hill v. Cox, 110 Wn. App. 394,410, 41 P.3d 495 (Div. III 2002)(Fire is applicable to civil cases). Plaintiff's cause challenge was denied, VRP 255:1-21.

Prospective juror number 30 was excused for cause. Prospective juror 30 stated in voir dire that: "Suicide. I don't think that's right. I think we have to be responsible for ourselves. I don't think parents are good and valuable— VRP 240:9-12.

“Lawsuits I think we spend too much time and energy on frivolous lawsuits” VRP 240:15-19

Prospective juror 12 immediately thereafter spoke up and said:”Ditto [referring to what Prospective juror 30 had just said] is basically all I have to say. I think there is too much of this whole lawsuit thing going on. It’s unfortunate for the child, but ultimately that was her father’s when he made the decision. I mean if she was trying to get some kind of ruling like there has to be a screening process, I’d be all for that, but maybe for education that she’s had but not for like, you know, frivolous types of things. So I’m kind of— I’m completely over here [referring to the Oak Harbor table] so far.” VRP.241:1-9, VRP 243:1-3

When asked if she could keep an open mind she responded equivocally, but renewed her strong statement of bias in favor of law enforcement.

“I have an open mind about everything. It’s hard to swing me, especially since I grew up with law enforcement all around me. I always looked to my uncle and he has been a police officer for about 13 years.” VRP 242:8-12.

She responded that Appellant would not want her “[m]ostly because I might be difficult to sway. I’m very over here right now (indicating the Oak Harbor table). VRP 2428:21-25; VRP 243:1-3.

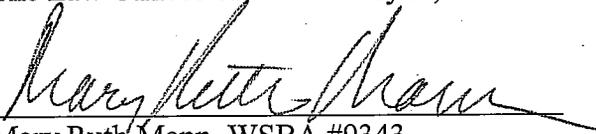
While she once again said that she could be open minded, but that didn't change her predilections for the defense, coming from a family of police officers. Given the nature of the issues in the case, her statements of alliance with the Oak Harbor table, and her family association with law enforcement she should have been excused for cause. VRP 246-249; RCW 4.44.170(2)

III. CONCLUSION

This case should be remanded for a new trial.

Respectfully submitted this 29 day of May, 2007.

The Law Offices of Mann & Kytle, PLLC


Mary Ruth Mann, WSBA #9343


James W. Kytle, WSBA #35048

APPENDIX A

The Honorable Alan R. Hancock

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR ISLAND COUNTY

TANYA GREGOIRE, guardian)
for the person and estate of BRIANNA)
ALEXANDRIA GREGOIRE, a minor,)
and as personal representative for Edward)
ALBERT GREGOIRE, deceased,)

Plaintiffs,)

vs.)

CITY OF OAK HARBOR, a municipal corporation,)

Defendant.)

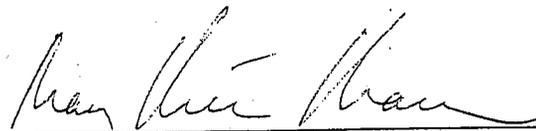
Case No.: 02-2-00360-0

PRAECIPE DIRECTING CLERK
TO ENTER JUROR "BLOG"
MATERIALS AS PREVIOUSLY
ALLOWED BY THIS COURT
ON MAY 30, 2006

The attached Exhibit A, Juror 5 Justin Ross' Internet Public Blog website excerpts related to this matter, is to be filed pursuant to the Court's direction, as noted on Exhibit B, page 347. Please consider the Blog excerpts, attached as Exhibit A, filed within this case.

DATED this 2nd day of February, 2007.

LAW OFFICES OF MANN & KYTLE, PLLC



James W. Kytile, WSBA #35048
Mary Ruth Mann, WSBA #9343
Attorneys for Appellant

PRAECIPE - 1

Law Offices of
MANN & KYTLE, PLLC
615 Second Avenue, Suite 760
Seattle, WA 98104
(206) 587-2700

COPY

EXHIBIT A

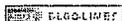
Let wonder replace worry

Christian Life, Politics, Culture, Current Events, Youth Ministry, and what you think about what I'm thinking.

Disclaimer

Even though I am the youth minister at Whidbey Presbyterian Church: the views presented here do not reflect the opinions or positions of that wonderful church or the PC(USA). They are solely my personal views and thoughts. Please contact me via email if you have questions about the content.

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Archives

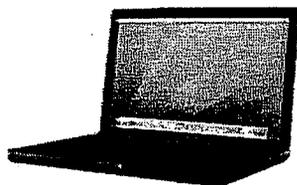
- May 2006
- April 2006
- March 2006
- February 2006
- January 2006
- December 2005
- November 2005
- October 2005
- September 2005
- August 2005

May 29, 2006

Where have you been all my life?

Yes, I have been gone for awhile. It has to do with me serving on Jury Duty. I still cannot talk about it, but later this week when I can, I am going to have lots and lots to say to you lawyers who keep coming to this blog everyday. That's right, I know. :)

In much more exciting news, I made a purchase today that will forever change my life. I am the proud owner of a HPA1000 HPA1000 HPA1000.



It is beautiful and runs like a dream. I'll never go back.

I really hope this trial is over tomorrow. Look for me to be back to regular posts this week.

Posted by Justin Ross at 10:48 PM | [Permalink](#) | [Comment](#) | [Trackback](#)

May 2006

Sun	Mon	Tue	Wed	Thu	Fri	Sa
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			



Justin P. Ross

Led by Jesus. loved by Nicole. enthusiastic traveler. obsessive clothes shopper. constant book reader. addicted to slurpees. consumer of good beer. enthralled with politics. captivated by pop culture. motivated by a love for teenagers. compelled by the call, passionate about youth ministry. This is my journey.

Where I Work

Where I Live

Where I Grew Up

My Christian Book Reading List

2005 Annual Report

My Charge to the 2005 Graduating Seniors

The Core Youth Leaders Training

2005 National Youth Workers Convention: Nashville

May 19, 2006

Still on the Jury

Jury Duty has really made blogging each day a challenge. The case that I am on should last 7 or 8 more days. I don't think I am even half done yet. It's a good experience, but I'll be glad to get it behind me.

The fundraiser on Saturday went off without a hitch. We worked setting up until 11pm Friday and we were all back at 6am Saturday. By 5pm, we had all of the rooms clean and ready for church Sunday morning. For all of that work, we raised almost \$5000! It was worth it; although I don't think I would have said that early Saturday morning.

Something I am excited for is that I got my free copy of Mark Driscoll's new book in the mail. That will make Jury Duty tomorrow much more enjoyable. I look forward to reviewing it here soon.

Posted by Justin Ross at 11:23 PM | [Permalink](#) | [Comment](#) | [Trackback](#)

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Jury Duty

I spent all day at the county courthouse enduring the jury selection process. I have to go back in the morning and they tell us that they will have a jury selected by noon. I really have no idea if they will select me, but I keep telling myself they won't.

The day was pretty uneventful: except for one thing. I turned my cell phone to silent and set it to switch back normal at 4:20 because I figured we would be done around 4:15. I set my phone to switch back automatically so I don't forget to check my messages after having my phone off. The lawyer is talking to someone, the court room is quiet, and at 4:22, Nicole decides to call to see if I'm finished yet. That was even worse than someone's phone ringing during the sermon: and the judge was not happy. He did tell me to have a good night though, so I guess it was not that big of a deal.

Its back to the courthouse tomorrow.

Posted by Justin Ross at 11:24 PM | [Home](#) | [About Me](#) | [Contact Us](#)

May 15, 2006

Monday thoughts

1. The retreat over the weekend was great. The band and speaker really impressed me. The only thing all weekend that did not impress me was the "network" meeting we had Saturday afternoon. I am still not sure what that was all about.
2. I ended up doing something to my foot during the dodge-ball tournament Saturday. The side of my foot have a big knot that looks like a bruise. It is getting better today though.
3. I am having a yard sale fundraiser this Saturday. My students spent all day yesterday collecting everything you can imagine from church members. We have some really nice stuff and we can easily raise all that we need.
4. I have Jury Duty at 8:30am tomorrow. I am not sure what to expect, but I'll report back here tomorrow night.
5. Tomorrow is my birthday. 27 feels old. I started this job when I was 22. That seems like such a huge difference.

Posted by Justin Ross at 11:24 PM | [Home](#) | [About Me](#) | [Contact Us](#)

May 12, 2006

Retreat

I am off to our SR high spring retreat. Ministry is getting really busy. It is going to be a wild couple of weeks.

Posted by Justin Ross at 10:01 PM | [Home](#) | [About Me](#) | [Contact Us](#)

May 10, 2006

What my Tivo records for me...

24

The Office

CSI

Prison Break

Los

Deadliest Catch

Survivorman

My Wish List



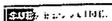
Let wonder replace worry

Christian Life, Politics, Pop Culture, Current Events, Youth Ministry, and what you think about what I'm thinking

Disclaimer

Even though I am the youth minister at Whidbey Presbyterian Church, the views presented here do not reflect the opinions or positions of that wonderful church or the PC(USA). They are solely my personal views and thoughts. Please contact me via email if you have questions about the content.

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Categories

- //Creative, Youth, Ideas, Books
- Christian Life
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- My life
- Politics
- Sports
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- Theology
- Travel
- Weblogs
- Youth Ministry

Email Me

Archives

- November 2006
- October 2006
- September 2006
- August 2006
- July 2006
- June 2006
- May 2006
- April 2006
- March 2006
- February 2006

[Main](#)

April 29, 2006

November 2006

Sun	Mon	Tue	Wed	Thu	Fri	Sat
				1	2	3
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

Bad week

I am really pissed right now.

I want to punch something and scream every cuss word I can think of.

Yet, here I sit at my laptop trying to figure out how I am going to handle all of these emotions.

Just over a week ago, a senior at the high school walked over 10 miles from Oak Harbor to Deception Pass bridge, set his back pack down and jumped 180 feet to his death and no one knows why. Several of my students knew him. He was a happy kid already accepted into college with a bright future in front of him. Last weekend was spent

comforting,

counseling,

consoling,

and confronting hurtful and damaging theology concerning suicide that made a bad situation even worse.

He was the fifth kid lost this school year. Eighth in the last 2 years.

Yeah, you read that right. 8 students in less than 2 years.

One of the students told me last week that he has not really known any of these kids who have died. That changed last night.

Back at Deception Pass, one of the guy's best friends was hiking to a popular, albeit dangerous, cave off to the side of the bridge with his sister and a few friends. He slipped, falling over rocks and into the water.

Neither body has, or probably ever will be, recovered.

These kids don't deserve this. Sure, every class in school loses classmates to death, but this is getting ridiculous. Some of these poor kids are so calloused that death does not even phase them anymore. This one hits close to home; and I am tired of dealing with death. How much more are they going to have to deal with? How many more?

So tonight I sit here angry, not at anyone but at the situation. Tomorrow, I head to church to wrap my arms around hurting kids. To tell them that I don't understand, but I know the only One who does. To load up a bunch of guys after church and take them out

to comfort,

to council,

to console.

And to suspend for another week my plans for youth group.

God is not shocked or surprised at any of this and I know that in time, He will work through these tragedies. Sure I am angry, but this will pass. I don't think I am mad at God, although I have thought about yelling at him and while I know that he is big enough to take it, I just can't see how doing that could make me feel better. The one thing I do know without a doubt is why I have been brought from Arkansas to Oak Harbor, Washington.

For such a time as this.

Youth Ministry has never been needed more in this town than it is right now. I am up for the challenge; but this has got to stop.



Justin P. Ross

in less than 50 words:

Led by Jesus, loved by Nicole, enthusiastic traveler, impulsive shopper, converted Mac user, constant book reader, addicted to surprises, consumer of good beer, enthralled with politics, captivated by pop culture, motivated by a God given love for teenagers, compelled by the call, passionate about youth ministry. This is my journey.

Where I Work

Where I Live

Where I Grew Up

My Christian Book Reading List

2005 Annual Report

My Charge to the 2005 Graduating Seniors

The Core Youth Leaders Training

2005 National Youth Workers

Blogroll

- jonathan neron
- Advancing
- After-thought
- AireadyNotYet
- Amanda in Kenya
- The Berkley Blog
- braneoberly.com
- Clavejones
- Creative Youth Ideas
- Danny's Blog
- don't call me Veronica
- Doogie Howser Did It. So
- Why Not Me
- Far Country Tell: the wit of
- jesus and orpheus
- the G sides
- Hit the Back Button to Move
- Fwd
- Hopefully Meaningful
- Rambings
- Into the ears of babes
- Jesus & Java
- Journal
- Kingdom Adventure:
- Journey, Discovery,
- Transformation...
- Life in student ministry
- like a fire
- Live On Two Legs
- looking out from my little
- place
- Mark D. Roberts Blog
- One Year Bible Blog
- pomomusings
- rip's blog
- scottthodge.org
- TallSkinnyKiwi
- Technorati Search for youth
- ministry
- Think Christian
- Vintage Faith
- Your Lucky Day!
- Youthblog: Christian Youth
- Work & Ministry
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Technorati

11 10

10 10

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White House Press Sec.

I am really excited that Tony Snow has accepted the job of White House Press Sec. The official announcement should be tomorrow morning. I listen to his radio snow ever so often and he comes across to me as a man of honesty and integrity. He has also been very critical of Bush and I am sure that he will make these opinions known.

I wonder what would have happened if Bush had selected Bill O'reilly for this job. It probably would go something like _____

Posted by Justin Ross at 03:28 PM |

April 25, 2006

US maps by denomination.

I found this [map](#) really interesting. The maps are divided into percentages of residents in every county in the country affiliated with that particular denomination.

The Baptist church completely dominates the south, but not much of the rest of the country, while the majority of Catholics are in the northeast. I'll give you one guess as to where the Mormon church has its strongest presence.

The Presbyterian Church is pretty equally spread throughout the country and not dominate in any certain area. I am not sure why this is, or if it is a good or bad thing.

Check out your church's denomination.

Posted by Justin Ross at 02:10 PM |

April 24, 2006

Only one more day...

Yes, it is true. Free cone day is tomorrow at Ben & Jerry's! Check out

On Happy Day!

Tuesday, April 25th is Free Cone Day at Ben & Jerry's and you know what that means... three scoops cream for you!

As a way to thank our customers for their support and to celebrate 22 years of scooping the creamiest, yummiest ice cream, frozen yogurt and soft-serve Ben & Jerry's scoop shops are giving it away!

Around the world scoop shops are opening their doors from noon to 8:00 pm to serve up a free scoop of your favorite flavor or better yet, a new one you've been wanting to try like Turtle Sour, Peanut Butter Swirl or Lemonade Sorbet.

So grab a cone and come on down to have some scream on us!

Like we said... On Happy Day!

Posted by Justin Ross at 10:40 AM |

April 21, 2006

Recent Posts

- Karl Barth in Time Magazine
- When I was 15... (or Mission impossible)
- Meenings
- Dead Sea Scrolls
- Mike Tysor
- Youth Group Games
- At this very moment...
- Bindi Irwin
- Why Jessica Alba quit Youth Group
- Google snaps up YouTube

On my desk

- Church of England: Book of Common Prayer (1979)
- Personal Size Economy, Black

On my Nightstand

- Lincoln Child: The Reinc

New on my iPod

- Adrenaline: Adios
- Various Artists: Freaked!
- Leeiand: Sound of Melodies

What my Tivo records for me...

- 24
- The Office
- CSI
- Prison Break
- Lost
- Deadliest Catch

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ISLAND

TANYA GREGOIRE, Guardian)
for the person and estate of)
BRIANNA ALEXANDRIA GREGOIRE,)
a minor, and as Personal)
Representative for EDWARD)
ALBERT GREGOIRE, deceased,)

Plaintiff,)

vs.)

CITY OF OAK HARBOR, a)
municipal corporation,)

Defendants.)

Cause No: 02-2-00360-0

Court of Appeals

No: 585444 Division I

Volume 5

Pages 327-349

Excerpt of the Verbatim Report of Proceedings
(Jury Question and Request to Interview or Excuse
Juror Number 5)

BE IT REMEMBERED, that on Wednesday, May 30,
2006, the above-named and numbered cause came on
regularly for hearing before the HONORABLE ALAN R.
HANCOCK, sitting as judge in the above-entitled court,
at the Island County Courthouse, in the town of
Coupeville, state of Washington.

The plaintiff appeared in person and through
her attorneys, Mary Ruth Mann and James W. Kytle;

The defendant Richard Wallace appeared in person and through his attorney, Robert L. Christie, who appeared telephonically.

WHEREUPON, the following proceedings were had, to-wit:

	INDEX	
		PAGE
Jury question re clearer definition of proximate cause		329
Plaintiff's motion during jury deliberations to interview or excuse Juror Number 5		
by Ms. Mann		335
by Mr. Christie		339
by Ms. Mann		340
by the Court		342

Court's recollection that the plaintiff had submitted a 15.01.01 definition of proximate cause. However, if the Court's memory serves correctly, the plaintiff's 15.01.01 did not have the bracketed language about a new independent cause or something to that effect, and there may also have been the omission of the fact that -- or the statement in the WPI that there may be more than one proximate cause for an injury. I could be wrong about that. I'm quite sure that there was no independent cause bracketed language, which I think needs to be given here. So that's the Court's memory of this. So I'll just ask counsel if they would agree that the Court could give the 15.01.01 WPI at this point?

MR. CHRISTIE: I agree with that, Your Honor.

MS. MANN: I have a concern about giving them two different definitions. They're very closely related. We had asked the Court for 15.02, and I know that that was rejected.

THE COURT: That was also requested, but I think the plaintiff also requested 15.01.01 in addition to 15.02, and the Court did reject 15.02. That's not appropriate in the Court's judgment under the circumstances of this case.

MS. MANN: All right. We'll agree to giving

(JURY NOT PRESENT.)

THE COURT: Back in session on Gregoire v. The City of Oak Harbor. The bailiff has provided the Court with a question the jury submitted. The question reads as follows -- before I get to that are you on the line with us, Mr. Christie.

MR. CHRISTIE: Yes, Your Honor.

THE COURT: Okay. Good morning. The question is as follows: Can we get a clearer definition of proximate cause? That is the question.

For the record. I took the liberty of filling in the court caption and the number of the case at the top of the document which is entitled jury note and Court's response. The Court received this question from the jury at about 11:00 this morning.

Counsel, I'm going to suggest that the Court provide the jury with the definition of proximate cause as outlined in WPI 15.01.01, which is the alternative definition to proximate cause, which is set forth in 15.01 which the Court gave to the jury. Counsel?

MS. MANN: Your Honor, I'd like to look at that. We don't have that in court with us.

THE COURT: Surely. I brought the book in with me so we'll show it to you here, counsel.

I would note for the record that it is the

that, and we would ask that "event" rather than "injury" be used for the language.

THE COURT: Yes. Let's deal with that. Let me suggest the following as the instruction: Deleting the word "injury," including the word "event" from bracketed language and then including the bracketed language about unbroken by any new independent cause.

So that the proposed instruction would read as follows: A cause of an event is a proximate cause if it is related to the event in two ways: One, the cause produced the event in a direct sequence unbroken by any new independent cause, and, two, the event would not have happened in the absence of the cause.

Then a new paragraph. There may be more than one proximate cause of an event. Would that be acceptable?

MR. CHRISTIE: Yes, Your Honor, from the defense.

MS. MANN: The jury has the intervening superseding cause instruction, right?

THE COURT: Yes.

MS. MANN: It seems to me that if we're going to refer to unbroken by a new independent cause the language should correspond to that instruction so that they would use those together rather than having a

1 separate definition of what might break the sequence of
2 causation unbroken by a superseding intervening cause.

3 THE COURT: Mr. Christie?

4 MR. CHRISTIE: I think the Court should give
5 the instruction exactly as you read it into the record.

6 THE COURT: Final comment, Ms. Mann?

7 MS. MANN: The jury then has two different
8 terms to use for what would break the chain of causation
9 and with no definition for what a new independent cause
10 is. I think that's troublesome.

11 THE COURT: One moment. Mr. Christie, do
12 you recall the WPI number for the superseding cause
13 instruction?

14 MR. CHRISTIE: Give me just a second, Your
15 Honor, and I'll find it. WPI 15.05.

16 THE COURT: Yes, thank you. One moment.
17 Looking at WPI 15.05, which is essentially the
18 instruction that the Court gave making some decisions
19 about the bracketed material, this instruction refers to
20 a later independent intervening act or cause.

21 MS. MANN: So they do correspond in terms of
22 language, I guess, somewhat.

23 THE COURT: So that is the opening sentence,
24 the reference to a later independent intervening act or
cause. I don't recall right off the top of my head what

1 but that it was anticipated.

2 THE COURT: Well. The Court has decided
3 after hearing from counsel to give 15.01.01 in the form
4 in which the Court read it to counsel here. I think it
5 would be a mistake to try to overdo this in such a
6 manner that it would go beyond what the pattern
7 instructions are in these connections, and I'm just
8 going to give the 15.01.01. Let me write this out here
9 and then I'll show it to Ms. Mann or read it to the
10 parties here.

11 All right. The Court's response reads as
12 follows: A cause of an event is a proximate cause if it
13 is related to the event in two ways: One, the cause
14 produced the event in a direct sequence unbroken by any
15 new, independent cause, and, two, the event would not
16 have happened in the absence of the cause.

17 There may be more than one proximate cause
18 of an event.

19 That is the pattern instruction. All right.
20 I've signed that, and I'll hand this to the bailiff to
21 deliver to the jury.

22 MS. MANN: Your Honor, is it possible to get
23 a copy of that?

24 THE COURT: Sure. Let's go ahead and -- let
25 me just take it back, Mr. Roberts. I'll make copies for

1 the specific word was that the Court used in that
2 connection, but the reference was to independent
3 intervening act or cause. Whatever it was.

4 MR. CHRISTIE: Your Honor, I have your
5 instruction 18 in front of me. It says, if you find
6 that the defendant was negligent but that the sole
7 proximate cause of the injury/event was a later
8 independent intervening cause, et cetera.

9 MS. MANN: The important part, Your Honor,
10 the et cetera, is that it includes in the exercise of
11 ordinary care could not have been reasonably
12 anticipated. If we could say a new independent
13 intervening cause as defined herein so that they
14 understand they need to look at that definition because
15 otherwise it is not accurate by itself.

16 MR. CHRISTIE: I disagree with that, Your
17 Honor. You're giving a stock instruction that the
18 committee spent time creating as an alternative, and it
19 only makes sense that if they want more context for a
20 definition that you give them a stock instruction that
21 the committee has prepared.

22 THE COURT: Any final comment, Ms. Mann?

23 MS. MANN: I think it's extremely important,
24 Your Honor, in this case in particular because the jury
25 could easily find that there was an independent cause

1 Ms. Mann and Mr. Kytie.

2 MR. CHRISTIE: Your Honor, Mr. Rosen will be
3 up there shortly. If you could make a copy for him, I'd
4 be grateful.

5 THE COURT: I'll do that.

6 MR. CHRISTIE: Thank you.

7 THE COURT: Thank you very much. That is
8 all for now.

9 MR. KYTLE: Thank you, Your Honor.

10 (RECESS.)

11 (JURY NOT PRESENT.)

12 THE COURT: We're back in session on
13 Gregoire v. The City of Oak Harbor. Counsel requested
14 that a hearing be conducted. Do we have counsel for the
15 defendant on the telephone?

16 MR. CHRISTIE: Yes, Your Honor.

17 THE COURT: Okay. Good afternoon. Is that
18 Mr. Christie?

19 MR. CHRISTIE: Yes, sir.

20 THE COURT: Okay. Counsel --

21 MS. MANN: Your Honor, may I remain seated?

22 THE COURT: Yes.

23 MS. MANN: Thank you. We called
24 Mr. Christie to alert him to what we were concerned
25 about. One of the jurors, Justin Ross -- I can't

remember what his number is; his original number was 13 -- has a public blog, and our trial team occasionally monitored it just to make sure there was nothing about the case in it, and we want to just make a record of -- it was checked last night, and there is a blog about the case, and it mentions -- let me hand it up to the Court. What I've handed up is the blog from last night. I also want to hand up the jury questionnaire, and a prior entry on the blog site that's dated April 29th, which relates to issues in this case, and we just felt we had an obligation to disclose to the Court, and we do have a concern that we have verified that the act of just going to the blog to see what's posted on it does not provide any identification of the person. So we're concerned about what he knows or believes about lawyers who keep coming to his blog every day which is not -- we have not been going to his blog every day but there have been spot checks to it. So it raises an issue of concern.

THE COURT: You're just bringing this to the Court's attention?

MS. MANN: The secondary issue, Your Honor, is that in Mr. Ross' questionnaire on page 4 on the questions about suicide he did not identify anyone -- he checked no on both of the boxes about whether you have any family members or close friends who have ever been

depressed or suicidal or lost anyone close due to suicide, and after seeing the blog called "bad week" dated April 29th, we have a serious concern about whether he was forthright in voir dire about how much he had going on about that issue, and I don't know whether the Court would want me to read the relevant parts into the record or whether we can make a record of this, but --

THE COURT: Well, if you'd like to file these documents, you may do so.

MS. MANN: Okay. The issue is that apparently this young man is a youth minister and during the two weeks prior to the trial apparently was comforting, counseling, and consoling youths and confronting hurtful and damaging theology concerning suicide, and that is one of the issues that was discussed extensively in voir dire and that he did not respond to.

He talks about the fifth kid, the last this school year, and several of my students knew this young man who committed suicide. So it's a troublesome situation, Your Honor, and I -- we don't have any way to know what this young man's blog is about. What he indicates is, later this week when I can talk about it, I'm going to have lots and lots to say to you lawyers

who keep coming to this blog every day. That's right. I know. So --

THE COURT: So you're bringing this to the Court's attention; is that it?

MS. MANN: Well, we think that it violates the Court's directive to communicate about the case outside of court and that there should be inquiry of some kind about what knowledge he has which is indicated here and what it means.

THE COURT: Back to my question. What, if anything, are you requesting that the Court do?

MS. MANN: Your Honor, we would like the Court to either inquire of this juror or to remove him.

THE COURT: All right. Let me read the documents, and then we'll hear from Mr. Christie.

All right. I read these documents that counsel provided. One is a document dated April 29, 2006. Ms. Mann has represented that this is a document from the so-called blog of Justin Ross, one of the jurors in this case. Then the other document is a document dated May 29, 2006, also apparently a document from Mr. Ross' so-called blog.

Did you get copies of these documents, Mr. Christie?

MR. CHRISTIE: Your Honor, I have them on my

computer screen in front of me so I'm familiar with what the Court is discussing and what Ms. Mann is presenting to you, and she did call me and alert me to her plans so I appreciate that.

THE COURT: Okay. Your response, Mr. Christie?

MR. CHRISTIE: Well, I don't see anything in the -- I'll speak to them separately. I see nothing in the May 29th blog that is any way in violation of the Court's directive. Certainly, people in jury duty are free to advise people they're on jury trial, and the directive is not to talk about it, and that's exactly what he says here. How he may know lawyers, if they are, checking his blog, I have no way of knowing that, but I don't see why this would give any basis for the Court to make inquiry of him about that, and, certainly, it's not grounds for disqualifying him.

This April blog concerning his comments about the suicide, it's clear from reading it that he -- this isn't a close family friend or relative, so I don't see how that's in any way contradicted by his answer to the questionnaire. Without going back through the record I don't recall that he answered any particular questions about suicide, and, obviously, I'm certainly not in a position to speak about whether or not he

volunteered to come forward with information., whether he raised his hand, none of which would -- well, certainly, raising his hand wouldn't be reflected on the record anyway. So there's nothing I can see on this record that would justify the Court at this point calling him out separately and somehow questioning him and certainly nothing that would serve as grounds for disqualifying him.

THE COURT: Final comments, Ms. Mann?

MS. MANN: Yes, Your Honor. As we look at this, two things of concern. One is a failure to disclose what was clearly an extremely powerful current emotional issue of the suicide being -- the suicide of youths that was impacting the students he was working with directly and that he was spending days and days on that issue. Wrapping his arms around hurting kids. And it seems to me that that would easily have come within a disclosure where it asks for family members or close friends being depressed or suicidal.

Further, that he didn't disclose in response to all the questioning, which was extensive during voir dire, but the current issue of concern is the comment about going to have lots and lots to say to you lawyers who come keeping to this blog every day. That's right. I know. And that has a tone to it that on paper you can

THE BAILIFF: Number 5 in the jury box.

THE COURT: That's not what I'm interested in. I want to know his struck jury number.

MS. MANN: 13 is on the number on our juror questionnaire for him.

THE COURT: Okay. Yes. I'm prepared to rule on the request. As I understand the situation, the plaintiff is requesting that the Court either excuse Number 5, Justin Ross, from further service or have further examination of him at this time or some other relief. Plaintiff's counsel has provided the Court with these copies from Mr. Ross' so-called blog, as they've been identified. They're dated April 29, 2006, and May 29, 2006.

First of all, there's this issue of whether Mr. Ross was truthful about the questions on the jury questionnaire to the effect of whether any close friend, family member or relative committed suicide or was involved in suicide or something to that effect. There is nothing in the information that's been provided to indicate that Mr. Ross was untruthful in answering no to those questions. There's nothing in this documentation or other information provided by plaintiff's counsel that would indicate that Mr. Ross had a family member, relative, or close friend who committed suicide or was

interpret several ways, and I think it is potentially a retaliatory or confrontive tone as opposed to just a mention, and, as I told the Court, the best information we have is that simply going to the Web site and viewing it is something that is not detectable other than there has been a visit so this indicates knowledge that we don't know a way that he could have as to who was visiting his Web site.

THE COURT: I'm going to take a brief recess. I want everyone to remain seated. I'm going to get some materials. I'll be right back. Please remain seated and stay on the line, Mr. Christie.

MR. CHRISTIE: Yes, Your Honor.

(RECESS.)

(JURY NOT PRESENT.)

THE COURT: I'm back. If you just give me a moment, I want to review some notes here. Just a minute.

Ms. Mann, did you say that Mr. Ross' juror number was 13?

MS. MANN: Yes, Your Honor.

THE BAILIFF: I believe he's number 5 on the jury.

THE COURT: On the struck jury list number

5:

involved in suicide. So that would not be a violation of the questionnaire or an indication of some untruthful statement on the questionnaire. So that would not be a basis for excusing Mr. Ross or other relief.

Then we have the matter of whether he's discussed the case in some manner contrary to the Court's instruction not to discuss the case. Again, there's nothing in these documents or other information provided by plaintiff's counsel that indicate that Mr. Ross has discussed the case. There is nothing inappropriate about someone advising others that he or she is a juror in this case. That's all that Mr. Ross has done in this situation. So there's no basis for relief in that regard.

Then we have this matter of the statement in the May 29, 2006, document where he says he cannot talk about the case and then he says that later this week when I can I'm going to have lots and lots to say to you lawyers who keep coming to this blog every day. That's right. I know.

Again, I find no basis for any relief here either to excuse him or to require further questioning of him. It would be understandable that Mr. Ross having a blog like this would be concerned about attorneys in this case contacting the blog. It would seem to the

1 Court that it would be understandable that a person
2 would find it somewhat offensive that an attorney for
3 one of the parties in the case would be proceeding with
4 some kind of investigation, if you will, of Mr. Ross,
5 and whether he was somehow not an appropriate juror or
6 something of that nature.

7 Having said that, there is nothing in this
8 information that indicates that Mr. Ross cannot be fair
9 and impartial about being a juror in this case. There's
10 no indication that he knows who the lawyers are that
11 were contacting the blog, although I understand that
12 Ms. Mann is telling the Court that she and/or Mr. Kytie
13 have contacted the blog or pulled up the blog, however
14 you want to characterize it, to review it. Once again,
15 though, the point is that there's nothing here that
16 indicates he cannot be fair and impartial. There's
17 certainly nothing in the information as a whole that
18 indicates he cannot be fair and impartial. From the
19 April 29, 2006, entry in the so-called blog it indicates
20 that he has a good deal of compassion for people who
21 have committed suicide or may be involved in that and
22 he's a youth minister and would naturally be concerned
23 about helping people that have been involved in
24 situations like that or been affected by situations like
that.

1 The Court's notes indicate that Mr. Ross did
2 disclose in questioning that he was a youth minister.
3 He did respond to other questions as well on several
4 occasions, if the Court recalls correctly. The Court's
5 practice is to take notes about any possible basis for
6 bias or prejudice or any other basis for challenging a
7 juror for cause, to keep notes on those issues and to be
8 ready to respond to any requests for challenges for
9 cause or anything of that nature. I find nothing in my
10 notes that indicates that Mr. Ross was in any way biased
11 or prejudiced or that raised any question about his
12 ability to be fair and impartial, and the answers he
13 gave to questions do not raise any issue in that regard.
14 So I think the voir dire would not be any basis for
15 challenging Mr. Ross for cause or to call into question
16 his ability to be fair and impartial.

17 Let it also be stated for the record that
18 counsel for both parties had every opportunity to
19 question Mr. Ross and all of the other members of the
20 jury panel to explore more particularly any issue
21 relating to suicide. Just the fact that they responded
22 to questions on the questionnaire about close friends,
23 family members and/or relatives does not mean that
24 counsel could not have inquired of Mr. Ross or others
25 about other situations that they might have been

1 involved in pertaining to suicide.

2 So the Court finds no reason under this
3 information that's been presented to exclude, excuse or
4 disqualify Mr. Ross. Nor does the Court find any need
5 or that it would be appropriate to question him further
6 based on the information presented. So these
7 proceedings have been recorded for the record and
8 they're noted, but the Court finds no basis for relief
9 at this time.

10 MS. MANN: Thank you, Your Honor. If I
11 might just note one thing. One of the questions on the
12 questionnaire is, have you lost anyone close to you due
13 to suicide? So it doesn't limit it to close friends or
14 family members. That was one point. And I do agree
15 with the Court that what we're raising about the April
16 29th blog could well have been information favorable to
17 the plaintiff as opposed to the defendant, but the issue
18 we're raising is if there was not forthrightness in
19 disclosing something that would have been responsive to
20 many of the questions in voir dire then that's an
21 independent issue, but I appreciate the Court hearing us
22 and making a record.

23 THE COURT: Surely. I want to say in
24 relation to the last comment that there was a question
25 about whether anyone close to you has committed suicide.

1 Again, I find nothing in this information that indicates
2 that anyone close to Mr. Ross under a reasonable reading
3 of the term "close" has -- that Mr. Ross was -- had
4 anyone close to him under a reasonable reading of that
5 term "close" commit suicide or be involved in suicide.
6 So, again, these matters are noted for the record. I'll
7 deny relief.

8 MS. MANN: Your Honor, can these documents
9 be filed perhaps even under seal? I guess that's a
10 problem, but can we make a record of what these
11 documents are?

12 THE COURT: You certainly may make a record.
13 The documents will be filed -- or you may file them.
14 Now, as you say, sealing is a problem under the new
15 court rules and prior to the new court rules, for that
16 matter. I'm going to suggest that, Ms. Mann, you hang
17 on to these documents and make a motion to have these
18 sealed. They will be filed either directly or under
19 seal. One of the two. It's not a question of whether
20 they will be filed or not. They will be filed. The
21 issue is whether they'll be filed under seal. I'd like
22 to have you make a formal motion in writing to that
23 effect --

24 MS. MANN: Sure.

25 THE COURT: -- so we can have a basis for

the Court making a decision as to whether there's a compelling interest or whatever the standard is under the new court rule for sealing these documents.

(MR. ROSEN ARRIVED.)

THE COURT: Thank you very much. That will conclude these proceedings.

(OTHER PROCEEDINGS WERE HAD ON THIS DAY BUT ARE NOT TRANSCRIBED AT THIS TIME.)

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CERTIFICATE

I, JEANNE M. WELLS, do hereby certify that the foregoing excerpt of the verbatim report of proceedings was taken by me and completed on Wednesday, May 30, 2006, and thereafter, transcribed by me by means of computer-aided transcription;

That I am not a relative, employee, attorney, or counsel of any such party to this action or relative or employee of any such attorney or counsel, and I am not financially interested in the said action or the outcome thereof;

That I am herewith filing the original with the Island County Clerk of Court and emailing one copy to James W. Kyle.

Jeanne M. Wells, RPR
CCR #: 2298
October 20, 2006

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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

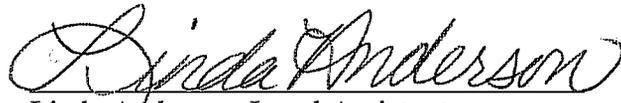
TANYA GREGOIRE,)	NO. 57004-8-I
)	
Appellant,)	DECLARATION OF
v)	SERVICE OF
CITY OF OAK HARBOR,)	APPELLANT'S
a Municipal Corporation,)	REPLY BRIEF
)	
Respondent.)	

I, Linda Anderson declare as follows: I am a legal assistant for Mann & Kyle, PLLC. On the date below signed, our staff filed the original and one copy of the Appellant's Reply Brief and this Declaration of Service with Washington State Court of Appeals, Division I. I also faxed and mailed true and correct copies, on opposing counsel, as follows:

Robert Christie
Christie Law Group
2100 Westlake Avenue N., Suite 206
Seattle, WA 98109.

I Swear Under Penalty of Perjury Pursuant to the Laws of the State of Washington That the Statements Herein Are True and Correct.

Dated this 29th day of May, 2007, at Seattle Washington.


Linda Anderson, Legal Assistant

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