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**THE SUPREME COURT OF WASHINGTON**

**No. 81253-5**

**No. 58544-4-I**

**Division One**

**Washington State Court of Appeals**

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TANYA GREGOIRE, Guardian for the person and estate of BRIANNA  
ALEXANDRIA GREGOIRE, a minor, and as personal representative for  
EDWARD ALBERT GREGOIRE, deceased,

Petitioner,

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; and WILLIAM  
WILKIE, and his marital community,

Defendants.

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**RESPONDENTS' SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

Respondent City of Oak Harbor provides the following brief in supplement to its Answer to Petition for Discretionary Review. This brief addresses the sole issue this Court accepted for review and demonstrates why the trial court properly instructed the jury on contributory negligence and assumption of risk, despite the special relationship between Oak Harbor and Mr. Gregoire, its inmate. The jury should determine whether an inmate assumed the risk and/or was contributorily negligent for self-inflicted injuries while in-custody.<sup>1</sup>

Further, even if this Court determines otherwise, the trial court's act of instructing the jury on contributory fault and assumption of the risk was harmless and would not warrant setting aside the verdict for Oak Harbor. As documented in the Special Verdict Form (CP 21-23), the jury found that Oak Harbor was negligent on at least one of plaintiff's five theories of liability outlined in Instruction No. 6. (CP 32.) This finding of negligence necessarily means that the jury did not relieve Oak Harbor of its duty of care towards Mr. Gregoire, thereby rejecting the defense of assumption of risk as outlined in Instruction No. 20. (CP 46.) The jury then concluded that this negligence was not "a proximate cause of the

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<sup>1</sup> Appellant does not challenge the sufficiency of the evidence to support these instructions.

death of Edward Gregoire.” (CP 21.) As such, the jury never reached the issue of whether Mr. Gregoire himself was negligent. (CP 22.) Consequently, the jury never considered the court’s instructions on contributory negligence.

## **II. STATEMENT OF THE ISSUES**

1. Did the trial court properly instruct the jury as to contributory fault and assumption of risk, when plaintiff committed suicide while in the custody of Oak Harbor?

2. Assuming any error in giving either of those instructions, was the error harmless in light of the jury’s finding that Oak Harbor was negligent, but that this negligence was not a proximate cause of Mr. Gregoire’s death?

## **III. ARGUMENT**

### **A. The Trial Court Properly Instructed the Jury on Contributory Fault and Assumption of Risk.**

At trial, Ms. Gregoire asserted a negligence claim against Oak Harbor under five separate theories of liability. The trial court gave Instruction No. 6, which set forth each of these separate theories. The jury made a finding of negligence against Oak Harbor, reflected on the Special Verdict Form. It is impossible now to determine which or how many of these separate duties the jury deemed the City to have violated.

In order to prove negligence, a plaintiff must establish: “(1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) injury; and (4) that the claimed breach was a proximate cause of the resulting injury.” *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). The issue of duty is a question of law for the court to decide. Here, the trial court determined that Oak Harbor had each of the duties encompassed in plaintiff’s separate theories of negligence, leaving it for the jury to determine whether the city breached any of these duties and whether that breach was a proximate cause of Mr. Gregoire’s death.

At common law, there is no duty to protect people from the criminal acts of third persons, nor is there a duty to protect others from self-inflicted harm, including suicide. *Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 199, 943 P.2d 286 (1997). In fact, Washington courts recognize that suicide is a willful, volitional act:

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.’ Thus, in the cases of suicide, the person committing suicide is in effect both the victim and the actor. In fact, no duty exists to avoid acts or omissions that lead another person to commit suicide unless those acts or omissions directly or indirectly deprive that person of the command of his or her faculties or the control of his or her conduct.

*Webstad v. Stortini*, 83 Wn. App. 857, 866, 924 P.2d 940(1996), *citing* *Hepner v. Dep’t of Labor & Indus.*, 141 Wn. 55, 59, 250 P. 461 (1926).

Washington courts do recognize an exception to the general “no duty” rule when a special relationship exists between the defendant and the third party or the foreseeable victim. *Webstad*, 83 Wn. App. at 867; *Nivens*, 133 Wn.2d at 200.<sup>2</sup> Such a special relationship exists between a city, as custodian, and its inmates. *Shea v. City of Spokane*, 17 Wn. App. 236, 241-42, 562 P.2d 264 (1977), *aff’d*, 90 Wn.2d 43 (1978).

The City, in operating and maintaining a jail, has a twofold duty: one to the public to ‘keep and produce the prisoner when required,’ and the other to the prisoner ‘to keep him in health and safety.’ The duty to the prisoner arises because when one is arrested and imprisoned for the protection of the public, he is deprived of his liberty, as well as his ability to care for himself ... This is a positive duty arising out of the special relationship that results when a custodian has complete control over a prisoner deprived of liberty.

*Id.*, citing *Kusah v. McCorkle*, 100 Wn. 318, 323, 170 P. 1023 (1918).

However, a defendant with a special relationship to a plaintiff does not become a guarantor of the plaintiff’s safety. *Nivens*, 133 Wn.2d at 203. There is no duty to protect a plaintiff against harm that is

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<sup>2</sup> In *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), the Court adopted the Restatement (Second) of Torts § 315 which states:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

unforeseeable. *Id.* at 205.

**1. Mr. Gregoire Owed a Duty to Protect Himself from Self-Inflicted Harm.**

Washington is a contributory fault state, whereby a plaintiff may be found liable for his own failure to protect himself from harm. *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 66, 124 P.3d 283 (2005). The legislature adopted this method of apportioning damages between a negligent plaintiff and a negligent defendant intending to ‘create a fairer and more equitable distribution of liability among parties at fault.’ *Christensen*, 156 Wn.2d at 66, citing LAWS OF 1981, ch. 27, § 1.

Similarly, Washington State also recognizes the doctrine of assumption of risk. *Scott v. Pac. W. Mt. Resort*, 119 Wn.2d 484, 496, 834 P.2d 6 (1992). This doctrine is divided into four classifications: (1) express; (2) implied primary; (3) implied reasonable; and (4) implied unreasonable. *Id.* Implied primary assumption, the classification at issue here, arises when a plaintiff impliedly consents to relieve the defendant of a duty to the plaintiff regarding specific known and appreciated risks. *Id.* at 497. It means “the plaintiff assumes the dangers that are *inherent in* and *necessary to* the particular ... activity.” *Tincani v. Inland Empire Zoological Sc’y*, 124 Wn.2d 121, 143, 875 P.2d 621 (1994). Since implied primary assumption of risk negates a duty, it also acts as a bar to recovery.

*Scott*, 119 Wn.2d at 498; *Tincani*, 124 Wn.2d at 143.

Oak Harbor's duties to keep Mr. Gregoire in health and safety are not at issue in this appeal and were described for the jury in Instruction No. 13. (CP 39.) However, Washington law does not support appellant's contention that because Oak Harbor shared a special custodial relationship with Mr. Gregoire, he was relieved of a duty to protect himself from harm *as a matter of law*. Even when a special relationship exists, defenses such as contributory negligence and assumption of risk are available to reduce or eliminate a defendant's liability. *See Yurkovich v. Rose*, 68 Wn. App. 643, 847 P.2d 925 (1993) (13-year-old girl assessed with contributory fault in an action against a school district alleging bus driver negligence); *Pearce v. Motel 6, Inc.*, 28 Wn. App. 474, 480, 624 P.2d 215 (1981) (jury could have considered evidence of the care and attention exercised by a motel guest for her own safety in a negligence action against the motel).

Appellant relies on *Christensen* to argue that Mr. Gregoire had no duty to avoid self-inflicted harm, in this case his own suicide. In that case, the Court held that it was improper for a jury to consider the possible contributory negligence of a 13 year-old victim of sexual abuse by her teacher on school premises. *Christensen*, 156 Wn.2d at 64. The Court recognized that it was facing an issue of first impression and answered the question on very narrow grounds. *Id.* at 66.

Two strong policy considerations compelled the Court's holding. First, the societal interest embodied in the criminal laws protecting children from sexual abuse should apply equally in the civil arena. *Christensen*, 156 Wn.2d at 67. An adult is guilty of a felony for engaging in sexual relations with a minor, even if the minor consents. *Id.* Second, a student has no duty to protect him or herself from sexual abuse by a teacher while at school. *Id.* Neither policy consideration is at issue here.

*Christensen* is distinguishable for another reason as well. It involved three different actors: the school, teacher and student. While the Court found it improper to instruct the jury on the child's possible contributory fault, it never suggested that the teacher, who inflicted the injuries, was relieved of his own duty to protect the child. Similarly, an inmate who inflicts injury to him or to others should not, as a matter of law, be relieved of his duty to protect himself and others from harm.

Appellant also relies on the Restatement (Second) Torts, § 452(2), which states: "Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause." The comments explain that in certain "exceptional relationships," the duty to protect another from harm shifts from the one doing the harm to the one

responsible for preventing it. Restatement (Second) Torts, § 452, comment d. The failure to prevent the harm in such an exceptional relationship is considered a superseding cause, thereby relieving the original actor of all liability. *Id.*

The Restatement does not provide any examples of “exceptional relationships.” Restatement (Second) Torts, § 452, comment. d. Instead, it lists factors a court can consider, including:

[T]he degree of danger and the magnitude of the risk of harm, the character and position of the third person who is to take the responsibility, his knowledge of the danger and the likelihood that he will or will not exercise proper care, his relation to the plaintiff or to the defendant, the lapse of time, and perhaps other considerations.

*Id.*

This Restatement has never been adopted in Washington. Further, it relates to the concept of superseding cause, which is not at issue in this appeal. Only one Washington case, *Hoglund v. Raymark Indus.*, 50 Wn. App. 360, 372, 749 P.2d 164 (1987), has even mentioned this section of the Restatement, and then did so only in the context of quoting with approval from a Third Circuit case, *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 497 (3rd Cir. 1985). The courts in *Hoglund* and *Van Buskirk*, both asbestos exposure cases, held that negligence on the part of an employer in failing to maintain a safe work place did not relieve

the manufacturer of liability for failing to warn workers of the danger associated with handling asbestos.

No Washington court has recognized such an “exceptional relationship” under this section of the Restatement. Using the analytical framework of *Hoglund*, in order to remove liability from the original actor (here, Mr. Gregoire), the intervening negligence of the defendant (Oak Harbor) “must be so extraordinary or unexpected that it falls outside the realm of reasonably foreseeable events; unless this threshold is met, there is not superseding cause.” *Id.* at 371. Here, appellant never contended that Oak Harbor’s alleged negligence was a superseding cause absolving Mr. Gregoire of all liability.

Even if this Restatement section is read to apply to the concept of contributory negligence, the duty Oak Harbor owed to Mr. Gregoire was never so “exceptional” that it relieved Mr. Gregoire entirely of his duty to protect himself from harm. Put another way, Mr. Gregoire’s duty to prevent self-inflicted harm never entirely shifted to Oak Harbor, as a matter of law.

In *Hunt v. King County*, 4 Wn. App. 14, 481 P.2d 593 (1971), *review denied*, 79 Wn.2d 1001 (1971), Division I considered whether a contributory negligence instruction was proper in the context of an extremely broad duty of care. The plaintiff in *Hunt* was the father of a

psychiatric patient in a closed psychiatric ward at Harborview, which owed a duty to safeguard its patients under its exclusive control against the reasonably foreseeable risk of self-inflicted injuries.<sup>3</sup> *Id.* at 20. He brought a negligence action against King County, the hospital operator, for its alleged failure to safeguard his son from self-inflicted injuries. *Id.* at 15. The patient was admitted to the closed psychiatric ward, and, when the staff person who was with him turned his back, the patient jumped out the fifth story window and suffered serious injuries. *Id.* at 18. King County argued that the patient's volitional conduct proximately caused his own injuries, and that the patient was contributorily negligent. *Id.* at 19.

The special relationship in *Hunt* is more exceptional, and therefore distinguishable, from the relationship in the present case. The relationship between a patient and the operator of a closed psychiatric ward creates a broad duty that is greater than the duty a jail facility owes to its inmates. *Id.* at 16-17. The hospital's knowledge of each patient's pre-existing mental instability and its willingness to treat such conditions buttress the hospital's heightened duty of care. *Id.* at 23-24.

Significant to this case, despite the *Hunt* court's finding of a broad

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<sup>3</sup> "A duty broad in scope, such as the hospital's duty to safeguard its patient under its exclusive control in a closed psychiatric ward, against the reasonably foreseeable risk of self-inflicted injuries, is another matter. Such a duty 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." *Id.* at 22.

duty of care between the hospital and the psychiatric patient, it still recognized that if the injured party's conduct was not reasonably foreseeable, that party could be at fault either because he has a duty to protect himself from harm or because his conduct proximately caused his own injuries. *Id.* at 23. Division 1 recognized the rule that "as to reasonably unforeseeable consequences, the injured party is liable for his own self-inflicted injuries." *Id.* (citing W. Prosser, Torts § 50 (3d ed. 1964)). Because the issues of foreseeability and an injured party's duty of care are questions for the jury, the *Hunt* court allowed an instruction regarding the patient's contributory negligence. *Id.* at 23-24.<sup>4</sup>

The Court should likewise affirm the giving of a contributory fault instruction here. A detention facility does not owe its inmates a duty so broad that the inmate is immune, as a matter of law, from liability for his or her own self-destructive conduct. The trial court properly determined that Mr. Gregoire's contributory negligence was an issue that should be submitted to the jury.

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<sup>4</sup> The *Hunt* court observed in dicta that in light of the broad duty owed by Harborview, requiring the hospital to anticipate that its psychiatric patients would suffer self-inflicted injury whether or not it was the product of the injured person's volitional or negligent act, the injured party was absolved from the duty of self-care. *Id.* at 22. Under this analysis, it would be unnecessary for the jury to consider whether the patient's conduct was the proximate cause of his own injuries, because such an instruction would render King County's duty meaningless.

**2. Policy Considerations Support Instructing the Jury on These Issues in Cases of In-Custody Suicide.**

If the Court were to accept Ms. Gregoire's argument, and if a jury finds a jail or prison facility negligent, inmates would be absolved of responsibility for all self-inflicted injuries *as a matter of law*. A jury could never find them negligent for knowingly causing harm to themselves. Such a holding would fly in the face of the Legislature's intention to hold individuals accountable for their actions. The purpose of Washington's comparative fault system is to fairly apportion damages and create a more equitable distribution of liability among parties at fault. *Christensen*, 156 Wn.2d at 66.<sup>5</sup> A holding that juries are precluded from considering a plaintiff's contributory negligence or assumption of risks creates a lopsided equation where only a defendant can ever be at fault.

Ms. Gregoire may argue that the issues of breach, proximate cause and foreseeability adequately protect a defendant in these

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<sup>5</sup> See also Restatement § 503(3): a plaintiff who acts in reckless disregard for his own safety cannot recover for a defendant's negligence.

In general, the effect of the plaintiff's reckless disregard of his own safety is the same as that of his ordinary contributory negligence. The exception to this rule is that where the plaintiff's conduct is itself in reckless disregard of his own safety, it bars his recovery not only from a defendant who has merely been negligent, but also from one who has acted in reckless disregard for the plaintiff's safety. The greater fault in the one case is balanced against the greater fault in the other.

Restatement § 503(3), cmt. c.

circumstances.<sup>6</sup> Certainly, if a jury finds that a custodial facility took reasonable measures to provide for the health and safety of its inmates, or if an inmate's self-inflicted harm was not foreseeable, a defendant will not be liable. However, any sense of protection here is false. Government entities and their jail or prison facilities are constantly at risk of suit by disgruntled, bored or mentally unstable inmates. If the Court creates immunity for all inmates that engage in self-destructive behavior, the liability exposure of these facilities will significantly increase. A jury could reasonably find that a prison facility was, for example, 15% at fault for an in-custody suicide, but because the inmate would be immune from fault, the facility would be 100% responsible for any resulting damages. Contributory negligence and assumption of risk are issues for the jury to determine. RCW 4.22.070; *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 483, 951 P.2d 749 (1998); *Nevue v. Close*, 123 Wn.2d 253, 258, 867 P.2d 635 (1994). Jurors should be allowed to do their job: weigh the evidence, determine the facts and apportion fault. The jury may very well find no contributory negligence, or assign only a small portion of fault to a plaintiff. Justice is not served by determining these issues as a matter of

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<sup>6</sup> While Oak Harbor is protected in this appeal from any remand, the jury having found negligence and no proximate cause, this Court obviously accepted review of the case because it presents the broader policy issues of whether, in this type of case involving an apparent suicide of an inmate in jail custody relationship, the legal doctrines of contributory fault and implied primary assumption of the risk apply.

law, and deprives the jury its responsibility to make factual determinations in complicated and fact specific cases.

**3. Other Jurisdictions Are Split Whether Contributory Negligence and Assumption of Risk Instructions are Proper in the Case of In-Custody Suicide.**

Other state courts are split whether jury instructions on contributory negligence and assumption of risk are proper in cases of in-custody suicide. The cases on which appellant relies are not persuasive.

Ms. Gregoire cites *Sandborg v. Blue Earth County*, 615 N.W.2d 61 (Minn. 2000) and *Sauders v. County of Steuben*, 693 N.E.2d 16 (Ind. 1998) to support her contention that Mr. Gregoire was relieved of any duty to protect himself from harm. The *Sandborg* court held that comparative fault is not applicable in custodial-suicide wrongful death actions if the jailor had a duty to protect an inmate from *foreseeable* self-inflicted harm. *Sandborg*, 615 N.W.2d at 62. It determined that the jailer-detainee relationship was an exceptional circumstance, and to deny recovery because the inmate did exactly what was foreseeable and thus created the duty would nullify the jailor's duty all together. *Id.* at 65. However, the analysis under Minnesota law is distinguishable in two notable respects.

First, Minnesota applies a modified comparative fault analysis, barring recovery to a plaintiff who's fault is determined to be greater than the fault of the person from whom recovery is being sought. Minn. Stat.

§ 604.01. Second, in Minnesota, unlike in Washington, foreseeability is determined as a matter of law by the trial court prior to submitting the case to the jury. *Cooney v. Hooks*, 535 N.W.2d 609, 612 (Minn. 1995) (quoting *Alholm v. Wilt*, 394 N.W.2d 488, 491 n.5 (Minn. 1986)). These distinctions should dissuade the court from Ms. Gregoire's invitation to blindly adopt the policy of another jurisdiction reached under a different legal framework.

The *Sauders* court also held that an inmate's act of suicide cannot form the basis of contributory negligence, because such a rule would eliminate the custodian's duty to protect the inmate from harm. *Sauders*, 693 N.E.2d at 17. Under the Indiana Tort Claims Act, any contributory fault on the part of the plaintiff acts as a complete bar to recovery against a government actor defendant. *Id.* at 18. It was in this light that the court determined instructions on contributory fault and incurred risk were not appropriate, because the plaintiff's suicide itself relieved the defendants of their duty to prevent that specific harm. *Id.* at 19.

Both *Sandborg* and *Sauders* held, as a matter of law, that inmates who commit in-custody suicide are 100% fault free for their actions. However, both decisions were determined under legal frameworks different from Washington, and neither compel the policy shift espoused by Ms. Gregoire.

In contrast, other jurisdictions hold that contributory negligence is a question for the jury in cases of in-custody suicide. *E.g.*, *Dezort v. Village of Hinsdale*, 342 N.E.2d 468 (Ill. App. Ct. 1976); *City of Belen v. Harrell*, 603 P.2d 711 (N.M. 1979). In *Dezort*, the plaintiff filed a wrongful death action alleging a municipality and its officers were liable for the suicide of her inmate husband. *Dezort*, 342 N.E.2d at 470. She argued that because defendants owed a duty to exercise reasonable care to prevent his suicide, there could be no contributory negligence. *Id.* at 474. The court rejected this reasoning and held that contributory negligence applies to wrongful death situations, and in-custody deaths should be no exception. *Id.* Ultimately, the question of contributory negligence was one for the jury. *Id.* at 475.

The *Harrell* court also considered whether an inmate's suicide could amount to contributory negligence. *Harrell*, 603 P.2d at 712. It held that a decedent's capacity to exercise reasonable care and to be contributorily negligent were questions for the jury. *Id.* at 714. *See also*, *Hickey v. Zezulka*, 487 N.W.2d 106, 120 (Mich. 1992) (contributory negligence may be appropriate in jail suicide cases).

**B. Even if Improper, the Trial Court's Instructions on Contributory Negligence and Assumption of Risk Were Harmless.**

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).

An improper jury instruction is harmless if it is “not prejudicial to the substantial rights of the part[ies] ..., and in no way affected the final outcome of the case.” *Blaney v. Int’l Ass’n of Machinists & Aerospace Workers*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004), citing *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947). A jury instruction is prejudicial if it affects the results of a case and is prejudicial to a substantial right. *Blaney*, 151 Wn.2d at 211. Additionally, the Court presumes that the jury properly followed lawful instructions. *Tincani*, 124 Wn.2d at 136.

In the present case, the trial court gave Instruction No. 24, which outlined the methodology for the jury to follow in reaching a verdict, including the command to answer to special verdict form questions in numerical order. (CP 53.)

Even if the Court finds that the assumption of risk instruction was improper, the error was harmless. Implied primary assumption of risk negates a defendant’s duty; it is a complete bar to recovery. *Scott*, 119

Wn.2d at 498; *Tincani*, 124 Wn.2d at 143. Instruction No. 20 properly stated that assumption of risk “relieve[s] the defendant of a duty of care owed...” (CP 46.) Question 1 on the Special Verdict Form asked the jury if Oak Harbor was negligent. (CP 21.) The Jury answered yes. (Id.) If the jury considered the assumption of risk instruction, it necessarily rejected Oak Harbor’s theory by finding the City negligent. Therefore, as a matter of law the instruction did not prejudice or affect the result of the case, and it was harmless error.

Even if the Court finds that the contributory negligence instruction was improper, that error was also harmless. After answering Question 1 on the Special Verdict Form, the jury was instructed to answer Question 2. (CP 21.) That question asked the jury if the City of Oak Harbor’s negligence was the proximate cause of plaintiff’s death.<sup>7</sup> (Id.) The jury answered “no.” (Id.) The instruction after Question 2 told the jury that if they answered “no” to that question, they were not to answer any further questions and sign the verdict. (Id.) The Court should presume that the jury followed these instructions. The jury never reached Questions 4, 5 or 6, which addressed Mr. Gregoire’s contributory negligence. (CP 22-23.) Therefore, as a matter of law the contributory negligence instruction did

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<sup>7</sup> Appellants do not challenge the instruction on proximate cause in this appeal.

not prejudice or affect the result of the case, and it was harmless error. See, e.g., *Bornmann v. Great Southwest Gen. Hosp., Inc.*, 453 F.2d 616 (5th Cir. 1971) (when the jury found a hospital negligent, but the hospital's actions were not the proximate cause of the decedent's death, an instruction on contributory negligence was harmless error because a lack of liability makes the issue of contributory negligence irrelevant.)

#### **IV. CONCLUSION**

Oak Harbor owed Mr. Gregoire a duty to keep him in health and safety. However, Washington law and its comparative fault framework also hold Mr. Gregoire responsible to protect himself from harm. The custodial relationship between a jail and an inmate does not impose upon the jail a broad duty, regardless of circumstances, to foresee and prevent any self-destructive behavior an inmate may seek to inflict upon himself.

Rather, as the trier of fact, a jury should determine whether, under the particular circumstances of their case, the municipality should have foreseen that the inmate presented a risk of self-inflicted harm. Likewise, a jury should determine whether an inmate assumed the risk and to what extent he was contributorily negligent for self-inflicted harm while in custody. The Court should not determine these issues as a matter of law. To do so would greatly expand the liability exposure of custody facilities and circumvent existing Washington law that fosters self-responsibility.

Should this Court rule otherwise, effectively removing these defenses from custody facilities, such a holding would have no impact in this case where the jury (1) rejected the defense of assumption of risk by finding Oak Harbor negligent in the first place, and (2) never reached the issue of contributory fault, finding that the city's negligence was not a proximate cause of Mr. Gregoire's death. As such, the verdict in favor of Oak Harbor would stand as the final disposition of plaintiff's claims.

Respectfully submitted this 21st day of October, 2008.

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