

76008-4

76008-4

No. 95511-5

No. 76008-4

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

CATHY HARPER, et al,

Appellants,

v.

STATE OF WASHINGTON, DEPT. OF CORRECTIONS,

Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Bruce Heller

APPELLANTS' OPENING BRIEF

Christopher Carney, WSBA No. 30325
Sean Gillespie, WSBA No. 35365
Kenan Isitt, WSBA No. 35317
CARNEY GILLESPIE ISITT, PLLP
600 1st Ave #LL08
Seattle, Washington 98104-2679
Telephone: (206) 445-0220

Attorneys for Appellants

FILED
Mar 24, 2017
Court of Appeals
Division I
State of Washington

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL 2	
A. Assignments of Error.	2
B. Issues Presented.	4
III. STATEMENT OF THE CASE	5
A. DOC KNEW THAT SUPERVISING DV OFFENDERS REQUIRES SPECIAL VIGILANCE	
1. "Domestic violence intervention = homicide prevention"	5
2. Supervision of DV Offenders Must Take Into Account the Cycle of Silence and Re-offense	6
3. Supervision of Offenders Requires Particularized Knowledge of the Offender's Behavior	8
4. Community Corrections Supervisors Must Promote Vigilance and Collaboration to Ensure Effective Supervision of DV Offenders	9
B. DOC HAS FAILED TO TRAIN AND SUPERVISE CCOs ABOUT THE RISKS POSED BY DV OFFENDERS	11
C. MILLER IS A HIGHLY DANGEROUS DV OFFENDER WITH READILY ASCERTAINABLE, RECOGNIZED PATTERNS OF BEHAVIOR	14

	<u>Page</u>
1. Grossly Negligent Supervision Allowed Miller to Murder Patricelli	29
2. Miller Brutally Murdered Patricelli on October 30, 2012	32
D. DOC ADMITTED ERRORS IN ITS CRITICAL INCIDENT REVIEW	33
IV. ARGUMENT	34
A. STANDARD OF REVIEW	34
B. GROSSLY NEGLIGENT SUPERVISION	35
1. Duty	35
2. Breach	36
3. Causation	42
C. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS	43
1. Arrival Shortly After the Incident	44
2. Objective Symptoms of Emotional Injury or Distress	45
V. CONCLUSION	46

TABLE OF AUTHORITIES

Washington Cases

- Bishop v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999)—pg. 37
- Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008)—pg. 44-45
- Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814 (1986)—pg.35
- Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 787 P.2d 553 (1990)—Pg.44
- Hansen v. Washington Natural Gas Co.*, 95 Wn.2d 773, 632 P.2d 504 (1981)—Pg.35
- Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985)—Pg.36
- Hegel v. McMahon*, 136 Wn.2d 122, 960 P.2d 424 (1998)—Pg.44-46
- Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999)—Pg. 35, 37-38
- Johnson v. Spokane to Sandpoint, LLC*, 176 Wn.App. 453, 309 P.3d 528 (2013)—Pg.36
- Jones v. Allstate Ins. Co.*, 146 W.2d 291, 45 P.3d 1068 (2002)—Pg. 34
- Joyce v. State, Dept. of Corrections*, 155 Wn.2d 306, 119 P.3d 825 (2005)—Pg. 36-37, 42
- Kelley v. Department of Corrections*, 104 Wn.App. 328, 17 P.3d 1189 (2000)—Pg. 38-40
- LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975)—Pg. 35
- Nist v. Tudor*, 67 Wn.2d 322, 407 P. 2d 198 (1965)—Pg. 35-38, 41
- State v. Grant*, 83 Wn. App. 98, 920 P.2d 609 (1996)—Pg. 13
- Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992)—Pg. 36-37

Whitehall v. King County, 140 Wn.App. 761, 167 P.3d 1184 (2007)—Pg. 38-41

Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982)—Pg. 34

Statutes and Court Rules

CR 56(c)—Pg. 34

RCW 72.09.320—Pg. 35

GR 14.1—Pg. 40

Other Authorities

Schulte v. Seattle, Court of Appeals Division I, Case No. 72821-1-I (Unpublished Slip Opinion)—Pg. 40-42

I. INTRODUCTION

The Washington Department of Corrections (“DOC”) inexcusably failed Tricia Patricelli. DOC was responsible for protecting Patricelli from Scottye Miller, the man who DOC knew had threatened to kill her for years. DOC was grossly negligent in its supervision of Miller through nearly a decade of domestic violence (“DV”) offenses, allowing him to fool them over and over with the same transparent lies and chronically violate no contact orders to assault Patricelli repeatedly.

Despite designating Miller as a highest risk level offender, DOC assigned his case to a Community Corrections Officer (“CCO”), Rhonda Freeland, whose only previous experience was supervising low-level offenders from a desk. DOC failed to train Freeland that she needed to study Miller’s history. Because Freeland did not know Miller’s history of lying to CCOs that he was “couch-surfing” or staying with unnamed friends and relatives at unknown addresses, Freeland allowed him to fool her; Miller in fact immediately began staying with Patricelli after his latest release, violating of a no contact order and his conditions of supervision.

On October 30, 2012, Miller stabbed Patricelli over 20 times, killing her in her own apartment. CP 330, 796-810, 856. Tragically,

Appellant Cathy Harper arrived to find her daughter's bloody body, within moments of her death, a traumatic vision that haunts her to this day.

Plaintiffs' expert William Stough reviewed the facts and opined that DOC was grossly negligent in numerous respects during its supervision of Miller, causing Patricelli's horrific death.¹ Stough's expert opinion was uncontradicted before the trial court.

The trial court erred by granting DOC's motion for summary judgment. A jury must be allowed to decide whether DOC committed gross negligence.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering (1) its Memorandum Opinion dated August 31, 2016; (2) its Order Regarding Motions to Reconsider dates October 4, 2016; (3) its Order Granting State's Motion for Reconsideration dated October 12; and (4) its Order Granting Defendant's Motion for Summary Judgment dated October 13, 2016.² Plaintiffs presented sufficient evidence of gross negligence by DOC to require a jury

¹ See CP 278-322.

² In its Memorandum Opinion (CP 1245-1255), Order Granting Defendants' Motion for Summary Judgment (CP 1288-1289), Order Granting State's Motion for Reconsideration (1286-1287), and Order Regarding Motions for Reconsideration (CP 1277-1278), the trial court did not include findings of fact designated as such. In an abundance of caution, Appellants assign error to various assertions of fact contained therein, treating them as findings of fact.

trial on their claims, and granting summary judgment to DOC was therefore error.

2. The trial court erred in its finding at CP 1251 that Freeland “monitored [Miller’s] progress toward obtaining a mental health evaluation.” The record contains no evidence that Freeland followed up during Miller’s community custody to determine whether he ever attended his mental health evaluation.

3. The trial court erred in its finding at CP 1251 that “Miller appeared to be in compliance with the terms of his sentence.” In fact, Freeland was willfully blind to Miller’s flagrant violations, including his admission that he had violated his conditions by moving from his listed address and by failing to provide his new address when directed to.

4. The trial court erred in its finding at CP 1251 that “[m]ost importantly, there was no indication that [Miller] was violating the NCO and living with Patricelli.” In fact, Miller’s immediate violation of the no-contact order was both eminently predictable and consistent with his obvious pattern, making his clumsy lies about his whereabouts a bright red flag that he was violating the order.

5. The trial court erred in its finding at CP 1252 that “... the court concludes that no reasonable jury could find the absence of slight care.”

As described below, because DOC was grossly negligent in training its CCOs and their supervisors how to monitor DV offenders, Freeland utterly failed to properly prepare for Miller’s case, and Freeland was grossly negligent in failing to take obvious steps to check on the lies Miller was telling her.

6. The trial court erred in its finding at CP 1289 that “the plaintiffs fail to supply facts sufficient to establish their legal claims against the defendant. The defendant is entitled to summary judgment.” As described below, Plaintiffs presented evidence of gross negligence by DOC and its employees sufficient to require a jury trial on their claims.

7. The trial court erred in its conclusion at CP 1286 that “[s]ince the court concluded that no reasonable jury could find gross negligence with respect to the negligent supervision claim, the same conclusion must be made for the NIED claim.” As described below, Plaintiffs have presented evidence of gross negligence sufficient to require a jury trial on their claims.

III. ISSUES PRESENTED

1. Whether the trial court erred in ruling that no reasonable jury could find that DOC was grossly negligent in its supervision of Scottye Miller, when: DOC failed to follow its own policies for training and

supervising its CCOs to face the unique challenges of supervising DV offenders; Freeland made no effort to become familiar with Miller's obvious patterns of behavior; Freeland failed to act on Miller's admitted violations of his conditions of supervision; and Freeland failed to even make a single phone call that would have revealed that Miller had lied to her about his residence and was violating the no contact order to protect Patricelli from him?

IV. STATEMENT OF THE CASE

A. DOC KNEW THAT SUPERVISING DV OFFENDERS REQUIRES SPECIAL VIGILANCE

1. "Domestic violence intervention = homicide prevention"

DV offenders pose a unique and continuing deadly threat to their victims. CP 337-65. DOC knows that DV dynamics require proactive, hyper-vigilant supervision of these dangerous offenders, using tactics that take into account the behavior patterns of each offender. CP 347-48, 359. DOC has created training that should be provided to all community corrections officers ("CCO"). CP 337-365.

DOC's training protocols acknowledge the unique dangers of DV offenders, noting that "DV Behaviors are targeted and repeated; violence increases in frequency and intensity; death is always a potential outcome."

CP 358. Community corrections staff are to be reminded that "Domestic violence intervention = homicide prevention." CP 358. For this reason, when supervising a DV offender, the victim's safety is the CCO's "primary consideration." CP 345.

CCOs should be taught that prior physical abuse and prior threats to kill are important predictors of DV killings. CP 358. The training cites data showing that 88% of DV murders had a history of physical abuse, and 44% had prior threats to kill. *Id.*

DV offenders are deceptive and may present a false image of compliance to their CCOs. DOC training recognizes that "[m]anipulation is at the center of domestic violence behavior. An outwardly compliant offender does not mean that the victim is safe." CP 358. (See also CP 347: "An offender's success on supervision is not a true indicator of possible domestic violence at home.") This manipulative, deceptive character of DV offenders requires extremely vigilant and responsive supervision: DV offenders *"will get an inch & take a mile, if not addressed & held accountable."* CP 347 (emphasis added).

2. Supervision of DV Offenders Must Take Into Account the Cycle of Silence and Re-offense

The proper approach to supervising a DV offender is to "[f]ocus on the offender's behavior," and not blame the victim because "when the victim is blamed the offender is freed of responsibility of the violence." CP 358. It is easy to misinterpret the behavior of DV victims; their survival skills "may not make sense to an outsider." CP 350, 358. Often, DV abusers use violence to manipulate their victims and convince them that no one will believe them or help them. CP 345. Due to fear and manipulation, "60-90% of DV cases go unreported." CP 358.

For that reason, it is unhelpful for a CCO to wonder why a DV victim stays with her abuser. The focus "should not be on 'Why does victim stay in or return to relationship?' DV is complex and victims have incorporated many survival skills to manage the offender's risk to harm them." CP 349. DOC training states that "Leaving is a process for victims. It may take a victim 7-9 times to leave. Leaving increases risk to victim!" CP 358.

Similarly, CCOs should never conduct supervision by assuming that a DV victim will report any violations by her abuser: "Offenders' violations of supervision conditions should be pursued with awareness of potential consequences and evidence of violations should be gathered from sources other than the victim." CP 356. DV victims "might lack trust

in the system which they believe has failed them previously." CP 345.

DOC training acknowledges that "[t]he victim doesn't have to prove the case, the CCO does." CP 363.

3. Supervision of Offenders Requires Particularized Knowledge of the Offender's Behavior

Because of the highly dangerous nature of the DV dynamic, CCOs must thoroughly familiarize themselves with the offender's file in order to determine "patterns of behavior." CP 363. "CCOs should be encouraged to look at the bigger picture, asking those relevant questions to the offender. Identifying patterns of behavior." CP 352.

CCOs must review a DV offender's complete criminal history, DOC staff notes, history of court orders prohibiting contact with victims, and police reports and probable cause statements from prior offenses. CP 363. All of this information is available to a CCO either in the physical field file, or in DOC's OMNI "chronos" system where staff records their activities on cases. CP 375. CCOs must also initiate contact with "collaterals," such as the offender's family and treatment providers. CP 363.

Gathering information about the offender as required by DOC training allows the CCO to tailor the supervision to the offender's

individual characteristics. This will allow the CCO to "[d]etermine conditions to be imposed *in addition* to standard/court ordered conditions by evaluation of offender risk and needs areas." CP 351 (emphasis added).

Examples of imposed conditions CCOs must consider include geographical restrictions to keep the offender away from the victim (while being careful not to reveal the victim's location), imposing a curfew, polygraph testing, frequent unannounced home visits, and monitoring phone and social media usage. CP 355, 362-363.

The DOC "Imposed Conditions" policy, 390.600, authorized CCOs supervising Miller to add relevant conditions to his supervision, including polygraph testing under DOC policy 400.360, and GPS monitoring under DOC policy 380.450. CP 374, 427-59, 616. Miller was required to take polygraphs concerning prohibited contact with his prior victim in the past, but none of his three most recent CCOs tried it. CP 462-67.

4. Community Corrections Supervisors Must Promote Vigilance and Collaboration to Ensure Effective Supervision of DV Offenders

Community Corrections Supervisors (CCSs) also have special responsibilities for the supervision of DV offenders. CP 348, 350, 354. They must "[r]emind staff that a victim of domestic violence is often preoccupied with trying to survive" and with "keeping herself [and] her

children safe." CP 345. CCSs must remind staff that victims may have various challenges making it difficult to communicate clearly with CCOs, and must "[d]iscuss with the CCO reasons a victim might lack trust in the system which they believe has failed them previously." *Id.*

CCSs must closely supervise to their CCOs handling DV cases. CCSs must "staff domestic violence cases with ... CCOs and bring in CVL as needed." CP 350. CCSs must "Evaluate whether the CCO has made the appropriate recommendation." CP 350. CCSs must "[e]xpect and value collaboration" with their staff and between their staff and community resources. CP 350.

When CCOs are considering imposed conditions in preparation to begin supervision of a DV offender, CCSs must have a discussion with the CCO to make sure that "[a]dditional conditions imposed by the CCO should be based on identifiable offender behaviors." CP 348. The importance of this is that "the supervisor assists CCOs to think about imposing conditions based on risk and offender need." CP 354. The CCS is responsible for asking "how the CCOs will monitor the conditions they've imposed." CP 354.

During the CCO's supervision of the DV offender, the CCS must "[c]heck CCO chronos" to ensure that DV offenders are properly

supervised and that the supervision is properly documented. CP 350, 354. If staff are not properly addressing DV issues, the CCS must intervene to correct that pattern. CP 350. CCSs must ensure that CCOs "take a proactive vs. reactive approach to the supervision of DV offenders." CP 359.

**B. DOC HAS FAILED TO TRAIN AND SUPERVISE
CCOs ABOUT THE RISKS POSED BY DV
OFFENDERS**

Despite developing comprehensive DV supervision policies and training, DOC appears to have made no effort to ensure that its Auburn field staff was adequately trained. Miller's last two CCOs were Heidi Ellis and Freeland, both of whom worked in the Auburn office under CCS Curtis Crisp. CP 383, 473. Crisp had no knowledge of the DOC DV training and indeed believed many things about his job that are in direct conflict with it. CP 538-40.

Crisp does not believe that there is any difference in approach to supervising a DV offender as opposed to any other offender such as a property crime offender. CP 538-540. In his deposition in April of 2016, Crisp saw no reason that he should directly and actively collaborate with CCOs to gather information plan for the supervision of DV offenders; instead, he simply "defer[red] to their professionalism" that they were

adequately addressing DV issues and would not have known whether the CCOs were gathering background information on DV offenders or not. CP 530, 539.

Crisp testified that it would not be his place as a supervisor to encourage CCOs to impose additional conditions such as GPS for DV offenders. CP 539. Crisp did not see any problem with relying on the DV offender's victim to report violations. CP 539.

After Patricelli's 2012 murder, DOC completed a "Critical Incident Review Report" ("CIR") which is a summary of events and DOC actions preceding the murder. CP 574-92. A key finding of that review was that DOC needed to create "specialized caseloads and/or train[ing] staff on the dynamics involved in supervising DV offenders." CP 591.

Following the CIR, DOC issued a "Critical Incident Review Corrective Action Plan," assigning responsibility to designated staff members to implement the CIR recommendations. CP 594-95. By March 29, 2013, Crisp was directed to:

Train staff on the dynamics involved in supervising DV offenders. CCS will discuss/review DOC Policy 390.300 Victim Services with the Unit. Staff will be expected to understand policy and policy expectations. Supervisor will review with staff the Domestic Violence Training that was presented to all CCSs by the Crime Victim Liaisons.

CP 594.

Crisp had never given that training to his CCOs before that assignment, and he never did it after being again directly instructed to do so, either. CP 406, 494. In her deposition in June of 2016, CCO Freeland still believed that supervising a DV offender is no different than any other offender and does not understand the DOC policy for imposing GPS monitoring on an offender. CP 486.

This stands in stark contrast to the known dynamics of DV relationships recognized by DOC's training and by this Court two decades ago, which found that "victims of DV often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others." *State v. Grant*, 83 Wn. App. 98, 107, 920 P.2d 609 (1996). In *Grant*, this Court further found:

A victim's apparently inconsistent response to abuse may stem from any number of reasons. Some victims minimize or deny abuse because they fear retaliation by the abuser: the perpetrators in these cases may have terrorized the abused party over the period of time between the assault and the time of the court proceeding in order to coerce the abused party into lying. The perpetrator may increase the violence and the threats of violence, or they may bargain with the abused party to change the story with promises that if they do, the violence will stop.

Grant, 83 Wn. App. at 111 fn. 5. The court also remarked:

Sometimes ... the abused party has learned that the systems with the power to intervene will not act. Thus they are forced to try to work out their own deals with the abuser in hopes of stopping the abuse.

[...]

Victims may know from past experience that the violence gets worse whenever they attempt to get help... Perpetrators may repeatedly tell the abused party that she/he will never be free of them. The abused party believes this as a result of past experience. When they did attempt to leave, the perpetrator may have tracked them down or abducted the children in the attempt to get the victim back.

Id.

Clear evidence shows that DOC failed with little effort to communicate its knowledge of DV dynamics and proper practices for supervision of DV offenders to their staff at the administrative, supervisory, or CCO levels.

C. MILLER IS A HIGHLY DANGEROUS DV OFFENDER WITH READILY ASCERTAINABLE, RECOGNIZED PATTERNS OF BEHAVIOR³

Miller has a lengthy history of DV assaults and violating no-contact orders. His pattern with his previous domestic partner was the same as with Patricelli. He committed DV assaults, gave fake addresses to his CCOs, moved residences without prior notice to CCOs, and violated no-contact orders to commit additional assaults. CP 844-914.

³ Miller's criminal history is described in more detail in the Declaration of William Stough, CP 278-322, and in relevant reports at CP 844-1022.

On May 13, 2009, Miller picked up Patricelli from work in her car. CP 930-33. He was noticeably high on cocaine. *Id.* By the time they arrived at Patricelli's apartment in Kent, Washington, Miller was so angry that Patricelli asked him to get his things and leave. *Id.* Instead, Miller barged into the apartment and grabbed a bottle of vodka. *Id.* Patricelli managed to lock him out of the apartment. *Id.* Miller walked off toward Patricelli's car. *Id.* Patricelli was worried Miller would vandalize her car, so she went outside and found him drinking vodka from the bottle next to her car. *Id.*

Miller demanded a ride and money, which Patricelli would not give him. *Id.* This made Miller even more angry, and he shoved Patricelli as she was beginning to walk back up the stairs to her apartment. *Id.* Patricelli fell into the concrete stairs and was bruised and bloody. *Id.* By the time officers of the Kent Police Department arrived, Miller had fled. *Id.* At 3:30 a.m. the following day, after Miller had returned, Patricelli told officers that she had actually "fallen down the stairs" and that Miller did not do anything to her. *Id.*

Between that May 13, 2009, incident and September 10, 2009, Ms. Patricelli broke up with Miller and tried to avoid him. CP 940. Patricelli moved again and did not tell Miller where she was living. CP 938.

Nonetheless, Miller knocked on the door of Patricelli's Auburn apartment at approximately 8 a.m. on September 10, 2009, as Patricelli was getting her daughters ready for school. CP 935. One of Patricelli's daughters answered the door, and Miller shoved past her, knocking her to the ground. CP 935-36, 939.

In front of her daughters, Miller charged at Patricelli and tackled her. *Id.* Miller landed on top of Patricelli and repeatedly punched her in the face with his fists, then choked her. *Id.* Patricelli tried to push Miller away, but he bit her arm and continued choking. *Id.* Patricelli could not breathe. *Id.* Patricelli told police that the only thing she could remember was hearing her daughters screaming. *Id.*

After choking Patricelli, Miller hit her with a baseball bat. *Id.* Patricelli raised her left arm to deflect the blow away from her head. *Id.* While Patricelli lay on the floor gasping for air, Miller stole two cell phones and left. CP 936.

After Miller left, Patricelli staggered to her feet and ran to her daughters, who were physically unharmed. *Id.* Patricelli then took her children to school. CP 935-36. The school nurse noticed Patricelli's injuries, including livid scratches on her neck, but Patricelli would not tell

her what had happened. *Id.* The nurse called police, asking that they check on Patricelli. *Id.*

After Patricelli left the school, she went to a job interview at a DSHS office in Auburn. *Id.* The DSHS employee saw her injuries and immediately called 911. *Id.* Police interviewed Patricelli at the DSHS office and documented what had happened. *Id.* The officers took pictures of her injuries. CP 947-50. Fire department medics took her to the hospital. CP 936.

Auburn police discovered that Miller had a DOC warrant for violations of his supervised release. CP 937. An officer called Miller's assigned CCO, Natasha Reed, about Miller's new assault of Patricelli, but Reed did not answer or call back. CP 936.

In the days after the assault, Miller called Patricelli repeatedly, demeaning and threatening to kill her. CP 939. Miller told Patricelli that she deserved the horrific assault and that, now that he knew where she lived, he was going to kill her. CP 940. Patricelli told police that she believed that Miller would kill her or hurt her children. CP 940.

For that attack, Miller pleaded guilty to Assault 3 and received a five-month sentence, 12 months of community custody, a no contact order protecting Patricelli. CP 952-65.

Miller was released from that sentence on March 1, 2010, and resumed supervision by Reed. CP 749. Miller again told Reed that he was homeless and claimed to be staying with friends but did not provide their names, an address, or a contact number. *Id.* On March 8, 2010, Miller reported to Reed and again told her that he was couch hopping with various friends and relatives. *Id.* He again did not provide an address or contact numbers. *Id.* Chronos show no effort by Reed to verify what Miller told her about where he was staying. *Id.* Reed told Miller that he needed to provide her with an address by his next report date but took no further action. *Id.* In fact, Miller went back to staying with Patricelli and her children immediately after his release. CP 967-976.

Miller reported on March 15, 2010, and told Reed he was still "homeless." CP 748. Miller again did not provide the address where he was supposedly staying. *Id.* During the meeting, Miller's phone buzzed repeatedly, prompting Reed to pick it up to reject the call. *Id.* Reed then noticed that Miller had a picture of Patricelli as his phone's wallpaper, prompting her to ask Miller if he had been in contact with her. *Id.* Miller denied it but agreed to let Reed look over his phone. *Id.*

Reed saw that Miller had been texting Patricelli in violation of the no contact order, and told him to stay put while she sought permission

from a supervisor to search his phone. *Id.* When she returned, Miller was gone. *Id.* Reed requested a warrant. *Id.*

Following Miller's flight from Reed's office, DOC's Community Response Unit ("CRU") searched for him. *Id.* CRU staked out Patricelli's apartment, anticipating that Miller would go straight back there. *Id.* Naturally, he did. *Id.* Officers saw Miller riding in Patricelli's car as they entered parking lot of her apartment, but he got out and ran away. *Id.* Officers confirmed that Miller had been staying with Patricelli continuously since his release. *Id.*

The warrant for Miller remained outstanding for another three months, until on June 19, 2010; CRU again staked out an apartment that Patricelli had recently rented and immediately found Miller moving in with her. CP 978.

Following Miller's arrest on June 19, 2010, DOC held a violation hearing. CP 980-83. Miller was found guilty of several violations, including having prohibited contact with Patricelli on March 19, 2010 and June 19, 2010. *Id.* Based on Miller's record, the hearing officer saw that he needed stricter supervision and imposed jail time and 60 days of GPS monitoring. *Id.* According to the chronos, Reed knew about the GPS order.

CP 745. Reed was responsible for making sure the GPS sanction was carried out after Miller was released. CP 618. She did not. CP 617-19.

Miller was released on December 5, 2010. CP 744. During the two months following Miller's release, he told Reed that he was living in Kent. CP 741-44. Reed made multiple attempts to conduct home visits, but he was never home. *Id.* Reed even directed Miller to meet her at the residence on December 30, 2010, but chronos suggest that she never followed through. CP 742-43.

On February 4, 2011, a man who answered the door at Miller's purported residence told Reed he had never heard of Miller. CP 741. Because Reed had never imposed the GPS tracking ordered at the hearing, she had to accept the word of Miller's friend that items in a closet belonged to Miller and that he was still living there. *Id.*

On February 19, 2011, Patricelli called 911 to report that Miller climbed to her third-floor balcony and was trying break into her apartment. CP 1002. On her first 911 call, she lost her nerve and hung up. *Id.* When 911 called back, Patricelli admitted that "a male" climbed up to her balcony, violating a court order. *Id.* She refused to give her name. *Id.*

When police arrived, Patricelli whispered to the officer "please don't let him know that I called." *Id.* Patricelli "appeared to be very

scared." After Miller was arrested, "Tricia pleaded with [the officer] to make sure [Miller] wouldn't find out" that she had called police. *Id.* When the officer could not promise that, Patricelli "became visibly upset and tears came from her eyes." *Id.*

Patricelli told the officer that Miller "always gets a copy of the case and knows what she said to the police." *Id.* Patricelli "said that she is extremely scared of retribution from Miller, his family, and friends." *Id.* Patricelli told the officer that Miller "always knows where she moves to." *Id.* Patricelli refused to provide a statement or testify against Miller, which the officer stated "was entirely due to her fear of retribution to her and the children." *Id.*

Miller was released from jail on June 20, 2011, and provided Reed an address in Auburn. CP 739. Because Reed worked out of the Renton DOC office, Miller was reassigned on July 26, 2011, to CCO Heidi Ellis in the Auburn office, working under CCS Crisp. CP 371-72, 737.

On August 25, 2011, Ellis attempted a home visit to verify Miller's address. CP 734. Miller was not home, and the house program manager Franklyn Smith said Miller had been "coming and going," staying away from his housing some nights. *Id.* Miller reported to Ellis on August 31, 2011. CP 738. Ellis could have arrested Miller at this point but chose not

to. CP 384-85. Ellis verbally reprimanded Miller, and asked where he had been staying. *Id.* Miller once again told his CCO that he was staying with an unnamed friend at an unknown address. *Id.* Ellis directed Miller to give her the address of this "friend" at his earliest opportunity. *Id.* On September 8, 2011, Ellis conducted another home visit at Miller's registered address. *Id.* She was told that Miller had not been home in a couple of days. Miller never did provide the address of the "friend." *Id.*

On September 13, 2011, Miller reported to Ellis. CP 385. Ellis again gave Miller merely a "verbal reprimand." *Id.* Ellis directed Miller to stay at his registered address every night unless Ellis gave prior permission to stay elsewhere. *Id.* Ellis characterized this as giving Miller a "last chance." CP 386.

Also that day, Miller provided court documents to Ellis showing that the last no-contact order relating to Ms. Patricelli had been recalled. CP 732. The very next day, Miller told Ellis that he was already having trouble getting along with Patricelli and ironically threatened to get a protection order against *her*. *Id.* Miller promised again that he would stay at his registered address every night. *Id.* Nonetheless, when Ellis spoke to Franklyn Smith on September 29, 2011, she learned that once again Miller was spending nights elsewhere. *Id.* The next day, Ellis tried a home visit,

but Miller was not there. CP 731. Again, Ellis could have arrested Miller but did not. CP 388.

On October 6, 2011, Miller again reported to Ellis. CP 731. Ellis spoke to Miller about staying away from his residence overnight. *Id.* Miller claimed to have misunderstood but finally admitted that, rather than an unnamed "friend," he had been staying nights at Patricelli's apartment. *Id.* Ellis again let Miller get away with this. CP 388.

Miller next reported on October 20, 2011. CP 730. Miller told Ellis that he wanted to move in with Patricelli and admitted that he had spent five of the seven nights at her apartment. *Id.* Ellis once again chose merely to reprimand Miller. *Id.* Ellis initiated a transfer request to the Kent DOC field office, because Patricelli lived in Kent then. *Id.*

On November 7, 2011, Miller's request to move into Patricelli's apartment was discussed by Reed, CCO Angel Davis and CCS Dewing. CP 729. Reed told Davis and Dewing that Miller had repeatedly assaulted Patricelli while Reed was supervising Miller and that Patricelli repeatedly told Reed that she was scared of Miller. *Id.* Reed also told them about the stakeouts on March 19 and June 19, 2010, and that Patricelli had "harbored" Miller and helped him escape. *Id.* Davis, Reed, and Dewing decided that "due to potential victim concerns, [transfer] denied." *Id.*

The next day, Ellis told Miller the transfer was denied. CP 728. Miller disregarded this directive; when Ellis attempted a home visit that week, Franklyn Smith told her that he had not seen Miller in a couple of days. *Id.* Ellis chose to do nothing about this. *Id.* Throughout the rest of the month of November, 2011, and into mid-December 2011, Ellis was unable to find Miller at his approved address despite several attempts. CP 726-28. DOC had never informed Ellis that she could ask CRU to assist in locating Miller. CP 405.

On December 19, 2011, Ellis took a call from an "anonymous" woman that she believed to be Patricelli, reporting that Miller was using cocaine. CP 726. Ellis reviewed Miller's Facebook page and discover that he was fighting with Patricelli and posting pictures of guns and of himself drinking beer. *Id.* After consulting with Crisp, Ellis decided not to arrest Miller and instead called him to report to her office. CP 725.

Patricelli came with Miller when he reported on December 20, 2011. *Id.* Miller's urinalysis was positive for cocaine, despite his initial denial. *Id.* Ellis *again* chose not to arrest Miller, instead imposing weekly reporting, a 30-day curfew, and additional sober support meetings. *Id.* The following day, Ellis tried and failed to find Miller at home. When Miller next reported on December 27, 2011, he did not have proof that he had

attended the required sober support meetings. CP 724. Ellis merely gave him a verbal warning. *Id.*

Three days later, on December 30, 2011, Miller again assaulted and threatened to kill Patricelli. CP 1035-36. Patricelli ran outside to call 911 from her cell phone, begging police to "please hurry, he's going to kill me." *Id.* Miller chased Patricelli around the parking lot yelling "if you call the police I'm going to kill you." *Id.* Patricelli screamed for help, and Miller ran away. *Id.*

When the police arrived, they asked if Patricelli thought Miller would actually kill her; she said "yes." *Id.* Police noted that Patricelli "continued to breathe heavily and shout hysterically" while they questioned her, repeating the phrases "he's gonna kill me, he's gonna kill me," and "you don't know who you're dealing with." *Id.* The police noted that "during the statement Patricelli appeared to have difficulty controlling her emotions, having to catch her breath and crying throughout." *Id.*

This incident perfectly illustrates what DOC already knew: If you give Miller an inch, he will take a mile, and his victim will suffer for it. The incident also illustrates why DV victims lose trust in DOC.

Ellis learned of the assault and death threats from Franklyn Smith on January 3, 2012. CP 724. Ellis finally issued an arrest warrant for

Miller that same day. CP 723. The CRU team received the request to arrest Miller on January 5, 2012, and found him within two days simply by going to Patricelli's apartment. CP 399, 1075.

After his arrest, Miller had a hearing relating to his numerous violations. CP 399-400. In her violation report, Ellis noted that "Mr. Miller is classified as a High-Violent offender, the highest risk to reoffend," and that once again Miller had "proven his risk level true[.]" Ellis wrote that Miller "is a significant risk to the safety of the community and his victim(s)." *Id.*

Within a few weeks after receiving a DOSA sentence for the December 30, 2011 incident, Miller was expelled from two different treatment facilities for fighting, once over a television remote and the other for no apparent reason. CP 401-02. In a violation report, Ellis wrote that Miller had "clearly demonstrated with his actions that he is a direct threat to the safety of the community" and that Miller had "proven that he is not going to change his criminal behavior." CP 402-03. Miller's DOSA was revoked, and he was incarcerated until October 15, 2012. CP 403.

During Miller's incarceration, he was again classified as risk level High-Violent. CP 584. On August 28, 2012, DOC Counselor John Walner reviewed police reports from Miller's assaults on Patricelli and was

concerned by his threats to kill her. CP 1072. Surprised that DOC's computer system showed no community safety concerns, Walner wrote to Angella Coker, a Community Victim Liaison (CVL). CP 1120-23, 1131. Coker told Walner that her office had no records for Patricelli, and suggested that he submit a "Threatening Behavior/Victim Services Referral," so that her division would assign a staff member to reach out to Patricelli. CP 1131. Walner did so, emphasizing the fact that Miller was fixated on resuming a relationship with Ms. Patricelli in spite of the no-contact order. CP 1075-77.

When this document was generated, Ellis was still Miller's assigned CCO. CP 404. Yet, not only did DOC never communicate about that form to her, Ellis had never seen one in her entire career. *Id.*

Walner's form resulted in a CVL case being opened, and Coker was assigned. CP 136-62, 1071-72. When Coker called Patricelli, she told Coker that talking to Coker would be a waste of time because Patricelli did not believe that DOC would actually supervise Miller. CP 156. Patricelli told Coker that she planned to move to stay away from Miller. *Id.* Coker's job included a responsibility to create "wraparound services" to help keep Patricelli safe, including geographic restrictions on Miller's movements to keep him away from Patricelli. CP 139, 1091-96. Coker

admits that she did not ask Patricelli where she would be moving. CP 139. DOC then released Miller to Auburn, without knowing that Patricelli's new apartment was also in Auburn. CP 586.

About a month before Miller's release, CCO Freeland was assigned. CP 706-708. Freeland was assigned solely because she had the lightest caseload in the field office. CP 527. Freeland had just returned to DOC after being laid off three years earlier. CP 469. During parts of 2008 and 2009, Freeland had worked in DOC's Offender Minimum Management Unit, where her job was to supervise lowest risk offenders. CP 470-71, 1106-16. Freeland never met with offenders in person and never did any field work. CP 470-71. DOC rehired Freeland on September 5, 2012, less than six weeks before Miller's prison release. CP 1118.

Prior to release on October 15, 2012, Miller told DOC that he wanted to return to live at the same Auburn sober housing, whose conditions he had so frequently violated in 2011. CP 1120. In reviewing that proposed address, CCO John Buchanan remarked that Miller had used that same address before and "upon release, just goes to his girlfriend's house, - the NCO victim." *Id.* Reasoning that "past behavior is the best indicator of future behavior," Buchanan's assessment was that that address did "not present enough of a protective factor for Mr. Miller or his victim/

s." DOC nonetheless released Miller with the Auburn house as his registered address. CP 1125. Miller's conditions of supervision included no contact with Patricelli, notify CCO before changing address, abide by CCO instructions, and consent to home visits. CP 576.

1. Grossly Negligent Supervision Allowed Miller to Murder Patricelli

On release in October, 2012, Miller immediately went to stay with Patricelli. CP 324, 679. Patricelli did not want to him to stay, but because she was afraid he would get violent again, she did not tell him to leave. CP 324-25. Miller stayed the night with Patricelli and her daughters at their apartment every night after his release, until the night before he murdered Patricelli. CP 324. When Patricelli moved, Miller came along and stayed, whether Patricelli liked it or not. CP 325.

Miller reported to Freeland on October 16, 2012, having already begun violating his conditions. CP 324, 679. Freeland was unaware of Miller's past violations, but based only on his demeanor she formed the belief that he would comply with conditions. CP 488.

Miller immediately resumed his pattern: Miller told Freeland that he was not going to be staying at his registered address. CP 708. Exactly like he had told Reed and Ellis before, Miller told Freeland that he would be "homeless and couch-surfing with relatives" whose addresses and

phone numbers he did not provide. *Id.*, CP 783-84. Exactly did Reed and Ellis before her, Freeland fell for it.

Miller admitted to Freeland that he changed his registered address without notice, which constituted a violation for which he could be arrested. CP 536-37, 781 ("Presumption of graduated sanctioning" but "the CCO has discretion in responding to violation behavior."). Not only did Freeland not arrest Miller, she allowed to leave her office with no idea where he was going and no way to find out. CP 480-81, 708.

Freeland did not impose or even consider polygraph examinations, geographical restrictions, curfew, GPS monitoring, or any additional conditions based on Miller's patterns of behavior or the risk that he posed to Patricelli's life. *Id.*

Miller next reported to Freeland on October 23, 2012. CP 707. He gave Freeland a shelter confirmation sheet that falsely showed that he had stayed every night with his mother, Leola Benson. CP 786-87. The form had Benson's phone number but not her address. *Id.* Having said that he had moved in with his mother without providing her address, Miller was again in violation, and Freeland could have arrested him. CP 536-37. Instead, as did Reed and Ellis before her, Freeland's notes show that she

merely told Miller he "needs to call with address." CP 289-90. Incredibly, Freeland did not think to simply call the number herself. CP 479, 706-07.

If Freeland had simply called Benson on October 23, 2012, while Miller was in her office, she would have learned that Miller was lying to her about where he had been staying and could have arrested him immediately. CP 324, 329. If Freeland had simply made a single phone call to verify what Miller was telling her, Patricelli would be alive today. Instead, Miller again left this meeting with Freeland and went back to Patricelli's apartment. CP 324.

During the October 23, 2012 meeting, Freeland learned that Miller had an appointment for a mental health evaluation to re-enter DV treatment, scheduled for the following day. CP 488, 707. Miller's conditions required him to complete this evaluation and re-enter DV treatment. CP 576. Chronos show no evidence that Freeland ever made any attempt to find out whether Miller attended that evaluation until the day after she learned that Miller had murdered Patricelli. CP 706-07. Freeland documented all of her activities in the chronos; if she did not document it, it did not happen. CP 479 ("I always make an electronic record.") Freeland never did any field work to supervise Miller and never attempted a home visit. CP 706-07.

2. Miller Brutally Murdered Patricelli on October 30, 2012

On October 30, 2012, Miller murdered Patricelli by stabbing her more than twenty times in her own apartment. CP 325-27, 655-58, 794-97. Miller was convicted and sentenced to 600 months in prison. CP 800-10.

Tragically, Harper responded to a frantic call from Patricelli's friend Rayford Varnado and arrived at the apartment before the police. CP 326-27, 670. Harper was the first person to discover her daughter's bloody, lifeless body. CP 670. Police found Harper crying hysterically in Patricelli's apartment, screaming "she's dead, she's dead, my daughter is dead." *Id.* Police took photos of Harper moments later, which capture her anguish. CP 312-18. Harper was deeply traumatized by this horrific experience and continues to suffer from it.

Following a psychological examination, Harper was diagnosed with "Major Depression, Single Episode, Severe without Psychotic Features" by a defense expert. CP 820-32. Harper told the defense psychiatrist that "[d]aily living with the fact that I found my daughter stabbed to death is an everyday living hell. Every time I close my eyes all I see is my daughter's dead body. I have difficulty sleeping because of seeing her dead body when I close my eyes." CP 823. It is easy to see how

this is true from a photo of what Harper found when she frantically rushed to her daughter's apartment. CP 834.

D. DOC ADMITTED ERRORS IN ITS CRITICAL INCIDENT REVIEW

In the findings of the Critical Incident Report, CVL Coker belatedly recommended that GPS should be used to track the movements of dangerous DV offenders like Miller. CP 586. The report's findings focused on improvements in the way that CCOs should improve efforts to use field work to verify offender housing, and noted that "the consistent lapses in staying at the clean and sober location were not addressed in a timely manner." CP 591.

When Freeland was interviewed in connection with DOC's Critical Incident Review, Freeland admitted that she had learned that Miller had posted on Facebook threats against Patricelli's life in the days before the murder, but Freeland was not monitoring his Facebook page and never saw that until Miller carried out the threats. CP 586, 1133. Showing her ongoing ignorance of DOC's standards for supervision of DV offenders, Freeland nonetheless blamed Patricelli, saying that she "believes had the victim contacted DOC or [police], there was the possibility this crime may have been prevented." CP 586.

IV. ARGUMENT

A. STANDARD OF REVIEW

The standard of review of an order on summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 W.2d 291, 300, 45 P.3d 1068 (2002). A summary judgment motion under CR 56(c) should be granted only if there is no genuine issue of material fact and that as a matter of law the moving party is entitled to judgment. *Dickinson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Summary judgment is proper only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); CR 56(c). Facts and reasonable inferences from the facts must be considered in the light most favorable to the nonmoving party. *Hertog*, 138 Wn.2d at 275.

In a negligence action, a plaintiff must show (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; and (3) a resulting injury. *Hansen v. Washington Natural Gas Co.*, 95 Wn.2d 773, 776, 632 P.2d 504 (1981). However, "[f]or legal responsibility to attach to

the negligent conduct, the claimed breach of duty must be the proximate cause of the resulting injury." *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975). Issues of negligence and proximate cause are generally not susceptible to summary judgment and may be resolved short of trial *only* "when reasonable minds could reach but one conclusion[.]" *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985).

B. GROSSLY NEGLIGENT SUPERVISION

Under RCW 72.09.320, the state may be held liable for inadequate supervision of an offender in the community where the inadequacy constitutes gross negligence. The Washington Supreme Court in *Nist v. Tudor* held that "gross negligence, being a form of negligence on a larger scale, must also, like ordinary negligence, derive from foreseeability of the hazards out of which the injury arises." *Nist v. Tudor*, 67 Wn.2d 322, 331, 407 P.2d 198 (1965). Though over 50 years old, *Nist* remains the gross negligence standard today. *See Johnson v. Spokane to Sandpoint, LLC*, 176 Wn.App. 453, 309 P.3d 528 (2013).

1. Duty

With regard to parolees or probationers, "once the State has taken charge of an offender, 'the State has a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous

propensities of parolees." *Joyce v. State, Dept. of Corrections*, 155 Wn.2d 306, 310, 119 P.3d 825 (2005) (quoting *Taggart v. State*, 118 Wn.2d 195, 217, 822 P. 2d 243 (1992)). "The existence of the duty comes from the special relationship between the offender and the State." *Joyce*, 155 Wn.2d at 310. "Once that special relationship is created, the State has a duty of reasonable care and may be liable for lapses of reasonable care when damages result." *Id.* See also *Hertog*, 138 Wn.2d 265, 979 P.2d 400.

The issue is not simply whether the CCO was aware of probation violations but rather whether the state "should have known of the offender's dangerous propensities." *Joyce*, 155 Wn. 2d at 318-19 (*citing Bishop v. Miche*, 137 Wn.2d 518, 524, 526-27, 973 P.2d 465; *Taggart*, 118 Wn.2d at 219, 822 P.2d 243). A CCO may not simply bury her head in the sand but must "adequately monitor" the offender based on the "offender's dangerous propensities." *Id.* A "failure to adequately monitor" is equated with "failure to adequately supervise" and is the basis for liability. *Id.*

2. Breach

"In determining the degree of negligence, the law must necessarily look to the hazards of the situation confronting the actor." *Nist*, 67 Wn.2d at 331. In *Nist*, the defendant tried to turn left in front of an oncoming truck. "Her acts and omissions in turning suddenly into so obvious a

danger supplied evidence from which a jury could well infer that she acted in the exercise of so small a degree of care under the circumstances as to be substantially and appreciably more negligent than ordinary, and hence could be held guilty of gross or great negligence." *Nist*, 67 Wn.2d at 332.

Under that standard, foreseeability of the risk is a major factor in determining whether a defendant's acts or omissions breached its duty of slight care. The more foreseeable a risk is, the more egregious are the acts or omissions that allow it to cause harm. This understanding has been affirmed by the Supreme Court in *Taggart*, *Hertog*, and *Joyce*.

Obviously here, Miller's criminal history and his supervision performance made his violence, specifically toward Patricelli, highly foreseeable and, in fact, it was *actually foreseen* by many, many people inside and outside of DOC.

First, DOC labeled him a "high-violent" risk long before the murder. CP 712, 717, 744, 749, 845, 850, 866, 872, 878, 884, 889, 978. Also, release planners agreed in an email thread with Freeland and Coker that Miller would almost certainly attempt contact with Patricelli. CP 1120-1123. During the previous assault, Miller himself was heard yelling "if you call the police I'm going to kill you!" CP 400. Most ominously,

Patricelli shouted repeatedly to police that "he's gonna kill me, he's gonna kill me" and "you don't know who you're dealing with!" CP 400.

The foreseeability of this murderous violence is chilling. To skirt this prominent factor of gross negligence, DOC in its summary judgment motion relied on *Whitehall v. King County*, 140 Wn.App. 761, 167 P.3d 1184 (2007) and *Kelley v. Department of Corrections*, 104 Wn.App. 328, 17 P.3d 1189 (2000) for the proposition that virtually any care at any point amounts to slight care. CP 15-29.

DOC and the trial court pointed to several token efforts at supervision by Freeland, e.g. CP 1252-1253. That logic fails, however, in assuming that, if Freeland exercised "slight care" at any point along the timeline of Miller's supervision, she defeats a claim of gross negligence.

Presumably, the defendant in *Nist* had managed to safely drive her vehicle for some distance prior to her reckless left turn in front of an oncoming truck, exercising slight care up to that point. However, it would be absurd to absolve her of her gross negligence in turning in front of an oncoming truck simply because she stopped at a stop sign a few blocks prior.

Similarly, Freeland's superficial engagement with Miller's supervision does not excuse her grossly negligent failure to make a single

phone call to verify Miller's address and thereby save Patricelli's life.

Likewise, Freeland's token efforts do not excuse DOC's gross negligence in failing to train its staff in accordance with its own policies and knowledge of DV offenders.

What *Whitehall* really held is that agencies supervising offenders in the community cannot be held liable for injuries caused by offenders outside of the foreseeable risks the presented by that offender. There, the plaintiff sued King County for allowing her hand to be destroyed in a bombing by an offender that the county supervised for a misdemeanor theft. *See Whitehall*, 140 Wn.App. at 765, 167 P.3d 1184. The court generally held that the limited resources expended to supervise the previously non-violent misdemeanor offender in that case were sufficient to meet the county's duty of slight care. *Whitehall*, 140 Wn.App. 761, 167 P.3d 1184.

In *Kelley*, DOC was sued for failing to arrest an offender for a minor curfew violation and this allowing the offender's attempted rape of the plaintiff while the department was supervising the offender for a sexual assault. *Kelley*, 104 Wn.App. 328, 330-331, 17 P.3d 1189. The court ultimately ruled that the CCO's honest but deficient efforts to actually gather information about minor supervision violations did not rise

to the level of gross negligence. *Id.* at 338, 17 P.3d 1189. Importantly, there is no indication that the *Kelley* offender had such a long and targeted criminal history like Miller's.

Nevertheless, in a case much more recent and much more relevant, this Court upheld the denial of summary judgment sought by the City of Seattle in a case in which plaintiffs sued the city for negligently supervising a repeat drunken driver, Mark Mullan, allowing him to kill and gravely injure several members of a family crossing a street in north Seattle. This Court affirmed the ruling in a non-binding, unpublished⁴ opinion. *Schulte v. Seattle*, Slip Opinion No. 72821-1-I. (2016), review denied (2017).

As did DOC here, the city in *Schulte* argued that it satisfied its duty under *Whitehall* and *Kelley*. *Schulte*, Slip Op. at 4, 7. This Court rejected that argument, finding that:

(T)he trial court persuasively distinguished *Whitehall* and *Kelley* when noting that unlike in those cases, here there was a "direct correlation" between the allegedly inadequate supervision of Mullan and the danger reflected in his recent criminal activities. The probation officer was confronted with the arguably foreseeable hazard that Mullan would continue to drink and continue to drive under the influence. Because a jury could find that the probation officer breached her duty by failing to track the Snohomish County

⁴ See GR 14.1, amended to permit citation to unpublished opinions.

case and contact collateral sources, a jury could also find that the breach was a failure to use even slight care.

Schulte, Slip Op. at 8.

That persuasive distinction of “direct correlation” exists just the same here. Miller was an incorrigible DV abuser just released from prison for beating and threatening to kill Patricelli. DOC possessed intimate knowledge of Miller’s offense tactics and strategies, and it knew that Miller was obsessed with Patricelli herself and that she was deathly afraid of him.

Even more egregiously than in *Schulte* and *Nist*, foreseeability of the risk posed by Miller is the lynchpin of DOC's breach in this case. Miller was a serial, vicious domestic abuser who threatened and assault Patricelli specifically and predictably over the course of several years. DOC's appalling institutional and Freeland’s individual neglect to supervise or monitor him meaningfully amounted to a breach of its duty. CP 284-309.

This Court in *Schulte* additionally held that, regardless of the scope of the duty of supervision, summary judgment was inappropriate because opposing experts disagreed about fact of breach. “In *Whitehall*, it was undisputed that the probation officers complied with local policies and

procedures. Here, it is disputed. Expert testimony on both sides creates a genuine issue of material fact.” *Schulte* at 5.

Here, Appellants have presented uncontradicted expert testimony that DOC was grossly negligent. CP 278-322. Appellants presented the expert opinion of retired correctional officer William Stough, disputing the scope of that duty articulated by DOC policies. *Id.* Stough determined that DOC’s duty, as outlined in its training materials, included training its community corrections officers to know and recognize in the special dangers and nuances of DV abusers. CP 295-301. Stough also determined that DOC had a duty to ensure that any High-Violent DV offender like Miller should be assigned only to a highly experienced and appropriately trained officer. *Id.* He also opined that DOC had a duty to know Patricelli’s current address to enforce the no-contact order. *Id.*

Given these expert opinions disputing DOC’s interpretation and application of relevant policies, summary judgment was improper because there is a factual dispute over how Miller should have been supervised.

3. Causation

DOC's breach of its duty in supervising an offender causes a plaintiff's injury when the injury would not have happened but for the breach and where there is no intervening legal cause. *Joyce*, 155 Wn.2d at

321-322. Here, if DOC staff had taken reasonable steps to restrict and track Miller during his two weeks of freedom, it would have learned of the many times he violated his no contact order with Patricelli. He would have been promptly arrested for violating his community custody and charged with new crimes. That would have prevented him from murdering Patricelli on October 30, 2012.

C. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Negligent Infliction of Emotional Distress ("NIED") is a judicially created tort that requires a plaintiff to prove: 1) negligent bodily injury of a family member of the claimant; 2) that claimant was present at the scene during or soon after a traumatic incident; 3) that claimant suffered objective symptoms of emotional injury. See *Colbert v. Moomba Sports, Inc.*, 163 Wn. 2d 43, 50, 176 P.3d 497 (2008) (internal quotations/citations omitted) (citing *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 260, 787 P.2d 553 (1990), and *Hegel v. McMahon*, 136 Wn.2d 122, 125-26, 960 P.2d 424 (1998)).

First, as discussed thoroughly above, Harper presented evidence that DOC caused her daughter's bodily injury by grossly negligently supervising Miller. In addition to that evidence, Harper also presented the

trial court with evidence that she arrived immediately after stabbing and that she suffered objective symptoms of emotional injury.

1. Arrival shortly after the incident.

”The tort of negligent infliction of emotional distress rests on the fact the plaintiff suffers emotional trauma stemming not only from witnessing the transition from health to injury, *but also from witnessing the aftermath of an accident in all its alarming detail.*

Colbert, 163 Wn. 2d at 53, 176 P.3d 497 (emphasis added).

"The kind of shock the tort requires is ... the result of the immediate aftermath of an accident. It may be the crushed body, the bleeding, the cries of pain, and, in some cases, the dying words." *Id.* at 63, 176 P.3d 497. When a plaintiff was not at the scene during the injury-causing accident, the tort requires that a plaintiff observe “an injured relative at the scene of an accident after its occurrence and before there is substantial change in the relative's condition or location." *Hegel*, 136 Wn. 2d at 132, 960 P.2d 424.

Here, Harper experienced her daughter's injuries at the murder scene as personally, vividly, and immediately as could be imagined without viewing the actual attack. She arrived within about seven minutes of the stabbing and touched her daughter's wounded, bloody, and apparently dead body. CP 655, 661-662, 665, 667, 669, 670, 837-38, 1135.

Photographs of Ms. Harper at the scene show her reaction to what she had just experienced. CP 812-18. The photos show her daughter's blood on her hands from her failed revival efforts. *Id.*

2. Objective symptoms of Emotional Injury or Distress

"In order to recover for negligent infliction of emotional distress, a plaintiff's emotional response must be reasonable under the circumstances, and be corroborated by objective symptomology." *Hegel*, 136 Wn.2d at 132, 960 P.2d 424. "nightmares, sleep disorders, intrusive memories, fear, and anger may be sufficient" to establish objective symptomology, so long as they "constitute a diagnosable emotional disorder." *Hegel*, 136 Wn.2d at 135.

Continually after her daughter's murder, Ms. Harper has suffered nightly visions of her daughter's dead body. With her diagnosis by Defendants's expert, it is incontestable that Ms. Harper has suffered symptoms that constitute a diagnosable emotional disorder. It appears that DOC only challenges the issue of gross negligence, rather than the remaining elements of the NIED claim, but in any case there is ample evidence of all the elements to require a trial.

V. CONCLUSION

For the reasons discussed above, this Court should reverse the order of summary judgment and remand the case back to the Superior Court for a trial on the merits.

Respectfully submitted this 24th day of March, 2017.

By CARNEY GILLESPIE ISITT PLLP
Attorneys for Appellant:

/s/Christopher Carney
Christopher Carney, WSBA# 30325
Carney Gillespie Isitt PLLP
600 1st Ave, Suite LL08
Seattle, WA 98104
Phone/Fax: (206) 445-0220
christopher.carney@cgilaw.com

/s/Sean Gillespie
Sean Gillespie, WSBA#35365
Carney Gillespie Isitt PLLP
600 1st Ave, Suite LL08
Seattle, WA 98104
Phone/Fax: (206) 445-0220
sean.gillespie@cgilaw.com

s/Kenan Isitt
Kenan Isitt, WSBA #35317
Carney Gillespie Isitt PLLP
600 1st Ave, Suite LL08
Seattle, WA 98104
Phone/Fax: (206) 445-0220
kenan.isitt@cgilaw.com