

76008-4

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No. 95511-5

NO. 76008-4

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CATHY HARPER, et al.,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

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Court of Appeals
Division I
State of Washington

RESPONDENT'S BRIEF

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I. INTRODUCTION

On October 30, 2012, 15 days after his release from prison, Scottye Miller murdered Tricia Patricelli. Appellants claim the Washington State Department of Corrections is responsible for Miller's intentional criminal act, because his Community Corrections Officer, Rhonda Freeland, failed to enforce Miller's conditions of supervision and failed to impose additional, discretionary conditions upon him.

This court should affirm the trial court, because Appellants do not supply evidence of gross negligence or establish proximate cause, *i.e.*, that but for the Department's gross negligence, Miller would have been incarcerated and unable to murder Patricelli on October 30, 2012. Freeland's decisions regarding the imposition of additional conditions of supervision are not evidence of gross negligence, because they were consistent with the sentencing court's conditions and because her exercise of discretion is entitled to quasi-judicial immunity, as a matter of law.

This court should also affirm the trial court's dismissal of appellant Cathy Harper's negligent infliction of emotional distress claim, because all claims arising from "community placement activities" are subject to a gross negligence standard, not a negligence standard, as a matter of law. Moreover, the facts in the record do not support that claim.

II. COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether Appellants supply evidence establishing gross negligence.
2. Whether Appellants supply evidence establishing proximate cause.
3. Whether a Community Corrections Officer's decision regarding additional conditions of supervision is entitled to quasi-judicial immunity.
4. Whether Harper can establish negligent infliction of emotional distress where the Department is only liable for gross negligence in claims arising from "community placement activities."

III. COUNTERSTATEMENT OF THE CASE

A. Miller's Criminal History

Miller has a long criminal history, much of it involving domestic violence toward Patricelli. CP at 31-32, 40-78. Prior to Patricelli's murder, Miller was convicted of four domestic violence felonies, two of them against Patricelli, and 24 misdemeanors, 18 of which were for domestic violence, and four of those misdemeanors were against Patricelli. CP at 31. In the ten year period before Patricelli's murder, Miller was either under the Department's supervision, in custody, or on escape status. CP at 31.

Miller's criminal domestic violence history included many court-issued no contact orders prohibiting him from contacting Patricelli, who routinely either requested that the orders be lifted or actively undermined

them to allow Miller to interact with her. CP at 31. On the day he killed Patricelli, Miller was subject to a no contact order permitting Miller's telephone contact with her, but prohibiting personal contact, except during visits when Miller was in custody or treatment. CP at 31, 101-02.

B. Release to Community Supervision

1. Court-Imposed Conditions of Supervision

At the time of Miller's October 15, 2012, release, he was under the Department's supervision on two misdemeanor convictions: King County Cause No. 10-1-03032-4 (misdemeanor domestic violence; court order violation) and King County Cause No. 12-1-00643-8 (assault in the fourth degree-domestic violence).¹ CP at 80-82, 84-91. Under the community supervision terms contained within the judgment and sentence, Miller was ordered to report to the Department; to enter, make substantial progress in, and complete domestic violence and chemical dependency treatment; to complete a mental health evaluation; to notify the Department of any change in residence; to submit to urinalysis testing as directed; to abide by the no contact order; to refrain from consuming controlled substances without a prescription; and to refrain from using alcohol, among other conditions. CP at 35-36, 80-82, 84-90, 93-95, 97-99, and 101-02.

¹ Miller was supervised by the Department for two misdemeanors pursuant to RCW 9.95.204(1). He was therefore placed on community custody pursuant to RCW 9.94A.501(2) and supervised under the terms of RCW 9.94A.704.

2. 15 Days of Community Supervision

On October 16, 2012, Miller reported to Freeland at her Auburn office. CP at 33. Miller was homeless, but said he would stay with his mother, Leola Benson, and relatives in Kent. CP at 33. Freeland required Miller to report weekly and gave him a shelter report form, which required Miller to list where he stayed each night, verified by a resident's signature. CP at 33. She also called the Department of Social and Health Services, to see if Miller qualified for benefits, and directed him there. CP at 33.

The following day, Freeland called and left a message with Patricelli, asking for a return call. CP at 33. She then called Angella Coker, the Department's Community Victim Liaison, to see if Coker had any concerns. CP at 33, 136-40. Coker told Freeland that she had spoken with Patricelli and helped Patricelli break her lease on a Kent apartment through a statute that protects victims of domestic violence, so Patricelli could move to a new apartment in Auburn. CP at 33, 136-40. Coker said that Patricelli told her Miller did not know where Patricelli would be living and that she was aware she could call the Department or the police, if needed. CP at 136-140. Freeland also called Dave Albers, Miller's 2010-2011 King County Probation Officer, but did not reach him. CP at 33.

On October 23, 2012, Miller again reported to Freeland. CP at 33.

He brought verification of food coupon benefits from the Department of Social and Health Services and a completed shelter form verifying that he had been staying with Benson. CP at 33. Miller also brought verification that he had a psychological evaluation scheduled for the following day. CP at 34. Freeland directed Miller to report on October 30, 2012. CP at 34.

Benson called Freeland on October 29 to tell her that Miller could live with her. CP at 34. On October 30, 2012, Miller murdered Patricelli.

IV. ARGUMENT

The trial court dismissed this case as a matter of law because Appellants did not supply evidence that the Department breached its duty of care. The Department's duty is to monitor compliance with, and sanction violations of, the court's conditions of supervision. Husted v. State, 187 Wn. App. 579, 587, 348 P.3d 776 (2015) (basis for "take charge relationship" is "statutory duty to supervise offender" and to "monitor the offender's compliance with the conditions of supervision and his . . . progress while on supervision"); Estate of Davis v. State, 127 Wn. App. 833, 842, 113 P.3d 487 (2005) ("A corrections officer cannot take charge of an offender without a court order and he can only enforce the order according to its terms and controlling statutes"); Couch v. Department of Corrections, 113 Wn. App. 556, 54 P.3d 197 (2002), *review denied*, 149 Wn.2d 1012 (2003) (court order creates and defines the "take charge" relationship). In the

context of community custody, the legal standard for a claim of negligent supervision is gross negligence, or a failure to exercise slight care, in enforcing the sentencing court's conditions of supervision. RCW 72.09.320; Kelley v. State, 104 Wn. App. 328, 17 P.3d 1189 (2000); Whitehall v. King County, 140 Wn. App. 761, 167 P.3d 1184 (2007).

Miller's domestic violence history was well known to each of his sentencing courts, the King County Prosecutor, local police agencies, Patricelli, and the Department. It formed the basis for his conditions of supervision. As a matter of law, Miller's criminal history does not change the Department's legal duty, which is to refrain from gross negligence.

Appellants provide no evidence that the Department failed to monitor and enforce Miller's compliance with the sentencing court's conditions of his supervision, because there is none. Nor can Appellants provide any evidence showing proximate cause, because there is no evidence that but for the Department's gross negligence, Miller would have been incarcerated and unable to murder Patricelli on October 30, 2012. Instead, Appellants argue the Department should have imposed additional conditions of supervision on Miller and, because it did not, the Department should be liable for his intentional criminal act.

Appellant's argument confuses the Department's *discretionary* authority to add conditions of supervision with the Department's

mandatory duty to enforce the sentencing court's conditions of supervision. The Department is entitled to immunity when it imposes or refrains from imposing additional conditions of supervision, because in doing so, the Department is undertaking a quasi-judicial function. RCW 9.94A.704(11) (imposition of requirements is a quasi-judicial function that does not form the basis for liability); Taggart v. State, 118 Wn.2d 195, 822 P.2d 243 (1992) (quasi-judicial immunity attaches to functions integral to judicial or quasi-judicial proceeding); Tibbits v. DOC, 186 Wn. App. 544, 551, 346 P.3d 767 (2015) (quasi-judicial immunity extends to government actors performing quasi-judicial functions, including modifying conditions of community supervision). It is only when the Department is enforcing the conditions of supervision that its duty to exercise slight care is invoked and liability for gross negligence can attach.

Appellants also focus on alleged deficiencies in the Department's training, policy and practice, but policy decisions made at the executive level constitute the discretionary act of governing, for which no liability can attach.² Taggart, 118 Wn.2d at 214-15; *see also* Estate of Jones v. State, 107 Wn. App. 510, 522, 15 P.3d 180 (2000) (courts refuse to pass

² Appellants' Statement of the Case is predominantly argument and is thus improper. *See* RAP 10.3(5) (content of brief) and RAP 10.7 (submission of improper brief).

judgment on policy decisions) (citing Chambers-Castanes v. King County, 100 Wn.2d 275, 669 P.2d451 (1983)). As a matter of law, the Department's legal duty does not arise from its internal training, policy and practice. Joyce v. Dep't of Corr., 155 Wn.2d 306, 315, 119 P.3d 825 (2005) (agency regulations, policies and directives do not create law). The gross negligence standard applies to all aspects of the Department's community placement activities. RCW 72.09.320. It therefore also applies to Harper's claim of negligent infliction of emotional distress.

A. No Evidence of Gross Negligence

Negligent supervision is a statutory tort. Husted, 187 Wn. App. 579. The basis for the "take charge relationship" creating the duty between a community corrections officer and an individual on supervision arises from the community corrections officer's statutory authority to supervise. Joyce, 155 Wn.2d at 315; Husted, 187 Wn. App. at 587; Estate of Davis, 127 Wn. App. at 842; *see e.g.* RCW 9.94A.704, .501, .707, .716, .737, and .740. As a matter of law, the Department's duty is to monitor the individual's compliance with the court's conditions for release. In the context of community supervision, a failure to discover violations, as distinguished from a failure to act on known violations, does not constitute gross negligence. Kelley, 104 Wn. App. at 333 (citations omitted); Nist v.

Tudor, 67 Wn.2d 322, 330, 407 P.2d 798 (1965); Eelbode v. Chec Medical Centers, Inc., 97 Wn. App. 462, 984 P.2d 436 (1999).

The Department's duty is specific and circumscribed:

[T]he basis of the take charge relationship and the duty created thereby, is the community correction officer's statutory authority to supervise the offender under RCW 9.94A.720. Pursuant to that statute a community corrections officer must monitor the individual's compliance with the conditions of supervision and his or her progress on supervision. And when necessary, the community corrections officer can control the individual's behavior by threat of incarceration, limiting movements to prescribed boundaries, increasing reporting requirements and the like.

Husted, 187 Wn. App. at 587; Estate of Davis, 127 Wn. App. at 842; Couch, 113 Wn. App. 556 (if the State is not authorized to intervene, it cannot have a duty to do so). Both the Legislature and the courts have stated that the Department's duty in supervising individuals is one of gross negligence, which can be violated only by evidence of a failure to exercise slight care. RCW 72.09.320; Kelley, 104 Wn. App. at 332; Whitehall, 140 Wn. App. at 770. The court determines what acts or omissions rise to this level:

Gross negligence is failure to exercise slight care. But this means not the total absence of care but substantially or appreciably less than the quantum of care inhering in ordinary negligence. It is negligence substantially and appreciably greater than ordinary negligence. Ordinary negligence is the act or omission which a person of ordinary prudence would do or fail to do under like circumstances or conditions. There is no issue of gross negligence without substantial evidence of serious negligence.

Kelley, 104 Wn. App. at 333 (citations omitted) (internal quotation marks omitted); Nist, 67 Wn.2d at 330; Eelbode, 97 Wn. App. 462. The facts in Kelley illustrate this high standard.

In Kelley, Kevin Ingalls was released to community custody following 43 months of confinement for attempted rape. Kelley, 104 Wn. App. at 330. A condition of his release was compliance with a court-ordered curfew, requiring that he remain at home between 11:00 p.m. and 7:00 a.m. Ingalls met with his community corrections officer twice per month at the Department field office, but his community corrections officer made only 14 out of the 27 field contacts required by Department policy during eight months of supervision. The community corrections officer was also on notice that Ingalls “may have” violated his curfew on one occasion, when he was detained by police outside a junior high school miles from his home, and the community corrections officer failed to discover that Ingalls violated his curfew on another occasion, when he had been arrested for entering an occupied motel room. Approximately one month after Ingalls’ curfew violation, he picked up the plaintiff along a road, demanded sex, and then assaulted her when she refused his advances.

In affirming summary judgment for the Department, the Kelley court held as a matter of law that the community corrections officer’s conduct, though arguably negligent, did not rise to the level of gross negligence:

Given Ingalls' background of attempted rape, a jury could easily find that [the community corrections officer] was negligent in failing to discover the actual time of the motel incident, which would have provided grounds for arrest. [The community corrections officer] recognized that the incident was serious and that he would have arrested Ingalls if he could have. But [the community corrections officer's] failure to more thoroughly investigate the motel incident falls short of "negligence substantially and appreciably greater than ordinary negligence." If [the community corrections officer] had made no attempt to learn the critical incident circumstances of the crime, a jury could find gross negligence. Here, he did investigate the critical incident circumstances but failed to verify the time of the arrest.

Id. at 335-36 (citations omitted). The Kelley court distinguished cases where other courts found an issue of fact regarding gross negligence, noting that "[i]n each, the defendant knew of the impending danger and failed to take appropriate action," and that the community corrections officer in Kelley merely failed to discover violations. *Id.* at 337.

Appellants' claims are similar to those in Kelley, insofar as they allege Freeland's gross negligence lies, in part, in her failure to discover that Patricelli was consorting with Miller, not in her failure to take appropriate action regarding a violation of which she was aware. Appellants' specific claims are that Freeland failed to (1) investigate or approve Miller's residence upon his release, (2) search his phone, (3) ensure that he completed a mental health evaluation, and (4) discover his contact with

Patricelli, which violated the no contact order. CP at 181, 192-93. None of Appellants' claims are supported by the evidence in the record.

Residence. Miller was supervised as a misdemeanor domestic violence offender.³ Thus, he was not required to establish an approved address upon his release from prison. CP at 34. Moreover, Miller was homeless, so Freeland required him to appear at her office weekly, subjecting him each time to urinalysis testing which was negative for drug and alcohol use. CP at 34. Freeland was working with Miller to establish a residence and Benson agreed that he could reside with her. CP at 34, 103-08. At Miller's October 23, 2012, office visit, he supplied Freeland with a signed verification from Benson confirming that he had resided with her between October 16 and 22, 2012. CP at 33.

Phone search. Freeland did not have the authority to search Miller's phone without reasonable suspicion that a willful violation of a condition of his supervision occurred. CP at 34. Regardless, Miller's May 18, 2012 no contact order allowed him to have telephone contact with Patricelli, so a phone search would not support a finding that he had violated the no contact order. CP at 34, 101-02.

³ CP at 35, 80-82 (August 20, 2010 Judgment and Sentence, Non-Felony, Domestic Violence, King County Cause No. 10-1-03032-4 KNT), CP at 84-91 (May 18, 2012 Judgment and Sentence, Felony, Domestic Violence, King County Cause No. 12-1-00643-8 KNT) (DOSA), CP at 93-95 (May 18, 2012 Judgment and Sentence, Non-Felony, Domestic Violence, King County Cause No. 12-1-00643-8 KNT) and CP at 97-99 (Order Revoking Residential DOSA).

Complete Mental Health Examination. Miller scheduled a mental health examination for October 24, nine days after his release from custody, and informed Freeland of that appointment during his October 23 office visit. CP at 34-35. But even if he had not already scheduled an examination, a failure to meet a mental health examination condition must be willful to support a violation. CP at 35. A community corrections officer must first consult with the treatment provider before even considering a violation, and Miller was entitled to a reasonable amount of time to set up and attend an examination, which requires both funding and scheduling with an available and qualified examiner. CP at 35.

Violation of No-Contact Order. Nobody in a position of authority, and no adult close to Patricelli, knew or could have known she was seeing Miller.⁴ Patricelli concealed her interactions with Miller from everyone, including (1) Coker, from whom Patricelli requested and received assistance in breaking her apartment lease under the pretense that she was avoiding Miller,⁵ (2) Breanna Capener, Patricelli's closest friend, with whom she had daily contact, (3) Cathy Harper, Patricelli's mother, with

⁴ Appellants submit the Declaration of Khalani Michael, Patricelli's daughter, to establish that Miller was seeing Patricelli. CP at 323-27. The Department does not dispute that Miller was seeing Patricelli. Rather, the Department disputes that there is any evidence the Department knew or should have known that Miller was seeing Patricelli.

⁵ Patricelli enlisted Coker's assistance to break her lease with the Royal Firs Apartments by using the domestic violence provisions in the Residential Landlord Tenant Act, telling Coker that she needed to break the lease to avoid Miller, though she was surreptitiously communicating and interacting with him. CP at 136-40, 215-16.

whom she had daily contact and an extremely close relationship, and (4) Freeland, who called Patricelli and left a message with her contact information and a request for a return call, which she never received from Patricelli. CP at 33, 35, 136-81, 208-09, 211-12, 214, 217-18.

In Whitehall v. King County, 140 Wn. App. 761, this court affirmed summary judgment in favor of the King County Probation Department because the plaintiff failed to produce evidence of gross negligence. The plaintiff was the victim of a probationer who left an explosive at his front door. Like Appellants here, the plaintiff alleged the probation department was negligent based on the probation officer's failure to perform home visits or field contacts to ensure the probationer's compliance with his conditions of probation. The court concluded those failures did not prove gross negligence. As in Kelley, the court reached this conclusion despite the opinions of Appellants' liability expert. Whitehall, 140 Wn. App. 768, 770.

The unreported opinion Appellants rely upon, Schulte v. Mullan,⁶ does not alter this analysis. Schulte was a wrongful death and personal injury suit arising from an accident caused by a drunk driver who was on probation at the time of the accident. The duty establishing the driver's probation supervision was created by "local court policies and

⁶ Schulte v. Mullan, No. 72821-1-I, 2016 WL 3919695. Pursuant to CR 14.1, Schulte has no precedential value, is not binding on any court, and can only be cited for such precedential value as the court deems appropriate.

procedures.” The City of Seattle was alleged to have been grossly negligent because there was evidence that the probation officer failed to comply with those policies and procedures and consequently did not learn that the driver had been subject to an arrest warrant, appeared drunk at a court hearing and had been jailed for two weeks. There was also evidence that the probation officer failed to make any collateral contacts required by policy, which may have revealed missed treatment appointments and evidence the driver was drinking and driving. Unlike Whitehall, where this court affirmed summary judgment because the probation officer followed the court policies and procedures, the Schulte court was presented with admissible evidence creating an issue of fact regarding breach of duty.

The duty applicable to the Department does not come from court policies and procedures; it is derived from statute. RCW 9.94A.703, .704. The Department is required to enforce the sentencing court’s conditions of supervision. The failures alleged by Appellants do not show Freeland breached this statutory duty. At best, they show the Department did not train community corrections officers about domestic violence, assigned Miller’s supervision to a less experienced community corrections officer, that Freeland did not talk to Benson about her address until October 29, and that Freeland did not impose additional conditions of supervision on Miller. Unlike Schulte, these arguments do not create an issue of fact.

Whether Freeland's alleged failures breached the duty of care is speculative at best, because there is no evidence that a differently-trained or more experienced community corrections officer would have made different decisions. Estate of Bordon v. Department of Corrections, 122 Wn. App. 227, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003, 114 P.3d 1198 (2005) (evidence required to establish causation; testimony of former parole officer insufficient); *see also* Hungerford v. Dep't of Corr., 135 Wn. App. 240, 139 P.3d 1131 (2006). And Freeland's decision not to impose additional conditions of supervision is not a basis for the Department's liability, because such decisions are protected by immunity.

Freeland's supervision of Miller fully complied with the Department's policies. Miller was classified as a "High Violent" offender under the Washington State Institute for Public Policy's Static Risk Assessment. CP at 36. As a "high violent" offender, Miller was subject to three face-to-face contacts with Freeland per month, two of which were to occur in the field, and one collateral contact. CP at 36. During the 15 days Freeland supervised Miller, she met with him each week in her office and subjected him to urinalysis testing which showed negative results for drug or alcohol use. Though Freeland had not yet completed her two monthly field contacts in those 15 days, she made multiple collateral contacts, including the Department of Social and Health Services, community

victim liaison Coker, and Benson. She also attempted collateral contacts with Albers and Patricelli. Appellants cannot prove gross negligence.

To the extent Appellants argue that Freeland was grossly negligent for following the Department's internal policies related to supervision, they fail to state a claim. The Department is entitled to immunity for high-level policy decisions. Taggart, 118 Wn.2d at 215; Jones, 107 Wn. App. at 522; King v. Seattle, 84 Wn.2d 239, 246, 525 P.2d 228 (1974) (immunity for policy decisions based on balancing of risks and advantages).

Appellants allege deficiencies in the Department's training, policy and practice *per se*, arguing the Department's gross negligence lies in how it trained Freeland, staffed Miller's supervision, and discharged the Department's policies. But the Department's training, policy, and practice do not create a legal duty, as a matter of law. Joyce, 155 Wn.2d at 315.

Moreover, Appellant's argument is essentially a claim of negligent training, which is a *respondeat superior* theory that only applies if the Department denies vicarious liability. Gilliam v. DSHS, 89 Wn. App. 569, 950 P.2d 20 (1998) (negligent supervision superfluous where employee acting in scope of employment); LaPlant v. Snohomish County, 162 Wn. App. 476, 479-80, 271 P.3d 254 (2011) (negligent training and supervision superfluous when *respondeat superior* applies). Shielee v. Hill, 47 Wn.2d 362, 366, 287 P.2d 479 (1955) (training and experience

irrelevant where employee acting in scope of employment). Where, as here, an employer acknowledges responsibility for the acts or omissions of its employee, the employee's training is irrelevant. If the alleged act or omission does not establish negligence, then it does not matter whether or how the employee was trained. Thus, the testimony of Appellants' liability expert regarding Freeland's assignment to Miller and allegedly deficient training are insufficient to create an issue of material fact. *See also* CP at 1185-92 (Objections to Admissibility of Evidence).

Finally, Appellants allege the Department's Critical Incident Review provides evidence of negligence, because the Review identifies improvements the Department could make that might diminish or eliminate recurrences of similar adverse events caused by individuals on supervision. Observations stated in such reviews do not provide evidence of negligence. Critical Incident Reviews apply a 20/20 hindsight standard to adverse events perpetrated by individuals on community supervision in an effort to evaluate possible remedial measures. Subsequent remedial measures do not create evidence of negligence. ER 407. The public expects the Department to operate transparently, continually assess and improve internal standards and practices, and publicly demonstrate that commitment to improvement. Critical Incident Reviews are a manifestation of responsible government, not a basis for tort liability.

B. No Evidence to Establish Proximate Cause

The court may affirm on any basis supported by the record. Redding v. Virginia Mason Medical Center, 75 Wn. App. 424, 878 P.2d 483 (1994). Here, the court can also affirm the trial court because Appellants supply no evidence to prove proximate cause. They do not show that but for Freeland's provable failure to exercise slight care, Miller would have been incarcerated on October 30, when he murdered Patricelli.

To establish proximate cause in a claim of negligent supervision, the plaintiff must supply evidence showing the individual on supervision would have been incarcerated but for the Department's negligence. In Bordon, 122 Wn. App. 227, the court reversed a verdict in favor of a decedent killed in an automobile collision caused by an intoxicated individual on supervision, finding there was no evidence establishing a causal link between the Department's negligence and the decedent's death, because there was no evidence he would otherwise have been incarcerated on the day in question.

The same absence of evidence exists here. There is no evidence of what sanction, if any, would have resulted from any alleged violation of Miller's conditions of supervision and there is no evidence that Miller would have been in jail on October 30, 2012, when he murdered Patricelli.

C. Quasi-judicial Immunity for Discretionary Conditions

As stated, the Department is entitled to quasi-judicial immunity for Freeland's decisions regarding whether or not to add or modify conditions of supervision. In Taggart, *supra*, the Washington State Supreme Court held that "[i]n setting, modifying, and enforcing conditions of community custody, [the Department] shall be deemed to be performing a quasi-judicial function." Taggart, 118 Wn.2d 195, at 213. This quasi-judicial immunity has been expressly applied to community custody. RCW 9.94A.704(11).

In Tibbits, *supra*, this court affirmed summary judgment for the Department where the plaintiff claimed the Department should have added a condition requiring the individual on supervision to be physically escorted into inpatient treatment. Tibbits, 186 Wn.2d at 551. The court found that because quasi-judicial immunity includes both affirmative decisions and omissions, the Department is immune regarding a claim that the Department should have added or modified conditions. The same analysis applies here.

It is undisputed that as of October 30, 2012, Freeland met the Department's policy requirements. Appellants' arguments and their liability expert's opinions regarding her failure to impose additional conditions of supervision such as using a Global Positioning System, requiring employment, residence at a mission, and polygraph

examinations all challenge Freeland's discretionary decision-making, which is a quasi-judicial function entitled to immunity. And even if Freeland's discretionary decisions regarding additional conditions of supervision were not entitled to immunity, Appellants would still fail to create a material issue of fact. None of the conditions advocated by Appellants would be allowed, appropriate, or effective in fact. CP at 37 (regarding GPS, employment, required residence), CP at 32 (regarding supervision by gang unit) and CP at 38 (regarding polygraphs).

D. No Evidence of Negligent Infliction of Emotional Distress

As already explained, the Department is liable for civil damages arising out of "community placement activities" only when its acts or omissions constitute gross negligence. The statute conferring this immunity applies to all claims arising from such activities: "The state of Washington, the department and its employees . . . are not liable for civil damages from any act or omission in the rendering of community placement activities unless the act or omission constitutes gross negligence." RCW 72.09.320. The dismissal of Appellants' negligent infliction of emotional distress claim was proper and should be affirmed.

VI. CONCLUSION

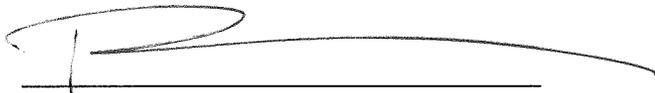
Appellants claim that the Department is responsible for Miller's intentional criminal act is misplaced. The evidence does not provide any

basis for finding gross negligence, because it does not show that Freeland failed to act in a manner consistent with the sentencing court's conditions of supervision. The evidence also does not provide any basis for finding that Freeland proximately caused Miller's crime against Patricelli, or that Harper can maintain a claim for negligent infliction of emotional distress.

This court should affirm the orders granting summary judgment.

RESPECTFULLY SUBMITTED this 21st day of April 2017.

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DECLARATION OF SERVICE

I hereby declare that on this 21st day of April, 2017, I caused to be electronically filed with the Washington State Court of Appeals, Division 1, the State of Washington's Response Brief, and I also served a copy on all parties or their counsel of record as follows:

- US Mail Postage Prepaid via Consolidated Mail Service
- ABC/Legal Messenger
- Hand Delivered
- Electronic Mail by Agreement to:

Christopher Carney: Christopher.carney@cgilaw.com
Sean Gillespie: Sean.gillespie@cgilaw.com
Kenan Isitt: Kenan.isitt@cgilaw.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 21st day of April, 2017 at Seattle, Washington.


VALERIE TUCKER – Legal Assistant