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No. 95511-5

SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, DEPT. OF CORRECTIONS,

*Petitioner,*

v.

CATHY HARPER, et al,

*Respondents.*

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ON REVIEW  
FROM COURT OF APPEALS, DIVISION I, No. 76008-4

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**SUPPLEMENTAL BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

Before Scottye Miller murdered Tricia Patricelli on October 30, 2012, he was convicted four times for domestic violence (DV) offenses against her. While in the community custody of DOC for those offenses, Miller performed very poorly by lying to DOC while violating no-contact orders and committing new crimes against Patricelli. DOC ignored this long and detailed history — as well as its own policies for supervising DV offenders — in failing to carry out its duty to take charge of Miller and protect Patricelli.

The Court of Appeals reversed the trial court's grant of summary judgment for DOC on these facts, finding that they amounted to evidence of serious negligence and that the claims should be resolved by a jury at trial.

This court should affirm the Court of Appeals and remand this case for trial.

## II. ARGUMENT

### A. Summary judgment is generally inappropriate for resolving negligence claims.

An appellate court reviews a trial court's grant of summary judgment de novo. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d

541 (2014). "Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.*; see CR 56(c).

Moreover, "(o)n a motion for summary judgment, all facts submitted and reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party." *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014).

In *Swank v. Valley Christian School*, 188 Wn.2d 663, 398 P.3d 1108 (2017), this court articulated the distinctions among simple negligence, gross negligence, and recklessness. It pronounced unanimously that, "[b]ecause each of the three standards turns on a fine-grained factual analysis, 'issues of negligence and proximate cause are ***generally not susceptible to summary judgment.***'" *Swank*, 188 Wn.2d at 685 (quoting *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) and *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995))(emphasis added).

**B. The Court of Appeals correctly reversed the trial court, finding that a reasonable jury could conclude that DOC committed gross negligence.**

In light of the above, the Court of Appeals here was tasked with a de novo review to identify the proper legal standard for defining gross

negligence and then to apply that standard to the facts produced by the parties to the trial court.

The court properly below did so and correctly reversed the trial court's order of summary judgment, determining that a reasonable juror conducting a such a fine-grained factual analysis and "(t)aking all reasonable inferences in favor of Harper" could find that DOC breached its duty of slight care here. *Harper v. Dept. of Corr.*, Slip Op. 76008-4-1 (20017) at 14.

Under RCW 72.09.320, DOC is liable for failures in community supervision only where they constitute gross negligence. Gross negligence means the failure to exercise slight care. *Nist v. Tudor*, 67 Wn.2d 322, 407 P.2d 798 (1965) (citing *Crowley v. Barto*, 59 Wn.2d 280, 367 P.2d 828 (1962) and *Eichner v. Dorsten*, 59 Wn.2d 728, 370 P.2d 592 (1962)).

Gross negligence is merely a species of negligence "substantially and appreciably greater than ordinary negligence." *Nist*, 67 Wn.2d 322, 331, 407 P.2d 798. This court in *Nist* even held that a jury hearing a claim of gross negligence should be instructed on the elements of ordinary negligence "so that it may have as basis of comparison." *Id.* at 332, 407 P.2d 798.

“The standard elements of a negligence claim are duty, breach, causation, and damage.” *Reyes v. Yakima Health District*, Slip Op. 94679-5, Supreme Court of Washington, En Banc, (June 21, 2018). The difference between the two torts is simply the difference between their definitions of what constitutes a breach: the failure to exercise ordinary care (WPIC 10.01) versus the failure to exercise slight care. The latter “means not the total absence of care but care substantially or appreciably less than the quantum of care inhering in ordinary negligence.” *Nist*, 67 Wn.2d at 331, 407 P.2d 798.

The *Nist* formulation of gross negligence remains the law today. See *Swank*, 188 Wn.2d 663, 398 P.3d 1108. Logically, in applying that standard here and assessing whether sufficient evidence exists to prove a breach of DOC’s duty to Tricia Patricelli, there must first be a full understanding of the scope of that duty.

*1. Duty*

"As a general rule, our common law imposes no duty to prevent a third person from causing physical injury to another." *Aba Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006) (citing Restatement (Second) of Torts § 315 (Am. Law Inst. 1965)). But such a duty can arise when "a special relationship exists between the defendant and either the third party

or the foreseeable victim of the third party's conduct." *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997) (quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 227, 802 P.2d 1360 (1991)).

“Once that special relationship is created, the (third party) has a duty of reasonable care and may be liable for lapses of reasonable care when damages result.” *Joyce v. Dept. of Corr.*, 155 Wn.2d 306, 310, 119 P.3d 825 (2005). In the parole context, this court found that such a relationship existed:

The State can regulate a parolee's movements within the state, require the parolee to report to a parole officer, impose special conditions such as refraining from using alcohol or undergoing drug rehabilitation or psychiatric treatment, and order the parolee not to possess firearms. The parole officer is the person through whom the State ensures that the parolee obeys the terms of his or her parole. Additionally, parole officers are, or should be, aware of their parolees' criminal histories, and monitor, or should monitor, their parolees' progress during parole. Because of these factors, we hold that parole officers have "taken charge" of the parolees they supervise for purposes of § 319. When a parolee's criminal history and progress during parole show that the parolee is likely to cause bodily harm to others if not controlled, the parole officer is under a duty to exercise reasonable care to control the parolee and to prevent him or her from doing such harm.

*Taggart v. State*, 118 Wn.2d 195, 220, 822 P.2d 243 (1992). While the court recognized later “that a community corrections officer arguably has

less power than a parole officer, this does not change the bedrock fact that the State still has a duty to use reasonable care once it takes charge of an offender.” *Joyce*, 155 Wn.2d 306, 315, 119 P.3d 825. “Once the theoretical duty exists, the question remains whether the injury was reasonably foreseeable.” *Id.* (citing *Taggart*, 118 Wn.2d at 217, 226, 822 P.2d 243; also Restatement (Second) of Torts § 319 (Am. Law Inst. 1965)).

Critically, while the connection between the offender and his victim can “be relevant and properly brought before the jury, it is not the only basis for determining foreseeable dangerous propensities.” *Joyce*, 155 Wn.2d 306, 316, 119 P.3d 825.

Since *Taggart*, state agencies have continued to argue in a variety of venues (judicial, legislative and otherwise) that *Taggart* should be reversed. Alternately, they have argued that, as a matter of law, there is no causal link between their failure to use reasonable care to monitor and supervise offenders, and the foreseeable injuries caused by offenders. Illustratively, in *Bishop*, King County argued that a breach of the duty of reasonable care simply could not be a proximate cause of injury when an intoxicated probationer with a history of substance abuse caused a motor vehicle collision that killed a child. [*Bishop v. Michie*, 137 Wn.2d 518, 531, 973 P.2d 465 (1999)]. We explicitly rejected the county's contention and found that a duty to use reasonable care did exist.

*Id.* at 317-318.

Here, DOC had a duty to take charge of Miller and to protect Patricelli from his foreseeable dangers. After his most recent release from prison, the agency was supervising Miller for a 2010 conviction for violating a no-contact order against Patricelli. CP 980-87. She was the victim not only of that crime but also DV crimes before and after that offense, including the assault and harassment for which Miller was in prison until shortly before the murder. CP 399-400, 952-65, 1047-68, 1071.

DOC's duty was governed by Miller's judgment and sentencing and any applicable statutes. See *Couch v. Dept. of Corr.*, 113 Wn. App. 556, 565, 54 P.3d 197 (2002), review denied, 149 Wn.2d 1012, 69 P.3d 874 (2003). The sentencing court ordered that DOC supervise Miller for 24 months while commanding him to complete a state-certified DV treatment program and prohibiting his contact with Patricelli, CP 985-987. The court also ordered that Miller commit no criminal offenses. *Id.* RCW 9.95.210, meanwhile, commanded DOC to "promulgate rules and regulations for the conduct of the person during the term of probation." These provisions constituted DOC's authority to take charge of Miller for the purpose of protecting Patricelli from his foreseeable dangers.

DOC's duty then is outlined by the foreseeable risks that Miller presented. In determining these risks the court should consider not only Miller's criminal history and his previous performance under supervision but also what DOC staffers actually foresaw from him.

On August 28, 2012, while Miller was still in prison, DOC Counselor John Walner reviewed police reports from Miller's assaults on Patricelli and was concerned by his threats to kill her and the intense fear that she expressed to police about them. 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.

A couple of weeks later, as Miller's release planning process progressed, CCO Michael Buchanan wrote to Coker and Walner:

Mr. Miller has submitted the same address ... on previous releases and, upon release, just goes to his girlfriend's house -the NCO victim. As past behavior is the best

indicator of future behavior, I would argue this address should not be approved, as it clearly does not present enough of a protective factor for Mr. Miller or his victim/s.

CP 1122. In a response to that email, Counselor John Walner wrote:

I agree that Mr. Miller will eventually try to make contact with the victim. With his amended NCO, it almost appears that the county is enabling the whole thing by allowing him contact while incarcerated via phone and letter.

CP 1123.

Beyond those observations, Miller's previous CCO, Heidi Ellis wrote the following about Miller in June, 2010, in support of sanctions for supervision violation related to an earlier conviction:

Mr. Miller's adjustment to supervision has been poor. He has absconded on several occasions, used controlled substances through his time on community custody, has never participated in domestic violence treatment, continues to have a relationship with his victim and has not taken responsibility or realized the severity of his criminal behavior.

CP 997. By the end of 2011, Ellis was even more pessimistic about Miller:

"Mr. Miller is classified as a High-Violent offender, the highest risk to reoffend," and that once again he had "proven his risk level true[.]" Ellis wrote that Miller "is a significant risk to the safety of the community and his victim(s)." CP 399-400.

In addition to these facts, it was known that Miller's August, 2010, conviction was for contact prohibited by a domestic violence order imposed after Miller's 2009 felony conviction for assaulting Patricelli. CP 952-65. Miller's supervision on the 2010 case was interrupted in 2012 when he was convicted and incarcerated for assaulting and threatening to kill Patricelli at the end of 2011. CP 1047-68. Supervision for the 2010 case resumed on October 15, 2012, when Miller was released from prison after serving his sentence following the 2012 conviction. CP 1071. For custody and supervision purposes, DOC long ago had assigned Miller a risk-level classification of "high violent" for his incorrigible domestic violence. CP 399-400.

Moreover, DOC had created comprehensive guidance for its CCOs to manage their DV offenders to protect against the scourge of domestic violence. These DV policies and training protocols are robust. They explicitly warn of the potentially fatal consequences of domestic violence, and they propose a comprehensive suite of techniques to supervise offenders who pose a DV risk. CP 337-65.

These policies show that 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 CCOs. CP 337-365.

DOC's training protocols note 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.

According to DOC materials, CCOs should know that prior physical abuse and 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 might 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.

Ultimately, all of these facts need to be incorporated into a jury's determination of DOC's duty protect Patricelli from foreseeable harm.

## 2. Breach

"Circumstances surrounding the actors largely determine the quantum of care required in any rule referring to or prescribing standards of care, unless the statutes declare otherwise." *Nist*, 67 Wn.2d 322, 331, 407 P.2d 798. In other words, the facts about Miller and his past performance on supervision, as well as the dynamics of DV relationships generally, determined the amount of effort DOC was required to exercise to carry out its duty to Patricelli.

Before Miller's release, Counselor Walner's administrative referral for Miller's death threats resulted in a case being opened in the victims' liaison division, and CVL 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.

On release, Miller's supervision was assigned to Rhonda Freeland, a CCO who had just returned to the department after a three-year layoff, during which she worked an entirely unrelated job at Washington's Employment Security Department. CP 469, 1118. In her previous work at DOC, Freeland was a CCO for cases of low-risk offenders whose nominal supervision never required that she leave her desk. CP 470-71, 1106-16.

Both Freeland and Miller's previous CCO, Heidi Ellis, worked in the Auburn field office under Community Custody Supervisor (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 still 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. *Id.* 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. Freeland corroborated this. 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.

In two weeks of supervising Miller before he murdered Patricelli, Freeland saw Miller twice at her office. CP 488, 707. She tried to call Patricelli once but never reached her because she had called the wrong number. CP 706-09. Freeland never tried a second time to reach Patricelli, who was at least four times a victim of Miller's domestic violence over the previous four years, and never sought her address. Freeland otherwise subjected Miller to two urinalyses and instructed him to schedule a mental health evaluation. CP 707-08.

Because Freeland was essentially a rookie and because she was never trained on the specific dynamics and dangers of DV offenders, she failed impose GPS monitoring; she failed to vigorously verify Miller's assertions about his residence; she failed to demand that he report daily;

she failed verify Patricelli's contact information to get the correct phone number; she failed to understand that Patricelli might be afraid to tell her about Miller's contact; she failed to visit Patricelli's home to see if Miller were there; and she even failed to learn where Patricelli lived for the purpose of keeping Miller away from her.

Moreover, CCS Crisp failed to ensure that a properly trained and experienced CCO were supervising such a dangerous, high-risk offender. CP 527. Knowing personally that Miller was terminated from drug treatment for threatening another patient just three months earlier (CP 50) and that Miller failing in his supervision at the end of 2011 (CP 59), Crisp took no interest in overseeing the supervision of Miller. First, he made no effort learn anything about Freeland's qualifications: "It wasn't necessary. I mean, if she arrived and she's a qualified CCO, then she's a qualified CCO." CP 542. Then, he made no effort to verify that Freeland was competently supervising Miller or to offer her any support:

I think CCOs are pretty professional folks, and anybody who's in the position, *it's not a new person just out of the -- just in the academy or something*. They know what they're doing. And so no. I -- that would be part of micromanaging, I think, and they knew -- if they felt they needed something, they got it. They used the mechanism to get it.

CP 530 (emphasis added).

Freeland was, in fact, just out of the academy when she began supervising Miller. CP 473-474. Yet, DOC assigned her to supervise a very dangerous offender who proved unable to avoid community custody violations and new crimes and who was violently obsessed with his former girlfriend.

In light of the tremendous risk that DOC knew that Miller posed to Patricelli personally because his extensive history of violence against her and because of the well understood dynamics of DV relationships generally, a reasonable juror could easily find that DOC owed to Patricelli a quantum of care far greater than what it provided in this case.

Just as the hypothetical window washer in *Nist* owed to his colleague the care not to engage in playful nudging at the top of a skyscraper even though the same behavior would be insignificant at ground-level, DOC owed to Patricelli protection from Miller that was far more vigilant than it owes to the community to protect it from a non-violent thief.

### **III. CONCLUSION**

For the reasons discussed above, this Court should affirm the Court of Appeals and remand the case back to the Superior Court for trial.

Respectfully submitted on July 23, 2018.

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