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NO. 95511-5

THE SUPREME COURT OF WASHINGTON

CATHY HARPER, et al.,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Petitioner.

**SUPPLEMENTAL BRIEF OF PETITIONER WASHINGTON
STATE DEPARTMENT OF CORRECTIONS**

ROBERT W. FERGUSON
Attorney General

Paul Triesch, WSBA No. 17445
Kaylynn What, WSBA No. 43442
Assistant Attorneys General
Attorneys for Petitioner
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
Tel: 206-464-7352
OID #91019

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I. INTRODUCTION

The Department of Corrections (DOC) supervised Scottye Miller's community custody on two misdemeanor domestic violence convictions. The Court of Appeals concluded that DOC's failure to investigate whether Miller was complying with a separate no-contact order (NCO) in favor of Tricia Patricelli was evidence that DOC's supervision was grossly negligent. However, the Legislature has not imposed a duty to investigate on DOC. *See* RCW 9.94A.704(2)(b) (DOC "shall supervise offenders during community custody on the basis of risk to the community safety and conditions imposed by the courts"). To the contrary, the Legislature has established limitations on DOC's duty, stating DOC is "not liable for civil damages resulting from any act or omission in the rendering of community placement activities unless the act or omission constitutes gross negligence," RCW 72.09.320, and "[i]n setting, modifying, and enforcing conditions of community custody, (DOC) shall be deemed to be performing a quasi-judicial function." RCW 9.94A.704(11). The Court of Appeals disregarded these statutory constraints in creating a cause of action for negligent investigation. This Court should reverse the Court of Appeals and remand to the trial court with direction to reinstate summary judgment.

II. STATEMENT OF THE CASE

DOC released Miller to community custody on two misdemeanor convictions, one for misdemeanor domestic violence and the other for assault in the fourth degree-domestic violence. CP 80-82, 84-91, 93-95, 97-99. Miller's criminal domestic violence history included many court-issued no-contact orders prohibiting his contact with Patricelli, who routinely asked that the orders be lifted or actively undermined them to allow Miller to contact her. CP 31. Miller's conditions for community custody did not require DOC to investigate whether he was violating Patricelli's NCO. CP at 80-99.

DOC assigned Patricelli a community victim liaison, Angella Coker, to facilitate Patricelli's safety. CP 136-62. Coker assisted Patricelli in breaking her apartment lease, so she could move to an address unknown to Miller, and ensured Patricelli understood she could contact DOC or law enforcement if Miller contacted her. CP 33, 136-62. Coker shared this information with Miller's community corrections officer, Rhonda Freeland, whose job it was to monitor Miller's conditions for community custody. CP 30-38, 136-62, 478.

The day after his release from custody, Miller reported to Freeland. CP 33. He was homeless, but said he would stay with his mother, Leola Benson. CP at 33. Freeland was familiar with Miller's offense history. CP at 30-38, 477-480. She required him 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 called the Department of Social and Health Services to see if Miller qualified for benefits and directed him there. CP at 33. The next day, she called Patricelli at the phone number used by Miller's prior community corrections officer and left a message requesting a return call. CP at 33, 723. She also spoke to Coker, and called Miller's King County Probation Officer, Dave Albers. CP at 33, 136-40.

Miller reported to Freeland again the next week. CP at 33. He brought verification of food coupon benefits from the Department of Social and Health Services, a completed Shelter Report Form confirming he was staying with Benson, and verification of a psychological evaluation scheduled for the following day. CP at 33-34. Freeland spoke with Benson, confirmed Miller was staying with her, and initiated an in-state transfer for Miller's supervision to occur through the DOC office closer to Benson's home. CP at 33-34, 483, 488. Freeland directed Miller to report the next week. CP at 34.

The next week, on the day he was to report to Freeland, Miller murdered Patricelli. If Patricelli was actually consorting with Miller during his 15 days of community custody, she concealed that fact from her mother, Cathy Harper, her best friend, Breanna Capener, her community victim liaison, Coker, and from Freeland. CP at 35, 136-40, 163-65, 208-09, 214.

III. ARGUMENT

A. **DOC's Duty is to Monitor the Offender's Conditions for Community Custody; it Does Not Include a Duty to Investigate**

The Legislature has stated DOC “shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court.” RCW 9.94A.704(2)(b). It has also stated DOC “is not liable for civil damages resulting from any act or omission in the rendering of community placement activities unless the act or omission constitutes gross negligence,” RCW 72.09.320, and “[i]n setting, modifying, and enforcing conditions of community custody, (DOC) shall be deemed to be performing a quasi-judicial function.” RCW 9.94A.704(11). DOC is thus only liable in tort for the supervision of offenders when its acts or omissions (1) constitute gross negligence, and (2) do not consist of setting, modifying, or enforcing the conditions of community custody. Here, the Court of Appeals expanded DOC's duty beyond that established by both the Legislature and the courts.

DOC has a “duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of parolees.” *Taggart v. State*, 118 Wn.2d 195, 219, 822 P.2d 243 (1992). The take-charge relationship that creates this duty is defined by the community corrections officer's statutory authority and by the offender's conditions of

release. *Id.* In *Binschus v. State*, this Court confirmed that “[t]he Restatement and our case law consistently explain the take charge duty as a duty to control, and that liability results from negligently failing to control, not failing to protect against all foreseeable dangers.” *Binschus v. State*, 186 Wn.2d 573, 579, 380 P.3d 468 (2017). Though it may be foreseeable that Miller would attempt to contact Patricelli, DOC’s duty does not include speculating that such contact is occurring. Rather, it is to enforce Miller’s conditions for community custody as ordered by the sentencing court.

A “community corrections officer must have a court order before he or she can ‘take charge’ of an offender; and even when he or she has such an order, he or she can only enforce it according to its terms and applicable statutes.” *Couch v. Dep’t of Corr.*, 113 Wn. App. 556, 565, 54 P.3d 197 (2002), *review denied*, 149 Wn.2d 1012, 69 P.3d 874 (2003); *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”). The Court of Appeals found gross negligence in DOC’s failure to investigate Miller’s alleged violation of Patricelli’s NCO,

not in DOC's failure to take appropriate action regarding a known violation of his conditions of community custody. DOC relies upon evidence showing a person under supervision is violating a NCO, rather than investigating whether a violation may have occurred absent facts to investigate. CP at 485. A failure to discover a violation of a condition of community custody may be evidence of negligence, but it is not evidence of gross negligence. *Kelley v. State*, 104 Wn. App. 328, 335-38, 17 P.3d 1189 (2001); *Whitehall v. King County*, 140 Wn. App. 761, 770, 167 P.3d 1184 (2007).

DOC's communication with Patricelli occurred through Coker, who became Patricelli's community victim liaison before Miller was released from custody. CP at 138, 156-57. While Freeland monitored Miller's compliance with the sentencing court's conditions for community custody, Coker worked with Patricelli to facilitate her safety. CP at 478. Freeland and Coker first discussed Miller's supervision and Patricelli's safety on October 17, 2012, two days after Miller's release. CP at 155-56. They continued to share information during Miller's 15 days of supervision. CP at 33, 136-40, 478-79, 482, 486, 488-89, 492. Neither Freeland nor Coker had facts showing Miller was violating any condition of community custody, much less Patricelli's NCO. CP at 35, 138-39. Freeland held the reasonable belief that Patricelli, who changed apartments to avoid Miller, was honest with Coker and would inform DOC if Miller contacted her.

The Court of Appeals essentially concluded there is a question of fact regarding gross negligence because, if Freeland made different enforcement choices and investigated Miller's potential violation of Patricelli's NCO in the four ways cited by the Court of Appeals, that investigation would have revealed Miller was violating the NCO. But even if this speculation could create an issue of fact on summary judgment, there is no evidence in the record to support it. To the contrary, the record shows Patricelli would not have disclosed to Freeland that she had contact with Miller, because she actively concealed such interactions (if they occurred) from Harper, Capener and Coker. CP at 138, 163-65, 208-09. In fact, Patricelli told both Capener and Coker that she would not resume her relationship with Miller. CP at 138, 164. And though Patricelli's daughter, Khalani Michael, attested that Miller stayed with Patricelli after his release, her grandmother, Harper, admitted that Patricelli's children "didn't tell grandma too much because they knew that mom would get mad." CP at 214.

By finding issues of material fact in DOC's purported negligent investigation, the Court of Appeals invited the jury to speculate about how DOC might otherwise have set, modified or enforced Miller's conditions for community custody. As a matter of law, these activities are quasi-judicial and do not form a basis for DOC liability. RCW 9.94A.704(11); *Tibbits. v. State*, 186 Wn. App. 544, 549, 346 P.3d 767 (2015) (judicial

immunity covers governmental actors performing quasi-judicial functions). Moreover, the Court of Appeals provided no contours for how DOC could discharge such an obligation. This was the very concern stated in *Donaldson v. City of Seattle*, 65 Wn. App. 661, 831 P.2d 1098 (1992).

In *Donaldson*, the plaintiff claimed police had a duty to conduct an investigation under the Domestic Violence Protections Act¹ as part of the mandatory duty to arrest. The *Donaldson* court disagreed, concluding:

There is a vast difference between a mandatory duty to arrest and a mandatory duty to conduct a follow up investigation. In the arrest situation the officer is on the scene, the arrest is merely a matter of deciding to do so and a few minutes to physically effectuate the arrest. A mandatory duty to investigate, on the other hand, would be completely open-ended as to priority, duration and intensity.

Donaldson, 65 Wn. App. at 671. This applies equally to a duty to investigate possible violations of a NCO. The Court of Appeals decision below imposes greater liability on community corrections officers and entities engaged in supervision than *Donaldson* did on a police officer making an actual arrest.

The Court of Appeals' implicit creation of a cause of action for negligent investigation is contrary to DOC's enabling legislation and longstanding Washington law. See RCW 9.94A.704(2)(b); *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003); *M.M.S. v.*

¹ RCW 10.99, Laws of 1984, ch. 263.

State Dep't of Soc. & Health Servs. & Child Protective Servs., 1 Wn. App. 2d 320, 331, 404 P.3d 1163, 1168 (2017), *rev. denied sub nom. M.M.S. v. State Dep't of Soc. & Health Servs.*, 190 Wn.2d 1009, 414 P.3d 581 (2018) (no general tort claim for negligent investigation); *Pettis v. State*, 98 Wn. App. 553, 990 P.2d 453 (1999) (negligent investigation claims cannot be brought by persons not identified in statute). This cause of action establishes a basis for DOC liability for *any* failure to investigate potential violations of a sentencing court's domestic violence NCO, without regard to DOC's actual statutory duty or the gross negligence standard established by the Legislature.

B. The Record Does Not Contain “Substantial Evidence of Seriously Negligent Acts or Omissions” by DOC

The Court of Appeals concluded that material issues of fact exist as to whether DOC breached the “take charge duty owed to Patricelli . . . regarding enforcement of the no-contact order.” *Harper v. State Dep't of Corr.*, 2 Wn.App.2d 80, 92-93, 408 P.3d 735 (2018). The Court of Appeals concluded a jury could find gross negligence, because Freeland did not (1) observe that Miller had a history of violating no-contact orders and lying to community corrections officers, (2) disbelieve the validity of Miller's signed Shelter Report Form, (3) attempt to call Patricelli at a different telephone number when Patricelli failed to return Freeland's phone

message, and (4) question Benson about whether Miller was in fact staying with her. *Id.* The record does not support these conclusions.

Freeland reviewed and was familiar with Miller's offense history. CP at 30-38, 477-80. Freeland spoke with Benson and verified that Miller was staying with her.² CP at 33-34, 483. Freeland called and left a message for Patricelli at the same telephone number successfully used by Miller's prior community corrections officer, Heidi Ellis, when Ellis gave Patricelli contact information for DOC's community victim liaison and told Patricelli to inform DOC if Miller contacted her. CP at 723. Freeland had ongoing contact with Coker, who was communicating with Patricelli. CP 33, 40, 42, 138-39.

In addition to misapprehending the facts underlying DOC's purported omissions, the Court of Appeals relied on speculation that these omissions, had they not occurred, would have revealed Miller was violating Patricelli's NCO. The record does not support this speculation, either.

On this record, the trial court found no evidence that DOC failed to exercise slight care and granted summary judgment, correctly concluding the record contains no "substantial evidence of seriously negligent acts or omissions." *See Nist v. Tudor*, 67 Wn.2d 322, 325, 407 P.2d 798 (1965)

² Miller provided an updated Shelter Report Form signed by Benson both times he reported to Freeland. CP at 33-34. Benson provided the same signature on the Form that she provided on her declarations in the trial court. CP at 490; *cf.* CP at 103-08. Regardless, there is no showing that if Freeland had interrogated Benson, she would have learned from Benson of prohibited contact between Miller and Patricelli.

(discussing gross negligence standard on summary judgment). Two prior decisions of the Court of Appeals conclude that the failure of a community corrections officer to discover a violation of a condition of community custody is not evidence of gross negligence. See *Kelley*, 104 Wn. App. at 335-38 and *Whitehall*, 140 Wn. App. at 770. Both cases support dismissal.

In *Kelley*, DOC released offender Kevin Ingalls to community custody following 43 months of confinement for attempted rape. 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 DOC's field office, but his community corrections officer made only 14 out of the 27 field contacts required by DOC 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 his curfew violation, Ingalls picked up the plaintiff along a road, demanded sex, and then assaulted her when she refused his advances.

In affirming summary judgment for DOC, 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.

Kelley, 104 Wn. App. 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.

Similarly, the *Whitehall* court affirmed summary judgment for the King County Probation Department because the plaintiff, who was the victim of a probationer who left an explosive at his door, failed to supply evidence of gross negligence. 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 probation

conditions. The court concluded those failures did not prove gross negligence, finding “the officers were under no statutory or administrative obligation to conduct home visits or contact third parties.” *Whitehall*, 140 Wn. App. at 770.

These cases illustrate that DOC is not grossly negligent when it conducts a faulty investigation or concludes that specific additional contacts are unwarranted. Applied here, these cases show DOC more than met its duty to monitor Miller’s conditions of community custody. There was no factual basis to investigate potential violations of Patricelli’s NCO.

C. Trial Courts Can Determine if the Record Shows “Substantial Evidence of Seriously Negligent Acts or Omissions”

The Court of Appeals undermined the statutory constraints discussed above and the trial judge’s role as evidentiary gatekeeper by holding the question of whether the record contains “substantial evidence of seriously negligent acts or omissions” will “almost always require the fact-finding judgment of a jury, as opposed to the legal analysis of a court.” *Harper*, 2 Wn.App.2d at 92. This conclusion fails to respect and give effect to the Legislature’s policy choice establishing a gross negligence standard.

In *Nist v. Tudor*, this Court explicitly recognized the gatekeeping function entrusted to trial courts on a motion for summary judgment. *Nist*, 67 Wn.2d 322. In the context of a claim for negligent supervision of an offender, this empowers the trial judge to assess the record to determine

whether it contains “substantial evidence of seriously negligent acts or omissions.” *Id.* at 332. Washington trial courts have capably applied this standard in actions alleging the negligent supervision of offenders. *See Schulte v. City of Seattle*, 195 Wn. App. 1004 (2016) (unreported) (denial of summary judgment affirmed), cited pursuant to GR 14.1; *Kelley*, 104 Wn. App. at 338 (summary judgment affirmed); *Whitehall*, 140 Wn. App. at 769 (summary judgment affirmed). By concluding it is nearly always a jury question whether the record establishes gross negligence, the Court of Appeals undermined not only the teachings of *Nist*, *Kelley*, and *Whitehall*, but the Legislature’s gross negligence standard, which is one of the principal statutory responses to the public liability created by *Taggart*.

DOC’s authority to supervise an offender arises from the conditions of release contained in a judgment and sentence for a crime:

[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 offender’s compliance with the conditions of supervision and his or her progress on supervision. And when necessary, the community corrections officer can control the offender’s behavior by threat of incarceration, limiting movements to prescribed boundaries, increasing reporting requirements and the like.

Hustad, 187 Wn. App. at 587; *Estate of Davis*, 127 Wn. App. at 842; *Couch*, 113 Wn. App. at 565. The Legislature has stated that DOC’s duty in supervising offenders on community custody is one of slight care, which is

violated only by evidence of gross negligence. RCW 72.09.320; *Kelley*, 104 Wn. App. at 332; *Whitehall*, 140 Wn. App. at 770. As stated in *Nist*, the trial court determines whether specific 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 circumstance or conditions. There is no issue of gross negligence without substantial evidence of serious negligence.

Nist, 67 Wn.2d at 330; *see also Kelley*, 104 Wn. App. at 333. The gross negligence standard established in RCW 72.09.320, and the quasi-judicial immunity extended to DOC in RCW 9.94A.704(11), limit the public liability inherent in claims of negligent supervision.

The manner in which negligent supervision of offenders became a theory of liability in the State of Washington illustrates both the importance of these two statutes and of the trial court's role in assessing the evidence in motions for summary judgment. During the early 1980s, Washington courts first began to consider claims that the government was liable for the crimes and accidents of released mental patients and criminal offenders. The issue of liability for actions of released mental patients arose first. In 1983, *Petersen v. State* held the State could be liable for an automobile accident caused by a former mental patient based on a doctor's decision not

to petition the court for an extra ninety-day commitment and failure to report probation violations on a burglary. *Petersen v. State*, 100 Wn.2d 421, 435, 671 P.2d 230 (1983). This Court held the doctor's "special relationship" with the patient created a duty to protect anyone foreseeably endangered by the patient's drug-related mental problems. *Id.* at 426.

The Legislature responded to *Petersen* by revising RCW 71.05.120, to provide immunity to governments in the absence of gross negligence. Laws of 1987, ch. 212, § 301; *see also Volk v. DeMeerleer*, 187 Wn.2d 241, 288 n. 7, 386 P.3d 254 (2016) (Wiggins, J., dissenting) ("the legislature cabined *Petersen* in RCW 71.05.120"). The next year, the Legislature provided a similar gross negligence standard limiting the liability of the State for community placement activities. RCW 72.09.320, Laws of 1988, ch. 153, § 10. The Legislature enacted similar provisions to protect local governments and municipalities from liability absent gross negligence. *See* RCW 4.24.760(1) (misdemeanant supervision); RCW 9.95.204(4) (same).

In 1992, this Court decided *Taggart v. State*, which held that parole officers have a "take charge" relationship with parolees, similar to the special relationship discussed in *Petersen*. *Taggart*, 118 Wn.2d 195. The *Taggart* Court made no mention of RCW 72.09.320, instead establishing a reasonable care standard, rather than the slight care standard defined by the

Legislature.³ *Id.* at 220. *Taggart* further stated the duty only arises when a plaintiff shows “first, that the officer’s actions were not an integral part of any judicial or quasi-judicial process and, second, that the officer failed to perform a statutory duty according to procedures dictated by statute and superiors.” *Id.* at 224. *Taggart* invited the Legislature to limit or eliminate this duty. *Id.* This Court repeated that invitation in 1999, as did the Court of Appeals in 1997, in *Hertog ex rel. S.A.H. v. City of Seattle*.

In *Hertog*, the concurring judge at the Court of Appeals observed:

I concur in the result on the negligence issue only because it is compelled by the Supreme Court's decisions in *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), and *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992). I continue to believe those decisions ignore the reality of what officials exercising the cursory supervision permitted by state and local law can do to “control” the behavior of dangerous or, as here, potentially dangerous criminals.

Hertog ex rel. S.A.H. v. City of Seattle, 88 Wn. App. 41, 63, 943 P.2d 1153 (1997) (Agid, J., concurring). This Court acknowledged that concurrence and reiterated that the Legislature could respond to liability problems created by *Taggart*. *Hertog ex. Rel. S.A.H. v. City of Seattle*, 138 Wn.2d

³ *Taggart* arose out of parole, not community supervision. The dissent/concurrence in *Joyce v. Dep’t of Corr.*, 155 Wn.2d 306, 119 P.3d 825 (2005), highlighted this distinction, stating “[a] CCO’s take charge ability and his authority to control supervisees is significantly more narrow and limited than that of the parole officers analyzed in *Taggart*,” because “community supervision is significantly different from traditional concepts of probation or parole.” *Id.* at 329 (Fairhurst, J., dissenting/concurring).

265, 278, 979 P.2d 400 (1999). Justice Talmadge echoed the observations of the concurring judge at the Court of Appeals:

I agree completely with the concurring opinion of Judge Agid in the Court of Appeals . . . These tragic cases result in what may well approximate strict liability for cities, counties, and the State. Even if every prescribed supervisory step is followed, if a released person harms someone there may always be a claim for ineffective supervision. . . .

Although Judge Agid asked us to reconsider our precedents, I believe the proper arena for reform is the Legislature. This situation cries out for legislative attention. Only the Legislature can properly balance legitimate concerns about public safety, the existence of liability should a released person cause harm to others, and the operation of pretrial release programs, probation services, and post-conviction community supervision programs operated by State and local government. A policy balance must be struck and it should be struck in the legislative process rather than here. The majority correctly applies the law, but the Legislature should take this opportunity to examine issues of pretrial release, probation, and post-conviction community supervision to strike the appropriate balance among public safety, liability, and the public policy behind such programs if it wishes those programs to continue at all.

Id. at 292-93 (Talmadge, J., concurring). Following *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 119 P.3d 825 (2005), the Legislature added more reforms.

In *Joyce*, this Court essentially held that where DOC has the authority to act, even when not explicitly required to do so, there may be liability for failing to act. *Joyce*, 155 Wn.2d at 320. The *Joyce* Court also held that DOC's internal policies, meant to provide guidance to community corrections officers, can be evidence of the standard of care and, therefore,

can be used as evidence of the breach of the standard of care. *Id.* at 324. In 2008, the Legislature amended chapter 9.94A RCW to add a section stating “[i]n setting, modifying, and enforcing conditions of community custody, (DOC) shall be deemed to be performing a quasi-judicial function.” Laws of 2008, ch. 231, § 10 (re-codified as RCW 9.94A.704(11)). Thus, in RCW 72.09.320 and RCW 9.94A.704 (11), the Legislature has attempted to strike the “policy balance” repeatedly urged by the courts in response to *Taggart*.

Here, the Court of Appeals reversed summary judgment not because there was substantial evidence of seriously negligent acts or omissions, such as a failure to act in response to a known violation, but because it disagreed with the method DOC chose to enforce Miller’s conditions of community custody, which the Court of Appeals interpreted to include Patricelli’s NCO. This second-guessing of DOC’s enforcement decisions and the imposition of an unlimited duty to investigate invites the strict public liability Justice Talmadge warned of *Hertog*. It also ignores the gross negligence standard established in RCW 72.09.320, the immunity conferred upon DOC by RCW 9.94A.704(11), and controlling precedents.

As *Nist* teaches, and as subsequent reported decisions have shown, trial courts are capable of evaluating the record on summary judgment to determine whether there is “substantial evidence of serious negligence.” This well-recognized gatekeeping function is vital to ensuring the

Legislative intent in RCW 72.09.320 and RCW 9.94A.704(11) is respected and given effect. The trial court below properly discharged this function.

IV. CONCLUSION

This Court should reverse the Court of Appeals and affirm the trial court's order granting summary judgment of dismissal.

RESPECTFULLY SUBMITTED this 23rd day of July 2018.

ROBERT W. FERGUSON
ATTORNEY GENERAL



PAUL TRIESCH, WSBA #17445
KAYLYNN WHAT, WSBA #43442
Assistant Attorneys General
Attorneys for Petitioner
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
Tel: 206-464-7352
Email: pault@atg.wa.gov
kaylynnw@atg.wa.gov

DECLARATION OF SERVICE

I declare in accordance with the laws of the state of Washington that on the undersigned date the foregoing document was electronically filed in the Washington State Court of Appeals, Division 1, according to the Court's protocols for electronic filing.

Further, a copy of the preceding document was sent for electronic service on the parties and their counsel of record as follows:

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 23rd day of July 2018 at Seattle, Washington.



VALERIE TUCKER – Legal Assistant

APPENDIX A

RCW 4.92.090

Tortious conduct of state—Liability for damages.

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

[1963 c 159 § 2; 1961 c 136 § 1.]

RCW 9.94A.704**Community custody—Supervision by the department—Conditions.**

(1) Every person who is sentenced to a period of community custody shall report to and be placed under the supervision of the department, subject to RCW 9.94A.501.

(2)(a) The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of community custody based upon the risk to community safety.

(b) Within the funds available for community custody, the department shall determine conditions on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection (2)(b).

(3) If the offender is supervised by the department, the department shall at a minimum instruct the offender to:

(a) Report as directed to a community corrections officer;

(b) Remain within prescribed geographical boundaries;

(c) Notify the community corrections officer of any change in the offender's address or employment;

(d) Pay the supervision fee assessment; and

(e) Disclose the fact of supervision to any mental health or chemical dependency treatment provider, as required by RCW 9.94A.722.

(4) The department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(5) If the offender was sentenced pursuant to a conviction for a sex offense, the department may:

(a) Require the offender to refrain from direct or indirect contact with the victim of the crime or immediate family member of the victim of the crime. If a victim or an immediate family member of a victim has requested that the offender not contact him or her after notice as provided in RCW 72.09.340, the department shall require the offender to refrain from contact with the requestor. Where the victim is a minor, the parent or guardian of the victim may make a request on the victim's behalf. This subsection is not intended to reduce the preexisting authority of the department to impose no-contact conditions regardless of the offender's crime and regardless of who is protected by the no-contact condition, where such condition is based on risk to community safety.

(b) Impose electronic monitoring. Within the resources made available by the department for this purpose, the department shall carry out any electronic monitoring using the most appropriate technology given the individual circumstances of the offender. As used in this section, "electronic monitoring" has the same meaning as in RCW 9.94A.030.

(6) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court-imposed conditions.

(7)(a) The department shall notify the offender in writing of any additional conditions or modifications.

(b) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to the crime of conviction, the offender's risk of reoffending, or the safety of the community.

(8) The department shall notify the offender in writing upon community custody intake of the department's violation process.

(9) The department may require offenders to pay for special services rendered including electronic monitoring, day reporting, and telephone reporting, dependent on the offender's ability to pay. The department may pay for these services for offenders who are not able to pay.

(10)(a) When an offender on community custody is under the authority of the board, the department shall assess the offender's risk of recidivism and shall recommend to the board any additional or modified conditions based upon the offender's risk to community safety and may recommend affirmative conduct or electronic monitoring consistent with subsections (4) through (6) of this section.

(b) The board may impose conditions in addition to court-ordered conditions. The board must consider and may impose department-recommended conditions. The board must impose a condition requiring the offender to refrain from contact with the victim or immediate family member of the victim as provided in subsection (5)(a) of this section.

(c) By the close of the next business day, after receiving notice of a condition imposed by the board or the department, an offender may request an administrative hearing under rules adopted by the board. The condition shall remain in effect unless the hearing examiner finds that it is not reasonably related to any of the following:

- (i) The crime of conviction;
- (ii) The offender's risk of reoffending;
- (iii) The safety of the community.

(d) If the department finds that an emergency exists requiring the immediate imposition of additional conditions in order to prevent the offender from committing a crime, the department may impose such conditions. The department may not impose conditions that are contrary to those set by the board or the court and may not contravene or decrease court-imposed or board-imposed conditions. Conditions imposed under this subsection shall take effect immediately after notice to the offender by personal service, but shall not remain in effect longer than seven working days unless approved by the board.

(11) In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

[2016 c 108 § 1. Prior: 2015 c 287 § 7; 2015 c 134 § 8; 2014 c 35 § 1; 2012 1st sp.s. c 6 § 3; 2009 c 375 § 6; 2009 c 28 § 12; 2008 c 231 § 10.]

NOTES:

Effective date—2015 c 134: See note following RCW 9.94A.501.

Effective date—2012 1st sp.s. c 6 §§ 1, 3 through 9, and 11 through 14: See note following RCW 9.94A.631.

Application—2012 1st sp.s. c 6: See note following RCW 9.94A.631.

Application—2009 c 375: See note following RCW 9.94A.501.

Effective date—2009 c 28: See note following RCW 2.24.040.

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

CERTIFICATION OF ENROLLMENT

HOUSE BILL 2719

Chapter 231, Laws of 2008

60th Legislature
2008 Regular Session

OFFENDER SENTENCING--ACCURACY

EFFECTIVE DATE: 06/12/08 - Except sections 6 through 60, which become effective 08/01/09.

Passed by the House March 12, 2008
Yeas 97 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 12, 2008
Yeas 49 Nays 0

BRAD OWEN

President of the Senate

Approved March 28, 2008, 10:55 a.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **HOUSE BILL 2719** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

March 28, 2008

**Secretary of State
State of Washington**

HOUSE BILL 2719

AS AMENDED BY THE SENATE

Passed Legislature - 2008 Regular Session

State of Washington 60th Legislature 2008 Regular Session

By Representatives Priest, Hurst, Loomis, and VanDeWege

Read first time 01/16/08. Referred to Committee on Public Safety & Emergency Preparedness.

1 AN ACT Relating to ensuring that offenders receive accurate
2 sentences; amending RCW 9.94A.500, 9.94A.530, 9.94A.737, 9.94A.740,
3 9.94A.501, 9.94A.505, 9.94A.610, 9.94A.612, 9.94A.625, 9.94A.650,
4 9.94A.670, 9.94A.690, 9.94A.728, 9.94A.760, 9.94A.775, 9.94A.780,
5 9.94A.820, 4.24.556, 9.95.017, 9.95.064, 9.95.110, 9.95.123, 9.95.420,
6 9.95.440, 46.61.524, 72.09.015, 72.09.270, 72.09.345, and 72.09.580;
7 reenacting and amending RCW 9.94A.525, 9.94A.030, 9.94A.660, and
8 9.94A.712; adding new sections to chapter 9.94A RCW; adding new
9 sections to chapter 72.09 RCW; adding a new chapter to Title 9 RCW;
10 creating new sections; recodifying RCW 9.94A.628, 9.94A.634, 9.94A.700,
11 9.94A.705, 9.94A.710, 9.94A.610, 9.94A.612, 9.94A.614, 9.94A.616,
12 9.94A.618, and 9.94A.620; repealing RCW 9.94A.545, 9.94A.713,
13 9.94A.715, 9.94A.720, 9.94A.800, 9.94A.830, and 79A.60.070; providing
14 an effective date; and providing an expiration date.

15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

16 NEW SECTION. **Sec. 1.** It is the legislature's intent to ensure
17 that offenders receive accurate sentences that are based on their
18 actual, complete criminal history. Accurate sentences further the
19 sentencing reform act's goals of:

1 (1) Ensuring that the punishment for a criminal offense is
2 proportionate to the seriousness of the offense and the offender's
3 criminal history;

4 (2) Ensuring punishment that is just; and

5 (3) Ensuring that sentences are commensurate with the punishment
6 imposed on others for committing similar offenses.

7 Given the decisions in *In re Cadwallader*, 155 Wn.2d 867 (2005);
8 *State v. Lopez*, 147 Wn.2d 515 (2002); *State v. Ford*, 137 Wn.2d 472
9 (1999); and *State v. McCorkle*, 137 Wn.2d 490 (1999), the legislature
10 finds it is necessary to amend the provisions in RCW 9.94A.500,
11 9.94A.525, and 9.94A.530 in order to ensure that sentences imposed
12 accurately reflect the offender's actual, complete criminal history,
13 whether imposed at sentencing or upon resentencing. These amendments
14 are consistent with the United States supreme court holding in *Monge v.*
15 *California*, 524 U.S. 721 (1998), that double jeopardy is not implicated
16 at resentencing following an appeal or collateral attack.

17 **Sec. 2.** RCW 9.94A.500 and 2006 c 339 s 303 are each amended to
18 read as follows:

19 (1) Before imposing a sentence upon a defendant, the court shall
20 conduct a sentencing hearing. The sentencing hearing shall be held
21 within forty court days following conviction. Upon the motion of
22 either party for good cause shown, or on its own motion, the court may
23 extend the time period for conducting the sentencing hearing.

24 Except in cases where the defendant shall be sentenced to a term of
25 total confinement for life without the possibility of release or, when
26 authorized by RCW 10.95.030 for the crime of aggravated murder in the
27 first degree, sentenced to death, the court may order the department to
28 complete a risk assessment report. If available before sentencing, the
29 report shall be provided to the court.

30 Unless specifically waived by the court, the court shall order the
31 department to complete a chemical dependency screening report before
32 imposing a sentence upon a defendant who has been convicted of a
33 violation of the uniform controlled substances act under chapter 69.50
34 RCW, a criminal solicitation to commit such a violation under chapter
35 9A.28 RCW, or any felony where the court finds that the offender has a
36 chemical dependency that has contributed to his or her offense. In
37 addition, the court shall, at the time of plea or conviction, order the

1 is found not to have an alcohol or drug problem that requires
2 treatment, the offender shall complete a course in an information
3 school approved by the department of social and health services under
4 chapter 70.96A RCW. The offender shall pay all costs for any
5 evaluation, education, or treatment required by this section, unless
6 the offender is eligible for an existing program offered or approved by
7 the department of social and health services.

8 (ii) For purposes of this section, "alcohol or drug related traffic
9 offense" means the following: Driving while under the influence as
10 defined by RCW 46.61.502, actual physical control while under the
11 influence as defined by RCW 46.61.504, vehicular homicide as defined by
12 RCW 46.61.520(1)(a), vehicular assault as defined by RCW
13 46.61.522(1)(b), homicide by watercraft as defined by RCW 79A.60.050,
14 or assault by watercraft as defined by RCW 79A.60.060.

15 (iii) This subsection (4)(b) does not require the department of
16 social and health services to add new treatment or assessment
17 facilities nor affect its use of existing programs and facilities
18 authorized by law.

19 **NEW SECTION. Sec. 10.** A new section is added to chapter 9.94A RCW
20 to read as follows:

21 (1) Every person who is sentenced to a period of community custody
22 shall report to and be placed under the supervision of the department,
23 subject to RCW 9.94A.501.

24 (2)(a) The department shall assess the offender's risk of reoffense
25 and may establish and modify additional conditions of community custody
26 based upon the risk to community safety.

27 (b) Within the funds available for community custody, the
28 department shall determine conditions and duration of community custody
29 on the basis of risk to community safety, and shall supervise offenders
30 during community custody on the basis of risk to community safety and
31 conditions imposed by the court. The secretary shall adopt rules to
32 implement the provisions of this subsection (2)(b).

33 (3) If the offender is supervised by the department, the department
34 shall at a minimum instruct the offender to:

35 (a) Report as directed to a community corrections officer;

36 (b) Remain within prescribed geographical boundaries;

1 (c) Notify the community corrections officer of any change in the
2 offender's address or employment;

3 (d) Pay the supervision fee assessment; and

4 (e) Disclose the fact of supervision to any mental health or
5 chemical dependency treatment provider, as required by RCW 9.94A.722.

6 (4) The department may require the offender to participate in
7 rehabilitative programs, or otherwise perform affirmative conduct, and
8 to obey all laws.

9 (5) If the offender was sentenced pursuant to a conviction for a
10 sex offense, the department may impose electronic monitoring. Within
11 the resources made available by the department for this purpose, the
12 department shall carry out any electronic monitoring using the most
13 appropriate technology given the individual circumstances of the
14 offender. As used in this section, "electronic monitoring" means the
15 monitoring of an offender using an electronic offender tracking system
16 including, but not limited to, a system using radio frequency or active
17 or passive global positioning system technology.

18 (6) The department may not impose conditions that are contrary to
19 those ordered by the court and may not contravene or decrease court
20 imposed conditions.

21 (7) (a) The department shall notify the offender in writing of any
22 additional conditions or modifications.

23 (b) By the close of the next business day after receiving notice of
24 a condition imposed or modified by the department, an offender may
25 request an administrative review under rules adopted by the department.
26 The condition shall remain in effect unless the reviewing officer finds
27 that it is not reasonably related to the crime of conviction, the
28 offender's risk of reoffending, or the safety of the community.

29 (8) The department may require offenders to pay for special
30 services rendered including electronic monitoring, day reporting, and
31 telephone reporting, dependent on the offender's ability to pay. The
32 department may pay for these services for offenders who are not able to
33 pay.

34 (9) (a) When a sex offender has been sentenced pursuant to RCW
35 9.94A.712, the board shall exercise the authority prescribed in RCW
36 9.95.420 through 9.95.435.

37 (b) The department shall assess the offender's risk of recidivism

1 and shall recommend to the board any additional or modified conditions
2 based upon the risk to community safety. The board must consider and
3 may impose department-recommended conditions.

4 (c) If the department finds that an emergency exists requiring the
5 immediate imposition of additional conditions in order to prevent the
6 offender from committing a crime, the department may impose such
7 conditions. The department may not impose conditions that are contrary
8 to those set by the board or the court and may not contravene or
9 decrease court-imposed or board-imposed conditions. Conditions imposed
10 under this subsection shall take effect immediately after notice to the
11 offender by personal service, but shall not remain in effect longer
12 than seven working days unless approved by the board.

13 (10) In setting, modifying, and enforcing conditions of community
14 custody, the department shall be deemed to be performing a
15 quasi-judicial function.

16 NEW SECTION. **Sec. 11.** A new section is added to chapter 9.94A RCW
17 to read as follows:

18 No offender sentenced to a term of community custody under the
19 supervision of the department may own, use, or possess firearms or
20 ammunition. Offenders who own, use, or are found to be in actual or
21 constructive possession of firearms or ammunition shall be subject to
22 the violation process and sanctions under sections 15 and 21 of this
23 act and RCW 9.94A.737.

24 "Constructive possession" as used in this section means the power
25 and intent to control the firearm or ammunition. "Firearm" as used in
26 this section has the same definition as in RCW 9.41.010.

27 NEW SECTION. **Sec. 12.** A new section is added to chapter 9.94A RCW
28 to read as follows:

29 (1) Community custody shall begin: (a) Upon completion of the term
30 of confinement; (b) at such time as the offender is transferred to
31 community custody in lieu of earned release in accordance with RCW
32 9.94A.728 (1) or (2); or (c) at the time of sentencing if no term of
33 confinement is ordered.

34 (2) When an offender is sentenced to community custody, the
35 offender is subject to the conditions of community custody as of the
36 date of sentencing, unless otherwise ordered by the court.

1 judgments and sentences in order to prevent unconstitutional
2 application of the act. This summary shall be incorporated into the
3 *Adult Sentencing Guidelines Manual*.

4 (6) Sections 6 through 58 of this act shall not affect the
5 enforcement of any sentence that was imposed prior to August 1, 2009,
6 unless the offender is resentenced after that date.

7 NEW SECTION. **Sec. 56.** (1) The following sections are recodified
8 as part of a new chapter in Title 9 RCW: RCW 9.94A.628, 9.94A.634,
9 9.94A.700, 9.94A.705, and 9.94A.710.

10 (2) RCW 9.94A.610 (as amended by this act), 9.94A.612 (as amended
11 by this act), 9.94A.614, 9.94A.616, 9.94A.618, and 9.94A.620 are each
12 recodified as sections in chapter 72.09 RCW.

13 (3) Sections 51 through 54 of this act are added to the new chapter
14 created in subsection (1) of this section.

15 (4) The code reviser is authorized to improve the organization of
16 chapter 9.94A RCW by renumbering existing sections and adding
17 subchapter headings.

18 (5) The code reviser shall correct any cross-references to sections
19 affected by this section in other sections of the code.

20 NEW SECTION. **Sec. 57.** The following acts or parts of acts are
21 each repealed:

22 (1) RCW 9.94A.545 (Community custody) and 2006 c 128 s 4, 2003 c
23 379 s 8, 2000 c 28 s 13, 1999 c 196 s 10, 1988 c 143 s 23, & 1984 c 209
24 s 22;

25 (2) RCW 9.94A.713 (Nonpersistent offenders--Conditions) and 2006 c
26 130 s 1 & 2001 2nd sp.s. c 12 s 304;

27 (3) RCW 9.94A.715 (Community custody for specified offenders--
28 Conditions) and 2006 c 130 s 2, 2006 c 128 s 5, 2003 c 379 s 6, 2001
29 2nd sp.s. c 12 s 302, 2001 c 10 s 5, & 2000 c 28 s 25;

30 (4) RCW 9.94A.720 (Supervision of offenders) and 2003 c 379 s 7,
31 2002 c 175 s 14, & 2000 c 28 s 26;

32 (5) RCW 9.94A.800 (Sex offender treatment in correctional facility)
33 and 2000 c 28 s 34;

34 (6) RCW 9.94A.830 (Legislative finding and intent--Commitment of
35 felony sexual offenders after July 1, 1987) and 1987 c 402 s 2 & 1986
36 c 301 s 1; and

1 (7) RCW 79A.60.070 (Conviction under RCW 79A.60.050 or 79A.60.060--
2 Community supervision or community placement--Conditions) and 2000 c 11
3 s 96 & 1998 c 219 s 3.

4 NEW SECTION. **Sec. 58.** The repealers in section 57 of this act
5 shall not affect the validity of any sentence that was imposed prior to
6 the effective date of this section or the authority of the department
7 of corrections to supervise any offender pursuant to such sentence.

8 NEW SECTION. **Sec. 59.** The code reviser shall report to the 2009
9 legislature on any amendments necessary to accomplish the purposes of
10 this act.

11 NEW SECTION. **Sec. 60.** Section 24 of this act expires July 1,
12 2010.

13 NEW SECTION. **Sec. 61.** Sections 6 through 60 of this act take
14 effect August 1, 2009.

15 NEW SECTION. **Sec. 62.** If any provision of this act or its
16 application to any person or circumstance is held invalid, the
17 remainder of the act or the application of the provision to other
18 persons or circumstances is not affected.

Passed by the House March 12, 2008.

Passed by the Senate March 12, 2008.

Approved by the Governor March 28, 2008.

Filed in Office of Secretary of State March 28, 2008.

RCW 72.09.320

Community placement—Liability.

The state of Washington, the department and its employees, community corrections officers, their staff, and volunteers who assist community corrections officers in the community placement program are not liable for civil damages resulting from any act or omission in the rendering of community placement activities unless the act or omission constitutes gross negligence. For purposes of this section, "volunteers" is defined according to RCW **51.12.035**.

[1988 c 153 § 10.]

NOTES:

Effective date—Application of increased sanctions—1988 c 153: See notes following RCW **9.94A.030**.

AGO TORTS SEATTLE

July 23, 2018 - 2:54 PM

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