No. 1031114

SUPREME COURT
OF THE STATE OF WASHINGTON

BARBARA ANDERSON and ROD BATTON, and each of them, INDIVIDUALLY, and BARBARA ANDERSON and ROD BATTON as Co-Personal Representatives of the Estate of Derek Batton,

Respondents/Cross-Petitioners,

v.

GRANT COUNTY, WASHINGTON,

Defendants.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Incarcerated people are a vulnerable population, and the newly arrested are a particularly vulnerable subset of that population. They often are in crisis, there is a high percentage of drug or alcohol addiction, as well as people with mental health disorders. They have been removed from any support system they had in place and all that was familiar.

This Court in *Gregoire v. City of Oak Harbor* acknowledged the special duty imposed on jailers to prevent foreseeable self-inflicted injuries, and that defenses which negate that duty cannot stand. As explained by the lead opinion in *Gregoire,* "a duty to prevent someone from acting in a particular way logically cannot be defeated by the very action sought to be avoided." This sentiment was echoed by the full Court in *Hendrickson v. Moses Lake School Dist.*, which noted that comparative fault plays no role in cases involving self-injury by an inmate.

The appellate court in the present case recognized that if allowed, both felony defense (RCW 4.24.420) and the

intoxication defense (RCW 5.40.060) would shield the jail from liability in almost every case involving a drug overdose. Citing to *Gregoire* and *Hendrickson,* the *Anderson* court held these defenses were not available in this type of case.

In seeking review, the County asks this Court to find *Anderson* in conflict with *Gregoire.* But the County offers no evidence of an actual conflict and its argument that *Gregoire* does not support the reasoning in *Anderson* is unpersuasive.

The felony and intoxication defenses are complete defenses, meaning they are a complete bar to recovery if the conditions of the defense are satisfied. *Gregoire's* lead and concurring opinions agreed that any complete defense which excuses the jail from all liability for violating its duty could not stand.

In seeking review, the County argues that because the felony defense and the intoxication defense differ from the assumption of risk defense in *Gregoire,* that case does not apply. For example, the County notes the felony defense requires a mens rea while the assumption of risk does not. This argument misses

the point. The evil sought to be avoided by *Gregoire* is any de facto immunization from liability based on the jail's own failure to perform its duty. That is precisely what would occur in the present case if these complete defenses were allowed. The use of drugs by an inmate, made possible by the jail's failure to do its duty, would automatically relieve the jail of that duty. As this Court has noted, a jail cannot cast off the duty with which it is charged through a violation of that duty. Because *Anderson* is not in conflict with any decision from this Court, review under RAP 13.4(b)(1) should be denied.

The County also argues this is an issue of substantial public importance that needs to be resolved by this Court. But contrary to the County's claim, there is no confusion that needs to be resolved by this Court. Although this is the first time *Gregoire* has been applied to these affirmative defenses, that does not mean the case is one that must be reviewed by this Court. *Anderson* was soundly decided based on existing case law.

The County also argues that *Anderson* will permit inmates to attempt to commit murder against a jail guard and then bring suit for any injuries they incurred in the process. While the County is to be commended for its imagination, there is nothing in *Anderson* which would support such an interpretation. The County's argument for review under RAP 13.4(b)(4) falls flat.

Finally, the County argues that *Anderson* violates the separation of powers doctrine by not giving deference to the statutory defenses. In making this argument, the County fails to address cases in this Court where statutory defenses give way to policy considerations. The County's assertion that this determination is a legislative function is not supported by reason or caselaw. The County has not met the criteria under RAP 13.4(b)(3).

II. IDENTITY OF RESPONDING PARTY

The responding parties are Barbara Anderson and Rod Batton, individually, and in their role as personal representatives of the estate of their deceased son, Derek Batton. They were

plaintiffs below and respondents/cross-appellants at the court of appeals. They are referred to collectively as the "Estate."

III. RELIEF SOUGHT

Respondents ask this Court to deny Grant County's petition for review.

IV. STATEMENT OF FACTS

Facts Presented in the Summary Judgment Motion

In the summer of 2018, Grant County had a serious drug problem in its jail. The Grant County Sheriff's Office was concerned. In a letter dated July 6, 2018, Lieutenant Durand wrote to Chief Deputy Kriete with a request for funding to obtain a full body scanner. He explained, "As you are well aware, the problem of drugs and contraband entering the jail is a present and ongoing concern. Recent intelligence has provided information that drugs and contraband are being brought into the jail even more frequently than first suspected." CP 113. An informant had warned the Chief Deputy it "was becoming commonplace for high level gang members to regularly instruct others on the outside to turn

themselves in with drugs and contraband inserted rectally or swallowed for excretion later." *Id*.

Lieutenant Durand's letter noted that one inmate had recently been taken to hospital and that another inmate was found unconscious with no discernable pulse. CP 114. It was later determined the inmate had received drugs from another inmate. Lieutenant Durand warned, "An inmate death due to overdose would most likely result in hundreds of thousands of dollars in legal fees and costs either imposed by litigation or settlement." *Id.* Durand acknowledged there are procedures in place for strip searches but stated that the mandates for a search are long, cumbersome, and confusing to the staff. *Id.* Lieutenant Durand wrote his letter one month before Mr. Batton's death at the jail.

Derek Batton was arrested and booked into jail on August 10, 2018. Jordan Tebow was booked into the jail in the mid-afternoon the following day, August 11th. At the time of his arrest, Mr. Tebow had 40 prior bookings into the Grant County Jail and had been caught attempting to introduce contraband on a past

occasion. CP 130. He also had prior felony drug offenses. *Id.* These factors mandated a strip search to determine if Mr. Tebow was again attempting to smuggle drugs into the jail. CP 130-31.

The jail did not conduct the search and Mr. Tebow's drugs went undetected. CP 131. Mr. Tebow then gave or sold drugs to Mr. Batton, who was housed in the same dorm room. Video monitoring shows Mr. Batton ingesting drugs that same evening and going to lie down on his bunk shortly after doing so. CP 102, 129-130. Mr. Batton died at some point in the night or early morning. There was no evidence suggesting that Mr. Batton was high or intoxicated when he ingested the drugs.

The Estate brought suit based on the County's failure to take reasonable steps to prevent the introduction of drugs into the jail facility. Deposition testimony and conclusions in the expert analysis of Dr. Peter Scharf[1] produced these admissions and facts:

[1] Dr Scharf's CV is attached to his declaration that was submitted in opposition to the County's summary judgment motion. *CP 132-147*.

1. Grant County was aware of the problem of drugs entering the jail and of the grave threat posed by those drugs to the health and safety of those in the jail. *CP 94-95 (Deposition L. Durand)*; CP 113-14, (Durand letter).

2. Grant County had policies and procedures that established criteria for the strip search of inmates upon their booking/entry into the jail. CP 117-124.

3. The strip search policies and procedures called for strip searches where the individual being booked had an extensive criminal history and/or where the individual had a history that included felony drug crime(s) and/or introduction of contraband into the jail. *Id.*

4. Jordan Tebow had been booked into the Grant County Jail approximately 40 times before August 2018. Bookings included felony drug crimes and an attempt to introduce contraband. Deputies conducting the booking on August 11, 2018 had access to the above-described information. CP 91-92. Per the jail's policies and procedures in effect at the time, the correction

officers should have conducted a strip search of Jordan Tebow. *See CP 117-124*.

5. Given these facts, jail supervisory staff would have authorized a strip search of Jordan Tebow had one been requested by the officers involved in the booking. CP 130-131 (Dr. Scharf declaration); CP 126. No strip search was performed of Jordan Tebow.

6. A strip search would, more probably than not, have revealed that Jordan Tebow was in possession of drugs at the time of his booking and would have resulted in the confiscation of those drugs by jail personnel, thus preventing the overdose and death of Derek Batton. CP 130-131 (*Declaration of Peter Scharf, Ed.D.)*

To avoid defending on the merits, Grant County raised two affirmative defenses: the intoxication defense (RCW 5.40.060) and the felony bar defense (RCW 4.24.420). Both defenses serve as a complete bar to recovery despite liability on the part of the defendant. The County sought a summary judgment on those

defenses, which the trial court denied. The trial court's ruling was not clear, and after a request for clarification from the County, both parties jointly moved for discretionary review at the court of appeals.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. **Because the appellate court's decision is not in conflict with *Gregoire* and *Hendrickson,* review should not be granted under RAP 13.4(b)(1)**.

A. *Gregoire v. City of Oak Harbor*

In arguing that *Anderson* conflicts with *Gregoire,* the County mischaracterizes the reasoning in both cases. In *Gregoire*, an inmate committed suicide in a jail. The family brought a wrongful death action. The jail asserted that the inmate assumed the risk and was contributorily at fault for hanging himself in his cell. *Id. at 633.* The trial court instructed the jury as to assumption of risk, a complete defense, and contributory

negligence if the jury did not find an assumption of risk.[2] The jury returned a verdict in favor of the jail.

The Supreme Court reversed and remanded for a new trial. The lead opinion written by Justice Sanders found that where the jail has a duty to protect inmates from self-injury, the jail cannot escape that duty by asserting the complete defense that the inmate assumed the risk when he chose to hurt himself. *Id.* at 636-67. "A duty to prevent someone from acting in a particular way logically cannot be defeated by the very action sought to be avoided." *Id. quoting Myers v. County of Lake*, 30 F.3d 847, 853 (7th Cir.1994).

This Court did not stop there, finding that any contributory negligence (comparative fault) was also inappropriate in this setting. The lead opinion explained, "[o]nce a jailer forms a special relationship with an inmate, contributory negligence cannot

[2] The Supreme court explained that although it was using the term "contributory negligence" in the opinion for sake of consistency with the jury instructions, the Court was referring specifically to "comparative fault" as it now exists under the Tort Reform Act. *Gregoire, 170 Wn.2d at 633.*

excuse the jailer's duty to protect the inmate, *even from self-inflicted harm.*" *Id*. at 640 (quoting *Hunt v. King County*, 4 Wn. App. 14, 22-23, 481 P.2d 593 (1971)) (emphasis added). This Court reasoned that allowing a defense of contributory fault would "gut the duty" to protect "because the injury producing act – here, the suicide – is the very condition for which the duty [to protect] is imposed." *Id*. at 640-41.

Justice Madsen's concurrence/dissent agreed with the lead opinion as to assumption of risk. Where she parted ways was on comparative fault. Justice Madsen asserted that the out-of-state cases relied on the lead opinion were distinguishable. She described those "comparative fault" cases as more like the complete defense of assumption of risk or Washington's earlier "contributory negligence" statute. For example, Minnesota comparative fault bars recovery if the plaintiff's negligence is greater than the defendant's. *Id.* at 653-54. Justice Madsen explained, "In contrast to Washington's pure comparative fault statute, Minnesota's modified comparative fault increases the likelihood that a

plaintiff's claim would be barred despite a jail's violation of its duty, thus gutting the jail's duty." *Id.* As her opinion makes clear, complete defenses which shield a jail from all liability are inappropriate in this context.

Eight years later in *Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269, 285–86, 428 P.3d 1197 (2018), this Court adopted Justice Sanders' lead opinion in identifying jail self-injury cases as one of the few examples of where contributory negligence is inappropriate:

> We also held that a prison may not assert a defense of contributory negligence in situations of inmate suicide. *Gregoire,* 170 Wash.2d at 631, 244 P.3d 924. *We reasoned that "the injury-producing act—here, the suicide—is the very condition for which the duty [to protect the inmate] is imposed*." *Id.* at 641, 244 P.3d 924. Thus, any instruction on an inmate's contributory negligence *would absolve a prison of its duty to protect that inmate from injuring him- or herself. Id.* at 643-44, 244 P.3d 924. This de facto immunization from liability for inmate suicide was "unsupportable from a policy perspective." *Id.*

Hendrickson, at *285-286 (emphasis added).*[3]

B. The Felony Defense (RCW 4.24.420)

Gregoire refused to allow the assumption of risk defense. The County argues this prohibition should not apply to the felony defense. The County reasons that the felony defense differs from assumption of risk because the felony defense requires a specific mens rea of knowledge.

This argument misses the point. The evil sought to be avoided in *Gregoire* was a complete defense that bars suit despite a jail's violation of its duty, thus gutting the jail's duty. *See Gregoire.* at 636-67 (lead opinion) and *Id.* at 653-54 (Justice Madsen's opinion). Here, under the County's theory, every time an inmate knowingly possesses drugs in a jail, he will have committed a felony. Because the felony defense is a complete

[3] The County asserts that this provision only applies to purposeful suicide as opposed to fatal drug overdoses. P4R at 15-16. As *Anderson* noted, however, in a case such as this, the distinction is without real meaning. *Anderson,* at 16. Moreover, the italicized language in the above quote from *Hendrickson* makes clear that this Court was referring to self-harm, whether the death was intentional or otherwise.

defense, the inmate or inmate's family will be barred from suing the jail. This de facto immunization from liability will nullify the jail's duty to take reasonable steps to prevent the flow of drugs into the facility.

The repercussions of releasing the jail from this duty of care are obvious, as evidenced by the letter from Lieutenant Durand to Chief Deputy Kriete asking for funding for a full body scanner to detect drugs. Lieutenant Durand stated: "An inmate death due to overdose would most likely result in hundreds of thousands of dollars in legal fees and costs either imposed by litigation or settlement." CP 114. For better or worse, civil liability is the main way to hold agencies accountable, and the threat of monetary judgment motivates them to toe the line. See *Ford v. Trendwest Resorts, Inc.,* 146 Wn.2d 146, 154, 43 P.3d 1223 (2002) (Tort actions are maintained for a variety of reasons, including the deterrence of wrongful conduct.) By removing that threat, jails are less likely to adhere to their duty of care.

The County makes other unsupported assertions in its petition for review. For example, the County states, "*Gregoire* does not ban contributory negligence in a jail setting, so it cannot support the appellate court's ban on the felony defense in a jail setting." P4R at 16. But as described above, the felony defense is not based on contributory negligence. It is a complete defense that does not consider the negligence of either party. Nor did *Anderson* "ban the felony defense in a jail setting." The court's decision simply prevents the use of this defense in drug overdose cases where the jail has not taken reasonable steps to prevent the flow of dangerous drugs into the facility.

Further, the County is wrong in stating that contributory negligence is allowed in a drug overdose case. It is clear from *Gregoire* and *Hendrickson* that contributory negligence has no place where "an inmate's contributory negligence would absolve a prison of its duty to protect that inmate from injuring him- or herself." *Hendrickson* at 285, *citing Gregoire* at 643.

C. The Intoxication Defense

The intoxication defense is also a complete defense, meaning that if the defense applies, the jail is not liable for its negligence. The jail must take reasonable steps to avoid drugs being introduced into this vulnerable population. Like assumption of risk, the intoxication defense lets the jail avoid liability by pointing to the very action it had a duty to help prevent. If an inmate uses a drug made available by the jail breaching its duty of care, then the use of that drug lets the jail assert the intoxication defense. This is not supportable under *Gregoire* and *Hendrickson.* The *Anderson* decision to disallow this defense in a drug overdose case is not only consistent with the reasoning in *Gregoire*, but also compelled by *Gregoire.*

2. The County has failed to identify an issue of substantial public importance that should be resolved by this Court.

RAP 13.4(b)(4) allows review if the petition "involves an issue of substantial public interest that should be determined by the Supreme Court." The County asserts that review is needed to

clarify this area of law. But there is nothing here that needs clarification. *Anderson* prohibits the use of two complete defenses in the case of a fatal overdose, as those defenses would eliminate the duty owed to inmates. This ruling is consistent with both the lead opinion and Justice Madsen's concurring opinion in *Gregoire*. It is also supported by this Court's decision in *Hendrickson*. While the County disagrees with *Anderson*, their disagreement does not create an issue of substantial public interest.

In addition to claiming that the issues in *Gregoire* are questions of substantial public interest, the County also argues review is appropriate under RAP 13.4(b)(4) because the *Anderson* opinion is "dangerous." To make this argument, the County first mischaracterizes the *Anderson* holding. According to the County, *Anderson* creates "a blanket prohibition on the felony-bar defense in jail settings." P4R at 21. This is incorrect, as *Anderson* did not suggest the felony defense never applies in a jail. The appellate court had to determine whether the two defenses could be raised in a drug overdose case in a jail. That is all.

Persisting with this argument, the County asks this Court to imagine a scenario where an inmate is injured while trying to murder a guard. P4R at 22. The County argues that under *Anderson,* the jail could not raise the felony defense, thus creating a dangerous situation whereby inmates may violently attack guards with impunity. But nothing in *Anderson* would compel that result. The County's attempt to conjure an issue of "substantial public importance" to justify review under RAP 13.4(b)(4) is not persuasive.

3. **The Court did not violate the separation of powers doctrine when it properly determined that the intoxication defense and felony defense could not be used in this context**.

The County argues that courts may not disregard statutory defenses, and that *Anderson's* decision to prohibit two statutory defenses violates the separation of powers doctrine. The County cites to many general cases involving this doctrine but fails to include any cases relating to defenses in a civil suit. More importantly, the County fails to distinguish cases in which this Court has declined to allow statutory defenses. *See e.g.,*

Christensen v. Royal School Dist No. 160, 156 Wn.2d 62, 70, 124 P.3d 283 (2005).

"Under the 'Tort Reform Act of 1986,' the trier of fact is required to apportion fault to every person or entity that caused the claimant's damages." *Hendrickson,* at 284-285. By statute, when a jury concludes plaintiff contributed to his or her own injury, the plaintiff's award must be reduced by a proportionate amount. *See* RCW 4.22.005 (comparative fault statute). Although this is a statutory defense, courts may decline to apply this defense when appropriate.

For example, in *Christensen,* this Court concluded the school owed a special duty to students to prevent sexual abuse. Given that special duty, this Court determined that the school district may not assert the statutory defense of contributory negligence when a student is sexually abused by a teacher. *Christensen,* at 70-71. The Court found that the statutory defense would violate public policy. *Id.*

Similarly, in *Hendrickson,* this Court cited to *Gregoire* as another example of where it would violate public policy to allow the statutory defense of contributory negligence in a case of self-harm at the jail. *Hendrickson,* 192 Wn.2d at 285-86.

These decisions show it is up to the courts, not the legislature, to determine whether use of a statutory defense is appropriate in a case. *Anderson* did not violate the separation of powers doctrine when it disallowed the affirmative defenses based on the reasoning in *Gregoire.*

VI. CONCLUSION

Anderson was correctly decided, and the County has failed to present any legitimate issues requiring review from this Court. As the County as failed to present grounds for review under RAP 13.4(b), review should be denied.

I certify that this motion contains 3,571 words, in compliance with the Court Rules.

Respectfully submitted this 28th day of June, 2024.

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