No. _____

Court of Appeals No. 38892-1-III

SUPREME COURT
OF 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-appellants,

v.

GRANT COUNTY, WASHINGTON,

Petitioner/Appellant/Cross-respondent.

PETITION FOR REVIEW

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSB 22278
Shelby R. Frost Lemmel, WSB 33099
Mail: 321 High School Road NE, D-3 #362
Office: 241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
shelby@appeal-law.com
Attorneys for Petitioner

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INTRODUCTION

While incarcerated in the Grant County Jail, Derek Batton voluntarily ingested heroin and died from an overdose. His Estate does not disagree that his actions were voluntary, that they amount to a felony, and that they are a proximate cause of his death. Yet in a published decision, the Court of Appeals Division III held that Grant County is not entitled the statutory protection of the felony bar, RCW 4.24.420, because Batton was incarcerated.

This decision is an unprecedented, unwarranted, and even dangerous expansion of this Court's decision in ***Gregoire v. City of Oak Harbor***, *infra*, rejecting the defense of implied primary assumption of the risk in the case of inmate suicide. It violates the Separation of Powers doctrine by invading the Legislature's prerogative to set policy in our State. For these same reasons, the appellate court erred in prohibiting the intoxication defense too.

This Court should accept review and reverse.

ISSUES PRESENTED FOR REVIEW

This Court held in ***Gregoire v. City of Oak Harbor***, a plurality opinion, that the defense of implied primary assumption of risk does not apply in cases of inmate suicide and that the defense of contributory negligence may apply unless the jail affirmatively assumes the inmate's duty of self-care. 170 Wn.2d 628, 244 P.3d 924 (2010). This Court subsequently distinguished ***Gregoire*** as a rare exception to the general rule of contributory negligence. ***Hendrickson v. Moses Lake School District***, 192 Wn.2d 269, 428 P.3d 1197 (2018). Neither addresses the felony bar, RCW 4.24.420, and neither addresses the intoxication defense, RCW 5.40.060.

Did the appellate court err in holding that ***Gregoire*** probits application of the felony bar when the felony at issue occurs in jail? Does this holding conflict with ***Gregoire*** and ***Hendrickson***, and raise a question of

substantial public interest this Court should determine? RAP 13.4(b)(1), (4).

Does this holding violate the Separation of Powers doctrine, where the Legislature, which is entitled to establish policy in our State, has placed only one limitation on the application of the felony bar for actions arising out of law enforcement activity? RAP 13.4(b)(3).

For the same reasons, should this Court review and reverse the appellate court's ban on the intoxication defense in jail settings?

Does this appeal present questions of substantial public interest that this Court should determine? RAP 13.4(b)(4).

FACTS RELEVANT TO PETITION FOR REVIEW

A. The facts are not seriously disputed.

The parties agree that the facts are "not seriously disputed." CP 74. Appellants' adult son, Derek Batton, was arrested and booked into Grant County Jail on August 10, 2018. ***Anderson v. Grant County***, No. 38892-I-III at 4 (November 28, 2023), attached as App. A. Jordan Tebow was booked into Grant County Jail the next day. ***Anderson*** at 4. Although Tebow had an "'extensive'" history with the Sheriff's Office that would have permitted the County to strip search him, it did not do so. *Id*. Tebow smuggled heroin into the jail. *Id*.

Tebow, who was assigned to a cell with Batton, offered him heroin. *Id*. Batton accepted and was captured on video snorting heroin in the late evening of August 11. *Id*. He was found dead in his cell the next day around 10:45 a.m. *Id*. The cause of death was "'[a]cute morphine intoxication (likely heroin).'" *Id*. (quoting CP 3).

Batton's parents sued Grant County, alleging negligence in inadequately searching Tebow, detecting heroin in Batton's cell, and providing care. ***Anderson*** at 5. The County sought summary judgment dismissal under the felony bar defense, Former RCW 4.24.420 (1987):

> It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death. However, nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983.

The Legislature later amended this statute, creating an exception for actions "arising out of law enforcement activities" in RCW 4.24.420(2) (2021):

> In an action arising out of law enforcement activities resulting in personal injury or death, it is a complete defense to the action that the finder of fact has determined beyond a reasonable doubt that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death, the commission of which was a proximate cause of the injury or death.

The County asked the court to apply the 1987 version of the statute, while the Estate argued that both statutes were

inapplicable here. ***Anderson*** at 6. The appellate court did not reach whether these amendments apply retroactively.

Alternatively, if the court were to deny its motion under RCW 4.24.420, the County also raised the intoxication defense under RCW 5.40.060:

> … [I]t is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault.

Anderson at 5-7. The County argued that Batton was under the influence at the time of his death and that his intoxication was a proximate cause, but conceded that questions of fact remained as to whether Batton was more than 50% at fault. *Id*.

The trial court denied the County's motion, ruling that the 2021 amendments to RCW 4.24.420 applied and that a trier of fact must determine whether the felony defense

was applicable at all and, if so, whether the County could meet the beyond-a-reasonable-doubt threshold. *Id*. at 7 (citing CP 184). On the County's motion for clarification, the court permitted the intoxication defense. *Id*. (citing CP 222). The court also granted the parties' joint motion for certification under RAP 2.3(b)(4). *Id*. at 7.

The appellate court granted the parties' joint motion for discretionary review on three issues:

> (1) whether RCW 4.24.420 applies in this case;
>
> (2) if it applies, whether the 2021 statutory amendments apply; and
>
> (3) whether the law, as enunciated in the Supreme Court's holding in ***Gregoire*** [*supra*] (plurality opinion), precludes application of RCW 5.40.060.

Anderson at 2, 7-8. Neither the order on certification nor the ruling granting review addressed whether ***Gregoire*** applies to RCW 4.24.420.

B. The appellate decision broadly expanded the scope of discretionary review, misstated the County's arguments, and misinterpreted this Court's precedents.

After briefing and oral argument, the appellate court announced in its decision that it had "broadened its review," holding "that the special relationship between the County and Mr. Batton precludes the County from asserting the complete defense of immunity under RCW 4.24.420 and comparative fault under RCW 5.40.060." ***Anderson*** at 2. Having so held, the Court declined to reach the first and second questions. *Id*.

In addressing ***Gregoire***'s application to the felony defense, RCW 4.24.420, the appellate court began with the unsupported assertion that the felony defense is "predicated on an assumption of the risk." *Id*. at 14. The appellate court then recast the County's claim as "Batton assumed the risk that led to his death when he unlawfully possessed a controlled substance while incarcerated (in

violation of RCW 9.94.041(2)).” *Id*. at 14-15. Having thus misstated both the felony bar statute and the County’s claim, the appellate court quickly determined that ***Gregoire*** controlled. *Id*. at 15.

As to the intoxication defense, RCW 5.40.060, the court held that the County’s knowledge that drugs may come into the jail made its “‘duty to ensure health, welfare, and safety’ of inmates … particularly acute.” *Id*. at 16-17 (quoting ***Gregoire***, 170 Wn.2d at 635). Thus, the court held, “public policy” precluded the County from asserting the intoxication defense. ***Anderson*** at 17.

The County moved for reconsideration, arguing (in addition to the merits) that the appellate court erred in considering ***Gregoire***’s application to RCW 4.24.420, which had not been accepted for review or briefed. The appellate court denied reconsideration on April 15, 2024.

REASONS THIS COURT SHOULD ACCEPT REVIEW

A. The appellate decision unreasonably expands this Court's *Gregoire* decision to eliminate the statutory felony-bar defense in jails and prisons.

1. *Gregoire* simply does not apply to the facts of this case. RAP 13.4(b)(1) & (4).

In ***Gregoire***, this Court addressed whether the defenses of assumption of risk and contributory negligence applied in the context of inmate suicide. 170 Wn. 2d at 631. Shortly after his arrest, Edward Gregoire "displayed a range of unstable behavior, including thrashing violently, tussling with officers, crying, making irrational statements, and asking officers to shoot him." *Id*. at 630-632. Once at the Oak Harbor jail, police removed Gregoire's restraints, placing him in a regular cell without any mental health screening and ignoring him as he sat there crying. *Id*. at 631-32. He died by suicide approximately 30 minutes after being incarcerated. *Id.* at 632.

Gregoire's estate sued, asserting among other things wrongful death and negligence surrounding Gregoire's

death. *Id*. at 631, 633. Over objection, the trial court gave multiple jury instructions on implied primary assumption of risk and contributory negligence.[1] *Id*. at 637-39.

In a fractured opinion, Justice Sanders (joined by Justices C. Johnson, Chambers, and Stephens) concluded that the County could not, in the context of inmate suicide, assert implied primary assumption of risk as a complete defense, noting a judicial reluctance "to allow jailers charged with a public duty to shed it through a prisoner's purported implied consent to assume a risk, especially in a context where jailers exert complete control over inmates." *Id*. at 638. The plurality takes issue with "the implied nature of the purported assumption of risk [finding it] markedly inappropriate," in the context of inmate suicide. *Id*.

[1] While the court used "contributory negligence" for consistency, it noted that the Legislature had abolished contributory negligence in favor of comparative fault. *Id*. at 633 n.1.

As to contributory negligence, the plurality states that "[o]nce a jailer forms a special relationship with an inmate, contributory negligence cannot excuse the jailer's duty to protect the inmate, even from self-inflicted harm." *Id*. at 640. Here too, the plurality found assigning fault inconsistent with the jail's duty and the act of suicide. *Id*.

In a concurring/dissenting opinion, Justice Madsen (joined by Justices Owens and J. Johnson) wrote separately to express agreement with the plurality's analysis of assumption of risk, but disagreement with its analysis of contributory negligence. *Id*. at 645. The concurrence explained that a jail has no "freestanding duty to prevent inmate self-inflicted harm" and that such a duty would arise only when expressly imposed by law or assumed by the jail. *Id*. Thus, contributory negligence would be an appropriate defense unless "the jail assumed the inmate's duty of self-care …." *Id*. The concurrence notes too that the duty flowing from a special relationship

includes the duty to protect from "negligent self-inflicted harm," but not from "intentional self-inflicted harm." *Id*. at 647. Under Washington law, suicide fell into the latter category. *Id*.

Lacking a single majority opinion, the holding in ***Gregoire*** """may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds""": (1) Justice Sanders' opinion that a jail's special relationship with inmates precludes the assumption of risk defense; and (2) Justice Madsen's opinion that a jail may assert contributory negligence unless it assumes the inmate's duty of self-care. *See* ***Anderson*** at 12 n.5 (quoting ***State v. Hickman***, 157 Wn. App. 767, 774, 238 P.3d 1240 (2010) (quoting ***Marks v. United States***, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977))). That is, ***Gregoire*** itself does not necessarily prevent a jail from asserting contributory negligence.

According to the appellate court, it is not ***Gregoire***, but this Court's subsequent decision in ***Hendrickson***, that leads to an absolute prohibition on the felony defense in a jail setting. ***Anderson*** at 13-14 (citing 192 Wn.2d 269). In ***Hendrickson***, a student sued Moses Lake School District after suffering an injury while operating a saw during a shop class. 192 Wn.2d at 271. The jury returned a defense verdict, finding that the plaintiffs' own negligence caused her injury. *Id*.

This Court held that the District owed the student a duty of ordinary care, not a heightened duty. *Id*. at 274-78. The Court held too that the District was allowed to assert contributory negligence, holding that it is the "default rule" under the 1986 Tort Reform Act. *Id*. at 284-87. The Court then distinguished the "few situations" where contributory negligence is not permitted: (1) a school district may not assert contributory negligence against a student who was sexually abused by a teacher (***Christensen v. Royal Sch.***

Dist. No. 160, 156 Wn.2d 62, 70-71, 124 P.3d 283 (2005));

and (2) ***Gregoire***:

> We also held that a prison may not assert a defense of contributory negligence in situations of inmate suicide.[2] ***Gregoire***, 170 Wn.2d at 631. 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. 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. This de facto immunization from liability for inmate suicide was "unsupportable from a policy perspective."

Hendrickson, 192 Wn.2d at 285-86.

The appellate opinion overstates (and oversimplifies) ***Hendrickson*** in stating that this Court "explicitly adopted Justice Sanders' view of contributory negligence in the context of self-harm." ***Anderson*** at 14. ***Hendrickson*** distinguished ***Gregoire*** as one of two circumstances where

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[2] This is incorrect. As addressed above, while the plurality said the jail could not assert contributory negligence, its opinion did not garner a majority. Rather, Justice Madsen's opinion that a jail could assert contributory negligence unless it assumed the inmate's duty of self-care is the Court's holding on contributory negligence.

the "default rule" of contributory negligence did not apply. 192 Wn.2d at 284-86. ***Hendrickson*** did not refer to "self-harm," but specifically to "situations of inmate suicide." *Compare* ***Anderson*** at 14 *with* 192 Wn.2d at 285. It emphasized that contributory negligence in situations of "inmate suicide was 'unsupportable from a policy perspective.'" *Id*. at 286 (quoting ***Gregoire***, 170 Wn.2d at 643-44).

Simply stated, ***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. ***Hendrickson*** does not extend ***Gregoire***, but rather limits it to a rare exception to the default rule that contributory negligence applies. In misconstruing ***Hendrickson*** to expand ***Gregoire***, the appellate decision conflicts with ***Hendrickson***. RAP 13.4(b)(1).

RAP 13.4(b)(4) provides an additional basis for review. The fractured ***Gregoire*** opinion is confusing at

best. This is not remedied by ***Hendrickson***, which distinguishes ***Gregoire***, but also seems to mistake the plurality decision for a majority. The appellate decision adds to this confusion by overstating and oversimplifying ***Hendrickson***'s treatment of ***Gregoire***. This Court should accept review to clarify this area of the law.

2. *Gregoire* does not preclude application of the statutory felony-bar defense, which is based not on assumption of risk, but on the applicable *mens rea*. RAP 13.4(b)(1) & (2).

The Estate concedes that Batton died from a "drug overdose" caused by ingesting heroin he possessed in jail:

> Plaintiffs completely agree and stipulate that defendant is correct: Jordan Tebow smuggled drugs into the jail; gave/sold some to Derek Batton; the drugs were used by Mr. Batton and the drugs caused him to overdose and die.

CP 77 n.2. Batton committed a Class C felony when he possessed or controlled heroin while in jail:

> Every person confined in a county or local correctional institution who, without legal authorization, while in the institution … knowingly possesses or has under his or her control any

> narcotic drug or controlled substance, … is guilty of a Class C felony.

RCW 9.94.041(2). That is the basis of the felony defense.

The appellate court plainly believed it was following ***Gregoire***'s "holding" precluding the application of the felony-bar defense here. ***Anderson*** at 14-15. But it simply assumed – without support or discussion – that the defense was "predicated on an assumption of the risk." *Id*. at 14. That is incorrect – and in direct conflict with ***Gregoire***. RAP 13.4(b)(1).

The felony defense is not predicated on implied primary assumption or risk (the type at issue in ***Gregoire***), defined as the plaintiff's "consent[] to relieve the defendant of a duty – owed by the defendant to the plaintiff – regarding specific known risks." ***Gregoire***, 170 Wn.2d at 636. That defense arises when "'the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the

risk.'" 170 Wn.2d at 636 (quoting ***Kirk v. Wash. State Univ.***, 109 Wn.2d 448, 453, 746 P.2d 285 (1987)).

The statutory felony-bar defense is not based on the plaintiff's voluntary choice to encounter a known risk, but on his "commission of a felony" that is a proximate cause of the injury or death. RCW 4.24.420(1). To assert the defense, the defendant must prove that the plaintiff formed the requisite *mens rea* for the felony at issue. ***Watness v. City of Seattle***, 16 Wn. App. 2d 297, 309, 481 P.3d 570 (2021) (holding that the felony bar rule required the defendant to prove intent, the *mens rea* for assault); ***Davis v. King County***, 16 Wn. App. 2d 64, 73-74, 479 P.3d 1181 (2021) (same). Here, the requisite *mens rea* is knowledge. RCW 9.94.041(2).

In short, the appellate opinion assumes what it seeks to prove – that the felony defense is simply a version of assumption of risk, so must be barred by ***Gregoire***. ***Anderson*** at 14-15. This unsupported assertion conflicts

with ***Gregoire***'s holding on assumption of risk. RAP 13.4(b)(1).

The appellate decision also conflicts with ***Watness*** and ***Davis***, *supra*, in prohibiting application of the felony defense in the jail context because it "must account for the fact that both a person with an addiction and one suffering from mental illness may lack the ability to account for all the risks and consequences that follow acts of self-harm." ***Anderson*** at 16; RAP 13.4(b)(2). If there is a concern that the injured party lacked the capacity to form criminal intent, the solution is to determine whether they committed a felony at all, without which, the felony defense does not apply. ***Watness***, 16 Wn. App. 2d at 309; ***Davis***, 16 Wn. App. 2d at 73-74. The solution is not to prohibit the statutory felony-bar defense in an entire class of cases.

B. This unwarranted expansion of *Gregoire* is dangerous. RAP 13.4(b)(4).

As addressed above, the appellate opinion takes ***Hendrickson***'s distinguishing ***Gregoire*** as one of two instances where the default rule of contributory negligence does not apply and turns it into a blanket prohibition on the felony-bar defense in jail settings. This unwarranted expansion of ***Gregoire*** has dangerous consequences, warranting this Court's review under RAP 13.4(b)(4).

The appellate analysis is essentially that the County knew drugs could be smuggled into jail and had a duty to protect Batton from foreseeable injuries that could be caused by drug use. ***Anderson*** at 2-4, 15. It is equally foreseeable that inmates might be injured doing any number of things a County has some duty to prevent to the extent possible, including fighting; verbal, emotional, or sexual abuse or harassment; and escape attempts.

Refusing to apply the statutory felony-bar defense in these circumstances simply makes no sense.

Suppose, for example, that an inmate seriously injures himself while attempting to murder a guard or trying to escape, both felonies. The inmate could perhaps claim that the jail had a duty to prevent his efforts and sue the jail. The jail should be able to assert the felony bar, but ***Anderson*** suggests it could not. The danger and potential injustice are palpable.

C. The appellate decision violates the Separation of Powers doctrine. RAP 13.4(b)(3).

The appellate decision violates the Separation of Powers doctrine. As noted *supra*, the Legislature chose to make an injured or killed person's "commission of a felony at the time of the occurrence causing the injury or death" "a complete defense to ***any*** action for damages for personal injury or wrongful death," where "the felony was a proximate cause of the injury or death." RCW 4.24.420

(emphasis added). In 2021, the Legislature imposed a higher burden for proving this "complete defense" in actions "arising out of law enforcement activities resulting in personal injury or death," requiring a factfinder to determine "beyond a reasonable doubt that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death" and that the felony "was a proximate cause of the injury or death." RCW 4.24.420(2) (2021). It is our courts' "obligation to determine and carry out the intent of the legislature." ***Hale v. Wellpinit Sch. Dist. No. 49***, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009) (cleaned up; emphasis added; citations omitted).

As also explained *supra*, this is a *statutory defense*, not "assumption of risk" nor any other common-law doctrine, as the Court of Appeals opined. And while the Legislature expressly heightened the standard for proving the defense in matters arising out of law enforcement

activities, it chose not to do so – nor to *eliminate* this statutory defense – for jails or prisons. The appellate court cannot do so "for" the Legislature.

Rather, the Legislature may "define and change tort law in our state." ***Morgan v. Johnson***, 137 Wn.2d 887, 896, 976 P.2d 619 (1999) (citing ***Geschwind v. Flanagan***, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993)). It is also "free to create exceptions to statutes, as well as common law." ***Geschwind***, 121 Wn.2d at 841. Determining such *legislative policy* is well within its purview, not within the jurisdiction of our appellate courts: "The right of a legislative body to exercise its legislative powers will not be invaded by the judicial branch of government." ***Brown v. Owen***, 165 Wn.2d 706, 720, 206 P.3d 310 (2009) (cleaned up) (quoting ***State ex rel. Gunning v. Odell***, 58 Wn.2d 275, 278, 362 P.2d 254 (1961) (citing ***Household Fin. Corp. v. State***, 40 Wn.2d 451, 244 P.2d 260 (1952)), *modified*, 60 Wn.2d 895, 371 P.2d 632 (1962)).

The Separation of Powers doctrine "is embedded in our constitutional structure." ***Gonzales v. Inslee***, 2 Wn.3d 280, 299, 535 P.3d 864 (2023) (citing ***Brown***, 165 Wn.2d at 718 (quoting ***Carrick v. Locke***, 125 Wn.2d 129, 135, 882 P.2d 173 (1994))). The doctrine "operates to ensure that the fundamental functions of each branch remain ***inviolate***." ***Gonzales***, 2 Wn.3d at 299 (cleaned up; emphasis added) (quoting ***Hale***, 165 Wn.2d at 504 (quoting ***Carrick***, 125 Wn.2d at 135)). Where, as here, "the activity of one branch . . . invades the prerogatives of another, it violates the separation of powers." *Id.* (cleaned up; citations omitted).

The doctrine "preserves the constitutional division between the three branches of government and ensures that the activities of one branch do not threaten or invade the prerogatives of another." ***Cornelius v. Dep't of Ecology***, 182 Wn.2d 574, 589, 344 P.3d 199 (2015) (cleaned up) (quoting ***In re Estate of Hambleton***, 181

Wn.2d 802, 817, 335 P.3d 398 (2014) (quoting ***State v. Elmore***, 154 Wn. App. 885, 905, 228 P.3d 760 (2010)); ***Zylstra v. Piva***, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)). It thus "is reciprocal." ***Hale***, 165 Wn.2d at 506.

But unlike "many other constitutional violations, which directly damage rights retained by the people, the damage caused by a separation of powers violation accrues directly to the branch invaded." *Id.* (cleaned up) (quoting ***Carrick***, 125 Wn.2d at 136). "The judicial branch violates the doctrine when it assumes tasks that are more properly accomplished by [other] branches." *Id*. (cleaned up) (quoting ***Mistretta v. United States***, 488 U.S. 361, 383, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (quoting ***Morrison v. Olson***, 487 U.S. 654, 680-81, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988))). "The legislature's role is to <u>set policy</u> and <u>to draft and enact laws</u>." *Id*. (emphases added). And these are "a legislative, not a judicial, function." *Id*. (cleaned up; citations omitted).

As relevant here, the question is "'whether the activity of one branch . . . invades the prerogatives of another.'" ***Carrick***, 125 Wn.2d at 135 (quoting ***Zylstra***, 85 Wn.2d at 750). "Each branch of government wields only the power it is given." ***State v. Moreno***, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). This prevents one branch from "encroaching upon the 'fundamental functions' of another." ***Moreno***, 147 Wn.2d at 505 (quoting ***Carrick***, 125 Wn.2d at 135). Under these standards, our courts must not be "allowed 'tasks that are more properly accomplished by'" another branch. ***Carrick***, 125 Wn.2d at 136 (quoting ***Mistretta***, 488 U.S. at 383). Deciding *legislative policy* and eliminating *statutory defenses* thus runs afoul of the doctrine.

This Court should grant review under RAP 13.4(b)(3) ("a significant question of law under the Constitution of the State of Washington . . . is involved"). It is certainly significant when an appellate decision broadly expands the scope of discretionary review, misstates the appellant's

arguments, and misinterprets this Court's precedents, all to the end of *eliminating a statutory defense* in violation of the Separation of Powers doctrine. The Legislature sets legislative policy, not the courts. Review is warranted.

D. For the same reasons, *Gregoire* does not preclude the intoxication defense in jail settings.

As addressed above, ***Gregoire*** prohibits the assumption-of-risk defense in situations of inmate suicide, and may preclude the contributory-negligence defense if the jail assumes the inmate's duty of self-care. ***Hendrickson*** does not expand ***Gregoire***, but distinguishes it as a rare exception to the default rule that contributory negligence applies. Neither of these support the appellate decision that the intoxication defense never applies in the jail setting. Neither should overrule the Legislature's decision "to curtail the rights of certain intoxicated persons …." ***Morgan***, 137 Wn.2d at 896.

As is its prerogative, the Legislature adopted RCW 5.40.060 as part of the 1986 amendments to the Tort Reform Act, adding a "statutory defense" based on the plaintiff's intoxication that operates as a "complete defense" if they are more than 50% at fault. ***Hickly v. Bare***, 135 Wn. App. 676, 685-86, 145 P.3d 433 (2006), *rev. denied*, 161 Wn.2d 1011 (2007). This complete defense if plaintiff's fault exceeds 50% is a "limited" exception to the TRA's general rule that a plaintiff's own contributory fault "diminishes proportionately the amount awarded … but does not bar recovery." RCW 4.22.005; ***Hickly***, 135 Wn. App. at 685-86. That is, as part of reforming tort law in Washington, the Legislature elected to create and exception from the default rule of contributory negligence in cases of intoxication, but only when the plaintiffs' fault exceeds the 50% threshold.

The appellate opinion undoes this legislative election, holding essentially that the jail had a duty to

prevent Batton from becoming intoxicated. ***Anderson*** at 15-16. But again, neither ***Gregoire*** nor ***Hendrickson*** support that outcome, and again too, this violates the Separation of Powers doctrine.

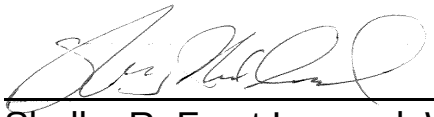
CONCLUSION

The appellate decision sets a dangerous precedent that conflicts with this Court's prior decisions and Legislative prerogative. This Court should accept review and reverse.

The undersigned hereby certifies under RAP 18.17(2)(b) that this document contains **4539** words.

RESPECTFULLY SUBMITTED this 24th day of May 2024.

MASTERS LAW GROUP, P.L.L.C.



Shelby R. Frost Lemmel, WSB 33099
Kenneth W. Masters, WSB 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
shelby@appeal-law.com
ken@appeal-law.com

Attorneys for Petitioner

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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, v. GRANT COUNTY, WASHINGTON, Petitioner, JOHN KRIETE, DAN DURAND, JOHN QUERIN and DAN SIMON and JOHN DOE V-X, and each of them, Defendants.	)	No. 38892-1-III PUBLISHED OPINION

COONEY, J. — In August 2018, Derek Batton, while incarcerated at the Grant County Jail, died after ingesting heroin that was smuggled in by his cellmate, Jordan Tebow. In February 2022, Mr. Batton's parents, Barbara Anderson and Rod Batton, individually and as copersonal representatives of the estate of Derek Batton (collectively Estate), sued Grant County (County), alleging negligence based on the County's failure to adequately search Mr. Tebow for drugs. The County promptly filed a motion for

summary judgment dismissal, asserting complete immunity under Washington's felony defense statute, RCW 4.24.420, and comparative fault under RCW 5.40.060. The trial court denied the County's motion. We granted the parties' joint motions for discretionary review to resolve three questions: (1) whether RCW 4.24.420 applies to the facts of this case; (2) if RCW 4.24.420 is applicable, whether the 2021 statutory amendments apply; and (3) whether the law, as enunciated in the Supreme Court's holding in *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010) (plurality opinion), precludes application of RCW 5.40.060.

As to the third question, we broadened our review and hold that the special relationship between the County and Mr. Batton precludes the County from asserting the complete defense of immunity under RCW 4.24.420 and comparative fault under RCW 5.40.060. With this holding, we need not address the first two questions.

BACKGROUND

Throughout the summer of 2018, the Grant County Sheriff's Office struggled to control the flow of opioids and other contraband into the Grant County Jail. As one lieutenant within the sheriff's office described, it became routine for dealers to deliver drugs to inmates by preplanning their arrests and then secreting the drugs orally, anally, or vaginally into the facility. Drug toxicity caused several inmates to be hospitalized. Clerk's Papers (CP) at 114.

Corrections officers attempted to block the entry of contraband into the jail by following a bodily search policy. On the least invasive end, officers conducted pat down searches of all inmates and arrestees on a "frequent[ ]" basis. CP at 118. Officers were further authorized to conduct modified or total strip searches of inmates under specified circumstances, including where the arrestee or inmate was previously found to possess contraband while incarcerated or was booked on a violent felony or drug charge. On the most invasive end, the bodily search policy authorized physical body cavity searches wherein the officer would obtain a search warrant and the prior written approval of the chief deputy and the ranking shift supervisor on duty.

Reportedly, several officers expressed confusion over when a reasonable suspicion or probable cause existed that allowed for authorization of a full or modified strip search. Staff also apparently struggled with the lack of procedures surrounding strip searches of transgender inmates. As a result, officers would occasionally fail to comply with the County's bodily search policy.[1]

[1] Even when the bodily search policy was adequately complied with, efforts to restrict the flow of drugs into the jail sometimes proved unavailing. As a result, in early July 2018, Lieutenant Dan Durand of the Grant County Sheriff's Office wrote to Joe Kriete, Chief Deputy of Corrections, requesting that any 2019 capital outlay funds go toward the purchase of a whole-body X-ray scanner, which would more accurately detect any drugs or other dangerous contraband smuggled in by arrestees or inmates. The record does not indicate what, if anything, Chief Deputy Kriete responded to Lieutenant Durand's request for a whole-body X-ray scanner.

On August 10, 2018, Derek Batton was booked into the Grant County Jail. The next day, Jordan Tebow[2] was booked into jail. Mr. Tebow had an "extensive" history with the Grant County Sheriff's Office. CP at 130. He had been booked into the Grant County Jail over 40 times by some counts. Mr. Tebow was arrested for felony drug charges multiple times and, in at least one instance, had attempted to smuggle contraband into the jail. Although these facts would have authorized the booking officers to strip-search Mr. Tebow, they neglected to do so. Consequently, Mr. Tebow successfully smuggled heroin into the jail.

After being booked, Mr. Tebow was assigned a cell with Mr. Batton. Allegedly, Mr. Tebow offered heroin to another inmate, who declined. Mr. Tebow then offered heroin to Mr. Batton. Mr. Batton, who struggled with drug addiction, accepted the offer and was captured on video surveillance snorting a fatal amount of heroin in the late evening of August 11.

The following day, at approximately 10:45 a.m., Mr. Batton was found dead in his cell. An autopsy report later attributed Mr. Batton's death to "[a]cute morphine intoxication (likely heroin)." CP at 3. As a result of Mr. Batton's death, Mr. Tebow pleaded guilty to controlled substance homicide on October 11, 2019.

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[2] The Estate's amended summons and complaint mistakenly refer to Mr. Tebow as "Tim Tebow." CP at 34. However, other documents within the clerk's papers and the parties' briefings make clear that Mr. Tebow's first name is Jordan.

PROCEDURE

In February 2022, Mr. Batton's parents, Barbara Anderson and Rod Batton, sued Grant County[3] individually and as representatives of their son's estate. In their complaint they alleged the County was negligent in its failure to adequately search Mr. Tebow, in its failure to detect the presence of heroin in Mr. Batton's cell through adequate supervision or video surveillance, and in its failure to discover and intervene in Mr. Batton's overdose crisis before his death.

Grant County promptly filed a motion for summary judgment, asserting complete immunity under the felony defense statute, RCW 4.24.420. Former RCW 4.24.420 (1987) provided:

> It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death. However, nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983.

The County further moved for partial summary judgment under RCW 5.40.060, averring comparative fault. RCW 5.40.060 provides:

> (1) . . . [I]t is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause

[3] Initially, the Estate named various corrections officers as defendants, but later dismissed them according to a stipulated agreement.

> of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault.

RCW 4.24.420 was amended between the time of Mr. Batton's death and the time the Estate filed its amended complaint. Currently, RCW 4.24.420 (2021) provides:

> (1) Except in an action arising out of law enforcement activities resulting in personal injury or death, it is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death.
>
> (2) In an action arising out of law enforcement activities resulting in personal injury or death, it is a complete defense to the action that the finder of fact has determined beyond a reasonable doubt that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death, the commission of which was a proximate cause of the injury or death.
>
> (3) Nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983.

The County urged the trial court to apply the 1987 version of the statute and focused its argument on the definition of "occurrence." CP at 162. The Estate argued to the trial court that RCW 4.24.420 was wholly inapplicable to the facts of this case. If the trial court decided otherwise, the Estate sought application of the 2021 amendments.

If the trial court were to deny the County's motion for summary judgment dismissal under former RCW 4.24.420 (1987) or (2021), the County urged the court to grant it partial summary judgment under RCW 5.40.060. Specifically, the County argued the Estate had failed to produce evidence that Mr. Batton was not under the influence at

the time of the occurrence causing his death, nor had it produced any evidence that such condition was not a proximate cause of his death. The County conceded a question of fact remained as to whether Mr. Batton was more than 50 percent at fault.

Regarding RCW 4.24.420, the trial court concluded that the 2021 amendments applied and, under subsection (2), it was for the trier of fact to determine the County's liability and percentage of fault. The court reasoned:

> The use of procedural statutes which destroy a plaintiff's right to petition the Court for redress should be used sparingly and only when the Court is convinced that no other option is appropriate. Here RCW 4.24.420(1) arguably doesn't apply due to plaintiff[']s allegation that "law enforcement activities" were a proximate cause of decedent's passing. Accordingly, the trier of fact, pursuant to subsection (2) of the statute, should determine "beyond a reasonable doubt" whether this defense is applicable. After making such a determination, the trier of fact should then determine what liability, if any, defendants have in this matter. Such a process will ensure that all parties get to make a complete record and [that] the issues extant in this case will be fully litigated.

CP at 184.

Following the trial court's decision, the County moved the court to clarify whether it could assert a defense under RCW 5.40.060. The court clarified "that Defendant[s] shall be permitted to avail themselves of the defense[s] set forth under RCW 5.40.060." CP at 222. It then granted the parties' joint motions for certification under RAP 2.3(b)(4). We accepted discretionary review to resolve three questions: (1) whether RCW 4.24.420 applies to the facts of this case; (2) if RCW 4.24.420 is applicable,

whether the 2021 statutory amendments apply; and (3) whether the law, as enunciated in the Supreme Court's holding in *Gregoire*, precludes the application of RCW 5.40.060.

While we accepted review of these three questions, including whether the special relationship doctrine recognized in *Gregoire* precludes application of RCW 5.40.060, we conclude that the special relationship doctrine applies to both RCW 4.24.420 and RCW 5.40.060. With this holding, we need not address the first two questions.

ANALYSIS

The summary judgment procedure is designed to avoid the time and expense of an unnecessary trial. *Maybury v. City of Seattle*, 53 Wn.2d 716, 719, 336 P.2d 878 (1959). Orders on summary judgment are reviewed de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). In deciding a summary judgment motion, the court must consider the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Id*. (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). "[W]hen reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985) (citing *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975)). Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Keck*, 184 Wn.2d at

370. An appellate court may affirm summary judgment on any basis supported by the record. *Swinehart v. City of Spokane*, 145 Wn. App. 836, 844, 187 P.3d 345 (2008).

> WHETHER REVIEW OF *GREGOIRE*'S APPLICABILITY TO RCW 4.24.420 IS PROPERLY BEFORE THIS COURT

At oral argument, the County urged us to refrain from considering whether the holding of *Gregoire* applies to RCW 4.24.420 as the issue is not overtly present in the order on discretionary review and was not raised before the trial court. The order on discretionary review calls on us to decide whether the Supreme Court's holding in *Gregoire* precludes the application of RCW 5.40.060. Nevertheless, the order is, at best, vague as it relates to whether we should decide *Gregoire*'s applicability to RCW 4.24.420.

In reviewing the entirety of the record, the briefing, and RAP 2.5(a), the question of *Gregoire*'s applicability to both statutes is properly before us. The issue was first presented to the trial court and is referenced in its order on summary judgment. Specifically, the trial court ordered:

> Plaintiffs' motion to expand consideration for review of RCW 4.24.420 in order to certify for review the decision of the Court that Defendants may avail themselves of the defense set forth in RCW 4.24.420 under the facts of the present case is GRANTED.

CP at 221. Moreover, the issue was raised by the Estate in its motion for discretionary review, is referenced in our order granting discretionary review, and was briefed by the Estate. In its reply brief, the County declined to respond to the Estate's arguments.

RAP 2.5(a) permits a party to "present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground," especially in the context of a motion for summary judgment. *Champagne v. Thurston County*, 134 Wn. App. 515, 520, 141 P.3d 72 (2006), *aff'd*, 163 Wn.2d 69, 178 P.3d 936 (2008). Whether the holding in *Gregoire* applies to RCW 4.24.420 has been sufficiently developed in the record, was referenced by the trial court in granting certification, and was briefed by the Estate. The issue has been adequately developed to permit our review.

WHETHER THE HOLDING IN *GREGOIRE* IS APPLICABLE TO RCW 4.24.420 AND RCW 5.40.060

A prima facie case of negligence requires plaintiffs to prove (1) duty, (2) breach, (3) proximate causation, and (4) damages. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). The first element, whether a duty was owed, is a question of law reviewable de novo. *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 753, 310 P.3d 1275 (2013). The remaining three elements are questions of fact. *Wells v. Nespelem Valley Elec. Coop., Inc.*, 13 Wn. App. 2d 148, 153, 462 P.3d 855 (2020) (citing *Briggs v. Pacificorp*, 120 Wn. App. 319, 322, 85 P.3d 369 (2003)).

In operating and maintaining a jail, the County "has a twofold duty: one to the public to 'keep and produce the prisoner when required,' and the other to the prisoner 'to keep him in health and safety.'" *Shea v. City of Spokane*, 17 Wn. App. 236, 242, 562 P.2d 264 (1977) (citing *Kusah v. McCorkle*, 100 Wash. 318, 323, 170 P. 1023 (1918)), *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978). The County's duty to the public and prisoner may arise from statute, ordinance, case law, or common law tort principles. *See* chapter 70.48 RCW; WAC 289-02-010 to WAC 289-30-060. The duty the County owes incarcerated individuals in its facilities is based on the special relationship between the jail and inmate because an incarcerated individual is deprived of their liberty and ability to care for themselves. *Shea*, 17 Wn. App. at 241-42; *Gregoire*, 170 Wn.2d at 635 (lead opinion). The special relationship creates a nondelegable duty for the jail to ensure the health, welfare, and safety of each inmate. *Shea*, 17 Wn. App. at 242. A County has an affirmative duty to protect those incarcerated in its facility. *Gregoire*, 170 Wn.2d at 638 (lead opinion).

Acknowledging the special relationship between the County and Mr. Batton, the parties debate *Gregoire*'s holding. In *Gregoire*, the decedent exhibited symptoms of emotional distress on his arrest and in the moments leading up to his suicide, including pleading with officers to kill him. 170 Wn.2d at 631-32 (lead opinion). In a plurality decision, the Washington Supreme Court overturned the trial court's verdict in favor of

the city of Oak Harbor, explaining that the trial court should not have instructed the jury on the defenses of assumption of risk and comparative fault.[4] *Id*. at 641. Justice Sanders' opinion primarily governed the assumption of risk analysis, and Justice Madsen's opinion controlled the comparative fault[5] analysis.

Justice Sanders explained that jails and their employees share a "special relationship with inmates," including the affirmative "duty to ensure health, welfare, and safety." *Id.* at 635 (lead opinion). As such, he determined that the assumption of risk

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[4] The *Gregoire* opinion referred to this doctrine as "contributory negligence." Still, it acknowledged that Washington abolished the doctrine of contributory negligence in favor of a comparative fault scheme and explained that it continued to refer to the doctrine as contributory negligence for consistency. 170 Wn.2d at 633-34 n.1 (lead opinion).

[5] "[W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *State v. Hickman*, 157 Wn. App. 767, 774, 238 P.3d 1240 (2010) (alteration in original) (quoting *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977)); *see also Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 152 Wn. App. 190, 197, 217 P.3d 365 (2009), *vacated on remand*, 160 Wn. App. 250, 255 P.3d 696 (2011). Applying this to the *Gregoire* holdings: (1) the opinion by Justice Sanders that jails have a special relationship with inmates, including the positive duty to provide for their health, safety, and welfare, which cannot be waived by assumption of risk, was joined by Justices Charles Johnson, Chambers, Stephens, Madsen, James Johnson, and Owens, whereas (2) the opinion by Justice Madsen that jails have no affirmative duty to prevent an inmate's self-inflicted harm such that the defense of contributory negligence may apply absent proof of the jail's undertaking of self-inflicted harm was joined by Justices James Johnson, Owens, Alexander, and Fairhurst. *See Gregoire*, 170 Wn.2d at 655 n.17 (Alexander, J., dissenting). This comports with other jurisdictions' understanding of *Gregoire*. *See, e.g.*, *Mulhern v. Cath. Health Initiatives*, 799 N.W.2d 104, 115 (Iowa 2011).

doctrine, and specifically the category of implied primary assumption of risk, could not serve as a complete defense against the decedent's claims. Justice Sanders cited a judicial "reluctan[ce] to allow jailers charged with a public duty to shed it through a prisoner's purported implied consent to assume a risk, especially in a context where jailers exert complete control over inmates." *Id.* at 638 (lead opinion).

Justice Madsen agreed with Justice Sanders' assumption of risk analysis and added that the duty to care for inmates' health included the requirement to "protect an inmate from injury by third parties and jail employees." *Id.* at 645 (Madsen, J., concurring/dissenting). However, she departed from Justice Sanders' conclusion (and, in doing so, garnered a weak plurality) that jails bore an automatic affirmative duty to protect an inmate from self-inflicted harm and that the defense of contributory negligence may be asserted absent proof that the jail assumed an affirmative duty to prove self-inflicted harm. *Id.* at 649 (Madsen, J., concurring/dissenting). Thus, under *Gregoire*, whether a jail assumed a duty to protect an inmate from self-inflicted harm precluding the defense of contributory negligence remained a question for the trial court to decide. *Id*. at 654-55 (Madsen, J., concurring/dissenting).

However, our analysis of a jail's affirmative duties cannot end with *Gregoire*. *See Norg v. City of Seattle*, 200 Wn.2d 749, 760-61, 522 P.3d 580 (2023) ("'[T]he first rule of case law as well as statutory interpretation is: Read on.'" (quoting *Ark. Game & Fish*

Comm'n v. United States, 568 U.S. 23, 36, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012))). The Supreme Court reversed course in *Hendrickson v. Moses Lake School District*, 192 Wn.2d 269, 428 P.3d 1197 (2018). In *Hendrickson*, the Supreme Court considered an injured student's contributory negligence claim against her school district. In doing so, it explicitly adopted Justice Sanders' view on contributory negligence in the context of self-harm, writing:

> We also held that a prison *may not* assert a defense of contributory negligence in situations of inmate suicide. *Gregoire*, 170 Wn.2d at 631. 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. 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. This de facto immunization from liability for inmate suicide was "unsupportable from a policy perspective."

Id. at 285-86 (emphasis added) (alteration in original); *see also Ghodsee v. City of Kent*, 21 Wn. App. 2d 762, 770, 508 P.3d 193 (2022), *review granted*, 1 Wn.3d 1001, 526 P.3d 852 (2023) (court order). The Supreme Court's holding in *Hendrickson* effectively resolved any confusion over the original holdings in *Gregoire.* Allowing a jail to shed its duty to protect an inmate through the inmate's purported assumption of the risk or comparative fault violates public policy.

GREGOIRE'S APPLICATION TO RCW 4.24.420

The County asserted complete immunity under RCW 4.24.420—a defense predicated on an assumption of the risk. The County contends Mr. Batton assumed the

risk that led to his death when he unlawfully possessed a controlled substance while incarcerated (in violation of RCW 9.94.041(2)). Allowing the County to forsake its duty because Mr. Batton acted in a manner that the jail was required to protect him from is "unsupportable from a policy perspective." *Gregoire*, 170 Wn.2d at 643-44 (lead opinion). Anything short of requiring a jail to protect its inmates from a reasonably foreseeable self-injury would render a jail's duty meaningless. *Id*. at 639 (lead opinion) (citing *Hunt v. King County*, 4 Wn. App. 14, 22-23, 481 P.2d 593 (1971)). The County's duty to protect Mr. Batton included the duty to thwart the entry of controlled substances into its facility. Otherwise stated, but for the County's failure to properly search Mr. Tebow, Mr. Batton would have lacked the opportunity to violate RCW 9.94.041(2).

GREGOIRE IS APPLICABLE TO RCW 5.40.060

In addition to asserting complete immunity, the County also raised a comparative fault defense under RCW 5.40.060. The County argues there are no genuine issues of material fact related to two of the three elements of RCW 5.40.060, entitling it to partial summary judgment. The County claims it is undisputed that Mr. Batton was intoxicated at the time of the occurrence causing his death and that intoxication was the proximate cause of his death. As to the element of apportionment of fault, the County concedes that a question of fact remains. RCW 5.40.060(1); *see Hickly v. Bare*, 135 Wn. App. 676, 688, 145 P.3d 433 (2006).

In response, the Estate does not contest the constitutionality of RCW 5.40.060, nor its applicability in a typical civil case. Rather, the Estate contends the holding of *Gregoire* precludes the County from escaping its duty to Mr. Batton through the apportionment of fault, thereby rendering RCW 5.40.060 inapplicable. Indeed, "[t]he jail's duty to protect inmates includes protection from self-inflicted harm and, in that light, contributory negligence has no place in such a scheme." *Gregoire*, 170 Wn.2d at 641 (lead opinion).

The County attempts to distinguish *Gregoire*, arguing Gregoire was a suicidal inmate, whereas here, the County lacked knowledge that Mr. Batton had an addiction and could overdose if presented with the opportunity. Initially, it is unclear what material difference exists between an inmate's suicide by hanging and an inmate's overdose on drugs smuggled into the jail. Perhaps an overdose is accidental rather than intentional, but that overlooks the fact that we do not know whether Mr. Batton intentionally or accidentally overdosed. Moreover, we must account for the fact that both a person with an addiction and one suffering from mental illness may lack the ability to account for all the risks and consequences that follow acts of self-harm.

Even putting the issue of self-harm aside, there is a colorable argument that the jail was negligent in failing to provide for its inmates' health and safety by allowing Mr. Tebow to enter the facility with controlled substances. Given Mr. Tebow's historical

interactions with corrections officers and the County's recognition of drugs being introduced into the jail, its affirmative "duty to ensure health, welfare, and safety" of inmates was particularly acute. *Id.* at 635 (lead opinion). As such, public policy precludes the County from shedding its duty to Mr. Batton by asserting RCW 5.40.060 as a defense.

Finally, the County attempts to distinguish *Gregoire* because, here, the contributory negligence defense is based on a statute (RCW 5.40.060), whereas in *Gregoire*, it was grounded in the common law. As the Estate correctly noted, however, the contributory fault scheme is codified at RCW 4.22.005; thus, any distinction between a statutory defense and one grounded in the common law is negligible. *Id.* at 633 n.1 (lead opinion).

CONCLUSION

As an inmate in its jail, the County possessed complete control over Mr. Batton's liberty. This created a special relationship wherein the County owed a nondelegable affirmative duty to protect Mr. Batton from harm and ensure his health, welfare, and safety. Allowing the County to advance the defenses of complete immunity under RCW 4.24.420 or comparative fault under RCW 5.40.060, would nullify the County's duty to protect Mr. Batton. Accordingly, we affirm the trial court's denial of the County's

motion for summary judgment of the Estate's claims and remand for further proceedings consistent with this opinion.

Cooney, J.

WE CONCUR:

Fearing, C.J.

Staab, J.

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **PETITION FOR REVIEW** on the 24th day of May 2024 as follows:

Co-counsel for Appellant/Cross-Respondent

Evans, Craven & Lackie, P.S.
Michael E. McFarland, Jr.
Scott A. Flage
818 W. Riverside Ave., Suite 250
Spokane, WA 99201
mmcfarland@ecl-law.com
sflage@ecl-law.com
ldavis@ecl-law.com

___ U.S. Mail
_x_ E-Service
___ Facsimile

Counsel for Respondents/Cross-Appellants Barbara Anderson & Rod Batton

Dixon & Cannon, Ltd.
James Dixon
701 N 36th St, Ste 420
Seattle, WA 98103
james@dixoncannon.com
litigators@dixoncannon.com

___ U.S. Mail
_x_ E-Service
___ Facsimile

Counsel for Respondent/Cross-Appellant Barbara Anderson

Schwartz Law Office, PLLC
Michael Schwartz
701 5th Ave, Ste 2460
Seattle, WA 98104
mschwartzlaw@hotmail.com

___ U.S. Mail
_x_ E-Service
___ Facsimile

Counsel for Respondent/Cross-Appellant Rod Batton

Law Office of Damon A. Platis, PLLC
Damon A. Platis
9449 53rd Ave W
Mukilteo, WA 98275
attorneydamonplatis@gmail.com

___ U.S. Mail
_x_ E-Service
___ Facsimile

Shelby R. Frost Lemmel, WSB 33099
Attorney for Petitioner

MASTERS LAW GROUP PLLC

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