No. 103111-4

SUPREME COURT
OF THE STATE OF WASHINGTON

---

BARBARA ANDERSON and ROD BATTIVIDUALLY, and BARBARA ANDERSON and ROD BATTON as CO-Personal Representatives of the estate of Derek Batton,

*Respondents,*

v.

GRANT COUNTY, WASHINGTON,

*Petitioner.*

---

# MEMORANDUM OF *AMICI CURIAE* WASHINGTON COUNTIES RISK GROUP AND MEMBERS ASOTIN, FERRY, LINCOLN, SKAMANIA, STEVENS, WAHKIAKUM, AND WHITMAN COUNTIES IN SUPPORT OF PETITION FOR REVIEW

---

Gregory M. Miller, WSBA No. 14459
Linda B. Clapham, WSBA No. 16735

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104
Telephone: (206) 622-8020

*Attorneys for Amici Curiae Washington Counties Risk Group and Members Asotin, Ferry, Lincoln, Skamania, Stevens, Wahkiakum, and Whitman Counties*

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

### Washington Cases



### Federal Cases



### Constitutional Provisions, Statutes and Court Rules



### Other Authorities

**Page(s)**

## I. IDENTITY AND INTERESTS OF *AMICI*

*Amici Curiae* are the Washington Counties Risk Group ("WCRG") and seven member counties – Asotin, Ferry, Lincoln, Skamania, Stevens, Wahkiakum, and Whitman Counties ("Named Counties"), further identified in their accompanying motion ("Motion"). At issue is the scope of liability and defenses for county jail inmate deaths and injuries in which the inmate was engaged in illegal conduct or was intoxicated, raising potential defenses under the felony bar statute, RCW 4.24.420, the intoxication statute, RCW 5.40.060, or contributory negligence.

As operators and the insurer of local jails, *Amici* have a continuing interest in cases affecting the scope of their liability.

*Amici* appear because *Andersen v. Grant County*, 28 Wn.App.2d 796, 539 P.3d 40 (2024) ("*Anderson*") imposes strict liability for jail operators for inmate injuries and deaths, effectively negating both statutory defenses and contributory negligence. This is untenable and legally incorrect.

*Amici* suggest jail operators should not be penalized beyond what they can control or for what an inmate is responsible, consistent with the contributory negligence defense recognized by *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 645-655 & fn. 17, 244 P.3d 924 (2010) (Madsen, C.J., concurring/dissenting, joined by Alexander, J., dissenting). But *Anderson* negates *Gregoire's* recognition that contributory negligence may apply while extending *Gregoire* to preclude application of the two statutes' defenses.

WCRG's ultimate goal is to reduce losses, particularly through on-site education. *Id.* A major aspect of on-site education is knowing the parameters of potential liability.

Here the question is: Will the jail be strictly liable for all injuries or death that may occur to a person while a jail inmate, or can a person bear any element of responsibility for their own conduct and choices while in jail? That is the issue the Court must resolve. RAP 13.4(b)(4).

## II. ISSUES ADDRESSED BY *AMICI CURIAE*

*Amici* suggest that *Anderson's* reliance on *Gregoire* to assert a rule that the intoxication defense of RCW 5.40.060 and the felony bar statute of RCW 4.24.420 cannot apply, and that comparative fault or contributory negligence cannot apply either, is both legally incorrect and bad policy.

*Amici* suggest it is critically important for the Court to understand the distinction made by Justice Madsen in *Gregoire* between: 1) the jailer's centuries-old duty of ordinary care to persons held in jail (due to the "jailer's special relationship" with them due to the jailer's complete control); and 2) a jailer's assumption of a jailed person's "duty of self-care", a material step beyond the special relationship duty to persons in jail.

Once this distinction is understood and Justice Madsen's majority holding on contributory negligence is given its due authority, it is readily apparent the strict liability rule of *Anderson* is incorrect and that there is no bar to application of either the intoxication statute or the felony bar statute as

legitimate policy choices of the legislature under appropriate facts.

*Amici* also stress to the Court that, beyond any conflict with *Gregoire* and its misapplication of *Hendrickson v. Moses Lake School District*, 192 Wn.2d 269, 428 P.3d 1197 (2018), *Anderson's* new rule of strict liability harms local jurisdictions operating jails by pre-emptively absolving jailed persons who may bear some responsibility for the harms suffered. This imposes costs on *Amici* and all local jail operators beyond what their legal responsibilities are as determined by this Court and the legislature. This matters to *Amici* for their continuing duties to operate jails. Since the legislature made the policy decision to provide the felony bar and intoxication defenses, it is not for the appellate court to cast them aside in jail cases.

*Amici* suggest there is a range of potential liability for jail operators in jail death and injury cases. The statutes and common law provide, at minimum, a common-sense, logically appropriate middle ground between strict liability and total defendant

immunity based on an appreciation of the limits of jail operators' abilities to protect inmates from themselves. Such an approach is consistent with the statutes (and thus the legislative policies) and with this Court's prior decisions recognizing the potential for contributory negligence.[1]

## III. STATEMENT OF THE CASE

*Amici* accept the statement of the case in the Petition.

## IV. LEGAL DISCUSSION

### A. *Anderson's* Conflict with *Gregoire* Must Be Addressed So That Local Jurisdictions Operating Jails Can Raise Statutory and Comparative Fault Defenses Where Warranted By The Facts.

First, review should be granted because of the conflict between *Anderson* and the ***holding*** in *Gregoire* that contributory

[1] In fact, plaintiffs recognized the availability of contributory negligence in the trial court. When arguing against Grant County's motion to dismiss based on total immunity under the felony bar statute for illegal use of drugs in the jail, plaintiffs pointedly made the distinction "it's not a question of ***the*** proximate cause it's a question of ***a*** proximate cause. And we are claiming ***a*** proximate cause was the occurrence which allowed the drugs to enter the jail in the first place." RP (4/1/22) 19:10-13 (emphasis added).

negligence is a potential defense in jail injury and death cases. *Anderson* expressly holds, based on *dicta* in *Hendrickson,* that contributory negligence is not an available defense in a jail injury or death case. 28 Wn.App.2d at 807-808. This is inconsistent with Justice Madsen's five-justice holding on contributory negligence in *Gregoire*[2] and calls for review per RAP 13.4(b)(1). *Amici* urge the Court to grant review because of their need to be able to adjust their operations according to the rules of potential liability, an important state-wide issue. RAP 13.4(b)(4).

It is important to note that then-Chief Justice Madsen's concurrence/dissent is ***not*** a ***"weak plurality***" as mis-characterized in *Anderson's* text. *See* 28 Wn.App.2d at 807, ¶24. Rather, it is a ***five-justice majority*** that constitutes a holding of the Court, a holding contrary to much of the text in Justice

[2] Justice Alexander's footnote 17 states that he, and his two concurring Justices, "agree with Chief Justice Madsen's discussion of comparative negligence and her opinion that on remand the trial court should 'be free to consider whether to instruct the jury on comparative fault' " in that suicide case. Concurrence/dissent of Justice Alexander, 170 Wn.2d at 937.

Sanders' opinion. It is also 180 degrees opposite from the Westlaw reporter's headnote 13 and associated text that a special relationship between jailer and inmate automatically eliminates contributory negligence. *See Gregoire,* 170 Wn.2d at 639-641, 644 ¶25.[3]

---

[3] The Westlaw headnotes and summary failed to recognize that Justice Madsen's dissent plus Justice Alexander's footnote 17 resulted in the actual holding on contributory negligence: that comparative fault and contributory negligence instructions ***may be*** an option in jail death and injury cases, ***including*** the suicide case of *Gregoire*. The West headnotes categorically swept away any potential for comparative fault or contributory negligence in a jail death case. West gives not one single footnote or summary point to Justice Madsen's controlling 5-vote majority on the contributory negligence issue. Instead, headnote 13 mis-stated the actual holding by conflating the jailor's "special relationship" with an assumption of the "duty of self-care":

> **13 Prisons**🔑Protection from violence, assault, or abuse
> **Prisons**🔑Self-harm in general
>
> Once a jailor forms a special relationship with an inmate, contributory negligence cannot excuse the jailor's duty to protect the inmate, even from self-inflicted harm. (Per Sanders, J., with three justices concurring and three justices concurring in part).

This is the mistake *Anderson* is built on. Only by not recognizing in its text the five-justice holding on contributory negligence in *Gregoire* could *Anderson* assert that the *dicta* in *Hendrickson* changed the ruling in *Gregoire.*[4]

Further, Chief Justice Madsen's majority is based on sound principles which take into account the custodial setting. It recognizes the difference between the jailer's "special relationship" in keeping the prisoner in health and safety (*see Shea v. City of Spokane,* 17 Wn.App. 236, 241, 562 P.2d 264 (1977) (citing earlier cases)) and a jail's assumption of a jailed person's "duty of self-care". *See Gregoire,* 170 Wn.2d at 649-50 (Madsen, C.J, concurring/dissenting) (assumption of duty of self-care is question of fact, stating elements).

---

[4] *See Grant County's Petition for Review* at 21:

> … 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).

While the jail's complete control over the jailed person means the jailer has a duty of ordinary care to provide for their health and safety, Justice Madsen focused on the next step in custody and control where a jailer "assumed responsibility" for the jailed person's "self-care" as the ***only*** time when contributory negligence of the inmate would ***not*** apply. *Id.* at 645.

> Both jail officials and Gregoire had duties—to provide for health and safety, and of self-care respectively—and **absent proof that the jail assumed Gregoire's duty of self-care, the trial court on remand should be free to consider whether to instruct the jury on comparative fault**.

170Wn.2d at 654-655 (emphasis added).

A significant problem with the *Anderson* decision is its elimination of the distinction between the "duty to produce and keep" the prisoner and the "assumption of responsibility for self-care," as in West's headnote 13, *supra*. The assumption of self-care means the jailer makes decisions for the jailed person – feeds, medicates, makes all choices, such as in an extreme mental health crisis or medical emergency, until the person can be transferred to an appropriate facility.

But in the context of local jails where that self-care responsibility has ***not*** been assumed by the jailer, which is the circumstance here, the jailed person makes his or her own decisions on what to eat from the available options, whether to buy anything allowed, whether to watch TV (if available) or to read a book, play cards, play chess. While there are precious few freedoms in jail, one choice is to consume or not consume what is available, from whatever source.[5] Thus, if there is a day-room or yard privilege and the jailed person has the opportunity to partake of more than the extra space and fresh air (such as to obtain contraband like the heroin in this case), it is that person's choice whether to seek it, buy it, accept it as a gift, ingest it.

[5] An exception can be a hunger strike. *See, e.g.*, W.P. Miller, "Hunger-Striking Prisoner", 6 *Journal of Prison and Jail Health* 40 (1986-1987), summary available at https://www.ojp.gov/ncjrs/virtual-library/abstracts/hunger-striking-prisoner (viewed 7/23/24) ("Prison authorities have only two choices [in a hunger strike]: do nothing and allow the prisoner to die or force feed the inmate.").

Justice Madsen's holding means that a jailed person's choice to ingest dangerous or illegal substances are, at least in part, their responsibility, as should also be his or her conduct with other jailed persons. *See Petition for Review* at 21-22 (makes no sense to preclude felony-bar defense for injuries sustained in fighting, committing sexual abuse, escape attempts).

Justice Madsen's five-justice holding recognizes the commonsense limits of what the "jailer" can control and that jailed people have responsibility for their own actions. But *Anderson* casts that all away, placing county jail operators at risk for actions over which they have no control, contrary to normal principles of law.

The correct application of the holdings in *Gregoire* – that contributory negligence is a potential defense in jail injury and death cases – makes a difference to the WCRG and the Named Counties who operate jails. The holding by Justice Madsen should be duly recognized and applied because that is, in fact,

what this Court decided in 2010, as other courts have recognized,[6] including state trial courts as noted *infra*.

### B. The Court Should Grant Review And Confirm The Legislative Policies in the Felony Bar And Intoxication Statutes Can Apply In The Jail Setting.

This case will determine whether a local jail operator is strictly liable for all injuries or deaths that may happen to a person when held in a jail, or whether that person may bear any responsibility for their own conduct which contributed in whole or in part to their injury or demise while jailed.

Until *Anderson*, the defense in such cases could include (as the facts warranted) the intoxication defense under RCW 5.40.060 and/or the felony bar defense under RCW 4.24.240 for jailed persons' deaths in Washington. For example, a trial judge dismissed a jail death case in 2022 entirely under the felony bar

---

[6] *See, e.g., Cooper v. Whatcom Cnty*., 650 F.Supp.3d 1144, 1163 (W.D.Wash., 2023) ("A close read of all of the opinions in *Gregoire* reveals…Chief Justice Madsen's conclusion about contributory fault in a jail setting—which was collectively joined by four other Justices—therefore appears to represent the majority position of the court.").

statute, resulting in a $50,000 settlement with Snohomish County while that appeal was pending. The analysis supporting the dismissal and settlement was dramatically changed by the *Anderson* decision as the article notes,[7] showing how much *Anderson* will change the law if review is not granted.

As described *supra*, *Amici* suggest the *Anderson* decision misunderstood that *Gregoire* was "clarified" by *Hendrickson*, with a result that skews the balance beyond what the two statutes state, what tort law requires, and what common sense accepts. *See Grant County's Petition for Review*, pp. 13-17. The misunderstanding of Justice Madsen's controlling opinion on the availability of contributory negligence in jail death cases, except where the jail has "assumed the inmate's duty of self-care", is the

[7] *See, e.g.*, Tall, Jonathan, "Jail had 'Immunity' to lawsuits over overdoses – so her family settled," THE EVERETT HERALD (Feb. 22, 2024), Ex. A to *Amici's* Motion, available at https://www.heraldnet.com/news/jails-had-immunity-to-lawsuits-for-overdoses-so-her-family-settled/ (visited 7/18/24).

key part of *Anderson*'s creation of strict liability and neutering of the two statutory defenses.

### C. If The Court Reviews RCW 4.24.420, The Court Should Clarify For Future Cases The Correct Burden Of Proof In A Jail Custodial Care Case Is Showing The Commission Of A Felony By A Preponderance of The Evidence.

Under this Court's "plain language" approach to statutory analysis, *Amici* suggest that if the Court addresses the 2021 version of RCW 4.24.420 and that it applies, then it should hold that subsection (1) applies when jails are at issue because jails are custodial in nature and the injuries, at least in this case, were not "arising out of law enforcement activities." The cases cited in *Anderson* are about the custodial duties to prisoners, not law enforcement. The 2021 changes to the statute added the elevated, criminal burden of proof to show the commission of a felony occurring "in an action arising out of law enforcement activities" – not custodial care.

Proper application of the plain terms of the 2021 statute requires application of subsection (1), which has the normal civil burden of proof. *See* Petition at pp. 23-24.

## V. CONCLUSION

*Amici Curiae* WCRG and the Asotin, Ferry, Lincoln, Skamania, Stevens, Wahkiakum, and Whitman Counties respectfully suggest the Court should grant review of Grant County's Petition for Review.

This document contains 2486 words, excluding the parts exempted from the word count by RAP 18.17.

Respectfully submitted this 25th day of July, 2024.

CARNEY BADLEY SPELLMAN, P.S.

By */s/Gregory M. Miller*
Gregory M. Miller, WSBA No. 14459
Linda B. Clapham, WSBA No. 16735

*Attorneys for Amici Curiae Washington Counties Risk Group and Members Asotin, Ferry, Lincoln, Skamania, Stevens, Wahkiakum, and Whitman Counties*

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via court e-filing website/Portal, which sends notification of such filing to the following:

***Attorneys for Attorneys for Barbara Anderson and Rod Batton***
James R. Dixon, WSBA 18014
Dixon & Cannon, Ltd.
701 N. 36th Street, Suite 420
Seattle, WA 98103
Tel: (206) 957-2247

Michael Schwartz, WSBA
11175 Schwartz Law Office, PLLC
321 First Ave. W.
Seattle, WA 98119
Tel: (206) 340-0990

Cisom@ecl-law.com
LDAVIS@ECL-LAW.COM
dplatis@feldmanlee.com
ken@appeal-law.com
mmcfarland@ecl-law.com
mschwartzlaw@hotmail.com
office@appeal-law.com
sflage@ecl-law.com
shelby@appeal-law.com

DATED this 25th day of July, 2024.

*S/ Allie M. Keihn*
Allie M. Keihn, Legal Assistant

## CARNEY BADLEY SPELLMAN

## July 25, 2024 - 2:27 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 103,111-4 |
| **Appellate Court Case Title:** | Barbara Anderson, et al. v. Grant County, Washington |
| **Superior Court Case Number:** | 19-2-00398-0 |

**The following documents have been uploaded:**

- 1031114_Briefs_20240725142153SC035701_3587.pdf
  This File Contains:
  Briefs - Amicus Curiae
  *The Original File Name was Memo of Amici Curiae WCRG and Members ISO Petition for Review.pdf*
- 1031114_Motion_20240725142153SC035701_2958.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  *The Original File Name was Motion of WCRG and Members for Permission to File An Amicus Curiae.pdf*

**A copy of the uploaded files will be sent to:**

- Cisom@ecl-law.com
- Keihn@carneylaw.com
- LDAVIS@ECL-LAW.COM
- clapham@carneylaw.com
- cogeorge@kingcounty.gov
- dplatis@feldmanlee.com
- james@dixoncannon.com
- ken@appeal-law.com
- litigators@dixoncannon.com
- mmcfarland@ecl-law.com
- mschwartzlaw@hotmail.com
- office@appeal-law.com
- sflage@ecl-law.com
- shelby@appeal-law.com

**Comments:**

Motion of WCRG and Members for Permission to File An Amicus Curiae Memo of Amici Curiae WCRG and Members ISO Petition for Review

---

Sender Name: Allie Keihn - Email: keihn@carneylaw.com
**Filing on Behalf of:** Gregory Mann Miller - Email: miller@carneylaw.com (Alternate Email: )

Address:
701 5th Ave, Suite 3600
Seattle, WA, 98104
Phone: (206) 622-8020 EXT 149

**Note: The Filing Id is 20240725142153SC035701**