No. 81253-5

MADSEN, C.J. (concurring/dissenting)—I agree with the lead opinion's assumption of risk analysis, but write separately to clarify that, depending on the facts, a trial court commits no error when it instructs the jury to apply comparative negligence to instances of jail suicide. A jail has a duty to provide health screenings and health care if necessary, and to protect an inmate from injury by third parties and jail employees, but it has no freestanding duty to prevent inmate self-inflicted harm. That duty arises only when specifically articulated by law or if the jail affirmatively assumes the inmate's duty of self-care. Even if this duty arises, it would not necessarily eliminate the inmate's duty of self-care. In instances where both parties have duties, comparative negligence may apply. Only when the plaintiff can prove that the jail assumed the inmate's duty of self-care does comparative negligence become inappropriate.

Discussion

The relationship between a jailor and an inmate is a "special relationship."

Caulfield v. Kitsap County, 108 Wn. App. 242, 255, 29 P.3d 738 (2001) ("Special relationships are typically custodial or at least supervisory, such as the relationship between doctor and patient, jailer and inmate, or teacher and student.").

Because there is a special relationship, there is some duty on the city of Oak Harbor's part. The lead opinion's mistake is to imply that merely finding a "special relationship" is sufficient to impose the specific duty to prevent suicide. This oversimplifies the analysis. A "special relationship" does not mean that the defendant owes the plaintiff every conceivable duty. As the court noted in *Caulfield,* the special relationship exception "do[es] not create new duties or eliminate recognized duties." *Id*. at 251 (citing *Meaney v. Dodd,* 111 Wn.2d 174, 178, 759 P.2d 455 (1988)). Indeed, each type of "special relationship" has a certain nature and scope from which specific duties are derived. *See Caulfield*, 108 Wn. App. at 255 (nature of special relationships between a county and "[p]rofoundly disabled" "vulnerable client[s]" creates a different duty of care than the special relationship between a hotel and guest).

In Washington, the duties of a jailer to an inmate (as of the time of Gregoire's arrest) derived from two sources: the *Restatement (Second) of Torts* and local administrative regulations.[1] Restatement (Second) of Torts § 314A

[1] The Washington Administrative Code originally listed jail operating procedures, including health screening and healthcare provision duties, but this code was obsolete by the time of Gregoire's arrest, after the legislature directed cities and towns to adopt their own jail operating standards. Former WAC 289-20-105, -110, -130 (1981), *decodified* by Wash. St. Reg. 06-14-008 (June 22, 2006); RCW 70.48.071 (requiring local cities and counties to promulgate their own jail operating standards). Jury instruction 14 lists the

(1965); Clerk's Papers (CP) at 40 (Jury instruction 14 listing "Washington State administrative regulations applicable to the Oak Harbor City Jail"). Taken together, these sources imposed a duty on the jail to screen for mental illness and provide emergency medical care but did not impose a duty to prevent self-inflicted harm. Washington's treatment of suicide as a volitional act supports this distinction between these duties. *Cf. Webstad v. Stortini*, 83 Wn. App. 857, 866, 924 P.2d 940 (1996) (stating suicide is a volitional rather than a negligent act).

Jury instruction 14, which was given in this case, correctly lists the administrative regulations applicable to Oak Harbor Jail. CP at 40. The duties of Oak Harbor Jail include (a) required screening for mental illness of all prisoners upon admission to the jail and (b) 24 hour access to emergency mental illness care or other medical care. *Id*. The regulations also require the jail to ensure that each shift include one person trained in cardiopulmonary resuscitation (CPR) and one person trained in receiving screening. *Id*. The instructions do not mention a specific duty imposed on the jail to prevent self-inflicted harm.

Restatement (Second) of Torts states: "One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a . . . duty to the other" "to take reasonable action (a) to protect them against unreasonable risk

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applicable administrative regulations. Clerk's Papers (CP) at 40.

of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others." Restatement (Second) of Torts § 314A(4), (1). Comment d clarifies that the scope of risk a custodian must protect against includes "the actor's [i.e., the custodian's] own conduct, or the condition of his land or chattels," and "risks arising from forces of nature or animals," "from the acts of third persons [regardless of intent]," "from pure accident," or "from the negligence of the plaintiff himself." *Id*. cmt. d.

Notably, the scope of the *Restatement* as explained in comment d makes no mention of intentional self-inflicted harm, only negligent self-inflicted harm. In Washington, suicide is not considered negligence, but rather volitional conduct. "Suicide is 'a voluntary willful choice determined by a moderately intelligent mental power[,] which knows the purpose and the physical effect of the suicidal act.'" *Webstad*, 83 Wn. App. at 866 (alteration in original) (internal quotation marks omitted) (quoting *Hepner v. Dep't of Labor & Indus.*, 141 Wash. 55, 59, 250 P. 461 (1926)).

The Court of Appeals adopted section 314A of the *Restatement (Second) of Torts* in *Shea v. City of Spokane*, 17 Wn. App. 236, 241-42, 562 P.2d 264 (1977), *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978), which held that a city has a nondelegable duty to provide medical care to a prisoner in custody. The duty to render medical aid is derived from the "special relationship" of custody that deprives the prisoner

of liberty and the opportunity to seek medical aid independently. *Shea*, 17 Wn. App. at 242 (citing Restatement (Second) of Torts § 314A(4) (1965)).

In interpreting the *Restatement*, this court has clarified that the mere existence of a special relationship does not make the defendant a guarantor of the plaintiff's safety. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 203-04, 943 P.2d 286 (1997) (interpreting *Restatement (Second) of Torts* § 344, including comments d and f limiting scope of the duty). Indeed, every person has a duty to use reasonable care for his or her own health and safety. Charles J. Williams, *Fault and the Suicide Victim: When Third Parties Assume a Suicide Victim's Duty of Self-Care*, 76 Neb. L. Rev. 301, 305 n.20 (1997) (citing 57A Am. Jur. 2d *Negligence* § 843 (1989)). Thus, in the ordinary case, the jail and the inmate both have duties and their respective fault should be apportioned by the jury through the comparative negligence doctrine. Only proof that the defendant assumed the plaintiff's duty of self-care should foreclose comparative negligence.

This conclusion is born out in our state's case law. For example, *Yurkovich v. Rose*, 68 Wn. App. 643, 847 P.2d 925 (1993), involved a negligence action against a bus driver and school district by the parents of a 13 year old girl who was killed crossing a highway shortly after exiting a school bus. The Court of Appeals recognized a special relationship and found "school bus operators owe child passengers a duty of the highest degree of care consistent with the practical operation of the bus." *Id*. at 648 (citing *Webb v. Seattle*, 22 Wn.2d 596, 602, 157

P.2d 312 (1945)). Although the bus driver owed a duty, and through his negligence created the risk of harm, the court nevertheless approved instructions that included contributory negligence. *Id*. at 656. The court reasoned that the plaintiff still owed a duty of self-care that neither the school district nor the bus driver assumed.

Similarly, *Pearce v. Motel 6, Inc.*, 28 Wn. App. 474, 480, 624 P.2d 215 (1981), involved a negligence action against a motel owner brought by a guest who slipped on the shower floor. The Court of Appeals recognized that innkeeper-guest relationships create specific duties to guests regarding unsafe conditions on the premises. *Id*. at 479. However, reasoning that motel owners do not guarantee their guests' safety, the Court of Appeals found that comparative negligence applies because it takes into account the two separate duties: of the motel owner to his guest and of the guest to himself or herself. *Id*. at 480.[2]

Whether the defendant jail has assumed the inmate's duty of self-care is generally a question of fact. To prove a defendant assumed an inmate's duty, a plaintiff must prove the defendant (i) had custody of the inmate, (ii) had knowledge, actual or constructive, of the inmate's self-destructive tendencies, and (iii) either expressly or implicitly assumed the inmates's duty of self-care. *See Caulfield*, 108 Wn. App. at 255 (custodial relationship between jailer and inmate);

[2] The lead opinion complains about my reliance on *Yurkovich* and *Pearce*, saying that they do not concern custodial relationships. They do, however, concern special relationships and application of comparative fault and contributory negligence principles.

Shea, 17 Wn. App. at 242 (duty of jail to render aid is derived from special relationship of custody and includes duty to provide medical care); *Bailey v. Town of Forks*, 108 Wn.2d 267, 268, 737 P.2d 1257, 753 P.3d 523 (1987) (discussing duty arising from special relationship in context of governmental defendant); Restatement (Second) of Torts § 314A cmt. e (regarding the duty arising out of a special relationship, "[t]he defendant is not liable where he [or she] neither knows nor should know of the unreasonable risk"); 57B Am. Jur. 2d *Negligence* § 857 (2004) (regarding the duty of self-care in context of contributory negligence, "the standard of conduct to which the actor must conform for his or her own protection is that of a reasonable person under like circumstances"). Unless the plaintiff establishes an assumption of his duty of self-care, a jury should not be foreclosed from considering comparative fault.[3]

The lead opinion relies heavily on *Christensen v. Royal School District No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005), and *Hunt v. King County*, 4 Wn. App. 14, 22-23, 481 P.2d 593 (1971), two cases in which defendants in special relationships did assume the plaintiff's duty of self-care, making comparative fault

[3] The lead opinion misstates the standard that I propose when it says that under my view the inmate's duty of self-care would "be assumed through constructive notice in jail suicides generally." The lead opinion says that jail suicides are not infrequent and are foreseeable, if not expected. Lead opinion at 18. The lead opinion's rewording of the analysis should be seen for what it is, an attempt to alter my proposed three-part test into a single pro forma inquiry, concluding with automatic constructive notice, and therefore duty, in virtually all cases. Such a meaningless inquiry does not accord with the concept of comparative fault and contributory negligence as set forth in our statutes and with my proposal that the defendant prove that the jail assumed the duty of self-care.

inappropriate. However, both of these cases involve unique circumstances not relevant here. Specifically, the *Christensen* holding was unique to sexual abuse. The court held that children, as a matter of public policy, have no duty to protect themselves from sexual abuse by teachers. *Id*. at 67, 69-70. Policy considerations involving sexual abuse of a child in the public school context do not apply in this case.

The second case, *Hunt,* involved the special relationship between a mentally disturbed patient and a closed psychiatric hospital. As noted by the lead opinion, the *Hunt* court held "the scope of duty owing by the hospital to its patients includes the duty to safeguard the patient from the reasonably foreseeable risk of self-inflicted harm through escape." *Id*. at 20. However, in explaining the duty owed, the *Hunt* court pointed out that every duty necessarily has a scope. The *Hunt* court contrasted the limited scope of a driver's duty to obey traffic laws, which does not include a duty to protect from self-inflicted harm (other than by "irresistible impulse"), to the broad scope of a psychiatric hospital's duty to prevent volitional self-inflicted injury. *Id*. at 21-22 (citing *Vistica v. Presbyterian Hosp. & Med. Ctr. of S.F., Inc.*, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967)).

Both *Hunt* and *Vistica* involved cases of a hospital psychiatric ward taking custody of a mentally disturbed patient for the purpose of treatment. In both cases, a concerned parent informed the hospital of the patient's strong desire to escape

regardless of physical harm an attempted escape might cause, and in both cases, hospital staff expressly assured the parent that preventative measures would be taken. *Hunt*, 4 Wn. App. at 17; *Vistica*, 67 Cal. 2d at 467-68. Even where a hospital had not expressly made such assurances, the nature of a psychiatric hospital may in some cases imply that the hospital takes custody of the patient with the primary purpose being treatment and prevention of self-inflicted harm. For these reasons, the defendants' assumption of the plaintiff's duty of self-care in *Hunt* and *Vistica* accords with the nature of the special relationship between the psychiatric ward of a hospital and a mentally disturbed patient.

In contrast, treatment and prevention of self-inflicted harm are not generally the purpose of incarceration. Moreover, although regulations require at least one person per shift on jail staff to be familiar with basic health requirements, such as mental and physical screening procedure and basic CPR, jail staff are not required to be mental health experts. CP at 40.[4] In contrast, psychiatric ward hospital staff are highly trained to recognize and prevent self-destructive behavior. As such, hospital staff can be expected to meet the higher standard of care of a health care professional. RCW 7.70.040(1); *Adair v. Weinberg*, 79 Wn. App. 197, 202 n.2, 901 P.2d 340 (1995) (citing *Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 442-43, 663 P.2d 113 (1983)). In sum, the scope of the duties owed by a jailer to an inmate are not sufficiently similar to psychiatric ward-patient relationship to

[4] The jury was instructed to this effect in instruction 14.

find that the jail assumed the inmate's duty of self-care.

Other jurisdictions and sources have also recognized that not all defendants in a special relationship assume a plaintiff's duty of self-care and thus agree that contributory negligence can be appropriate in instances of suicide.

In *Champagne v. United States*, 513 N.W.2d 75, 80 (N.D. 1994), the Supreme Court of North Dakota reasoned that whether a psychiatric hospital assumes a mental patient's duty of self-care is not a forgone conclusion, but instead depends upon the capacity of the patient. The court used a sliding scale analysis in which "[t]he worse the suicidal patient's diminished capacity, the greater the medical provider's responsibility." *Id*. at 81. Where the patient retained sufficient capacity, comparative fault analysis remained appropriate. *Id*.

Similarly, in *Molton v. City of Cleveland*, 839 F.2d 240, 247-48 (6th Cir. 1988), the Sixth Circuit Court of Appeals upheld a contributory negligence jury instruction in the case of a jail inmate suicide, concluding the facts provided sufficient evidence to support the jury's finding of the inmate's contributory negligence. *Id*. at 248.

The lead opinion relies heavily on statements from other jurisdictions to support its assertion that applying contributory negligence to inmate suicide would effectively "gut" the jail's duty to prevent inmate self-inflicted harm. However, this conclusion does not follow. First, as discussed above, the jail has no specific duty to prevent an inmate's self-inflicted harm, so this duty cannot be "gutted."

Second, the application of comparative fault will not absolve the jail of meeting its duties toward prisoners. The purpose of comparative negligence is to apportion the liability between two parties who both violated their duties. *See* RCW 4.22.005, .070. In the face of contributory negligence, a jail must still pay for its fair share of liability for any negligent departure from its duties. This is in contrast to primary assumption of risk, the application of which would completely bar a plaintiff's claim.

Finally, the lead opinion's heavy reliance on cases from Indiana and Minnesota is misplaced. These jurisdictions have different liability rules that cause contributory negligence to operate more like Washington's primary assumption of risk doctrine. The harsher operation of the doctrine in these jurisdictions makes contributory negligence less appropriate in Indiana or Minnesota than it is in Washington.

For example, the lead opinion cites *Sauders v. County of Steuben*, 693 N.E.2d 16, 20 (Ind. 1998), in which the Indiana court explained that comparative fault analysis is not appropriate to custodial suicide because it "would seem to risk random 'all or nothing' results based on a given jury's predilections." However, the Indiana court characterized its own holding as follows:

> [W]e hold that the decedent's act of suicide cannot be the basis for a finding of contributory negligence or incurred risk that would bar a plaintiff's claim for wrongful death of an inmate. To permit the suicide (or attempted suicide) *to constitute a bar to recovery* would eliminate altogether a claim for breach of a custodian's duty to take reasonable steps to protect an inmate from harm, self-inflicted or

otherwise.

Id. at 17 (emphasis added). The "all or nothing" "bar to recovery" result the Indiana court feared was a result of that jurisdiction's Tort Claims Act and case law in which any amount of contributory negligence completely bars recover against government defendants. *Id*. at 18 (citing Ind. Code § 34-4-16.5-1 et seq. (1993); *Town of Highland v. Zerkel*, 659 N.E.2d 1113, 1120-21 (Ind. Ct. App. 1995)). In this context, contributory negligence would "gut" a jail's duty. This is in contrast to Washington's pure comparative fault law, which allows a plaintiff to recover from a defendant regardless of the ratio of fault. RCW 4.22.005, .070. In our quite different context, comparative fault will not bar recovery, risk an "all or nothing" result, or gut the jail's duty.[5]

Similarly, the lead opinion also cites language from *Sandborg v. Blue Earth County*, 615 N.W.2d 61, 65 (Minn. 2000) (quoting Restatement (Second) of Torts § 449 cmt. b), in which the Minnesota court concludes application of comparative

[5] The lead opinion contends that I have misinterpreted *Sauders*' statement about "all or nothing" results as a statutory bar to recovery. Lead opinion at 15 n.7. The lead opinion fails to understand that, as the court in *Sauders* expressly stated, because the defendant in the case was a government entity, the action was covered by the Indiana Tort Claims Act. "[U]nder the Tort Claims Act, as at common law, both contributory negligence and incurred risk *operate to bar a plaintiff's recovery against government actors*." *Sauders*, 693 N.E.2d at 18 (emphasis added). Thus, as I explain, under Indiana law, the "all or nothing" "bar to recovery" result of which the Indiana court spoke was in reference to the fact that *any* contributory negligence on the plaintiff's part would absolutely bar any recovery. Therefore it would, as I explain, "gut" a jail's duty. Contrary to the lead opinion's erroneous assessment, the Indiana court's reference was *not* to the possibility that a jury might assign 100 percent of the fault to the plaintiff, lead opinion at 15 n.7, but to the possibility that a jury might assign *any* fault.

fault "'would be to deprive the [inmate] of all protection and to make the [jail's] duty a nullity.'" However, as the Respondent points out, Minnesota is a modified comparative fault jurisdiction "barring recovery to a plaintiff who's [sic] fault is determined to be greater than the fault of the person from whom recovery is being sought." Resp't's Suppl. Br. at 14-15 (citing Minn. Stat. § 604.01). 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.

Differences in the law of these jurisdictions undercuts the lead opinion's reliance on *Sauders* and *Sandborg*.

Conclusion

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.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Susan Owens

Justice James M. Johnson