IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TANYA GREGOIRE, guardian for the person and estate of BRIANNA ALEXANDRA GREGOIRE, a minor, and as personal representative for EDWARD ALBERT GREGOIRE, deceased, Petitioner, v. CITY OF OAK HARBOR, a municipal corporation, Respondent, RICHARD WALLACE, and his marital community; BENJAMIN SLAMAN, and his marital community; JOHN DYER and his marital community; RAYMOND PAYEUR and his marital community; STEVEN NORDSTRAND and his marital community; WILLIAM WILKIE, and his marital community, Defendants.	No. 81253-5 En Banc Filed December 2, 2010

SANDERS, J.—Shortly after police arrested Edward Gregoire (Gregoire), he displayed a range of unstable behavior, including thrashing violently, tussling with officers, crying, making irrational statements, and

asking officers to shoot him. Roughly half an hour after transporting Gregoire to the Oak Harbor jail, officers found Gregoire hanging by his neck from a ventilation grate. Gregoire died soon thereafter. Tanya Gregoire (Ms. Gregoire), personal representative of Gregoire's estate, sued Oak Harbor for negligence in his death.

During a jury trial, the court read instructions on assumption of risk and contributory negligence, over plaintiff's objections. The jury found Oak Harbor negligent, but that its negligence was not the proximate cause of Gregoire's death. On appeal the Court of Appeals affirmed the trial court, holding the jury instructions did not prejudice Ms. Gregoire's case. We now reverse the Court of Appeals. Because jailors owe a special duty of care to their inmates, jury instructions regarding assumption of risk and contributory negligence are inappropriate in cases of inmate suicide.

FACTUAL AND PROCEDURAL HISTORY

In December 1995 Washington State Trooper Harry Nelson arrested Gregoire on outstanding misdemeanor warrants. After handcuffing Gregoire, Nelson placed him in a patrol car for transport to the Oak Harbor jail. During transport Gregoire kicked and kneed the protective shield between the front and rear seats of the patrol car. Between violent bouts, Gregoire descended into despondency, at one point condemning his friends because, "I take one

step forward and my friends take me two steps back." Concerned that Gregoire might return to violence at the jail, Nelson called dispatch to have another officer meet the patrol car there. State Trooper Scott Wernecke waited outside.

When the patrol car arrived at the jail, Nelson unbuckled Gregoire's seat belt, allowing Gregoire to step out of the patrol car. As Nelson bent down to retrieve Gregoire's hat from the car's passenger compartment, Gregoire broke free and ran from the troopers. Nelson grabbed Gregoire's shirt, tearing it, and Gregoire fell to the ground. Nelson and Wernecke forcibly restrained him. Gregoire reportedly screamed, "Why don't you just shoot me, please just shoot me," as the troopers carried a writhing Gregoire into the jail. Clerk's Papers (CP) at 628. Oak Harbor Police Officer William Wilkie aided the troopers by fetching plastic flex cuffs to restrain Gregoire's legs. Wernecke struck Gregoire on the thigh with his collapsible baton to halt Gregoire's kicking. Inside the jail, officers strapped Gregoire into a restraint chair in a holding cell. Over the next few minutes, Gregoire reportedly calmed down enough for officers to unstrap him from the restraint chair and remove the flex cuffs. They transported Gregoire to a regular cell.

Jail officials did not administer any mental or physical health screening before leaving Gregoire alone in the cell. Minutes later a jail official

observed Gregoire crying. Approximately 10 minutes after the official saw Gregoire crying, an officer found him hanging from a bed sheet strung through the cell's ventilation grate. The officer called for help using the jail intercom and panic alarm. The officer ran to his desk to get a key to Gregoire's cell and a pair of scissors to cut him down. Several Oak Harbor police officers responded to the alarm. One called for an ambulance on his radio. Two responding officers checked Gregoire's pulse and breathing, but observed neither. None of the officers administered CPR (cardiopulmonary resuscitation) , even though it had been 5 to 10 minutes since Gregoire was last seen alive in the cell. When paramedics arrived, they detected warmth in Gregoire's body, and began CPR. After 15 or 20 minutes, the paramedics noticed a faint carotid pulse. CPR continued for approximately 25 minutes as paramedics transported Gregoire to the hospital. At the emergency room, doctors designated Gregoire's condition a "premorbid state." Doctors pronounced Gregoire dead shortly thereafter.

In 1998 Ms. Gregoire, acting as guardian ad litem for Gregoire's minor child, Brianna Gregoire, and as personal representative of Gregoire's estate, brought suit in the United States District Court for the Western District of Washington. Ms. Gregoire asserted three civil rights claims, under 42 U.S.C. § 1983, and state law claims of negligence and wrongful death against the city

of Oak Harbor and the various individual officers and jailors who interacted with Gregoire. On October 5, 2001 Judge Lasnik dismissed Ms. Gregoire's section 1983 and punitive damages claims, as well as the negligence claims against Nelson and Wernecke. Judge Lasnik declined to dismiss the remaining state law claims, ruling the parties had not substantively addressed the issue of supplemental jurisdiction. On May 6, 2002 Judge Lasnik declined to exercise supplemental jurisdiction and dismissed without prejudice the remaining negligence claims.

On May 30, 2002, Ms. Gregoire filed suit in Island County Superior Court, alleging wrongful death, state constitutional violations, civil rights claims, and negligence. Judge Alan R. Hancock dismissed the federal claims based on res judicata and dismissed the state constitutional claims for lack of a private cause of action. On June 12, 2003 Judge Hancock issued a letter decision denying Oak Harbor's motion for summary judgment on the remaining negligence claims.

In May 2006, a jury trial commenced before Judge Hancock on the wrongful death claim. Ms. Gregoire contended Oak Harbor negligently failed to satisfy its duty to protect Gregoire. Over Ms. Gregoire's objection, the trial court allowed Oak Harbor to assert affirmative defenses of assumption of risk

and contributory negligence[1] and instructed the jury on those theories. Oak Harbor also defended on two different proximate-cause theories, one of which rested on the affirmative defenses.

On May 31, 2006, the jury returned a verdict for Oak Harbor, finding that the city acted negligently, but its negligence was not a proximate cause of Gregoire's death. Ms. Gregoire appealed the verdict to the Court of Appeals, Division One, which affirmed. Ms. Gregoire argued that where a special relationship creates a special affirmative duty of care, assumption of risk does not apply. The Court of Appeals agreed the custodial relationship between jailor and inmate constitutes a special relationship but rejected the claim because Ms. Gregoire had not cited authority for the proposition that assumption of risk does not apply. *Gregoire v. City of Oak Harbor*, noted at 141 Wn. App. 1016, 2007 WL 3138044, at *4 (citing *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978)).

[1] Before April 1, 1974 contributory negligence was a complete bar to plaintiff's recovery in Washington if the damage suffered was considered partly the plaintiff's fault. *See* Laws of 1973, 1st Ex. Sess., ch. 138, § 1, *codified at* RCW 4.22.010, *repealed by* Laws of 1981, ch. 27, § 17; *Godfrey v. State*, 84 Wn.2d 959, 961 n.1, 530 P.2d 630 (1975). But this State, like most others, has abolished this doctrine and adopted a comparative fault scheme. In 1981, Washington embraced its current contributory fault scheme of apportioning damages between a negligent plaintiff and a negligent defendant. Laws of 1981, ch. 27, § 8, *codified at* RCW 4.22.005. We use the term "contributory negligence" in this opinion for consistency with the given jury instructions and in reference to the decedent's alleged own negligence, not to the now-superseded doctrine.

Ms. Gregoire filed a motion for reconsideration, which the Court of Appeals denied. She then petitioned this court for review, which we granted to determine whether the trial court erred by instructing the jury on assumption of risk and contributory negligence defenses in a case alleging negligent failure to prevent an inmate's suicide while in jail custody. *Gregoire v. City of Oak Harbor*, 164 Wn.2d 1007, 195 P.3d 86 (2008). We answer in the affirmative. When a special relationship forms between jailor and inmate, sparking a duty for the jailor to protect the inmate from self-inflicted harm, the defenses of assumption of risk and contributory negligence are inappropriate. In a claim of negligence stemming from inmate suicide, giving these instructions necessarily results in prejudicial error. We reverse the Court of Appeals and remand for a new trial consistent with this opinion.

STANDARD OF REVIEW

We review jury instructions de novo, and an instruction containing an erroneous statement of the law is reversible error where it prejudices a party. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). Jury instructions are sufficient if "they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). The court reviews a challenged jury instruction de

novo, within the context of the jury instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006).

ANALYSIS

I. Jailors owe inmates an affirmative duty, which cannot be nullified by an inmate assuming the risk of death by suicide

Washington courts have long recognized a jailor's special relationship with inmates, particularly the duty to ensure health, welfare, and safety. In *Kusah v. McCorkle*, 100 Wash. 318, 325, 170 P. 1023 (1918), this court acknowledged that a sheriff running a county jail "owes the direct duty to a prisoner in his custody to keep him in health and free from harm, and for any breach of such duty resulting in injury he is liable to the prisoner or, if he be dead, to those entitled to recover for his wrongful death." The duty owed "is a positive duty arising out of the special relationship that results when a custodian has complete control over a prisoner deprived of liberty." *Shea v. City of Spokane*, 17 Wn. App. 236, 242, 562 P.2d 264 (1977), *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978); *see also Caulfield v. Kitsap County*, 108 Wn. App. 242, 255, 29 P.3d 738 (2001). In *Shea*, which involved a municipal jail, the court noted this duty of providing for the health of a prisoner is nondelegable. 17 Wn. App. at 242.

The legislature has subjected municipal jails to regulation and public duty. Local governments operating jails must adopt standards "necessary to meet federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff . . . ." RCW 70.48.071. Administrative regulations require Washington jails to perform suicide screening and suicide prevention programs. *See* former WAC 289-20-105, -110, -130, -260 (1981). In jury instruction 13, the trial court recognized Oak Harbor's "duty to provide for the mental and physical health and safety needs of persons locked in the jail." CP at 39. Oak Harbor did not object to the instruction.[2]

We have recognized that "the general rubric 'assumption of risk' has not signified a single doctrine but rather has been applied to a cluster of different concepts." *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987). Four varieties of assumption of risk operate in Washington: (1) express, (2) implied primary, (3) implied unreasonable,[3] and (4) implied reasonable assumption of risk. *Id*. The first two types, express and implied primary assumption of risk, arise when a plaintiff has consented to relieve the defendant of a duty—owed by the defendant to the plaintiff—regarding

[2] "[J]ury instructions that are not objected to are treated as the properly applicable law for purposes of appeal." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

[3] "[I]mplied unreasonable assumption of risk is subsumed under contributory negligence and should be treated equivalently." *Kirk*, 109 Wn.2d at 454.

specific known risks. *Id.* The remaining two types apportion a degree of fault to the plaintiff and serve as damage-reducing factors. *Id.* at 453-54, 457-58; *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 497-99, 834 P.2d 6 (1992). Express and implied primary assumption of risk share the same elements of proof: "The evidence must show 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." *Kirk*, 109 Wn.2d at 453. Implied primary assumption of risk is a complete bar to recovery for the risk assumed. *Dorr v. Big Creek Wood Prods., Inc.*, 84 Wn. App. 420, 425, 927 P.2d 1148 (1996). Here, the trial court instructed the jury on the elements of implied primary assumption of risk,[4] permitting Oak Harbor to assert the complete defense. We note that the trial court confusingly instructed the jury that Gregoire's assumption of risk would relieve Oak Harbor of its duty of care, but subsequently instructed jurors on how to apportion fault if they

[4] Jury instruction 6 stated, "Defendant further claims that Mr. Gregoire was contributorily negligent and assumed the risk of death when he hanged himself, and therefore his own conduct was the sole proximate cause of his death." CP at 32; *see also* CP at 46 (Jury Instruction 20) ("It is a defense to an action for wrongful death that the decedent impliedly assumed a specific risk of harm."); CP at 47 (Jury Instruction 21) (instructing jury that to establish assumption of risk, Oak Harbor had the burden of proving (1) Gregoire had knowledge of the specific risk associated with hanging himself; (2) he understood the nature of the risk; (3) and he voluntarily chose to accept the risk and impliedly consented to relieve Oak Harbor of its duty of care; and then instructing the jury on how to apportion comparative fault).

concluded Gregoire assumed the risk. *See* CP at 46-47 (Jury Instructions 20-21).

Whether jury instructions regarding assumption of risk and contributory negligence apply to suits alleging negligence in jail suicides is a matter of first impression for this court. Other jurisdictions have tackled assumption of risk comprehensively on similar facts, and we find the reasoning from the Indiana Supreme Court persuasive. In *Sauders v. County of Steuben*, 693 N.E.2d 16, 19 (Ind. 1998), the court refused to apply assumption of risk and contributory negligence in a jail suicide case to "completely obviate the custodian's legal duty to protect its detainees from that form of harm." The *Sauders* court relied, in part, on the Seventh Circuit Court of Appeal's reasoning in *Myers v. County of Lake*, 30 F.3d 847, 853 (7th Cir. 1994). In *Myers*, which involved a juvenile delinquent's custodial suicide attempt, the court stated that "[a] duty to prevent someone from acting in a particular way logically cannot be defeated by the very action sought to be avoided." *Id*.

This court has analyzed express releases seeking to immunize a defendant for negligent breach of a duty imposed by law and found that these violate public policy. *See Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 110 Wn.2d 845, 758 P.2d 968 (1988) (invalidating on public policy grounds

preinjury releases required of students as a condition for participating in interscholastic athletics); *Vodopest v. MacGregor*, 128 Wn.2d 840, 913 P.2d 779 (1996) (invalidating on public policy grounds preinjury releases to the extent they exculpate medical research facilities for negligence in performance of research). In *Wagenblast* we recognized courts "are usually reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to rid themselves of that obligation by contract." 110 Wn.2d at 849. It flows logically that this court is even more reluctant to allow jailors charged with a public duty to shed it through a prisoner's purported implied consent to assume a risk, especially in a context where jailors exert complete control over inmates.

The trial court erred by allowing Oak Harbor, a municipality that was sued for failing to carry out its duty to provide for the health, welfare, and safety of an inmate, to raise the complete defense of implied primary assumption of risk. In the case of inmate suicide, we find the implied nature of the purported assumption of risk markedly inappropriate. Allowing Oak Harbor to invoke assumption of risk effectively eviscerated the city's duty to protect inmates in its custody. The jail cannot cast off the very duty with which it is charged through a violation of that duty.

II. Jailor's special duty to inmates includes protecting against suicide, to which contributory negligence cannot be a defense

In jury instruction 19, the trial court stated, "Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed." CP at 45. Instruction 6 provided, "Defendant further claims that Mr. Gregoire was contributorily negligent and assumed the risk of death when he hanged himself, and therefore his own conduct was the sole proximate cause of his death." CP at 32. The trial court also instructed the jury that Oak Harbor bore the burden of proving "the negligence of Mr. Gregoire was the proximate cause of his own death and of any damage to his estate and damage to his daughter, Brianna Gregoire, and was therefore contributory negligence." CP at 35 (Jury Instruction 9).

As outlined above, jailors have a special relationship with inmates, creating an affirmative duty to provide for inmate health, welfare, and safety.[5] In other special-relationship contexts, Washington courts have found this duty extends to self-inflicted harm. In *Hunt v. King County*, 4 Wn. App. 14, 22-23,

[5] Courts in other jurisdictions have extended prison authorities' duty to protect inmates from harm to include a prisoner's own self-destructive acts. *See, e.g.*, *Hayes v. City of Des Plaines*, 182 F.R.D. 546 (N.D. Ill. 1998) (applying Illinois law) (noting law enforcement owes a general duty of care to those arrested and incarcerated, including protecting prisoners from self-injury or self-destruction, under the circumstances of the particular case); *Maricopa County v. Cowart*, 106 Ariz. 69, 471 P.2d 265 (1970) (holding juvenile detention home officials must exercise such reasonable care and attention as a juvenile's mental and physical condition, if known, may require).

481 P.2d 593 (1971). the Court of Appeals upheld a negligence verdict against a hospital for failure to protect a patient from attempted suicide. The *Hunt* court indicated:

> Such a duty [to safeguard] contemplates the reasonably foreseeable occurrence of self-inflicted injury whether or not the occurrence is the product of the injured person's volitional or negligent act. . . . Any other rule would render the actor's duty meaningless. The rule would in the same breath both affirm and negate the duty undertaken or imposed by law. The wrongdoer could become indifferent to the performance of his duty knowing that the very eventuality that he was under a duty to prevent would, upon its occurrence, relieve him from responsibility.

Id. In a case involving a school district, we recently held the defense of contributory negligence is inappropriate against a 13-year-old student in a tort action for sexual abuse by her teacher. *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 71, 124 P.3d 283 (2005). In the case of suicide, a similar principle applies to the jailor-inmate relationship, even when the inmate is not a minor. 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. To hold otherwise would gut the duty.[6]

[6] The concurrence/dissent claims *Hunt*, 4 Wn. App. 14, and *Christensen*, 156 Wn.2d 62, do not apply. Concurrence/dissent at 7. While there is no silver-bullet case in our jurisprudence that resolves this matter of first impression, *Hunt* and *Christensen* make the best analogy to the facts before us. In contrast the concurrence/dissent's reliance on *Yurkovich v. Rose*, 68 Wn. App. 643, 847 P.2d 925 (1993), and *Pearce v. Motel 6, Inc.*, 28 Wn. App. 474, 480, 624 P.2d 215 (1981), is misplaced because those cases—both from the Courts of Appeal—involve noncustodial relationships. Concurrence/dissent at 5-6. While we note the obvious differences between "custody" in schools, mental hospitals, and jails,

In cases of jail suicide, other jurisdictions agree the existence of a duty to protect should forgive the injured party's alleged contributory negligence. Again, in *Sauders*, the Indiana Supreme Court said,

> custodial suicide is not an area that lends itself to comparative fault analysis. As already noted, the conduct of importance in this tort is the custodian's and not the decedent's. Further, it is hard to conceive of assigning a percent of fault to an act of suicide. . . . A comparative balance of "fault" in a suicide case would seem to risk random "all or nothing" results based on a given jury's predilections.

693 N.E.2d at 20.[7] Similarly, the Oregon Court of Appeals rejected contributory negligence as a defense to an attempted jail suicide, concluding that "the acts which plaintiff's mental illness allegedly caused him to commit were the very acts which defendant had a duty to prevent, and these same acts, cannot, as a matter of law constitute contributory negligence." *Cole v. Multnomah County*, 39 Or. App. 211, 592 P.2d 221, 223 (1979) (citing *Vistica v. Presbyterian Hosp. & Med. Ctr. of S.F., Inc.*, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967); *Hunt*, 4 Wn. App. 14). The Oregon court noted that even if the plaintiff was not mentally ill, or if corrections officials

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Christensen and *Hunt* present much closer similarities to the instant matter than do *Yurkovich* and *Pearce*. We do not contest that contributory negligence has a time and place in our courts; however, that time and place does not include suicides of jail inmates.

[7] *Sauders* mentions "all or nothing" results "based on a given jury's predilections" only to call attention to a jury's likelihood of assigning 100 percent fault to the suicide victim and none to the jail—leaving the plaintiff with zero damages. 693 N.E.2d at 20. The concurrence/dissent misinterprets this statement as a statutory bar to recovery. Concurrence/dissent at 11-12.

were reasonably unaware of any illness, for defendants to prevail they would have to prove they were not negligent, not that plaintiff was contributorily negligent. *Id*.

More recently, the Supreme Court of Minnesota held that a jury should not determine, compare, or apportion fault on the part of an inmate who committed suicide while in custody because of the duty owed to protect him from self-inflicted harm. *Sandborg v. Blue Earth County*, 615 N.W.2d 61, 65 (Minn. 2000). The *Sandborg* court reasoned:

> "The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability cannot relieve him from liability. . . . *To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity.*"

Id. (quoting RESTATEMENT (SECOND) OF TORTS § 449 cmt. b (1965)).[8]

We find the reasoning from the above-referenced opinions persuasive. The trial court erred by instructing the jury on contributory negligence because the injury-producing act—here, the suicide—is the very condition for which the duty is imposed. The jail's duty to protect inmates includes

[8] The court stressed this principle was not equivalent to imposing strict liability on defendants because the plaintiff must still prove the jail breached a reasonable standard of care. 615 N.W.2d at 65. Disallowing the defenses of contributory negligence and assumption of risk does not result in strict liability for jails because inmates must still establish the jail negligently performed its duty.

protection from self-inflicted harm and, in that light, contributory negligence has no place in such a scheme.

The concurrence/dissent cites *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257, 753 P.2d 523 (1987), to assert contributory negligence should apply unless the plaintiff shows the jail assumed the inmate's duty of self-care. Concurrence/dissent at 6.[9] *Bailey* does not apply to the facts of this case. *Bailey* discusses exceptions to the public duty doctrine, not contributory negligence. We have described the public duty doctrine to require "'for one to recover from a municipal corporation in tort it must be shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.*, a duty to all is a duty to no one).'" *Bailey*, 108 Wn.2d at 265 (quoting *J&B Dev. Co. v. King County*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983), *overruled on other grounds by Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988)). Under *Bailey*, if no duty "run[s] to the injured plaintiff from agents of the municipality," there is no liability at all. *Id*. at 266. The concurrence/dissent states: "Unless the plaintiff establishes an assumption of his duty of self-care, a jury should not be foreclosed from considering comparative fault."

[9] The concurrence/dissent invents a three-prong test to determine whether Oak Harbor assumed Gregoire's duty. *See* concurrence/dissent at 6. It offers no accurate support for this test, which is contained nowhere in *Bailey*.

Concurrence/dissent at 7. In other words, if the plaintiff does not show that the jail assumed the duty of self-care, the jury can entertain comparative fault. That is wrong, even under *Bailey*. *Bailey* says that if the plaintiff does not show that the jail assumed the duty of self-care, the plaintiff cannot sue at all. *Bailey*'s test does not permit comparative negligence; it serves as a wholesale bar to recovery. *Bailey*'s all-or-nothing approach does not apply. Moreover, while I do not subscribe to the concurrence/dissent's view that contributory negligence applies unless the plaintiff proves that the jailor assumed the inmate's duty of self-care, that duty would nonetheless be assumed through constructive notice in jail suicides generally—and certainly for Gregoire, who asked officers to shoot him. Jail suicides are hardly infrequent events. They are eminently foreseeable, if not expected. Corrections employees are fully aware of the propensity of prisoners to take their own lives. Reams of literature have been written on the topic. For example: "Suicide is often the single most common cause of death in correctional settings. Jails, prisons and penitentiaries are responsible for protecting the health and safety of their inmate populations, and the failure to do so[] can be open to legal challenge." WORLD HEALTH ORG., PREVENTING SUICIDE IN JAILS AND PRISONS 1 (2007). "[P]re-trial detainees have a suicide attempt rate of about 7.5 times, and

sentenced prisoners have a rate of almost six times the rate of males out of prison in the general population." *Id*. at 3.

Here, the jury found that Oak Harbor negligently failed to fulfill its duty to protect Gregoire. However, the jury concluded that the city's negligence was not the proximate cause of Gregoire's death. It seems likely the jury reached this verdict because the trial court described contributory negligence in a way that bore directly on proximate cause, an issue with which the jury struggled.[10] Jury instruction 6 read, "Defendant further claims that Mr. Gregoire was contributorily negligent and assumed the risk of death when he hanged himself, and therefore his own conduct was the sole proximate cause of his death." CP at 32. Instruction 19 added, "Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed." CP at 45. The interplay between these instructions[11] supports the finding that if Gregoire assumed the risk of death and contributed negligently when he hanged himself, his conduct became the sole proximate cause of his death. It follows that the given instructions would lead jurors to the inevitable conclusion that

[10] During deliberations, the jury requested clarification from the court on the definition of proximate cause. CP at 55.

[11] We consider the instructions as a whole, including the relationship between them, as the jury was charged with doing. *See Jackman*, 156 Wn.2d at 743.

Gregoire's own conduct was the sole proximate cause of his death. These instructions absolve Oak Harbor of its duty, and any action against the city would necessarily fail. This result is unsupportable from a policy perspective, but also because the instructions did not properly inform the jury of the applicable law. Oak Harbor had a specific duty to protect Gregoire from injuring himself, and both contributory negligence and assumption of risk defenses must yield to that affirmative, nondelegable duty.

CONCLUSION

When a special relationship forms between jailor and inmate, sparking a duty for the jailor to protect the inmate from self-inflicted harm, the defenses of assumption of risk and contributory negligence are inappropriate. Giving these jury instructions in a negligence action arising from inmate suicide necessarily results in prejudicial error.

We reverse the Court of Appeals and remand for a new trial consistent with this opinion.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

Justice Charles W. Johnson

Justice Debra L. Stephens

Justice Tom Chambers