

**Benskin v. City of Fife**

DO NOT CITE. SEE RAP 10.4(h).

Court of Appeals Division II

State of Washington

Opinion Information Sheet

Docket Number: 31523-8-II

Title of Case: Robin Benskin etal, Appellants v. City of Fife, Respondent

File Date: 10/18/2005

SOURCE OF APPEAL

-----

Appeal from Superior Court of Pierce County

Docket No: 03-2-11971-2

Judgment or order under review

Date filed: 03/05/2004

Judge signing: Hon. Ronald E Culpepper

JUDGES

-----

Authored by Christine Quinn-Brintnall

Concurring: Elaine Houghton

J Dean Morgan

COUNSEL OF RECORD

-----

Counsel for Appellant(s)

Thaddeus Phillip Iv Martin

Gordon Thomas Honeywell Et al

1201 Pacific Ave Ste 2100

Tacoma, WA 98402-4314

Kenneth Wendell Masters

Wiggins & Masters PLLC

241 Madison Ave N

Bainbridge Island, WA 98110-1811

Counsel for Respondent(s)

Andrew George Cooley

Attorney at Law

800 5th Ave Ste 4141

Seattle, WA 98104-3189

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ROBIN and SUSAN BENSKIN, No. 31523-8-II

individually, and ROBIN

BENSKIN, as the Personal

Representative of the ESTATE OF

HEATHER BENSKIN; JOSH MIHOK;

TINA MARIE GOODFELLOW; and

ROBERTA EVANS,

Appellants and Cross-

Respondents,

v.

CITY OF FIFE, ORDER AMENDING OPINION AND

DENYING MOTIONS TO RECONSIDER

Respondent and Cross- AND PUBLISH OPINION

Appellant,

JONG KIM and 'JANE DOE' KIM and

the marital community composed

thereof,

Defendants.

This matter having come before this court on the respondent and cross-appellant's motion for reconsideration and motion to publish opinion of the unpublished ORDERED:

1. The motion for reconsideration is denied.
2. The motion to publish is denied.
3. The first paragraph of the opinion on page 9 is amended as

follows:

Under the Fife sentencing court's order, and relying on our Supreme Court's Taggart decision as applied to a municipal probation department in Hertog, and a county probation department in Bishop v. Miche, 137 Wn.2d 518, 973 P.2d 465 (1999), Fife's probation department had a duty to supervise Kim. Under this duty, the probation department would owe a duty to protect the public from foreseeable behavior associated with the conditions of the order. These conditions were that Kim, a repeat DUI offender, provide proof of treatment and, essentially, refrain from driving. Because Washington law recognizes a duty to supervise parolees and those on probation under suspended sentences such as Kim's, summary judgment on the ground that no jury could find the City probation department had a duty to control his behavior was improper. See also Joyce v. State, Wn.2d , 119 P.3d 825, 2005 Wash. LEXIS 789, \*15 (Wash. 2005) (citing Hertog and Bishop with approval).

IT IS SO ORDERED.



v.

CITY OF FIFE,                      UNPUBLISHED OPINION

Respondent and Cross-  
Appellant,

JONG KIM and 'JANE DOE' KIM and  
the marital community composed  
thereof,

Defendants.

QUINN-BRINTNALL, C.J. The Benskins<sup>1</sup> appeal a summary judgment in favor of the City of Fife on their negligent supervision claim. On March 9, 2003, probationer Jong Hoon Kim was involved in a hit-and-run accident on State Route 16. The collision killed Heather Benskin and injured several others. The Benskins sued the City alleging that it had breached its duty to supervise Kim, who was on Fife Municipal Court probation for convictions of driving while under the influence (DUI) and first degree driving with a suspended license at the time of the collision. On appeal, the Benskins contend that the trial court erred in finding (1) the municipal court order imposing Kim's probation created no duty; and (2) the probation department was judicially immune because it was acting as an

arm of the court.<sup>2</sup>

The City cross-appeals contending that the trial court erred in refusing to strike various expert witness declarations and their attachments filed in opposition to the City's summary judgment motion.

We reverse. Based on the existence of facts indicating a 'take-charge' supervisory relationship, the trial court erred in finding that the City's probation department owed no duty to the appellants. And the City's probation department is not immune from suit based on judicial immunity at common law or ARLJ 11.3

## FACTS

### Kim's Probation

On January 27, 2002, Kim was charged with four violations in the Fife Municipal Court: the infractions of speeding and driving without proof of liability insurance and the criminal offenses of driving under the influence<sup>4</sup> and first degree driving while license suspended.<sup>5</sup> On July 30, 2002, Kim pleaded guilty to DUI as a third offense.<sup>6</sup>

Kim had a long history of alcohol-related driving violations and alcohol abuse. For example, the 2002 Fife DUI was Kim's fifth since 1991. And in 1999, the State Department of Licensing revoked Kim's license for seven years as a 'habitual traffic offender' under RCW 46.65.070.

Judge Kevin Ringus sentenced Kim to 365 days in custody but suspended 155 days of the sentence.<sup>7</sup> For the remaining 210 days, Kim was to serve 120 days under Electronic Home Monitoring<sup>8</sup> and 90 days in jail or at Progress House, a work release facility. Kim was also ordered to pay \$2,275 within 60 days. The court suspended Kim's license for three years.

The court also ordered that Kim (1) could not drive without a license and insurance; (2) '{h}ave law abiding behavior' and 'no similar incidents;' (3) not take mood altering substances without a prescription; (4) have no 'alcohol/drug related offenses or non-prescription drugs;' (5) have no criminal traffic convictions; (6) not drive a motor vehicle if a blood or breath test 'would result in a positive reading of alcohol or drugs {within} 4 hours of driving; and (7) 'NOT refuse to submit' to a breath or blood test for alcohol. 1 Clerk's Papers (CP) at 38. Kim was also directed to file 'monthly status reports (treatment)' and ordered to file with the court proof of an ignition interlock device after receipt of a valid driver's license. 1 CP at 38. Finally, he was ordered to 'REPORT TO THE FIFE MUNICIPAL COURT PROBATION WITHIN FIVE . . . WORKING DAYS TO MONITOR COMPLIANCE.' 1 CP at 38. Under the order, the court had jurisdiction over Kim for 60 months.

Kim entered Progress House on August 12, 2002, and was released on October 21, 2002. The City's probation department had little contact with Kim following his conviction. Rachel Brooks-Bailey, the City's only full-time probation officer, spoke with Kim once on the phone. But on January 13, 2003, Brooks-Bailey requested that the court conduct a probation review hearing because Kim had not complied with the conditions of his suspended sentence: 'Kim has failed to provide proof of treatment and has not had direct contact with the probation department and failed to appear for a scheduled . . . appointment.' 1 CP at 22. The probation department's request for court action noted:

Based on {Kim's} high risk to the community and lack of follow through

with court ordered probation the following is recommended:

1. {Kim} provide proof of treatment within 30 days or serve the remainder of his sentence in jail.
2. {Kim} will provide proof of 5 sober support meetings per day {sic} until actively in treatment.
3. {Kim} will remain on Formal probation until his case is closed and pay any additional cost.

1 CP at 22.

A review hearing was set for February 12, 2003, but Kim did not appear. Judge Pro Tem Sandra Allen decided to issue a failure to appear bench warrant for Kim's arrest, but after reviewing his file, she discovered that notice of the hearing had not been sent to Kim or his counsel. The court rescheduled the review hearing for March 12, a month later.

#### Fatal Collision

On March 9, 2003, three days before the rescheduled hearing, at approximately 1:49 a.m., Kim was driving the wrong way on the State Route 16 on-ramp from Interstate 5 in his 2003 Chevrolet Silverado pickup truck when he struck head-on a GMC Jimmy driven by Mihok. Twenty-four-year-old Heather Benskin, a passenger in Mihok's vehicle, died of injuries sustained in the crash.

Just before striking Mihok's vehicle, Kim had been involved in two other collisions on the same roadway. A witness, Gordon Bechtel, saw Kim's vehicle driving fast on westbound State Route 16. Bechtel heard a loud

noise and saw Kim's truck spin across the road toward the left side and collide with a Chevrolet Lumina driven by Goodfellow. Kim's truck eventually came to a stop facing eastbound in the westbound lanes of State Route 16. Evans was also driving westbound on State Route 16 in a Jeep Wrangler. After witnessing Kim's first collision, she pulled her vehicle to the left shoulder. Kim's truck started forward and struck Evans's Jeep so hard it deployed the airbag. After this second collision, Kim got out of his truck and asked Evans if she was okay. Evans told Kim that she was not, but Kim got back in his truck and drove away, still traveling eastbound in the westbound lanes. Kim's truck then struck Mihok and Heather Benskin's GMC. After the collision with the GMC, Kim got out of the car and left the scene on foot. A witness who saw Kim get out of his car and flee the scene opined that Kim was in a 'drunken stupor' at the time. 10 CP at 1807. Kim left his cell phone in his truck.

Kim contacted police approximately 31 hours after the collision.

#### Lawsuit

On October 3, 2003, the Benskins sued Kim and the City. The Benskins asserted that the City's probation department had breached its duty to supervise Kim while he was on probation for his July 30, 2002 DUI conviction.

The City moved for summary judgment on November 20, 2003, submitting in support of its motion the declarations of Judge Ringus and Judge Allen. Judge Ringus, Kim's sentencing judge, is also in charge of the City's probation department. In Judge Ringus's deposition, he states that the function of the City's probation department is to 'monitor compliance' with

court-imposed conditions of a defendant's suspended sentence.<sup>9</sup> 9 CP at 1682. Judge Ringus contrasted the City's probation department with the State Department of Corrections, which engaged in 'probation supervision.' 9 CP at 1682. According to Judge Ringus, the probation department 'use{s} the resources . . . available to the Fife Municipal Court to see if someone is complying with conditions of a suspended sentence.' 9 CP at 1681-82. Judge Ringus also stated in the deposition that he does not train the City's probation officers and that the City's probation department does not have any written policies or procedures.

The Benskins opposed the City's summary judgment motion and submitted documents including the expert witness declarations and their attachments of 'corrections expert' Brian Bemus, 'expert criminal profiler' Dr. Robert Keppel, and 'corrections expert' William T. Stough. The City objected to this evidence and moved to strike portions of the declarations and the attached exhibits.

Following a March 5, 2004 motion hearing, the court denied the City's motion to strike but granted summary judgment on three out of the four independent grounds asserted at the oral argument:

First, with respect to Judge Allen being an intervening cause {in not issuing a warrant for Kim's arrest}, I'm going to deny the summary judgment on that ground. . . .

{Second,} I believe in this case the Fife probation office does act as an arm of the court. {Benskin's counsel} says it's doing an executive function, but he also says it's established under ARLJ 11, which is a court rule directed to municipal courts. It's not an executive function in this

case. It's a court function.

{Third is} whether Judge Ringus is . . . negligent in his duty as a judge, in not doing more or not having his probation clerks do more. . . .

{H}e's immune from suit. The probation department . . . is an arm of the Fife Municipal Court . . . and is also cloaked in judicial immunity.

{Fourth,} the main reason I'm granting the motion for summary judgment is that I do not feel a special relationship was established here.

Report of Proceedings at 54-55. The trial court entered its written orders that same day.

The Benskins appeal the summary judgment and the City cross-appeals the court's denial of its motion to strike.

## ANALYSIS

### Standard of Review

In reviewing a trial court's grant of summary judgment in a negligent supervision claim, we make the same inquiries as the trial court, whether there are genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999) (citing CR 56(c) and *Taggart v. State*, 118 Wn.2d 195, 199, 822 P.2d 243 (1992)). In doing so, we consider facts and reasonable inferences from the facts in the light most favorable to the nonmoving party and review questions of law de novo. *Hertog*, 138 Wn.2d at 275.

### Duty Based on Court Order (First Independent Basis for Summary Judgment)

The Benskins contend that the trial court erred in determining that

the City owed no duty to supervise because there was no special relationship formed between the probation department and Kim. They assert that the July 30, 2002 court order created such a relationship and imposed such a duty.

Here, the question is whether a 'take-charge' or special relationship existed between the City's probation department and Kim. In most cases, two of the most important features of such relationship will be (1) the court order that put the offender on the supervising officer's caseload; and (2) the statutes that describe and circumscribe the officer's power to act. *Couch v. Dep't of Corr.*, 113 Wn. App. 556, 565, 54 P.3d 197 (2002), review denied, 149 Wn.2d 1012 (2003). Neither party asserts that a statute defines the relationship as in *Taggart*. But the Benskins argue that this case is no different than *Hertog*, which also involved a municipal probation department, and asserts the July 30, 2002 court order established a take-charge relationship and, therefore, a duty on the City's part.

The following factors, taken in the light most favorable to the Benskins, suggest the existence of a take-charge relationship here. The Fife Municipal Court suspended Kim's driver's license for three years; among other things it ordered that Kim not drive without a license and insurance; that he file 'monthly status reports' regarding his treatment; and that he 'REPORT TO THE FIFE MUNICIPAL COURT PROBATION WITHIN FIVE . . . WORKING DAYS TO MONITOR COMPLIANCE.' 1 CP at 38. Probation officer Brooks-Bailey was aware that Kim was not complying with the court order and sought revocation of Kim's suspended sentence at the February 2003 hearing. The probation department was acting to enforce the court order.<sup>10</sup>

Under the Fife sentencing court's order, and relying on our Supreme Court's Taggart decision as applied to a municipal probation department in Hertog, and a county probation department in Bishop v. Miche, 137 Wn.2d 518, 973 P.2d 465 (1999), a jury could find that a special relationship had been formed. Under this special relationship, the probation department would owe a duty to protect the public from foreseeable behavior associated with the conditions of the order. These conditions were that Kim, a repeat DUI offender, provide proof of treatment and, essentially, refrain from driving. Because Washington law recognizes a duty to supervise parolees and those on probation under suspended sentences such as Kim's, summary judgment on the ground that no jury could find the City probation department had a special relationship with Kim and a duty to control his behavior was improper. See also Joyce v. State, Wn.2d , 119 P.3d 825, 2005 Wash. LEXIS 789, \*15 (Wash. 2005) (citing Hertog and Bishop with approval).

Quasi-Judicial Immunity For Probation Department as 'Arm of the Court'  
(Second11 Independent Basis for Summary Judgment)

Next, the Benskins assert that the trial court erred in ruling that the City's probation department enjoyed absolute immunity as an arm of the court. We agree.

Quasi-judicial immunity attaches to persons or entities that perform functions so comparable to those performed by judges that they ought to share the judge's absolute immunity while carrying out those functions. Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 99, 829 P.2d 746

(1992) (citing *Butz v. Economou*, 438 U.S. 478, 512-14, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)), cert. denied, 506 U.S. 1079 (1993). Quasi-judicial immunity is absolute immunity. *Lutheran*, 119 Wn.2d at 99 (citing *Babcock v. State*, 116 Wn.2d 596, 606-08, 809 P.2d 143 (1991)).

To be entitled to immunity, a government employee must establish three things. First, the employee must show that he or she performs a function which is analogous to that performed by persons entitled to absolute immunity, such as judges or legislators. Second, the employee must show how the policy reasons which justify absolute immunity for the judge or legislator also justify absolute immunity for that official. And third, the employee must show that sufficient safeguards exist to mitigate the harshness to the claimant of an absolute immunity rule. See *Lutheran*, 119 Wn.2d at 106 (citing *Butz*, 438 U.S. at 512-13).

In *Taggart*, our Supreme Court held that when a parole officer performs functions such as enforcing the conditions of parole or providing the Indeterminate Sentence Review Board with a report to assist the Board in determining whether to grant parole, the officer's actions are protected by quasi-judicial immunity. *Taggart*, 118 Wn.2d at 207. But when the officer takes purely supervisory or administrative actions, no such protection exists. *Taggart*, 118 Wn.2d at 213. And in *Hertog*, the court stated, 'under *Taggart*, monitoring compliance with probation conditions is not protected by quasi-judicial immunity.' 138 Wn.2d at 291. Compare *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 86, 1 P.3d 1148 (2000); *Estate of Jones v. State*, 107 Wn. App. 510, 520, 15 P.3d 180 (2000), review denied, 145 Wn.2d 1025 (2002) (quasi-judicial immunity does not apply where

the defendant county fails to adequately monitor and report probation violations or fails to provide all material information to the court).

Immunity is a matter of function, not form. The City points out that, like judges, the City's probation department does not investigate or monitor probationers.<sup>12</sup> Therefore, it argues, the City's probation department is judge-like and entitled to quasi-judicial immunity. But the City's argument ignores the functional test for immunity, which is the first inquiry under *Lutheran*<sup>13</sup> monitoring probationers is not analogous to a judicial decision to place the defendant on probation or revoke probation and thus, it is not protected by quasi-judicial immunity. *Hertog*, 138 Wn.2d at 291; see also *Taggart*, 118 Wn.2d at 213 (no quasi-judicial immunity for supervisory or administrative actions by parole officers).

We also reject the City's argument that, because Judge Ringus administers the City's probation department, it is entitled to judicial immunity. First, we note that when a judge acts as the head of a probation department it does not mean that he does so in his judicial capacity. Being a probation department head is an essentially administrative role, and even where those duties are being performed by someone who also happens to be a judge, that fact does not transform those duties to judicial duties and the probation department does not enjoy judicial immunity for all its activities as a result. Thus, the trial court erred when it found that the probation department enjoyed quasi-judicial immunity for its actions in supervising Kim's court-ordered probation.

#### Judicial Immunity Under ARLJ 11

The Benskins also contend that the trial court erred insofar as it

granted summary judgment based on the probation department's immunity under ARLJ 11 because that rule does not create judicial immunity. Again, we agree.

RCW 10.64.120 authorizes ARLJ 11. It states:

(1) Every judge of a court of limited jurisdiction shall have the authority to levy upon a person a monthly assessment not to exceed one hundred dollars for services provided whenever the person is referred by the court to the misdemeanor probation department for evaluation or supervision services. The assessment may also be made by a judge in superior court when such misdemeanor or gross misdemeanor cases are heard in the superior court.

(2) For the purposes of this section the office of the administrator for the courts shall define a probation department and adopt rules for the qualifications of probation officers based on occupational and educational requirements developed by an oversight committee. . . . The oversight committee shall consider qualifications that provide the training and education necessary to (a) conduct presentencing and postsentencing background investigations, including sentencing recommendations to the court regarding jail terms, alternatives to incarceration, and conditions of release; and (b) provide ongoing supervision and assessment of offenders' needs and the risk they pose to the community.

(3) It shall be the responsibility of the probation services office to implement local procedures approved by the court of limited jurisdiction to ensure collection and payment of such fees into the general fund of the city or county treasury.

(4) Revenues raised under this section shall be used to fund programs for probation services and shall be in addition to those funds provided in RCW 3.62.050.

The rules referred to in RCW 10.64.120 were adopted as ARLJ 11 in 2001.14

Under ARLJ 11.1:

A misdemeanor probation department, if a court elects to establish one, is an entity that provides services designed to assist the court in the management of criminal justice and thereby aid in the preservation of public order and safety. This entity may consist of probation officers and probation clerks. The method of providing these services shall be established by the presiding judge of the local court to meet the specific needs of the court.

ARLJ 11.2 lists the qualifications and services provided by probation department personnel. ARLJ 11.3 directs that statutory probation service fees are to be used for the provision of probation services.

But in his deposition, Judge Ringus states that the City's probation department does not comply with ARLJ 11. Because the City's probation department does not comply with the rule, the trial court erred in finding as a matter of law that the City enjoyed judicial immunity under ARLJ 11.15

Causation in Fact

Although the Benskins argue on appeal that a jury could reasonably find that the City's actions were a cause in fact of the injuries in this case, the trial court did not reach the issue and we decline to address it.

## Motion to Strike Evidence

We turn now to the City's cross-appeal. In its cross-appeal, the City asserts that the trial court erred in failing to strike the declarations of the Benskins' experts and the attached exhibits from its consideration at summary judgment (except for deposition testimony and curriculum vitae).

Under CR 56(e), affidavits supporting or opposing a summary judgment motion must (1) be made on personal knowledge; (2) set forth such facts as would be admissible in evidence; and (3) show affirmatively that the affiant is competent to testify to the matters stated therein. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

The City argues that these experts' declarations should be stricken under *Grimwood*, which sets forth a test for sufficiency of an affidavit in a summary judgment context, i.e., whether such an affidavit sets forth "material facts creating a genuine issue for trial": {first} does the affidavit state material facts, and {second,} if so, would those facts be admissible in evidence at trial.' 110 Wn.2d at 359.

In asserting that the 'facts alleged' would not be admissible, the City questions the qualifications as experts of the individuals who submitted declarations. Under ER 702, a witness may testify as an expert if he or she possesses knowledge, skill, experience, training, or education that will assist the trier of fact. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611-12, 15 P.3d 210, review denied, 144 Wn.2d 1016 (2001). Qualifications of expert witnesses are to be determined by the trial court within its sound discretion, and rulings on such matters, including whether to grant summary judgment based on opinions of such expert witnesses, will

not be disturbed except for a manifest abuse of discretion. *Orion Corp. v. State*, 103 Wn.2d 441, 462, 693 P.2d 1369 (1985).<sup>16</sup> We note that the focus at summary judgment is on the facts averred within those declarations or affidavits, and the court here properly reviewed the declarations in the light most favorable to the non-moving party to determine whether such evidence created a material issue of disputed fact.<sup>17</sup> Accordingly, the court did not abuse its discretion in refusing to strike the declarations of the Benskins' expert witnesses or the police reports on which their opinion was based in consideration of the City's motion for summary judgment.

The City also contends that the trial court erred in failing to strike as hearsay the bulk of the documents the Benskins submitted in opposition to the City's summary judgment motion.<sup>18</sup> Hearsay alone is not competent evidence for summary judgment. *CR 56(e); Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 878, 431 P.2d 216 (1967). But ER 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

See also *Thornton v. Annett*, 19 Wn. App. 174, 181, 574 P.2d 1199 (1978) (statements which formed the basis for an expert's opinion were admissible and were not hearsay). Here, the declarations of the Benskins' expert witnesses did no more than relate their training and specify the experts

and information on which they relied in reaching their expert opinion. The reports were not offered for the truth of the matter asserted but only as the basis for the expert opinion stated in the declaration. *Group Health Coop. v. Dep't of Revenue*, 106 Wn.2d 391, 398-400, 722 P.2d 787 (1986); *State v. Martinez*, 78 Wn. App. 870, 878-81, 899 P.2d 1302 (1995), review denied, 128 Wn.2d 1017 (1996).

Next, the City argues that certain declarations and exhibits (such as those opining that Kim was intoxicated at the time of the accident) should be stricken because they are 'immaterial' to a determination of the scope of judicial immunity, which was the issue on summary judgment. But the City's summary judgment motion also sought judgment on additional issues beyond judicial immunity: for example, it argued that no special relationship existed between the City and Kim and that the appellants had not shown cause in fact.

In sum, the City has not shown that the trial court abused its discretion in refusing to strike generally unspecified information including the experts in forming their declared opinions. Whether some of the challenged documents the experts relied on in forming their opinion would eventually be excluded from evidence at trial is a separate question not yet ripe for our review. See *Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 246-47, 95 P.3d 764 (2004), review denied, 154 Wn.2d 1003 (2005) (in negligent supervision action, trial court did not abuse its discretion by excluding expert testimony of former community corrections officer; testimony that convict would have been in jail on day of accident but for Department of Correction's negligence was beyond his expertise and

speculative).

We reverse the summary judgment and remand for a trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, C.J.

We concur:

MORGAN, J.

HOUGHTON, J.

1 For clarity we refer to the appellants, Robin and Susan Benskin, individually, and Robin Benskin as the Personal Representative of the Estate of Heather Benskin, Josh Mihok, Tina Marie Goodfellow, and Roberta Evans, collectively as 'the Benskins.'

2 The Benskins also argue that a reasonable jury could find that the probation department's negligence was a cause in fact of their injuries, but the trial court did not reach that issue and we do not address it.

3 The Benskins also assert that a judge's refusal to issue an arrest warrant at Kim's February 12, 2003 probation review hearing based on Kim's failure to comply with probation conditions was not a superseding intervening cause because the judge's refusal to act was caused by the City's failure to notify Kim of the hearing. But the trial court actually denied the City's summary judgment motion on that ground and the City does

not cross-appeal on that basis, so we do not address it.

4 RCW 46.61.502.

5 RCW 46.20.342(1)(a).

6 Former RCW 46.61.5055(3) (2003) (setting forth penalty schedule for violations of RCW 46.61.502 for individuals with more than two prior offenses in seven years).

7 'After a conviction, the court may impose sentence by suspending all or a portion of the defendant's sentence . . . and may place the defendant on probation for a period of no longer than two years and prescribe the conditions thereof.' RCW 3.50.320. And under RCW 3.50.340:

Deferral of sentence and suspension of execution of sentence may be revoked if the defendant violates or fails to carry out any of the conditions of the deferral or suspension. Upon the revocation of the deferral or suspension, the court shall impose the sentence previously suspended or any unexecuted portion thereof. In no case shall the court impose a sentence greater than the original sentence, with credit given for time served and money paid on fine and costs.

8 Kim received credit for 32 days of home monitoring already served.

9 Judge Ringus noted that he did not personally monitor any probationers.

10 On the day of the hearing the court rescheduled the hearing after learning that the probation department had failed to notify Kim of this hearing.

11 This is actually the third independent basis provided by the court, but we analyze the reasons in this order for the sake of clarity.

12 The Benskins also argue that it is improper for the City to assert that

the employees are essentially clerks who engage in mere administrative, not supervisory, functions especially considering that applying the title 'probation officer' to these employees ensures that the City does not have to send money to the State for probation services under RCW 3.50.100.

13 119 Wn.2d at 106 (citing Butz, 438 U.S. at 512-13).

14 When the new rule was first proposed, it was accompanied by the following comment:

The 1996 Washington State Legislature mandated that the OAC adopt rules relating to the operation of local misdemeanor probation departments. . . .

. . . .

{Under RCW 10.64.120} the OAC established the Misdemeanant Probation Oversight Committee in October 1996. . . . The statute requires the oversight committee to define a misdemeanor probation department and recommend a detailed list of qualifications for the position of probation officer.

. . . .

The rule defines a misdemeanor probation department based on the type of services offered. Misdemeanant probation departments vary tremendously in the types of services offered and the method of delivering those services. In recognition of this fact, the presiding judge of the local court is granted authority under the rule to determine what services will be offered and how they will be delivered. Nevertheless, a department is still required to structure its services so that it will assist the court in the management of criminal justice with the intent of aiding in the

preservation of public order and safety.

The oversight committee acknowledged that staff with higher levels of training and education should perform certain types of services. To ensure that appropriately qualified staff performs probation services, the oversight committee has divided typical probation services into two categories: (1) professional, and (2) clerical. Under the rule, staff may only perform core services that they are qualified to perform. Although, the rule does not require misdemeanor probation departments to employ professional staff (i.e. a probation officer), probation departments organized without a probation officer would be limited under the rule to performing only clerical type services.

The Legislature specifically required the OAC to adopt rules, which set the training and education qualifications for probation officers. Once again, the detail in the rule is somewhat extensive; however, the detail is mandated. . . .

. . . .

In summary, the rule defines what constitutes a misdemeanor probation department under the statute. In addition, the rule establishes the types of services that may only be performed by professional probation officers, as opposed to clerical staff, and it establishes the education and training requirements for both probation officers and probation clerks.

4B Karl B. Teglund, *Washington Practice: Rules Practice*, ARLJ 11.3 history cmt. at 175-76 (6th ed. 2002).

15 The duty announced in *Taggart* only arises after it has been shown that (1) the probation officer lacks absolute immunity, i.e., the officer's

actions were not part of any judicial or quasi-judicial process; and (2) lacks qualified immunity, i.e., the officer failed to perform statutory duties according to procedures dictated by statute and superiors. 118 Wn.2d at 224. We note that the City may not claim its employees are entitled to qualified immunity here because it is undisputed that its probation department had no established procedures and, moreover, Judge Ringus stated that he did not train the probation officers.

16 The trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable reasons. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994); *Garcia v. Providence Med. Ctr.*, 60 Wn. App. 635, 642, 806 P.2d 766, review denied, 117 Wn.2d 1015 (1991).

17 Moreover, courts indulge in some leniency with respect to affidavits presented by the nonmoving party on a summary judgment motion. *Orion Corp.*, 103 Wn.2d at 462 (citing *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 879, 431 P.2d 216 (1967)).

18 The City did not specifically identify the documents. Instead its motion requested the court strike everything except the depositions and curriculum vitae.